













Chitty's Equity Index  
vol. 2  
1800



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be brought into hotchpot, nor a provision of land for an heir. *Id. ib.*

One settles a rent out of lands upon a younger child; this is an advancement *pro tanto*. *Id. ib.*

An annuity settled by a father upon a child, to commence after the father's death, is an advancement *pro tanto*, and must be brought into hotchpot. *Id.* 442.

A provision for a child by a father, though contingent, yet when the contingency happens, is an advancement *pro tanto*. So, a provision made for a child either by a voluntary settlement, or for a good consideration, is an advancement *pro tanto*. So, though the portion be not paid, yet if secured to the child in the father's lifetime, although not payable till after the father's death. *Id. ib.*

Maintenance money for a child not taken to be an advancement, &c. *Edwards v. Freeman*, *id.* 449.

Where a freeman of London leaves no wife, the children are entitled to one moiety, and the other moiety is the dead man's part. *Northey v. Strange*, 1 P. W. 341. *Prec. Ch.* 470. *Gilb. Eq. Rep.* 136. S. C.

Grandchildren of a freeman are not within the custom to come in for an orphanage part. *Id. ib.*

Freeman's son has had several sums from the freeman, the certainty of which does appear; the son had likewise several other sums, the certainty of which does not appear, otherwise than by the son's answer; the son not barred, but shall come in for his orphanage part. *Id. ib.* CUSTOM OF LONDON, WHO TAKE; CUSTOM OF LONDON, NOW BARRED.

Father buys an estate in the name of his younger son and of a trustee; it shall be taken as advancement. So, though a reversion be settled on the younger son expectant on the mother's death. *Lampugh v. Lampugh*, 1 P. W. 111.

Lord of manor (his tenants refusing to renew) makes a lease of the premises to his daughter for ninety-nine years, and afterwards sells the manor to J, who has notice of the lease, but has security that the daughter when at age should surrender; daughter decreed to have the benefit of the lease. *Jennings v. Selleck*, 1 Vern. 467. *VEND. & PURCH.*

A purchase by the father in the name of his infant son decreed to be an advancement, and not a trust. *Mumma v. Mumma*, 2 Vern. 19.

Real estate settled by a freeman of London on a child, no bar to the orphanage part. *Civil v. Rich*, 1 Vern. 216. 2 Ch. Ca. 160. S. C. CUSTOM OF LONDON.

A child advanced in marriage, with a portion, is barred of the orphanage part, unless the certainty of such portion appears by writing under the father's hand. *Id. ib.*

If a grandfather takes a bond in the name of his grandchildren, their father being dead, this shall be deemed an advancement, and not a trust, for by the death of their father, the grandchildren are under the immediate care of their grandfather. *Ebrard v. Dancer*, 2 Ch. Ca. 26. *TRUST.*

Purchase by a father in the name of his son an advancement. *Grey v. Grey*, 2 Swan. 594.

It is a constant rule that where a father purchases in the name of a child unprovided for, it is intended as a provision, and not a trust, and if otherwise the *onus probandi* of the intent lies on the plaintiff; but where the child has been already advanced, it shall be deemed a trust for the parent. *Gray v. Gray*, 1 Ch. Ca. 296.

### III. MAINTENANCE.

Where father is not of ability, court will allow maintenance for children, though mother has a com-

petent separate estate, *Hailey v. Bannister*, 4 Mad. 275. *HUSB. & WIFE; SEPARATE ESTATE.*

Maintenance under the circumstances given to a father who had 6000*l.* a year of his own, and although no report of debts had been made. *Jervoise v. Silk*, Cooper, 52.

The court will not make an allowance to a father for the maintenance of a child for the time past, although it should appear that, in fact, he had not been of ability to maintain him, and although the will had expressly given the produce to the trustees for his maintenance. *Andrews v. Partington*, 2 Cox, 223. S. C. 3 Bro. C. C. 60.

No allowance to a parent for maintaining an infant for the time past. *Hill v. Chapman*, 2 Bro. C. C. 231.

In order to entitle the father of an infant legatee to maintenance, it is not necessary that he should be absolutely insolvent, but that he should not be in sufficient circumstances to maintain his child suitably to his expectation. The court will not allow maintenance to a grandchild legatee out of a fund not vested. *Buckworth v. Buckworth*, 1 Cox, 80.

Maintenance not allowed by the court where the parents are of ability, though directed by the will; where the parent is reported not of ability, the sums allowed shall be only from the time of the report, not of the decree. *Hughes v. Hughes*, 1 Bro. C. C. 387.

Mother, married to a second husband, not obliged to maintain the children by the first, but shall have an allowance from the interest of their fortunes. *Biltingsley v. Critchet*, 1 Bro. C. C. 268.

If on voluntary settlement by father an account is directed for the child, maintenance is to be deducted. *Williamson v. Codrington*, 1 Ves. 517. *VOLUNTARY SETTLEMENT.*

Where maintenance is allowed it is always paid to the father out of the child's estate, and there is no instance of it being deducted out of a legacy left by a child. *Jeffereys v. Jeffereys*, 3 Atk. 123.

Where a father is sufficiently competent the court will give no direction with regard to an infant's maintenance. *Jackson v. Jackson*, 1 Atk. 515.

### IV. THE PECULIAR INCIDENTS OF THE RELATIONSHIP OF PARENT AND CHILD; AND HEREIN OF PURCHASES IN NAME OF SON.

Destruction by father of security given by son for money advanced, held under the circumstances an advancement and release of debt. *Gilbert v. Wetherell*, 2 S. & S. 254. *RELEASE OF DEBT.*

A legacy given by a father's will is such an advancement of younger children in lifetime of father, as will be accounted in equity as satisfaction *pro tanto*, of portions to be raised for them under the testator's marriage settlement, if it contain a clause providing that advancement shall be a satisfaction so far; the will being silent in that respect is not *per se* equivalent to a declaration that legacy shall not be towards such satisfaction. *Golding v. Haverfield*, 13 Price, 593. S. C. 1 M'Clel. 345. *ADVANCEMENT; SETTLEMENT, MARRIAGE, SATISFACTION.*

Tenant in possession procured grant of the copyhold to son in remainder, and at same time surrendered it to use of will: Held, not an advancement, and son trustee only. *Frankard v. Frankard*, 1 S. & S. 1. *ADVANCEMENT; TRUSTEE; COPYHOLD, SURRENDER.*

Stock purchased by father, afterwards a bankrupt, in name of his son an infant, and a trustee, is within the mischief of 1 Jac. 1 c. 15. s. 5. *Brown v. Belars*, 6 Mad. 63. *STATUTE, C. OF; BANKCY.; REPUTED OWNERSHIP.*

A father having purchased in the name of his sons, &c.

a copyhold estate, which he afterwards demised by licence obtained subsequently to the purchase; the sons take the estate successively as an advancement. To repel the presumption of advancement, evidence of the father's intention must be contemporaneous with the purchase. *Murless v. Franklin*, 1 Swan. 13. PRESUMPTION; ADVANCEMENT.

The title as to interest on legacies given to infants by persons standing in *loco parentis* does not extend to an adult, though she had received, during life of testator, a voluntary annuity from him. *Raven v. Waite*, 1 Swan. 653. WILL, C. OF; INTEREST ON LEGACIES.

Question on construction of intricate will as to the forfeiture by children, through the non-compliance on part of father, with the condition of assumption of name of deviser. *Hawkins v. Jascombe*, 3 Swan. 375. FORFEITURE; WILL, C. OF; CONDITION BREACH OF.

Presumption of satisfaction of a legacy by a portion from a parent, or person in *loco parentis* not applied to an illegitimate child, no relationship existing in law, nor recognized expressly or by inference by the testator, neither a legal parent, nor assuming the parental character, or discharging parental duties, and nothing in the nature or manner of the legacy indicating that it was given as a portion by a testator for his child. *Wetherby v. Dixon*, 19 Ves. 407. S. C. Coop. 279. S. P. *Exp. Pye*, 18 Ves. 140. LEGACY, SATISFACTION OF; BASTARD.

Satisfaction of a legacy by a parent to a child by a portion of the same amount, though with some circumstances of difference. Whether parol evidence can be admitted originally of an intention to substitute the one provision for the other, or only where it is first offered against the presumption, it is clearly admissible to shew that the father was the author of the portion, viz., by stipulating or joining in the marriage settlement of his eldest son for a charge, and giving wife interests in consideration of it. *Hartopp v. Hartopp*, 17 Ves. 184. WILL, C. OF; LEGACY, SATISF.; EVIDENCE.

Slight circumstances are laid hold of to get rid of the rule that a legacy to a creditor extinguishes the debt, but a little difference between a portion and a legacy to a child, and as to the time of payment will not prevail against the presumption of satisfaction. *Barclay v. Wainwright*, 3 Ves. 466. LEGACY, SATISF. OF; WILL, C. OF; DEBT, SATISF. OF.

Portions for the children by the will of the parent presumed a satisfaction of a prior provision by settlement, unless clearly not so intended; the presumption is not rebutted by slight circumstances; accounts in the testator's handwriting, were admitted as evidence of the circumstances under which he made his will, but not to explain the will. *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516. SETTLEMENT, SATISF. OF; EVIDENCE.

Portion for the children by the will of the parent, held a satisfaction of a provision by settlement upon the intention: slight circumstances of difference that would repel the presumption of satisfaction between strangers are not sufficient in the case of parent and child. *Sparks v. Cator*, 3 Ves. 530. *Id.*

Upon the ground of an express maintenance, and other indications of the intention, the Ld. Ch. inclined to the opinion, that the rule for interest upon a legacy given by a parent to a child till the time of payment, was not applicable, but the bill of the children was dismissed upon circumstances of acquiescence, *lack*, and the consequent difficulty of taking the account. *Wright v. Bower*, 3 Ves. 283. WILL, C. OF; LEGACY.

Legacy payable to child payable in future, if the child dies, generally it shall carry interest, but not if the testator has less than the interest is given for, or if the testator paying that shall have

the rest. *Crickett v. Dolby*, 3 Ves. 17. LEGACY; INTEREST.

If a father purchases land in the name of his eldest son, this shall be an advancement for the son, and not a trust for the father, though the father had been in possession, and had received the rents and profits. *Gray v. Gray*, 1 Ch. Ch. 296. Finch, 338. *Scroop v. Scroop*, 1 Ch. Ca. 27. *Elliot v. Elliot*, 2 Ch. Ca. 231. where this was said to be the constant rule; but Ld. Ch., in that case, took this distinction; where a parent made a purchase in the name of an unadvanced child, and where in the name of one already advanced; for in the former case it should be considered as an advancement, and in the latter, a trust for the parent. Vide *Shales v. Shales*, 2 Freem. 252, where this rule is said to have been so settled before the statute of frauds, and it is stronger since; and in *Redington v. Redington*, 3 Ridgw. P. C. 181, it was said by Fitzgibbon, C., that the rule laid down in *Gray v. Gray*, sup., and also in *Lamplugh v. Lamplugh*, 1 P. W. 111, and in *Taylor v. Taylor*, 1 Atk. 386, has this strong additional circumstance in the two latter cases, that parol evidence was there held admissible on the part of the advanced son or his heir to rebut a claim of trust, because although improper against the legal operation of a deed, yet in the case of an advanced son, it is in support of the deed, and of law and equity too. (*Bridgman*.) ADVANCEMENT.

If a father purchases an estate in the name of a younger son, and the eldest disclaims a trust on his part, unless a creditor interpose, it shall be deemed an advancement for the son in whose name it was made. So is the rule laid down in *Grey v. Grey*, Finch, 338. Where there is no clear proof of a trust between father and son, the law will never imply a trust. If a son is married in the father's lifetime, and by him fully advanced, and in a manner emancipated, there a purchase by a father in the name of a son may be a trust for the father, but where the son is not advanced, or is advanced or emancipated but in part, in such case there is no room for any construction of a trust by implication; without clear proof to the contrary, it must be taken as an advancement for the son. *Redington v. Redington*, 3 Ridgw. P. C. 176. 179. ADVANCEMENT; TRUST.

Copyhold granted to A, and B his wife, and C his son, to take in succession for their lives and the life of the survivors. The purchase money was all paid by A. C is not a trustee of his life interest for A, but takes it beneficially as an advancement from his father. *Dyer v. Dyer*, 2 Cox, 92. ADVANCEMENT; TRUST.

Deputation procured by father for a natural son, on security of his estate in J, held to be for son's own benefit, and not in trust. *Beckford v. Beckford*, Loft. 490. ADVANCEMENT; TRUST; BASTARD.

On the marriage of A, his sister advances him 600l. to make a present to his wife, and A procures his father to give her a bond for the amount, payable at a month after his death. A pays his sister interest during his father's lifetime, and for the month afterwards. On a bill by the sister against the representatives of her father and her brother, held a debt on the estate of the father, not to be indemnified by A. And the plaintiff was also decreed her costs out of her father's estate: *aliter*, if such a transaction had been between strangers. *Hill v. Ballard*, 1 Ves. 77. ADMON. OF ASSETS.

If the legacy be given by a parent to his child at twenty-one, or marriage, and the child has no other provision, the court will give interest by way of maintenance, though the legacy is not vested. *Heath v. Perry*, 3 Atk. 102. INFANT MAINTENANCE.

A creditor, under circumstances, may be let in upon estates jointly purchased by the father and his sons, and a moiety of each may be sold to satisfy



judgment. *Stileman v. Ashdown*, 2 Atk. 477. CREDITORS.

Though the father pays the whole consideration, yet if the purchase is made in the name of a younger son, the heir cannot maintain it to be a trust for the father. S. C. 2 Atk. 480. ADVANCEMENT.

The reason why a purchase in the son's name, though the possession continued in the father, has been held an advancement of the son, is because the father was his natural guardian during minority. S. C. *Id.*

A purchase in the name of father and son as joint tenants, is no advancement of the son, as it does not answer the purpose; for, till a division, the father has possession of the whole, and even after it, a moiety, besides the chance of the other moiety, by survivorship. S. C. *Id.*

As in the last case, the father was in possession of the whole, and was visible owner, creditor by elegit the father might have laid hold of a moiety. S. C. *Id.* CREDITORS.

When father in a purchase takes an estate in it to himself for life, with remainder to his son in fee, as the father has the profits for life, the father is liable to the creditors. S. C. *Id.*

Portion a satisfaction of a legacy from the father to the same amount, the evidence not being sufficient to repel the presumption. *Ellison v. Cookson*, 1 Ves. J. 100. LEGACY, SATISFACTION OF; PORTION.

A father purchases lands in his son's name, his son being then eighteen years of age; the father continued in possession till his death; this shall be considered an advancement for the son, and not a trust for the father. *Taylor v. Taylor*, 1 Atk. 386. ADVANCEMENT.

A father advances some of his children with portions in his lifetime, and then makes his will, and thereby recites he had advanced B and C, but omits reciting D (whom he had also advanced), and leaves to him a certain sum, and devises the residue equally among them: the money which D had received shall go in satisfaction of the legacy left to him. *Upton v. Prince*, Forres. 71. ADVANCEMENT; LEGACY, SATISFACTION OF.

A, on marriage with M, settled a jointure on her, with the approbation of B, his father, who witnessed the deed. A died, leaving a large personal estate, and made M executrix. Afterwards B discovered that A was only tenant for life, with remainder to himself in fee, and he recovered at law. *Per curiam*, it is plain, that the father thought the son had the fee, and that he knew of the settlement; considering, therefore, the near relation of father and son, the widow shall not be compelled to resort to the son's covenant, and compel the jointure to be made good out of his personal estate. *Tensdale v. Tensdale*, Sel. Ch. Ca. 69.

Mother gave bond to son, conditioned to surrender copyhold estate to him, of which she was heiress: Held, that she became a trustee for her son. *Alison's case*, 9 Mod. 62. COVENANT; TRUST.

A, amongst other legacies, leaves 1000*l.* to his niece, B, at eighteen, or marriage, and gives the residue of his personal estate to be laid out in land, and settled in strict settlement on C for 99 years, remainder to his first son, &c. in tail; afterwards A by codicil devises that the 1000*l.* given by his will to his said niece should be made up 6000*l.*, payable at twenty-one, or marriage. The niece was eighteen at the time of the testator's making his codicil, and under twenty-one: Decreed, she should have the interest of the 6000*l.* from the death of the testator: and that C was only entitled to the residue, exclusive of the 6000*l.* *Acherley v. Wheeler*, 1 P. W. 783. Mod. 68. 10 Mod. 518. Fort. 183. Com. Rep.

381.513. "See note (3.) id. ib." WILL, C. OF; INT. ON LEGACIES.

A by marriage articles covenanted, that all lands he should afterwards purchase in the parish of K should be to the uses of the articles. He purchased lands in K, and took a conveyance in fee in the name of his youngest son, without a declaration of trust: Held, that youngest son was a trustee as to the lands for the parties entitled under the settlement. *Blake v. Blake*, 7 Bro. P. C. 241. TRUST; TRUST, DECLARATION OF.

Portions devised by a father to his younger children, payable at twenty-one, or marriage, shall carry interest from his death till that time, if he made no other provision for them: but otherwise, if devised by a stranger, who is under no obligation to provide for them. *Att. Gen. v. Thompson*, Prec. Chan. 337. INT. ON LEGACIES.

Father buys an estate in the name of his younger son and of a trustee, it shall be taken as an advancement: so though a reversion be settled on the younger son expectant on the mother's death. *Lamplugh v. Lamplugh*, 1 P. W. 111. ADVANCEMENT.

A purchases lands in his eldest son's name, and puts him into possession, and the son falling sick, takes a declaration of trust from him, and after the son's recovery he is permitted to continue in possession. The son marries and dies, and the father gets a conveyance from his younger son. The eldest son's wife shall have dower in these lands. *Bateman v. Bateman*, 2 Vern. 436. DOWER; DECLARATION OF TRUST.

A devise by a father to a second son and his heirs for ever, and for want of such heirs, then to the right heirs of the testator, is an estate tail. But had the devise over been to a stranger, the second son would have taken a fee-simple, and consequently the devise over had been void. *Nottingham v. Jennings*, 1 P. W. 23. WILL, C. OF, WHAT ESTATE; ESTATE TAIL.

Lord of manor (his tenants refusing to renew) makes a lease of the premises to his daughter for 99 years, and afterwards sells the manor to J, who has notice of the lease, but has security that the daughter when at age should surrender. Daughter decreed to have the benefit of the lease. *Jennings v. Selleck*, 1 Vern. 467. ADVANCEMENT; VEND. & PURCH.

A purchase by the father in the name of his infant son, decreed to be an advancement, and not a trust. *Mumma v. Mumma*, 2 Vern. 19. ADVANCEMENT.

If a grandfather takes a bond in the name of his grandchildren, their father being dead, this shall be deemed an advancement, and not a trust; for by the death of their father, the grandchildren are under the immediate care of their grandfather. *Ebrund v. Dancer*, 2 Ch. Ca. 26. ADVANCEMENT; TRUST.

Purchase by a father in the name of his son, held an advancement. *Grey v. Grey*, 2 Swan. 594. ADVANCEMENT.

#### V. TRANSACTIONS AND DEALINGS BETWEEN.

A child entitled as tenant in remainder, after life of father agreeing with creditor of father in conjunction with, and on behalf of father, to give up certain interests, being deprived by conduct of father of benefit of agreement, held not bound by it. *Rhodes v. Cook*, 2 S. & S. 488. FRAUD, DEEDS BY.

Father under marriage settlement, with power appoint shares in which his younger children were to take a sum to be raised for their portions, exercised that power by will; afterwards a daughter, took release from her of her share by codicil, revoked his appointment by

Held, her portion was to go to the other children. *Noel v. Ld. Walsingham*, 2 S. & S. 99. ADVANCEMENT; PORTION.

A father tenant for life, remainder to his first and other sons successively in tail male; the eldest son, soon after he attained twenty-one, joined his father in suffering a recovery; an annuity was secured to him during his father's life, and parts of the estates were limited to the father in fee, the residue of them were resettled, the son taking back an estate for life, with remainder to his first and other sons in tail general, remainder to his daughters in tail general. The transaction to be considered as a mixed case of bargain and sale, and of family arrangement; and the eldest son having died without issue, a bill filed by his brother, the next remainder-man in tail, who had done confirmatory acts, and accepted interests under the will of his father, to set aside the settlement as obtained by undue influence, was dismissed. *Tweddell v. Tweddell*, 1 Turn. & R. 1. CONSON; FAMILY SETTLE.

Transactions of this nature between father and child to be viewed with a reasonable degree of jealousy, not in the light of reversionary bargains. *Id. ib.*

Equity will not relieve against a contract entered into by a child with a parent for an appointment from him; and a purchase from the parent, with notice of the fraud, will be affected with it. *Palmer v. Wheeler*, 2 Ball & B. 30. POWER; NOTICE; VEND. & PURCH.

Implied satisfaction of a debt from a father to his child by a marriage portion of a greater amount. *Chase v. Farrant*, 18 Ves. 8. DEBT, SATISFACTION; DEBT. & CRED.; PORTION.

Bond from father of wife, to trustees on marriage, for separate use of wife in case of bankruptcy of husband, declared valid. *Exp. Osley*, 1 Ball & B. 257. MARRIAGE SETTLE.; BANKCY.

A bond given by a daughter who had not received her fortune, to a step-father for the immediate payment of a sum alleged to be due to her mother for maintenance, ought to be set aside as improvidently executed; the utmost that the mother could claim being a lien on the interest of the daughter's fortune when recovered; an act of the daughter binding the interest of her fortune to that extent would have been valid. *Beasley v. Magrath*, 2 Scho. & L. 31. FRAUD; IMPROVIDENT BARGAIN; BOND OBTAINED BY FRAUD.

B, while in distressed circumstances, upon the advice and suggestion of M, and upon a supposed right in him to demand it, executes a bond to him for a sum due by a deceased brother to whom she was next of kin, but who left no personal chattels. The bond set aside under the circumstances; but if it had been executed by her from a feeling of propriety, after getting possession of an estate to which she became entitled on the death of her brother, she having immediate means of payment, and acting with proper advice, it could not have been defeated. *Id. ib.*

A son, placed by his father in business, accounting to his father for all profits, deducting only the expense of his board, having made no demand for wages during his father's life, was held not entitled as a creditor after his father's death, or if he had a demand, it was held satisfied by a will giving him a legacy to a greater amount, and other benefits. *Plume v. Plume*, 7 Ves. 268. DEBT. & CRED.

The court will support contracts entered into to preserve the peace of families; and, therefore, where a son, upon his marriage, joined with his father in resettling the estate, and, by a memorandum executed at the same time, agreed to secure 500*l.* to each of his sisters: Held, that there was sufficient consideration for the court to decree a specific performance of this agreement, an attempt to shew that it

had been obtained by an undue exercise of parental influence having failed: *Wycherley v. Wycherley*, 2 Eden, 175. FAMILY SETTLEMENT; SPEC. PERF.

A father having advanced a child in his infancy, upon his coming of age takes a bond from him to a greater amount than the sums advanced: Held, the bond obtained by parental influence, and decreed not to stand as a security for the sums advanced, but to be set aside altogether. Loose expressions in a letter from the son, held not to be a confirmation. *Carpenter v. Heriot*, 1 Eden, 338. CONFIRMATION; FRAUD IN OBTAINING BOND.

Father receives his child's earnings while living with him, and becomes bankrupt; the child, by agreement, admitted a creditor for a particular sum to avoid an inquiry, but dangerous to lay down such a rule. *Exp. Macklin*, 2 Ves. 675. BANKCY. PROOF IN.

Where parent had objected to daughter's marriage with an individual, and she entered into a secret bond to forfeit 500*l.* if she did not marry him in thirteen months after parent's death; on her application for relief against bond, decreed that it should be cancelled, such a transaction being encouragement to disobedience and fraud on parents. *Woodhouse v. Shepley*, 2 Atk. 535. BOND, RELIEF AGAINST.

Though a parent has no power to prevent the marriage of his child, yet his consent is expected, and, by the laws of some countries, necessary. S. C. *id.* 539.

The above transaction, compared to the cases of bonds given before marriage, to return a part of the portion, where the fraud was not between the contracting parties, but on the parents of one of them, who, being deceived in this respect, has induced the court to set aside such bonds. S. C. *ib.*

Where a father obtained an absolute conveyance from a daughter in order to answer one particular purpose, and afterwards makes use of it for another, the court will relieve under the head of fraud. *Young v. Peachey*, 2 Atk. 254. FRAUD, UNDUE INFLUENCE.

In the case of *Glissen v. Ogden*, the House of Lords laid great weight on the circumstance that the conveyance was obtained by a father from his daughter in distress, and reversed the decree of Ld. King, which had refused to give relief. *Id. ib.*

A freeman of London taking advantage of his son's necessities, in consideration of a bond for securing the son annuity of 50*l.*, prevailed on him to release his share of orphanage. The father also prevailed on another of his sons to give him a release of his share of orphanage in consideration of an annuity of the same nature, but there were not the same proofs of his being forced into the release, and the father had at times advanced him 300*l.* or 400*l.*: Held, the plaintiff being turned out of doors, left destitute and void of maintenance, a release extorted could not be supported. The other son was equally entitled to be relieved. *Heron v. Heron*, 2 Atk. 160. FRAUD, UNDUE INFLUENCE.

By the custom of London, the orphanage part must go in equal shares, and if the father turn the money into any other shape which he thinks may take it out of the custom, yet the court has relieved the children. *Id.* CUSTOM OF LONDON; ORPHANAGE.

Where a father, tenant for life, draws in a son, tenant in tail, to join in a conveyance which would destroy his remainder, the court, on slender evidence, will relieve the son. *Id.*

If a father merely for the sake of maintenance, and not for advancement in marriage or trade oblige his son to release his right to the orphanage share, such release is absolutely void. *Id.*

An agreement between a child and a father to alter

the limitations under a settlement, will not be set aside on pretence of being drawn in by the father's power and authority. *Tendril v. Smith*, 2 Atk. 85. FRAUD, UNDER INFLUENCE.

Deeds from child to parent are not void in se. Fraud, &c. must be shown to set them aside. *Manners v. Banning*, 2 Eq. Ab. 282. *Id.*

### PARISH, PARISHIONERS, AND PARISH RATES.

Where object of suit is to avoid payment of rate levied on the inhabitants of a town, all having common interest in avoiding the rate, any one or more may sue on behalf of themselves and the other inhabitants. *Att. Gen. v. Heelis*, 2 S. & S. 76. PL. PARTIES.

Court will not decree rate to be made to reimburse a former churchwarden monies laid out whilst in office in pursuance of a vestry order. *Lanchester v. Thompson*, 5 Mad. 4. JURISDICTION.

An account cannot be decreed against a parish; and a parish cannot, therefore, be made responsible for charity property applied during a long period to parish purposes under orders of the vestry. *Exp. Fowlett*, 1 Jac. & W. 70. ACCOUNT.

A bequest of money to trustees to pay the interest and dividend to the poor of a parish is not within the meaning of a local act, which vested all estates and monies held in trust for the benefit of the poor not otherwise specifically appropriated in the guardians of the poor of that parish. *Att. Gen. v. Freeman*, Dan. 117. S. C. 5 Pri. 425.

Creditors who had advanced money to corporation established for maintenance of poor of a certain district, held entitled to compel assessment of rates sufficient, after maintenance of poor, to pay principal and interest of their debts. *Jones v. Parishes of Montgomery, &c.* 3 Swan. 203. REIMBURSEMENT.

It is not sufficient that the receiver-general swears to his accounts before the 5th of April to enable him to set *insuper* upon a parish, unless the account is declared and passed within that time. *Exp. Liskeard Boro'*, Wightw. 97.

A collector of taxes in custody under an extant is not entitled to be discharged, though his deficiency has been made good to the crown by a re-assessment on the parish. *Rex v. Bennet*, *id.* 1. See the cases cited argued at the bar.

Proof of a debt was allowed against the estate of an overseer of the poor in respect of money in his hands, though the period of accounting had not arrived. *Exp. Exleigh*, 6 Ves. 811.

Bill by a former churchwarden against the parish officers (trustees for an estate of the poor of the parish and forty-five inhabitants) to be reimbursed money laid out on account of the trust under an order of vestry, his accounts being passed and ordered to be paid on demand; *Ld. Chancellor* expressed a strong inclination against the bill, and it not being signed by counsel, it was taken off the file. Plaintiff to pay costs. *French v. Dear*, 5 Ves. 547.

Bankrupt was for many years collector of the land-tax, and at the time of his bankruptcy he owed 928*l.* to the city chamber. An inhabitant of the parish where he was collector, was allowed to prove for himself and the rest. *Exp. Child*, 1 Atk. 111.

Trustees for a parish having the right of electing a vicar, cannot vote by proxy, for it is a personal trust. *Wilson v. Dennison*, Amb. 82.

The word "parishioners" takes in not only inhabitants of the parish, but occupiers of land that pay tithes and duties. *Att. Gen. v. Parker*, 3 Atk. 577.

The word "inhabitants" takes in all housekeepers

though not rated, and also such as have gained a settlement and so become inhabitants, though not housekeepers. *Id. ib.*

An order of vestry is made for building a work-house in a parish, and that in case any one will lay down the money, the parish shall repay; equity will decree a parish rate to be made to reimburse the party who lays down this money. *Blackbourn v. Webster*, 2 P. W. 632.

The spiritual court shall not proceed against a churchwarden, to account on oath, after his accounts are allowed by the vestry. *Nutkins v. Robinson*, Bunb. 247. *Snowden v. Herring*, *id.* 289.

The inhabitant of a parish, where a modus is insisted on, *prima facie* a bad witness; if he occupies no titheable land, he must shew it. *Watson v. Lindset*, Bun. 40. PR. WITNESS, COMPETENCY OF.

Parishioners are a body, and the churchwardens are only a name to sue by in personal actions; for the property is in the parishioners; and in all actions brought by churchwardens, it must be laid *ad damnum parochianorum*. *Whitmore v. Bridges*, 2 Eq. Ab. 204. pl. 5.

One devised 500*l.* to the church of St. H: this is good, and shall be employed by the churchwardens in repairing and adorning the church. *Att. Gen. v. Ripper*, 2 P. W. 135. Churchwardens are a corporation, to take personal things, in the same manner as the parson is for land. S. C.

The liberty of the Rolls is within the parish of St. Dunstan in the West, in London, and contributed a fifth towards the repairs of the church; but having distinct overseers and maintaining its own poor separately, is not entitled to a share of the charities given by will or deed to the poor of St. Dunstan's, though entitled to a fifth of all collections made at the church-doors, or at sacraments. *Att. Gen. v. Grant*, 1 P. W. 669. Before the statute 43 Eliz. there were no such officers as overseers of the poor. S. C.

Where churchwardens, by order of the parish, commence a suit, the consent of the parish shall bind it, and the vestry book shall be allowed as evidence of the consent. *Case of Rudnor Parish*, 4 Vin. 529. pl. 10.

Where there is a dispute touching money given to parishioners, none of the inhabitants of the parish can be witnesses. *Dodswell v. Nott*, 2 Vern. 317.

Bill by the executrix of a late churchwarden against ninety parishioners, to be reimbursed what her testator had advanced for parish: Held, that defendants should reimburse plaintiff with costs, and that the money should be raised by a parish rate. *Nicholson v. Masters*, 4 Vin. 529. pl. 9. BILL FOR ACCOUNT.

Bill against churchwardens, because they refused to make a rate for reimbursing the plaintiff according to a vote and order of vestry. They being out of their office, the decree was prayed against them and their successors. *Battily v. Cooke*, 2 Vern. 262. S. C. Pre. Ch. 42. JURISDICTION.

Churchwardens having, by order of the vestry, laid out several sums for repairs of the church, and building two new galleries, and having (at going out of office) their accounts taken by auditors, and passed and allowed by the vestry, who made an order for a rate to reimburse them; they brought a bill against the succeeding churchwardens, to enforce the making such rate; but those churchwardens being likewise removed, after examination of witnesses, and publication passed, made a good objection at the hearing, for that they had no remedy except in the spiritual court, or against the parishioners in particular who employed them. S. C. Pre. Ch. 42.

A agreed with B and C to pave the streets in the parish of D: B, and C, on behalf of themselves and

the rest of the parish agreed to pay A : the agreement was lodged in the hands of B ; A shall have his remedy against B and C, and they must resort to the rest of the parish. *Meriel v. Wymondshall*, Hard. 205.

### PARLIAMENT.

• See MEMBERS OF PARLIAMENT.

### PAROL.

See AGREEMENT, IV.—INFANT, II. 3.—*PR. EVIDENCE*, 4.

### PARTICEPS CRIMINIS.

Parties to a fraudulent assignment by trader, cannot sue out a commission of bankruptcy founded thereon. *Exp. Kilner*, Buck. 104. *BANKCY. COMMISSION, BY WHOM.*

The commission of a petitioning creditor, who with the knowledge of two or three of the creditors received his debt from the bankrupt, superseded under the stat. 5 G. 2. c. 30. s. 24. at the petition of a creditor privy to the transaction. Whether that creditor will be permitted to sue out a new commission : *Qu.?* *Exp. Bride*, 1 Buck. 19. *BANKCY. SUPERSEDING COMMISSION.*

Creditor assenting and acting under absolute bill of sale for benefit of creditors, but who do not sign deed, cannot sue out commission against debtor, on ground of bill of sale or commission of bankruptcy. *Exp. Shaw*, 1 Mad. 598. *BANKCY., ACT OF; BANKCY. PETITIONING CREDITOR.*

The rule "in pari delicto melior est conditio possidentis" preventing suit is not universal, admitting degrees of guilt by concurring in the same criminal act. *Osborne v. Williams*, 18 Ves. 379. *ACCOUNT; FRAUDULET TRANSACTIONS; MAXIMS.*

In general cases, where a debt is cut down by the policy of the law, the complaint may be by *particeps criminis*. *Exp. Kirk*, 15 Ves. 469.

Relief given to *particeps criminis* on ground of public policy. *Hutch v. Hatch*, 9 Ves. 292. 1 Smith, 226.

This court will decree money overpaid in pursuance of an usurious contract to be accounted for, notwithstanding the agreement of the oppressed party to allow such payments. *Bosanquet v. Dashwood*, Forbes. 38. *USURY; ACCOUNT.*

In the case of money lost at gaming and paid, possibly this court will refuse relief, the plaintiff in equity being *particeps criminis*. *Id. ib.*

*Particeps criminis*, in the case of fraud, is the most proper person to discover and prove it; especially when what he so proves turns to his own prejudice. *May v. Harman*, 4 Bio. P. C. 156. *PR. WITNESS, COMPETENCY OF.*

A, intrusted by B to receive the interest on tallies, receives the principal and fails, and afterwards compounds with his creditors; but B would not come in without having a greater composition than the rest, which A agrees to give; A brings a bill to be relieved against this underhand agreement, but he having been guilty of a great fraud and breach of trust, and having agreed to make some satisfaction, the court would not relieve him, but dismissed the bill. *Small v. Blackley*, 2 Vein. 602. *FRAUD ON CREDITORS.*

### PARTICULARS OF SALE.

See also AUCTION.—*PR. SALES JUDICIAL.*—VENDOR AND PURCHASER..

Order respecting the master's charge for particulars of sale. *Reames' Ord.* 483.

Where particulars of sale by auction, stated to be "without reserve," and pullers are employed by vendor, specific performance will not be decreed. *Meadows v. Towner*, 5 Mad. 34. *FRAUD, PUFFERS AT AUCTION; SPEC. PERF.*

Estates being sold by auction in lots under conditions, one of which expressed, that they were subject to the perpetual payment of 120*l.* a year to the curate of N., but that the same, and the perpetual annual payment of 20*l.* to the hospital of C., were in future to be charged upon and paid by, the purchaser of lot 1. only; the purchasers of the other lots are entitled, not to an absolute exoneration, but to an indemnity from the purchaser of lot 1. Nature of the indemnity which they may require. *Casamajor v. Strade*, 2 Swan. 347. See further 1 Jac. 630. *INDEMNITY; VEND. & PURCH.*

Verbal declarations of an auctioneer at the time of sale, not to be received in contradiction to the printed particulars; but *quere*, as to the effect of personal information of a mistake in the particular? *Ogilvie v. Falsjumb*, 3 Mer. 53. *SPEC. PERF.*

Purchaser under particular giving a false description, not bound at law or in equity, nor by any act of his agent without a fresh authority. *Deverell v. Id. Bolton*, 18 Ves. 509. *VEND. & PURCH.; SPEC. PERF.*

Particular describing a lease as subject to notice to quit, not inconsistent with a covenant that the tenant shall hold over for a certain time "after the end of the term," that being upon the context distinguished from the "other sooner determination," and time generally not being of the essence of the contract. *Hall v. Smith*, 14 Ves. 426. *VEND. & PURCH.*

A man purchasing an estate by a particular, but in the conveyance itself part of the land is left out, equity will set it aside. *Clavel v. Littleton*, Prec. Chan. 307. *FRAUD.*

A particular writing for the purchase of an estate, no writing within the statute of frauds, unless the party purchased by it, or that it was not shown him at the time of purchase, so that if that contains more than the words of the conveyance will in strictness carry, the purchaser cannot compel specific execution of the residue on the particular. *Cass v. Waterhouse*, Prec. Chan. 29. *FRAUDS, STAT. OF.*

### PARTIES.

See DEEDS, X.—*PL. PARTIES.*

### PARTITION.

See ESTATE, VII. 3.—*PR. COMMISSION OF PARTITION.*

### PARTNERS AND PARTNERSHIP.

See also BANKCY. VI. 13.—*PL. PARTIES*, 18.—*PR. PAYMENT INTO COURT*, 5.—*PR. RECEIVER*, 2. (h).—*SOLICITOR*, II.

I. PARTNERSHIP, HOW CONSTITUTED, ITS DURATION AND DETERMINATION.

- II. ARTICLES OF PARTNERSHIP, THEIR CONSTRUCTION, &c.
- III. DISSOLUTION OF PARTNERSHIP.
- IV. PARTNERSHIP PROPERTY, WHAT CONSTITUTES; ITS GENERAL INCIDENTS, AND HOW FAR LIABLE TO SEPARATE CREDITORS.
- V. BANKRUPTCY OF ONE OR MORE OF FIRMS AND ITS INCIDENTS.
- VI. PARTNERS GENERALLY.
- VII. HOW BOUND BY EACH OTHER'S ACTS.
- VIII. HOW DISCHARGED.
- IX. SURVIVORSHIP BETWEEN.
- X. DORMANT PARTNERS.
- XI. OF THE GENERAL RIGHTS AND LIEN OF PARTNERS AGAINST EACH OTHER, AND OF SUITS BY, BETWEEN AND AGAINST.

# I. PARTNERSHIP HOW CONSTITUTED, AND ITS DURATION AND DETERMINATION.

A being as a partner entitled to a share of extensive iron works, and of the lands and premises on which they were carried on, agreed for valuable consideration to assign to B his interest in the property and business: B interfered and acted as a partner, but afterwards he assigned his share and gave notice to the other partners what he had withdrawn from the business, and when called on to complete his purchase, resisted the performance of the contract successfully, on the ground that a good title could not be shewn: Held, that B, as between him and his other partners, was to be treated as a partner, and was to contribute to the partnership losses until the time when he gave notice of his withdrawal from the concern, and assigned his share. That his liability ceased upon his assigning his share and giving notice to the other partners of his withdrawal from the concern. That the assignment of his share though made to an insolvent person, was not for that reason the less effectual in putting an end to his liability. That the assignee not having been acknowledged a partner or permitted to act as such did not by his acceptance of the assignment incur any liability as between himself and the co-partners. *Jefferys v. Smith*, 3 Russ. 158. VENDOR AND PURCHASER.

R being possessed of mines and iron works, under leases of unequal duration, by will bequeathed 25,000*l.* to B, "as a capital for him to become partner with executors of one-fourth share in trade of all those works so long as lease endures," with a devise to H and his wife of three-eighths in concern at iron works, "so the partnership will stand at my death, W three-eighths, H three-eighths, and B two-eighths. After R's death, W, H and B, carried on works for two years, selling iron manufactured not only from mines but from other sources: Held that codicil revoked residuary clause in favour of the wife of H, as to the trade, and that concern was a partnership in trade. *Crawshay v. Maule*, 1 Swan. 495. WILL, C. OF; WILL, REVOC. OF.

No general rule that partners purchasing leasehold interest must be understood as entering into a partnership commensurate with duration of lease. In this case it was held not so to be. *Id.* 521. LEASE.

Partner constituted by a share in profits without interest in capital. *Exp. Hodgkinson*, 19 Ves. 291.

A public declaration in an advertisement of dissolution, constitutes a partnership. *Exp. Matthews*, 3 V. & B. 125.

Partnership by agreement for participation in profits or their application. *Exp. Langdale*, 18 Ves. 300.

Partner without participation of profit by lending his name, though contracting that he shall suffer no loss. *Id.* *ib.*

Partnership after the determination of it by the

contract of the partners, may continue for the purpose of winding up engagements with third persons. *Crawshay v. Collins*, 15 Ves. 226.

Partnership determined by death: the legal property survives, not the beneficial interest. Right of the executor to the value of the testator's interest, to be ascertained, not by calculation but by sale. *Id.* 227. DEATH.

No specific performance of agreement for partnership. *Herey v. Birch*, 9 Ves. 357. SPEC. PERF.

A partnership cannot be established by the evidence of the partners and their private communications. The fact must be proved *alimunde*. For want of such proof a commission against the ostensible partners only was sustained. *Exp. Benfield*, 5 Ves. 424. P. EVID.

A separate commission of bankruptcy established, though the other partner died after the assignment. *Exp. Smith*, 5 Ves. 295. BANKCY.; SEPARATE COMMISS.

Testator, after life interests in stock to each of his daughters, afterwards the principal among his grandchildren in pursuance of a power in articles of partnership, appointed his executors to carry on the trade in his room, with power to dissolve or nominate any other person; and gave them his share of the capital and all freehold and leasehold in trust to carry on the trade as long as they should think fit, and after expiration of partnership, to sell the estates, and with the produce and profits of trade and all the rest of his estate, to form a fund to accumulate twelve years; then among the grand children living; by codicil he substituted his partner, who was his son-in-law, in the room of one executor removed, and desired that if his executors should continue trade, and his grandsons T and J should attain twenty-one, his executors would nominate each a partner for a quarter, when executor should think fit, with legacies at the same time, to sink into the estate, if they should decline the partnership or die before twenty-one, executors to advance any further sum they might want to carry on trade; the rest of his property among all the grandchildren except T and J. By another codicil he left it entirely to executors to appoint J or not, if not appointed, his legacy to be void: T and J both entitled to be partners and to legacies at twenty-one, one executor (their father) being for admitting them, the other two against it; but if all had without fraud united in declaring J unfit, they might have excluded him; in which case he could have taken nothing under this devise. *Wainwright v. Waterman*, 1 Ves. J. 311. WILL, C. OF.

A draft of articles of partnership together with a stated account and payment of money by acting partner to others: Held sufficient evidence of partnership to ground decree for account. *Worts v. Fern*, 3 Bro. P. C. 548. EVID.

## II. ARTICLES OF PARTNERSHIP, THEIR CONSTRUCTION, &c.

Where there is a stipulation that partnership should exist for nineteen years, and in case of death of either partner, his widow, &c. should become partner, &c. Held that it is not imperative on widow, &c. to be a partner, but optional with her, &c. and that she, &c. was entitled to reasonable time to look to the concern, so as to elect, that is, not to have an account taken. *Pigott v. Bayleys*, 1 M. Cl. & Y. 569.

Articles of partnership providing that upon its expiration the stock in trade should be divided, received and taken by the partners according to their respective interests: Held that they could not be carried into execution literally, and that therefore by the general law of partnership the settlement must be by a

sale and division of the whole. *Cook v. Collingridge*, 1 Jac. 617.

Partnership amongst a number of persons to be arranged by a committee of five, and by general meetings of which the vote of the majority was to be binding, with a provision that any one wishing to retire should first offer his share to the committee at a certain price, and if they declined to buy might sell it to any other person: Held that the majority were not able to sell the whole concern without the consent of all; but that if all but two were desirous of retiring, they might sell their own share without making an offer of them to the committee. *Cappel v. Cadell*, 1 Jac. 537.

Deed by which A, B & C partners in trade, in consideration of 4000*l.* paid to them by D, in augmentation of their capital, agree to admit him into partnership with them for a term; it was agreed that A should receive in lieu of profits a clear sum of 560*l.* per annum, and all the property of the concern was charged with the payment of this sum quarterly, and of the 4000*l.* at the determination of the partnership. A, B and C were to pay rent, taxes, wages, and the other outgoings of the trade which was to be carried on by them, and in their names only, and D was not to be required to attend to it; D was at liberty to retire on giving twelve months notice, and on his retiring, or at the end of the term, the 4000*l.* and the arrears (if any) of the 560*l.* per annum were to be paid to him by A, B and C, by instalments to be secured by their bonds, and they were to indemnify him from the debts of the partnership: Held that this deed was not usurious. *Ferreday v. Hordern*, 1 Jac. 144. *USURY.*

Partners agree that settlement of accounts should take place on 25th March annually, and that if either should die he should not share profits accrued since the last preceding settlement day. By mutual consent settlement on 5th November, is substituted for 25th March. The last settlement made was on 5th Nov. 1811. In February 1813, one partner dies: Held his representative entitled to share of profits up to Nov. 1812, the time when last settlement ought to have been made. *Pettyt v. Janson*, 6 Mad. 146.

Stipulations in articles of partnership for an annual settlement of accounts, and for payment to the representatives of a deceased partner, of an allowance in lieu of profits since the last annual account, proportioned to the amount of his share of profits during two years preceding, are waived in equity by omission through several years to settle annual accounts, and by engaging in business to which the stipulations cannot be applied without injustice; and an injunction was granted to restrain the representatives of a deceased partner from proceeding on a bond given by the surviving partners, for re-payment of his share according to the articles, before the settlement of accounts of transactions pending at his decease, on which a loss was subsequently sustained. *Jackson v. Sedgwick*, 1 Swan. 460.

Partnership articles containing special clauses for taking the accounts on which the parties have not acted, read in equity as if those clauses were expunged. *Id.* 469.

Under a bill by some partners in a joint concern on behalf of themselves and the others, three hundred in number, for a dissolution, receiver, &c. and an account alleging mismanagement by the managers, the court refused to interfere by injunction, and the appointment of a receiver in the first instance, until they had used the means of redress provided by the articles. *Carter v. Drury*, 1 V. & B. 154.

Construction of deeds; first, that a provision for payment of the "just proportion or share" of all debts owing from one partner jointly and as a partner, referred to the contribution as among the

partners, but to what with reference to the state of the partnership funds, and the ability of the other partners, he may eventually be called on to contribute to the joint debts, so as they may be fully paid: secondly, that under a provision for debts of various descriptions, no reference was intended, which must be clearly shewn, otherwise the court favours equal payment; thirdly, a reference to a deed of a specified date, there being two of the same date, one executed at that time, the other subsequently, was in the absence of positive evidence, and aided by circumstances, applied to the former. *Wadson v. Richardson*, 1 V. & B. 103. *DEBTS. C. OF.*

Partnership, without any stipulation as to the proportions, the partners entitled in equal moieties. *Peacock v. Peacock*, 16 Ves. 49.

### III. DISSOLUTION OF PARTNERSHIP, AND ITS EFFECT.

Where a partner has a right to appoint a person to succeed upon his death to his share of the business, and the person so appointed refuses to accept the share, or to comply with the stipulation of the articles, the partnership is dissolved; but the dissolution is not a dissolution which is wrought by the exclusion of the appointee by the surviving partners. *Reynshaw v. Matthews*, 2 Russ. 62.

Semble, a shareholder in a joint-stock company cannot file a bill on behalf of himself and others of the shareholders, for a dissolution of the concern. *Van Sandau v. Moore*, 1 Russ. 441. *JOINT STOCK COMPANY.*

*Quære*, whether partnership for an indefinite time, without deed, can be dissolved on notice by either party? *Littlewood v. Caldwell*, 11 Pri. 98.

One partner may file a bill against his co-partner for account, without praying a dissolution of partnership. *Harrison v. Armitage*, 4 Mad. 143. But in *Loscombe v. Russell*, Sittings after T. T. 1830. V. C. held contrary. See also 2 V. & B. 329. *ACCOUNT; PL. PARTIES.*

In a suit instituted for the dissolution of a partnership, it being clear on the bill and answer that some party is entitled to a dissolution, a sale of the partnership property may be directed on motion. *Crawshaw v. Maule*, 1 Swan. 506.

In the instance of a trading partnership actually dissolved, the court orders a sale on motion. *Id.* 523.

If a partnership is actually ended, no person can make any use of the property inconsistent with the purpose of winding up the concern. *Id.* 507.

Where the contract neither expressly nor by reference limits the duration, the partnership may be terminated at a moment's notice by either party. *Id.* 508.

Death of one partner held a dissolution of partnership where there is no time of duration appointed. See the reason of the doctrine. *Id.* 509. *DEATH.*

Partnership for term of years is dissolved by death of one before expiration of term. *Crawford v. Hamilton*, 3 Mad. 251. *Id.*

If a retiring partner assign all his share in the concern to two of the continuing partners upon trust to pay him an annuity for his life, subject to abatement or enlargement, with the fluctuation of the profits of trade, that will not, with reference to creditors, determine the partnership. *Exp. Wilson*, 1 Buck. 48.

A retiring partner assigns all his share in the concern to two of the continuing partners upon trust for his infant children, in such share as he should appoint, and in default of appointment, upon trust for the children, to be divided amongst them when the younger shall attain twenty-one: held, that the continuing interest the father had in the share so assigned,

depending upon the death of any of the children under twenty-one, was such an interest reserved by him in the concern, as with reference to creditor prevented the determination of the partnership. *Id. ib.*

Order for goods by two partners, afterwards partnership dissolved; a bill drawn on the two partners but accepted only by one who carried on a separate trade, and the goods delivered to him, no claim can be made on the other partner. *Exp. Harris, 1 Maill. 583. PARTNERS.*

Solicitor in partnership cannot dissolve their partnership as against their client without his consent, so as to enable the retiring partner as discharged, to act against him. *Cholmondeley v. Clinton, 19 Ves. 273. ATT. & CLI.; PROFESSIONAL CONFIDENCE.*

Practice of solicitors' partners dividing their business, considering one only as agent to the other, disallowed, the client being entitled to their united exertions. *Id. ib.*

Partnership in the Opera House dissolved by the conduct of the parties, making it impossible to carry it on upon the terms stipulated. *Waters v. Taylor, 5 V. & B. 299.*

Decree for sale of partnership concern, restraining the managing partner from acting, with liberty to either party to lay proposals before the master for management until the sale. *Id. ib.*

One partner can, though the partnership be dissolved, sign the bankrupt's certificate for a joint debt proved under the commission by himself and his co-partner. *Exp. Hall, 1 Rose, 2. BANKCY. CERTIFICATE, SIGNATURE OF.*

A partnership without articles, and for an indefinite period, may be dissolved by any partner at any time, without previous notice, subject to the engagements of the partnership; but the existence of engagements with third persons, cannot prevent the right of dissolution as among themselves. The consequence of a dissolution where there are articles prescribing the terms, is a general sale and account of the joint property: one or more partners therefore cannot insist on taking the share of another at a valuation, or that he shall remove his proportion from the premises, thereby securing the goodwill. Partner after the dissolution of the partnership, continuing to trade with the joint property, must account for the profits. *Featherstonhaugh v. Fenwick, 17 Ves. 298.*

Partnership without any provision as to its duration, may be determined without previous notice, subject to the accounts to wind up the concern. *Peacock v. Peacock, 16 Ves. 49.*

The court will dissolve a partnership where it appears that the business cannot be carried on according to the true intent and meaning of the articles of co-partnership, although one partner objects to the dissolution. *Baring v. Dix, 1 Cox, 213.*

If a partner is so far disordered in his mind, as to be incapable of conducting the business according to the terms of the articles of co-partnership, a court of equity will dissolve the partnership. *Sayer v. Bennet, 1 Cox, 107. LUNACY.*

One partner, notwithstanding a temporary disorder, considered a partner. *Pearce v. Chamberlain, 2 Ves. 35.*

Lunacy is not a dissolution of partnership. *Wrexham v. Hudleston, 1 Swan. 514. LUNACY.*

A and B, partners in a goldsmith's trade, are bound in a bond to J; A and B break off the partnership and divide their stock; J, the obligee in the bond knows this, and that A took upon him to pay the debts, and after a great distance of time brings a bill against the executor of B, yet he (J) shall recover. *Heath v. Percival, 1 P. W. 683. 1 Stra. 403. Bond.*

A partnership in trade is continued for some purposes after a dissolution. *Beak v. Beak, 3 Swan. 627.*

#### IV. THE PROPERTY OF PARTNERSHIP, WHAT FORMS, ITS GENERAL INCIDENTS, AND HOW FAR LIABLE TO SEPARATE CREDITORS.

The interest of partners as tenants in-common, where the estate was purchased out of the joint property, and mortgaged by the firm for a joint debt, is a joint security. *Exp. Freeman, 2 G. & J. 250. SECURITY.*

A conveys lands to trustees on trust to sell if the unsatisfied debts of a partnership, in which he had been concerned, should at a given time, exceed 40,000*l.* The trustees sell and convey to the purchaser by a deed, which recites, that the debts of the partnership exceeded the specified amount, and that A had died intestate as to his real estates; and the heir at law of A joins in that deed, and enters into a covenant for the title of the trustees, a covenant against all acts done by him or his father, and a covenant for the further assurance; it afterwards appears to be uncertain whether A had not devised his real estate, and the purchaser files a bill to have protection against or remedy of the alleged defect in his title which this discovery created: held, that the purchaser is not entitled to have an account of the debts of the partnership, in order to establish the fact of their having, at the specified time, exceeded the specified amount. *Kallet v. Middleton, 1 Russ. 243. VEND. & PURCH.; ACCOUNT; DISCOVERY.*

A and B, &c. were common carriers from L to F, a separate portion of the road being allotted to each, and it having been stipulated also, that no partnership should exist between them; A for himself and the other parties, agrees with the Mint to carry coin from L to F, and afterwards makes another agreement with the Mint to carry other coin to places not on the road: held, that all the parties were entitled to share in the profits of this agreement. *Russell v. Austwick, 1 Sim. 52.*

Distinction between capital and stock in trade, with reference to the rights of retiring and continuing partners. *Crawshay v. Collins, 1 Jac. & W. 278.*

Two American citizens and a French subject being in partnership, and owners of certain ships captured by British cruisers, and the commissioners under the treaty of commerce in 1794, between this country and America, for awarding compensations to American subjects who had suffered losses by capture, for which they could obtain no redress in the ordinary tribunals, having awarded in compensation of the ship of the partnership captured, certain sums to the two Americans, with express exclusion of the French citizen, as an alien enemy; the sums so awarded are not partnership property, and the creditors of the partnership have no claim on them, as against the separate creditors of the Americans. *Campbell v. Mullett, 2 Swan. 551. ALIEN ENEMY.*

A partner having retired under an agreement of indemnity against partnership claims, was allowed a sum of money recovered by the sentence of a foreign court for customs, without examination of the merits. *Kennedy v. El. Casalis, 2 Swan. 325. FOREIGN LAWS.*

A deceased partner, having contracted in his own name for a lease of premises to be employed in the partnership trade, the court refused to restrain the landlord from granting a lease to his representatives, but restrained the representatives from disposing of the lease when granted, except for partnership purposes, and with the assent of the surviving partner. *Alder v. Fouracre, 3 Swan. 489. AGREEMENT FOR LEASE.*

Whether freehold estates purchased by a commercial partnership as an article of stock, devolve on the death of a partner as real or personal estate, *quere?* *Crawshay v. Maule, 1 Swan. 521. ADMON. OF ASSETS; ESTATE REAL.*

Joint creditors have no lien on the partnership effects, until execution, which may be joint or several; their equity after dissolution, depends on the right of the partners. *Exp. Rowlandson*, 2 V. & B. 173. S. C. 1 Rose, 416. LIEN.

Execution by a separate creditor against joint property, subject to account ascertaining the specific interest of the partner in the joint effects, allowed. *Exp. Hamper*, 17 Ves. 407. EXECUTION.

A, the partner of B, carrying on business at a different place, draws bills of exchange, sometimes in the name of the firm, and sometimes in his own name, on the clerk of the partnership managing the business in London, and discounts them with bankers in the country; on an application by them that the bills drawn in the separate name of A, might be considered as a partnership debt, as having been applied to partnership purposes, the lord chancellor, expressing an opinion against the claim, directed dividends to be reserved till after an action at law. *Exp. Emly*, 1 Rose, 61. See 15 *last*, 7.

The interest of each partner in his share of the surplus, subject to all the partnership accounts, and that interest only, is liable to the execution of a creditor by the bankruptcy of one; his interest is divested, and vests in his assignees by relation to the act of bankruptcy. *Dutton v. Morrison*, 17 Ves. 193. S. C. 1 Rose, Bank. Case, 213.

Assignment by one partner of joint property to secure his separate debt, must be subject to the joint debts. *Young v. Keighley*, 16 Ves. 557.

Partnership property of different natures, partly real, partly personal; the difficulty of disentangling and arranging it is no objection against the heir. *Stuart v. Marq. Bute*, 11 Ves. 666. HEIR AT LAW.

Upon a dissolution of partnership by retirement of partner followed by bankruptcy, the right of joint creditors against joint property remaining in specie, depends on the *bona fides*. *Exp. Williams*, 11 Ves. 3. BANKCY. PARTNERSHIP EFFECTS.

Ships purchased by one partner, held separate property as between creditors after his bankruptcy and death of the other, upon circumstances; particularly the registry being made in the name of one partner only, and being afterwards continued for a fraudulent purpose. *Curtis v. Perry*, 6 Ves. 739. SHIP REGISTRY; ADMON. OF ASSETS.

To make partnership liable to demand in respect of separate transaction, an agreement must appear. *Exp. Peel*, 6 Ves. 602.

Real estate purchased with a partnership fund, held to have descended to the heir against the claim of the residuary legatee. *Bell v. Phyn*, 7 Ves. 453. ADMON. OF ASSETS; ESTATE REAL.

A separate creditor of a partner has no right against the joint property, farther than the separate interest of partner, viz. his share upon a division of the surplus, subject to the account of the partnership, therefore, joint property of an insolvent partner taken in execution for a separate debt, cannot be held against the joint creditor. *Taylor v. Fields*, 4 Ves. 396. DEBT. & CREDITOR.

Assignee, executor, or separate creditor, coming in the right of one partner against the joint property, comes into nothing more than an interest subject to an account between the partnership and the partner, and therefore to the joint debts: assignee under a separate commission of bankruptcy, has only the same right to stand in the place of the bankrupt by the common law, not under the bankrupt laws. *Id. ib.* SEPARATE CREDITOR.

Real estates used for purposes of a partnership trade, shall go to the heir, not to the executor, though a co-partnership agreement may alter the nature of real estates, but it must be expressed so to do. *Thorn-ton v. Dixon*, 3 Bro. C. C. 199. REAL ESTATE.

Money paid to part owners for their votes in the appointment of a captain, no profit of the ship. *Muf-fatt v. Farquharson*, 2 Bro. C. C. 338.

Thirty shares in a privateer remaining unsubscribed for and taken by the managers of the concern on their own account, after a valuable capture, held to be the exclusive property of the managers. Bill on behalf of the other subscribers dismissed; since, if there had been a loss, they could only have been answerable to the amount of their own shares. *Blunt v. Cumyngs*, 2 Ves. 331.

Partnership effects first applied to pay partnership debts. *West v. Skip*, 1 Ves. 456. ADMON. OF ASSETS.

Rights of the separate creditor of one partner, against the partnership property. *Skip v. Harwood*, 2 Swan. 586. SEPARATE CREDTS.

Five persons purchased from the commissioners of sewers, and the purchase was to them as joint tenants in fee, but they contributed rateably to the purchase, which was with an intent to drain a level, after which several of them died; they were held to be tenants in common in equity, and though one of these five undertakers deserted the partnership for thirty years, yet he was let in afterwards, but on terms. *Lake v. Craddock*, 3 L. W. 158.

A enters into partnership in fifth, with three owners, for twenty-one years, in digging for mines in A's lands, A to have two-fifths, and in consideration of his ownership of the land, to have a tenth out of the other partners; A dies, and his widow sets up a voluntary settlement made after marriage: court inclined that the partners were as purchasers, and that the voluntary settlement should not stand against them. *Shaw v. Standish*, 2 Vern. 326. DEEDS; VOLUNTARY SETTLE.

## V. BANKRUPTCY OF ONE OR MORE MEMBERS, AND ITS INCIDENTS.

Partner may have allowance, though others are not entitled. 6 Geo. 4. c. 16. s. 129. BANKCY. ALLOWANCE.

A being entitled under a parol partnership agreement with B and C to three-eighths of the capital and profits of the business, became bankrupt; being at the time indebted to the partnership in respect of bills, in which the partnership name had been used for his personal accommodation. The assignees claimed a share of the profits made subsequently to the bankruptcy, while the continuing partners insisted, that the bankrupt's interest in the profits ceased at the time. In consequence of this difference, no settlement of accounts between the estate and the partnership took place, and the assignees filed their bill; but B and C, and afterwards C alone, pending the litigation with the assignees, carried on the business for many years with the stock and capital which existed at the time of the bankruptcy, and stock and capital substituted in the usual course of trade for such former stock and capital, aided by the expenditure of considerable sums by C. Held, that the assignees of A were entitled to three-eighths of the profits which had been made, or should be made, until the concern was fully wound up, and to three-eighths of the money to be produced by the sale of what remained in specie of the capital and stock; that A's proportion of the profits was not to be lessened, nor the proportion of C to be increased in respect of the debt which A brought to the partnership, or of the money which A brought into the business beyond his share of the original capital. *Crawshaw v. Collins*, 2 Russ. 325. BANKCY. ASSIGNT.

Solvent partner appointed receiver, without salary.



of the partnership property, &c. *Exp. Stoveld*, 1 G. & J. 303. **BANKCY. RECEIVER.**

The partner of the bankrupt ordered to attend before the commissioners to be examined, and to produce the partnership books and papers, there being no suggestion of his being indebted to the bankrupt, or having property of the bankrupt in his possession. *Exp. Leavitt*, 1 G. & J. 185. **BANKCY. ATTENDANCE OF WITNESS BEFORE COMMISSIONERS.**

Upon an exception to a master's report, stating the capital and stock in trade of a partnership to consist, at the time of the bankruptcy of one of the partners, of the estimated value of the dead stock employed in it, it was referred back to the master, to state what was the amount of the capital, and also of the stock in trade at that time, in order to adjust the amount of subsequent profits to which the assignees of the bankrupt partner were entitled, as against the other partners who had continued to trade with the partnership property after the bankruptcy. *Crawshaw v. Collins*, 1 Jac. & W. 267. **PR. REF. TO MASTER.**

On separate commission against one partner the assignees took possession of partnership property and were about to sell it. Injunction granted on filing bill and affidavit to restrain the sale. *Allen v. Kibbre*, 4 Mad. 464. **PR. INJUNCT.; BANKCY. JOINT SEPARATE COMMISSION.**

Articles of partnership having provided, that on dissolution by death, notice, or misconduct, of a partner, the remaining partner should have the option of taking his share at a valuation, payable by yearly instalments in the course of seven years; and that on the bankruptcy or insolvency of a partner, the partnership should be immediately void as to him; by a deed, four years subsequent, the partners declared (after a recital that such was their intention in the articles,) that in the event of bankruptcy or insolvency, the same arrangement should be practised as on dissolution by death, notice, or misconduct: one of the partners having become bankrupt, within a few months after the execution of the latter deed, his assignees are not bound by it. Whether a provision in articles of partnership, that on the bankruptcy of a partner, his share shall be taken by the solvent partners, at a sum to be fixed by valuation, and payable by instalments in a course of years, is not void by the statutes concerning bankrupts. *Quære? Wilson v. Greenwood*, 1 Swan. 471. **BANKCY. ASSIGNMENT, WHAT PASSES; FRAUD ON CREDITORS.**

Where A, an attorney, had prevailed on B, a young man about to be admitted, to become his partner in business for a certain term, and to pay him as a consideration a certain sum of money, part to be paid on the execution of the articles, and the remainder by instalments, and A sued out, in the character of petitioning creditor, a commission of bankruptcy against and made B a bankrupt, whereby the partnership was dissolved; A was restrained from proceeding for the instalments, and ordered to refund what was already received, except as far as was commensurate to the period of actual duration of the partnership. The same equity was held to apply to the assignees of A on his bankruptcy, and to a *bona fide* creditor, to whom the security of the instalments had been assigned. *Hamil v. Stokes*, 4 Price, 161. **FRAUD.**

Under a separate commission of bankruptcy, proof admitted by solvent partners, having paid the joint debts since the bankruptcy, on account of a misapplication by the bankrupt to his own use, not by contract, but by fraud, exceeding his authority, and without the privity of his partners. *Exp. Yonge*, 3 V. & B. 31. S. C. 2 Rose, 40. **BANKCY. PROOF UNDER; FRAUD.**

Retired partner, with covenant of indemnity against the debts, in consideration of assigning his share of the property, admitted under a commission against the re-

maining partner to prove a joint debt paid by him, indemnifying the joint estate against the joint debts. *Exp. Ogilby*, 3 V. & B. 133. S. C. 2 Rose, 177. **INDEMNITY & BANKCY. PROOF UNDER.**

A partner continuing the business took an assignment of all the stock, &c., and covenanted to indemnify the retiring partner from the debts then owing from the partnership. The continuing partner became bankrupt and obtained his certificate, and subsequently an action was commenced against the retiring partner, upon an acceptance of the partnership, judgment was obtained against him, and he paid the debt and costs. Held, that no action would lie against the bankrupt upon the covenant, since under 49 G. 3. c. 121. s. 8., the retiring partner might, on his liability, have resorted to and proved his debt under the commission, and was therefore barred by the certificate. *Wood v. Dodgson*, 2 Rose, 47. **BANKCY. PROOF; BANKCY. CERTIFICATE.**

Under a separate commission against one of two partners, the bankrupt, having paid twenty shillings in the pound to all his creditors, obtained an order for the payment of the surplus to him, and the same was accordingly paid to him. Held, that his partner was entitled to apply by petition in the bankruptcy, for an account of such surplus, and for payment of his proportion of it, and that the court had jurisdiction to make the order required. *Exp. Lanfear*, 1 Rose, 442. **BANKCY. SURPLUS.**

Lien of a retiring partner, under an agreement for dissolution, not against the creditors of the other, claiming either under a title given to him, or, in case of bankruptcy, property left in his order and disposition within stat. 21 James 1. c. 19. s. 11. *Exp. Rowlandson*, 2 V. & B. 173. S. C. 1 Rose, 416. **LIEN; BANKCY. REPUTED OWNERSHIP.**

Separate commissions of bankruptcy against partners taken out by a joint creditor on the same debt, and on the same day, immediately after dissolution of the partnership, and no separate creditor appearing. *Exp. Gardner*, 1 V. & B. 74. **BANKCY. SEPARATE COMMISSION.**

A and B, partners, gave a joint and several bond to C, who afterwards becomes indebted to A. B becomes bankrupt; C proves the bond under the commission, and then brings a joint action against A and B, to which B pleads his certificate. A being, by this form of action, precluded from setting off his separate debt, applies for and obtains injunction against C's proceeding in the joint action. *Bradley v. Millar*, 1 Rose, 273. **BANKCY. SET-OFF; INJUNCT.**

A, induced by the fraudulent representation of B, as to the profits of his business, gives him a certain sum of money for a share of it; on the discovery of the fraud, A files a bill in equity for an account, to have the partnership declared void, and for a receiver. The receiver was ordered: B becomes bankrupt; petition by A to be admitted to prove under his commission refused, with liberty to make a claim. *Exp. Broome*, 1 Rose, 69. **FRAUD; BANKCY. PROOF IN; BANKCY. CLAIM.**

Although A, as against B, might have an equity to say he never was a partner, it would be difficult to say so as against third persons. *Id. ib.*

Equitable right of partners, subject to the joint debts; depending upon the result of the account between them. Therefore, under a joint commission of bankruptcy, the separate estate of one has a lien on the other's share of a surplus of the joint estate in respect of a debt, proved under bills drawn in the name of the firm for a separate debt; and may come in with the other separate creditors for the deficiency. *Exp. King*, 17 Ves. 115. S. C. 1 Rose, 212. **BANKCY. LIEN.**

Bill by assignees of a bankrupt, claiming a debt, which had been paid to his partner, as paid after no-

of dissolution of the partnership, that partner retiring and the bankrupt continuing, dismissed; the terms of the alleged arrangement not being made out, so as to establish the right in equity of the bankrupt against the legal right of the other partner. The other questions therefore were not determined: 1st. Whether a demand, the result of an over-payment in advance upon a single transaction of sale between merchants, or merchant and factor, was within the exception as to merchant's accounts in the statute of limitations: 2dly. As to the effect of that exception; whether including merchants' accounts generally, or those only with items continuing within the six years: 3dly. Upon the objection of laches, independent of the statute. *Duff v. E. I. Comp.* 15 Ves. 198. **BANKCY. ASSIGN.**

Money paid by one partner in a joint concern, being his liquidated share of the joint debts to another partner, as agent for settling the debts, if not applied accordingly, may be proved as a debt upon the bankruptcy of the latter; and therefore, a payment by the other on the same account, after the bankruptcy, cannot be recovered from the bankrupt who had obtained his certificate; but in respect of another payment also, after the bankruptcy, in consequence of the failure of the bankrupt and other partners in paying their shares, a right to contribution arose, and the whole was recovered in an action against the bankrupt, who had obtained his certificate, the defendant not having pleaded in abatement. *Wright v. Hunter*, 5 Ves. 792. **BANKCY. PROOF IN.**

Upon a separate commission of bankruptcy, the benefit of an insurance effected by the bankrupt upon his own account on a ship, of which he was joint owner, is not liable to the joint creditors. *Exp. Parry*, 5 Ves. 575. **BANKCY. SEPARATE COMM.; BANKCY. ASSIGN.**

Creditors of a partnership which failed in two years, allowed to come upon the separate estate of one partner, in respect of effects taken out of the partnership by him, without the privity of the other. *Exp. Lodge*, 1 Ves. J. 166. **BANKCY. PROOF IN; BANKCY. JOINT & SEPT. COMMISSION.**

Assignees under separate commission cannot come upon joint estate for a sum brought into the partnership beyond his share: for creditors rely on the ostensible state of the fund. *Id.* 167. *Id.* *ib.*

Bankrupt partners paying different proportions towards the debts, shall have but one allowance, which shall be divided between them in the proportions their respective estates have paid. *Exp. Bate*, 1 Bro. C. C. 453. *Sed quare.* **BANKCY. ALLOWANCE.**

Commission may issue against one of several partners for a joint debt. *Exp. Crisp*, 1 Atk. 133. **BANKCY., COMM. OF.**

Under a joint commission, each of the persons included in it must be found bankrupt, and a joint commission void as to one is so as to both. If one partner be dead at the time it is taken out it abates, and is absolutely void. *Beasley v. Beasley*, 1 Atk. 97. **BANKCY. COMMISSION.**

## VII. PARTNERS GENERALLY.

No partner who owes a duty towards another, can place himself in a situation which gives him a bias against the discharge of that duty. *Burtm v. Wokeley*, 6 Mad. 367.

One partner may agree with other retiring partner to give him a sum for concern, though they know partnership to be insolvent, no fraud being intended. *Exp. Pauke*, 1 Atk. 346. **FRAUD ON CREDITORS; CONTRACT.**

Possession of the owners, is possession of all.

*Exp. Machell*, 2 V. & B. 216. S. C. 1 Rose, 447. **POSSESSION.**

If one of two partners give, by will, a sum out of share of business, the surviving partner may settle the account without the legatee. *Langley v. El. Oxford*, Anbl. 798. **ACCOUNT.**

## VII. HOW BOUND BY EACH OTHER'S ACTS.

If a partner borrows a sum of money, and gives his own security only for it, it does not become a partnership debt by being applied for partnership purposes with the knowledge of the other partner. *Bevan v. Lewis*, 1 Sim. 376.

A partner may give a guarantee where the obligation has reference to business connected with the partnership, and where the guarantee is notified to the firm, and they do not dissent from it. *Exp. Nolte*, 2 G. & J. 295.

Where one partner gives the acceptance of the firm for his separate debt without authority from his co-partner, such acceptance does not bind the firm. *Exp. Goulding*, 2 G. & J. 118.

Several persons entered into partnership as manufacturers, in December, 1806, on the terms, *inter alia*, that one partner should have the management of the business and accounts, and that three of the partners should have no votes or voices in the general affairs, but should be bound by the acts of the majority of the other partners. One of those other partners was also partner in a bank with which the firm kept an account. On the dissolution of the first firm, in 1820, a bill was filed against the partners, or their representatives, by the bankers for an account, and payment for a large balance claimed to be due to them, charging several stated accounts alleged to have been delivered and approved of. One of the defendants, (being one of the partners excluded from the management), by his answer, disputed the account, and, by a cross-bill, alleged, that the superintending partners had, by misconduct and neglect, suffered the acting partner to embezzle the partnership property; that, if any balance were due to the bankers, it had arisen through such misconduct; and that the superintending partners, including the partner in the bank, ought to bear the loss. By the decree dismissing the cross-bill, it was referred to the master to take the account, with liberty to state special circumstances. The master declined, under this direction, to take the account on the footing of a stated account, and the defendant insisted on the account being taken and vouched item by item; on which the plaintiffs presented their petition for a re-hearing, which was refused, the petition not having been presented within six months after the decree pronounced; the court, however, expressing a strong opinion, that no other decree could, according to the pleadings, have been made. *Milford v. Milford*, 1 McClell. & Y. 150.

Money admitted by executor to be in hands of his partner, is in his own hands sufficient for the purpose of being ordered into court. *Johnson v. Aston*, 1 S. & S. 73. **EXECUTOR'S ADMISSIONS OF ASSETS; PAYMENT INTO COURT.**

A partner may give third person an interest in his share, but cannot make him a partner. *Bray v. Fyomont*, 6 Mad. 5.

Demurrer to a bill by a security, stating that two partners having agreed to execute a release to the principal, in consideration of an assignment of his effects, one alone executed the release, overruled. Whether a release so executed binds all the partners, *quære.* *Hawkshaw v. Parkins*, 2 Swan. 539. **RELEASE.**

If A and B are partners in a trade carried on in

the name of A only, and A draws bills in his own name payable to his order, which he indorses, and afterwards B also indorses, and procures them to be discounted, there is no legal contract for a holder to maintain an action against A and B upon the bills, unless it appear that A drew and indorsed the bills in the character of, and as representing A and B. *Exp. Bolitho*, Buck. 1100.

A person discounting the bills may have a right of action against A and B jointly for money had and received, if he can shew that they received the money by means of the bills for partnership purpose. *Id. ib.*

Order for goods by two partners, afterwards partnership dissolved; a bill drawn on the two partners, but accepted only by one who carried on a separate trade, and the goods delivered to him, no claim can be made on the other partner. *Exp. Harris*, 1 Mad. 583. **Dissolution.**

One partner may act for all almost universally in bankruptcy, proving debts, voting for assignees, and signing certificates. *Exp. Hodgkinson*, 19 Ves. 293. *Exp. Mitchell*, 14 Ves. 597.

Joint commission of bankruptcy on affidavit of debt, and bond sworn and executed by one partner on behalf of all. *Id. ib.*

Where one of three partners in a banking concern, who resided at the place where the banking-house was, and was the only partner who transacted the business, the other two residing at a distance from it, absented himself from the banking-house, shut it up, and stopped payment: Held, that his was not evidence of a joint act of bankruptcy by all three. *Mills v. Bennett*, 2 M. & S. 556. **BANKCY., ACT OF.**

One partner bound by the other's signature of a bankrupt's certificate after dissolution of the partnership. *Exp. Hall*, 17 Ves. 62. **BANKCY. CERTIFICATE.**

Partnership bound by the signature of one partner. *Exp. Gardom*, 15 Ves. 28.

Power of a partner to bind the partnership, unless from the nature of the transaction, it can be inferred to be separate, in which case previous authority, or subsequent approbation must be shewn. *Exp. Bonbonus*, 8 Ves. 546.

Partners bound by an instrument executed by one in the presence of the others. *Burn v. Burn*, 3 Ves. 578.

A partner, after the partnership ceased, giving a joint note; bill filed to strike out the plaintiffs' (the former partners) name, have the bill retained for a year, and the trial had, when the plaintiff at law could not prove the partnership, and was non-suited; yet Ld. Ch. (on equity reserved) refused to decree the name to be erased. *Ryan v. Mackmath*, 3 Bro. C. C. 15.

One part-owner of a ship freighted against the express dissent of the other, the ship and cargo are lost; the loss falls wholly on the partner who freighted. *Horn v. Gilpin*, Amb. 255. **ACCOUNT.**

A, on behalf of himself and partners, entered into contract with B for certain commodity, but the name of A is only used in contract. Other partners, having paid part of deposit, were held liable to the contract. *Hirvine v. Gibbins*, 5 Bro. P. C. 491. **PARTIES TO CONTRACT.**

Part-owners of a privateer must bear costs proportionally of an illegal seizure of a prize at sea. *Walton v. Hanbury*, 2 Vern. 592.

In all sea-adventures the acts of a majority of partners shall bind the whole. *Falkland v. Cheney*, 5 Bro. P. C. 476.

One of several partners, who is treasurer of the whole, enters into contract with A, and, afterwards failing, his estate is vested in trustees. Though contract with A concerns the partnership business, yet he is not entitled to any satisfaction out of treasurer's

share of partnership effects, but must come in equally with the other creditors; the money due to A not being for wages. *Ball v. Lamesborough*, 5 Bro. P. C. 480.

Where A's name is used in partnership by other partners as a partner, but he receives no part of profits, &c., nor are any articles of partnership entered into by A and the others: Held but a nominal partnership. *Jacobson v. Hennekenius*, 5 Bro P. C. 482.

A and B partners; A receives money in the shop, and gives his note for it. Though no proof that this money was brought into stock, or used in trade, yet this note being given in the shop by one of the partners, it shall bind both, and though this note at law binds only the executor of the surviving partner, yet in equity the creditor may follow the estate of the other. *Jane v. Williams*, 2 Vern. 277. 292.

An account of the profits of a voyage settled by the major part of the part-owners shall conclude the rest. *Robinson v. Thompson*, 1 Vern. 465. **ACCOUNT.**

A, one of three part-owners of a ship, refuses to navigate; B and C, the other two, navigate without his consent, and ship is lost in the voyage. A shall bear his proportion of the loss, for he would have been entitled to an account of the profits. *Strell v. Winson*, 1 Vern. 297. But see *Horn v. Gilpin*, Amb. 255. **ACCOUNT.**

## VII. HOW DISCHARGED.

Deposit of bills with the house in D's lifetime, which were sold by the house, part in his lifetime, and part after his death; the estate of D is not answerable in respect of the latter, though in this particular case, it appeared that the party who deposited them had no notice of the death of D. *Debaynes Noble*, 1 Mer. 616. **DEBTOR & CREDITOR.**

Creditors at the death of D, who continued to deal with the surviving partners, both by drawing out and paying in money, whereby their debts were increased, but never at any time reduced: Held, no discharge of the deceased partner's estate. *Id. ib.*

Transfer of stock to the partnership, as a security for advances, under an agreement not to sell without notice. D's estate liable to the full extent of stock sold contrary to such agreement, and not only to the extent of the stock sold beyond the amount of the debt due to the partnership in respect of advances made by them. *Id.* 624.

Notice to the surviving partners given by a creditor of the partnership, as solicitor for the representatives of the deceased partner, that the estate of the deceased will not be liable for their future dealings, does not operate as discharging the estate from a debt previously incurred to that creditor, of which he was at the time ignorant. Payments subsequently made in respect of cash balances not to be taken as operating in extinction of such a debt. *Id.* 579.

Deposit with the partnership of exchequer bills, which were sold in D's lifetime, and the produce applied to the use of the house. D's estate is responsible in respect of the breach of trust, and not discharged by subsequent acts, from which an inference might be drawn of the creditor's adopting the surviving partners as his debtors. *Id.* 575.

The amount of money received by the sale of the exchequer bills becomes a partnership debt, which accrued from the moment when they were sold without the consent of the creditor; and this, whether the individual partners were or were not privy to the sale: the sale of the exchequer bills amounts only to a breach of trust. *Id. ib.*

Creditors who, after D's death, continued to deal with the surviving partners, by drawing out and paying in; but, having drawn sums out before they paid

any in, the balance varying from time to time, but being upon the whole increased by such subsequent payments by the surviving partners, must be taken in reduction of the balance due at D's death, and his estate held discharged *pro tanto*. *Id.* 585.

A general devise in trust for the testator's widow and children, having received from the widow who was executrix, on her going abroad to recover part of the property, bonds for a debt from him and his partners to the estate, in settling the affairs of the partnership, on the retirement of one partner who had notice of the trust, delivered to him the bonds to be cancelled without the privy of the *cestui que trust*; continuing to make remittances on that account from the funds of the new partnership, the partner who retired is not discharged. *Dickenson v. Lockier*, 4 Ves. 36.

Bankers, upon a deposit of money with them, gave notes bearing interest; the partnership was dissolved, one of the partners soon afterwards died, and his creditors were called by advertisement, and the partnership was formed by the survivors and others who re-issued notes of the former partnership, and paid the interest of the deposit notes for near two years, and they failed: the assets of the deceased partner are not discharged. *Daniel v. Cross*, 3 Ves. 277.

An account of a partnership estate, and of monies paid to one of the partners during the partnership, and of the dissolution of it, directed at a distance of four years after such dissolution, under circumstances showing that the partner refted from a conviction that the partnership was insolvent. *Anderson v. Maltby*, Bro. C. C. 423. Vide S. C. 2 Ves. J. 244. ACCOUNT.

Judgment in action against a surviving partner is no extinguishment of the partnership debt in equity, *Jeacomb v. Harwood*, 2 Ves. 265. JUDGMENT; EXTINGUISHMENT OF DEBT.

#### IX. SURVIVORSHIP.

Sale of a testator's share in a partnership trade, and the property belonging to it, by his executor to his partner, for the purpose of being re-sold to one of his executors, set aside, and his estate held entitled to his aliquot proportion of the subsequent profits as if the partnership had continued. Interest allowed at five per cent. on sums paid out to his estate. *Cook v. Cullinridge*, 1 Jac. 607. EXECUTOR; FRAUD, FID. SUC.; INTEREST.

The goodwill of professional partnerships survives on death of one to his co-partner, and his representatives have no claim, though he had paid a large premium. *Farr v. Pearce*, 3 Mad. 72. GOODWILL.

A commercial partnership might be very different. *Id.* 79.

The goodwill of a trade carried on in partnership without articles survives, and is not partnership stock. Profits accrued after the death of one partner, are joint property. *Hammond v. Douglas*, 5 Ves. 539. *Id.*

Articles of partnership do not survive for the benefit of executors, &c. without an express provision for such purpose. *Pearce v. Chamberlain*, 2 Ves. 33. ADMON. OF ASSETS.

Two persons occupy and stock a farm jointly. There shall be no survivorship. But if two take a lease jointly of a farm, the lease shall survive. *Jeffereys v. Smale*, 1 Vern. 217. SURVIVORSHIP.

Not necessary in articles of co-partnership to provide against survivorship. *Id.* *ib.*

Where two are jointly interested by way of gifts, survivorship takes place: otherwise, in a joint undertaking in the way of trade. *Id.* *ib.*

#### X. DORMANT.

A and B were in partnership, B being a secret partner, and A, on the partnership account, drew bills in his own name on B, which were accepted

by him: Held, on the bankruptcy of A and B, that the holder of these bills, who was ignorant of the partnership, was not entitled to prove them against the joint estate of A and B, and the separate estate of B, but that he was entitled to prove them against the separate estates of A and of B: Held, too, that the holder, having proved against the joint estate, might, after a declaration of dividend of the joint estate, retire from that proof, and prove against the separate estates. *Exp. Husbands*, 2 G. & J. 4. BANKCY. JOINT AND SEPARATE ESTATE; BANKCY. PROOF IN.

A creditor without notice of a dormant partner has the option to consider himself a joint or separate creditor. *Exp. Hodgkinson*, 19 Ves. 291. *Exp. Norfolk*, id. 457. S. P.

Distinction as to partners with reference to third persons, and as between the partners themselves. Partners, as to third persons, by a specific interest in the profits as such, not by receiving a sum of money even in proportion to a given share of the profits. Dormant partner, by a share of the profits; but the property by agreement belonging exclusively to the other, a joint commission not supported, as the joint property would not be liable to execution under an action against the dormant partner. *Exp. Hamper*, 17 Ves. 403.

Dormant partner not an ostensible contracting party; a creditor may, but is not bound to go against him. *Id.* 412.

#### XI. OF THE GENERAL RIGHTS AND LIEN OF PARTNERS AGAINST EACH OTHER, AND OF SUITS BY, BETWEEN, AND AGAINST THEM.

An order on two solicitors as partners is not duly served by serving it on one of them, and leaving a copy at the place where the partnership business is carried on. *Young v. Goodson*, 2 Russ. 255. PR. SERVICE OF ORDER.

The vendor of a share in a partnership business filed a bill against the purchaser, who had taken possession, charging that he had grossly mismanaged the property, and destroyed its value, and praying that he might be declared to have accepted the title, and might be decreed to perform the contract specifically. The court was of opinion that the title had not been accepted, and as a good title was not shewn, a specific performance could not be decreed: Held that upon a record so framed, no accounts or inquiries could be directed as to the defendant's possession and management of the property, with a view to ascertain whether any and what sum ought to be paid, or compensation made by him to the plaintiff. *Sterens v. Guppy*, 3 Russ. 171. ACCOUNT; VEND. & PURCH.

The shareholders in a joint stock company are entitled to relief in equity, where the conduct of the directors has been fraudulent, or a violation of the terms on which the company was formed. *Blain v. Agar*, 1 Sim. 37. FRAUD; JURISDICTION.

A bill in equity lies to recover deposits paid by a shareholder in a joint-stock company, where the project is a bubble. *Green v. Barrett*, id. 45. *Id.* *ib.*

Where partner dies, leaving partnership accounts unsettled, ecclesiastical court will grant administration of his effects to surviving partner, or any person claiming, if his next of kin decline it. *Cawthorn v. Chatlie*, 2 S. & S. 127. ADMON.

Where a partnership has expired by efflux of time, and in a suit for an account, &c. a receiver has been appointed before decree, the court will not compel defendant, (the former managing partner), to deliver up to receiver for the purpose of making out bills of costs, partnership books and accounts, which have remained in his hands, and title deeds belonging to a third person, which came into the possession of the copart-

ners as solicitors, such defendant offering the receiver free access thereto, and to assist in making out such bills. *Dacie v. John*, 1 McClell. 206. S. C. 13 Price, 446. PRODUCTION OF DEEDS.

Bill by some partners against the committee of partnership, for account, &c. must be on behalf of themselves and other partners not of the committee. *Baldwin v. Lawrence*, 2 S. & S. 18. PL. PARTIES.

If, upon dissolution of partnership, it is agreed that certain articles of partnership stock shall become exclusive property of one of them, and that certain fund shall be applied in payment of debts, and that fund proves insufficient; other partner has no lien on those articles for that deficiency. *Lingen v. Simpson*, 1 S. & S. 600. LIEN.

Mere temptation to abuse partnership effects is not sufficient to induce court to grant injunction. *Glaslington v. Thwaites*, 1 S. & S. 124. INJUNCT.

All the proprietors of the M. paper being also, with the exception of one, proprietors in the E. paper, an injunction to restrain using effects of former partnership to assist latter, in consideration of an annual sum, was refused where there had been agreement permitting use on those terms which had been long acted under. *Id. ib.* INJUNCT.; AGREEMENT.

But injunction granted to restrain using effects not included in agreement. *Id. ib.*

Some of the holders of scrip or shares of a loan cannot file a bill on behalf of themselves and the other holders, to have their subscriptions returned. *Jones v. Garcia del Rio*, 1 Turn. & R. 297.

Where partner withdrawing money from partnership, by entries in books, disguises transactions, or wholly omits or conceals, it is a fraud, and will entitle others to sue his separate estate; otherwise, if he does it openly. *Exp. Smith*, 6 Mad. 2. FRAUD; ACCOUNT.

If the defendant has a good defence against one of the plaintiffs, who hold a joint office, though not against the others, the court cannot make good a decree in the suit for the plaintiffs. *Hunter v. Richardson*, 6 Mad. 89. PL. DECREE.

A, B, and C, partners together; A agrees with D to give him a moiety of his share in the concern. An account may be decreed between A and D, without making B and C parties. *Brown v. De Tastet*, 1 Jac. 284. PL. PARTIES; ACCOUNT BETWEEN WHOM.

On the death of one partner, the scrivener retaining his capital, and employing it in the trade, decreed to account for the profits derived from it, making him proper allowances for the management of the business. *Id. ib.* ACCOUNT.

Where one partner is entrusted with the entire management of the partnership business, and openly, without disguise or concealment, enters into the partnership books the monies withdrawn by him from the joint stock for his separate use, it is not a fraud which will entitle the joint creditors to prove against the separate estate of that partner. *Exp. Smith*, 1 G. & J. 74. BANKRY. JOINT & SEPARATE ESTATE; FRAUD.

An injunction will not be granted to restrain the breach of a covenant in articles of partnership, which has not been infringed for any length of time, where the bill does not pray a dissolution of the partnership. Whether the court will, in any case, grant such an injunction, unless there is ground for, and the bill prays, a dissolution of the partnership; *quære?* *Marshall v. Colman*, 2 Jac. & W. 266. See in negative, 4 Mad. 143. and in affirmative, 2 V. & B. 329. and *Loscombe v. Russell*, *Sittings after T. T. 1830*. V. C. INJUNCT.; PL. BILL.

Receiver appointed of mines, in which several persons were interested; the concern, from the nature of the subject, being a species of trade, and not a mere tenancy in common in land. *Jeffereys v. Smith*, 1 Jac. & W. 298. MINES; RECEIVER.

Order for a partner to pay into court partnership money received by him contrary to good faith; but in general, a partner insisting that the balance of the amount is in his favour, is not obliged to bring into court what is in his hands, unless the other partners do the same. *Foster v. Donald*, 1 Jac. & W. 252. PR. PAYMT. INTO COURT.

The court will not, upon motion, appoint a receiver of a partnership, unless it appears that the plaintiff will be entitled to a dissolution at the hearing. *Chapman v. Beach*, 1 Jac. & W. 594. RECEIVER.

Plaintiff and defendant (partners) having agreed to dissolve, and that defendant, on payment of half value of effects, should take the whole. The defendant took possession, but failed to make payment, and had begun to pull down buildings. Injunction to restrain him refused. *Coyton v. Horner*, 5 Pri. 537. INJUNCT. TO RESTRAIN WASTE.

One of two part-owners of a ship, having assigned his share to the other, the former is a necessary party to a bill by a creditor of both against the representatives of the latter. *Pierson v. Robinson*, 3 Swan. 139. ASSIGNMT.; PL. PARTIES.

A joint stock company, established by act of parliament, vesting in them all property then belonging to them, and authorising them to bring actions in the name of their treasurer for the time being, having purchased an estate pending a suit against the vendors, to compel the specific performance of an agreement to grant a lease of part; on a bill by the vendee against the treasurer and directors, the plaintiffs were declared entitled to a lease, and the treasurer was enjoined from disturbing their possession, though the rest of the proprietors, being very numerous, were not parties; but no decree could be made for the execution of a lease. *Meux v. Maltby*, 2 Swan. 277. PL. PARTIES; PURCHASE, PENDENTE LITE.

Where some members of a partnership, either in the ordinary course of trade, or in closing the transactions after a dissolution, seek to exclude others from a just share in the management, the court appoints a receiver. *Wilson v. Greenwood*, 1 Swan. 48. PR. RECEIVER, APPOINTMENT OF.

Bill against two partners, one abroad; service of subpoena against him permitted on the other, on motion. *Coles v. Gurney*, 1 Mad. 187. PRACTICE, SUBSTITUTED SERVICE.

Court will not treat a bill to restrain an acting partner from collecting debts or creating them, and for appointing a receiver, as a bill to restrain waste; though otherwise, if partner has been shown guilty of culpable conduct, and to be insolvent. *Lawson v. Morgan*, 1 Price, 303. PR. INJUNCT.

Under covenant to retiring partner as soon as conveniently could be to pay the debts and indemnify him against them, broken by death of covenantor, leaving debts undischarged; those debts being paid by covenantor, become a specialty debt against the administrator. *Musson v. May*, 3 V. & B. 194. COVT. TO INDEMNIFY; SPECIALTY DEBT.

It is obligatory on a partner to apply property as received to partnership purposes, or to charge himself, as debtor, in the partnership books. *Exp. Yonge*, 3 V. & B. 36.

Negative plea, as no partnership, not going to collateral circumstances, charged as evidence of it, insufficient. *Evans v. Harris*, 2 V. & B. 364. PL. NEGATIVE PLEA.

No relief upon a bill by one partner against another, not praying a dissolution. *Forman v. Humphrey*, 2 V. & B. 329. So in *Loscombe v. Russell*, *Sittings after T. T. 1830*, before V. C. But see contra *Harrison v. Armitage*, 4 Mad. 143. See also 2 J. & W. 266. RELIEF.

Motion by defendants to a bill for a partnership

account, for a production of the accounts before answer, refused. *Pickering v. Riggby*, 18 Ves. 484. *PR. PROD. OF DEEDS, &c.* *PR. ANSWER.*

Motion for a receiver on a mining concern refused, upon a claim of partnership in the equitable interest, not raised until the concern, at a great expense, became prosperous, and denied by the answer. *Norway v. Route*, 19 Ves. 144. *RECEIVER; ACCOUNT.*

Receiver not ordered merely on a dissolution of partnership; ordered on breach of the duty of a partner, or of the contract, as by continuing trade with joint effects on the separate account. *Harding v. Glover*, 18 Ves. 281. *PR. RECEIVER.*

The principle upon which a court of equity interferes between partners, by appointing a manager, receiver, &c. is merely with a view to the relief, by winding up and disposing of the concern and dividing the produce, not to carry it on. The court, therefore, would not, upon motion, appoint a manager, &c. of the Opera House, except upon the principle applicable to any other partnership, as necessary to the relief, a foreclosure; taking into consideration also the difficulties from the nature of the subject, and the contract an anxious provision for arbitration, and that one party was, by the express contract, manager. *Waters v. Taylor*, 15 Ves. 10.

Injunction to restrain a surviving partner from disposing of the joint stock and receiving the outstanding debts. *Hartz v. Schrader*, 8 Ves. 317. *INJUNC.*

Demurrer to a bill for some members of lodge of freemasons against others, to have the dresses, &c. delivered up, and an injunction was allowed on ground that they affected to sue as a corporate body; but leave was given to amend, the court holding the jurisdiction for delivering of chattel, and where there is a joint interest permitting some to sue as individuals, representing the rest in other instances than those of creditors and legatees, if inconvenient to justice that all should be parties. *Lloyd v. Learing*, 6 Ves. 773. *PL. PARTIES; CHATTELS.*

A fair dissolution of partnership between two; one retiring and assigning the partnership property to the other, and taking a bond for value and covenant of indemnity against the debts; the other continued in the trade separately a year and a half, and then became bankrupt: Held the joint creditors had no equity attaching on the partnership effects remaining in specie; at all events, such a claim ought to be by bill, and not by petition. *Exp. Ruffin*, 6 Ves. 119. *BANKRY. ASSIGNMT.*

Though contribution among partners is now enforced at law, the jurisdiction of courts of equity is not ousted, and therefore, though the bill was dismissed, the object having been attained in an action directed, the court would not dismiss it with costs. *Wright v. Hunter*, 5 Ves. 792. *CONTRIBUTION; JURISDICTION.*

A joint creditor by simple contract may go against the assets of a deceased partner, but cannot before the account retain separate property of that partner in his possession. *Stephenson v. Chiswell*, 3 Ves. 566. *LEGN.*

Bill by a partner under a parol agreement, charging misconduct in the other partner, and praying a dissolution, account, and injunction from executing securities in the name of the firm; demurrer to the prayer for a dissolution, because there was no writing between them, overruled. *Master v. Kirton*, 3 Ves. 74. *PL. DEMURRER.*

Court of equity will order fund of annuity company into court, when members are about to abuse their trust. *Castland v. Lyster*, 1 Ridg. L. & S. 580. *PR. PAYMENT INTO COURT.*

Court will not appoint receiver of effects of sub-

sisting partnership, unless on grossest abuses of some of the partners. *Oliver v. Hamilton*, 2 Anst. 453. *RECEIVER.*

Motion granted for an injunction for one partner against another; the defendant being in contempt, and served personally, and not appearing. *Read v. Bowers*, 4 Bro. C. C. 441. *PR. INJUNC.*

At the commencement of a partnership, the partners both living in the same house, entertained their customers jointly; one removing, the whole expence of entertainment (which were necessary in the trade) fell upon the other. They ought to have agreed for an allowance, the court can make none. The accounts having been annually balanced without such allowance, is conclusive. *Thornton v. Proctor*, 1 Anst. 94. *ACCOUNT.*

Defendant need not set forth an account of the transactions of a trade in which the plaintiff pretends to have been a partner, if there is a clear denial of the partnership. *Jacobs v. Goodman*, 2 Cox, 282. *DISCOVERY; PL. ANSWER.*

Injunction to restrain surviving partners from using the name of a deceased partner in the firm of the trade, refused. *Webster v. Webster*, 3 Swan. 490. *INJUNC.*

Injunction against a surviving partner, proceeding by ejectment to obtain possession of a farm of which a joint lease had been made to himself and his deceased partner. *Elliot v. Brown*, 3 Swan. 489. *IB.*

One part-owner of a ship cannot bring a bill on behalf of himself and the other part-owners, but they must all be parties. *Moffat v. Farquharson*, 2 Bro. C. C. 338. *PL. PARTIES.*

In a cause for an account of a partnership, both parties being dead, a receiver shall be appointed, secus in the case of surviving partner. *Philips v. Atkinson*, 2 Bro. C. C. 272. *PR. RECEIVER.*

To a bill against a bailee, for re-delivery of jewels, persons entitled to a part of them are not necessary parties. *Saville v. Tancred*, 3 Swan. 141. *PL. PARTIES; BAILEE.*

At law, where one of the creditors will not join in the action, he is summoned and severed, and the other has judgment *quod sequatur solum*. *Darwent v. Walton*, 2 Atk. 510

Where one partner is abroad, the other partner who is before the court shall pay the whole of the joint demand. *Id. ib.*

Where an action is brought against two joint debtors, and one only appears, the creditor may have judgment for his whole debt against the person appearing, and by default against the person who does not appear. *Id. ib.*

Bill for an account of a copartnership, defendant pleaded an award, averring the matter in question comprised in the award; plaintiff replied generally to the plea; and though the plaintiff ought to have set down the plea to be argued, and not to have replied to it, yet court decreed defendant to account; but afterwards, though this decree was signed and enrolled, court ordered defendant only to answer. *Farrington v. Chute*, 1 Vern. 72. *PR. REPLICATION; ACCOUNT.*

Surviving partner, trading on his own account with the debtors to the partnership, ordered that an attorney be appointed to sue for the debts, unless the surviving partner would give security to answer a moiety of the debts to the administratrix of the deceased partner. *Estwick v. Couningsby*, 1 Vern. 118.

In a suit for a share of a partnership adventure, all the parties having shares must be parties. *Irelton v. Lewis*, Rep. T. Finch. 96. *PL. PARTY.*

In a bill to establish a title of fish all persons interested in any one particular adventure, must be parties. *Coppard v. Page*, For. Ex. 1. *IB.*

## PART PERFORMANCE.

See AGREEMENT, XI. 3.

## PATENTS.

See also PR. INJUNCTION, 16.

Instance of a patent amended and new sealed. *Beame's Orders*, 67.

To establish the validity of a patent, the invention must be both new and useful, and the specification must accurately describe it: also, if the specification seeks to cover more than is actually new and useful it vitiates the patent, rendering it ineffectual, even to the extent to which it might otherwise have been supported. *Hill v. Thompson*, 3 Mer. 629.

To support a patent, the specification should be so clear as to enable all the world to use the invention from the moment of the expiration of the patent. *Newbery v. James*, 2 Mer. 446.

There is no copyright in specification of patents. *Wyatt v. Bernard*, 3 V. & B. 77. COPYRIGHT.

No costs where the caveat was not unreasonable. *Exp. Far*, 1 V. & B. 67. PR. COSTS; CAVEAT.

Patent granted for an improved steam engine; as not infringing upon an existing patent. If the improvements could not be used without the engine, for which a patent had been granted, they must wait the expiration of that patent. *Id. ib.* IMPROVEMENTS.

Injunction upon possession under a patent, until the right can be tried; though subject to considerable doubt; the patent being for improvements upon a machine, the subject of a former patent expired, and the specification describing the original machine, with the improvements, as one entire machine, the subject of the latter patent; not distinguishing the improvements. *Harmer v. Plaine*, 14 Ves. 130. INJUNCTION.

Patent for improvements valid; but not to restrain the use of the original machine. *Id.* 133.

Enrolment of patent cannot be dispensed with for the purpose of preventing the specification being made public. After patent is passed, the time for enrolment cannot be enlarged without act of parliament. *Exp. Hoops*, 6 Ves. 599.

Injunction granted against infringement of patent, that the validity of a patent might be tried at law; verdict for the patentee, subject to the opinion of the court; upon a case the court were equally divided. The patentee must bring another action; but the court on the possession would not impose any terms upon him, nor dissolve the injunction in the mean time. *Boulton v. Bull*, 3 Ves. 140. PR. INJUNCTION, DIS- SOLVING.

A patentee claiming an exclusive right of printing bibles, must establish his right at law, before he can have an injunction in equity. *Grierson v. Jackson*, 1 Ridg. L. & S. 304. INJUNCTION; TITLE.

The court refused to seal a patent for representing Italian operas, because the provisions for carrying it on were by agreement with the Lord Chamberlain, his executors and administrators, and the right to the patent was not sufficiently connected with the property in the house. Not sufficient for the party applying merely to answer objections, but he must lay a proper case. Upon such application, the court will take care that the king is not deceived, or his object disappointed, and will represent the whole to the king, but will not decide upon the merits of the various claimants. Essential to the complainant of an old market against a new one set up near it, that the old is competent to the accommodation of the public; so here the old proprietors must be able to keep it up properly; the ac-

commodation of the public being the principal thing. *Exp. O'Reilly*, 1 Ves. J. 112. JURISDICTION.

On an application to the Ld. Chamberlain to withhold the great seal from a patent, he will only consider whether it is legal or not, and not whether the crown ought or ought not to grant it. *Exp. Daly*, Vern. & Scriv. 499.

But there are three stages in which a patent may be opposed:—1. While it is under the consideration of his Majesty; 2. When it comes to the privy seal; and 3. When it comes to the great seal. *Id.* 502.

A patent bearing date 12th August, but the caveat not discharged till the 27th, the patentee supposing it bore date the latter day, did not enrol till the 18th December; when the four months had expired, the date of the patent cannot be altered. *Exp. Beck*, 1 Bro. C. C. 578.

Upon a bill brought by the king's printer, to restrain the defendant from the publication of certain acts of parliament, &c., to which the patentees for printing law books were also defendants, the court refused to interfere between the contending patents, and therefore only restrained the defendant from printing at any other than a patent press. *Baskett v. Cunningham*, 2 Eden, 137. INJUNCTION.

Exemplification of part of a patent, not suffered to be read in evidence, notwithstanding the statutes of 3 & 4 of Edw. 6. and 13 Eliz. where the other side have no time to consult the patent roll, and so may be surprised by an imperfect exemplification. *Att. Gen. v. Taylor*, Prec. Chan. 59. PR. EVIDENCE.

Bill in equity lies to set aside letters patent obtained by fraud. *Att. Gen. v. Vernon*, 1 Vern. 277. 370. S. C. 2 Ch. Rep. 353. FRAUD; JURISDICTION.

Lease obtained by fraud may be avoided by patentee of crown. *El. of Decon. v. Haute*, Cary, 32.

## PAUPER.

See PR. COSTS, 10. (cc).—PR. PAUPER.

## PAYMENT.

See also ANNUITY, IV.—BOND, VI.—BANKRUPTCY, XV. 2.—DEBTOR & CRED. IV.—LEGACY, VIII.—MORTGAGE, IX. 1.—PL. PLA. 16.—PR. COSTS, 5.—PR. INJUNCTION, 18.—PR. PAYMENT.—PRESUMPTION, II.—VEND. & PURCH. 1.

Money paid into court upon an injunction and laid out, is security, and not payment. *Broughton v. Pitchford*, 6 Mad. 295. PR. PAYMENT INTO COURT.

Creditor is not obliged except by special agreement to take his debt by dribblets. *Wilkinson v. Sterne*, 9 Mod. 299. DEBTOR & CRED.

Stoppage no payment at law or in equity, unless under special circumstances, and in case of mutual demands where the balance only is the debt. *Jeff's v. Wood*, 2 P. W. 128. STOPPAGE IN TRANSITU.

S having borrowed 100l. of A on a bond, B, the scrivener, when the bond was sealed, delivered it to A. S paid many years' interest, and 50l. of the principal to B, which he paid over to A; but the remaining 50l. which S paid to B was not paid over to A when B failed. *Per curiam*, though B received the interest so long, and 50l. of the principal, it did not imply he had any authority from A; and as S could not prove he had any such authority, he shall pay the last 50l. again. *Wolstenholme v. Davies*, 2 Freem. 289. PRINC. & AGENT.

Payment of money to a trustee, with notice of the trust, is a mis-payment, though the trustee had judg-

ment and execution against the person that paid the money. *Prichard v. Langher*, 2 Vern. 197. TRUST.

Legacy bequeathed to a feme covert, Payment to her alone not good. *Palmerv. Trevor*, 1 Vern. 261. LEGACY; FEME COVERT.

Scrivener puts out money on bond, and receives the interest from time to time, and then receives part of the principal, the bond remains in the obligee's custody. No good payment. *Roberts v. Matthew*, 1 Vern. 150. See 1 Salk. 157. PRINC. & AGENT; BOND.

It is the rule of the court, that if the scrivener have the custody of the security, payment of the interest is good; if he delivers it up, being a bond, payment of the principal is good: but where payment of the principal, in case of a mortgage deed, the giving up the deed is not sufficient to restore the estate; there must be a re-conveyance. So payment of interest good, if mortgagee consents, or after his death his executor, either expressly or by implication, as if he accept the money afterwards of the scrivener, though the scrivener have not possession either of deed or bond. *Whitlock v. Waltham*, 1 Salk. 157. 1 Vern. 150. in note. PRINC. & AGENT.

Payment of debt, without taking receipt, is relievable in equity on oath of parties only. *Cary*, 2.

### PEERS.

Peers to answer on honour, and not on oath. *Beames' Orders*, 105.

So are widows and dowagers of temporal peers. *Id.* 106.

A master refusing to take their answers on honour, commits breach of privilege. *Id.* 262.

The answer of a peer, upon his protestation of honour, may be read on the question of costs. *Dawson, v. Ellis*, 1 Jac. & W. 524. ANSWER; EVIDENCE; PR. COSTS.

An amendment in the title of an answer being necessary, namely, instead of "the farther answer to the original amended bill," entitling it "the farther answer to the original bill," and "the answer to the amended bill;" the answer so amended must, in the case of a peer, be again attested upon honour, as in the case of a common debt it must be re-sworn. *Peacock v. D. of Bedford*, 1 V. & B. 186. PR. ANSWER, AMENDMENT OF; PR. ANSWER, JURAT OF. Peer not to be a receiver. *Att. Gen. v. Gee*, 2 V. & B. 208. PR. RECEIVER.

The right to the letter missive and copy of the bill is privilege of peerage, not of parliament: attaching, therefore, to all Scotch and Irish peers. Injunction, therefore, or other process not so accompanied, is ineffectual. *Ld. Milsington v. El. Portmore*, 1 V. & B. 419. PR. LETTER MISSIVE.

Peeress answering upon honour, in exactly the same situation as another defendant answering an oath. *Gilpin v. Ly. Southampton*, 18 Ves. 469. PR. ANSWER.

Since the union with Ireland, Irish peers, with the exception of those who are members of the house of commons, are entitled to every privilege except sitting in the house of lords, and therefore the letter missive. *Robinson v. Ld. Rokeby*, 8 Ves. 601. PR. LETTER MISSIVE.

Construction of the Gen. Order, 23rd January, 1794, in the case of a peer defendant, that in the cases specified upon application for time to answer, the defendant enter his appearance, and undertake that if the answer is not put in, a sequestration shall go, i. e. a sequestration absolute. *G. eger v. Ld. Arundel*, 8 Ves. 87. GEN. ORDER, C. OF; PR. TIME TO ANSWER; PR. SEQUESTRATION.

Where is to perfect answer by examination,

&c., he is upon his honour; but where he comes himself to make satisfaction, &c., or to answer interrogatories and examination as witness, he is on his oath. *Meers v. Ld. Houston*, Dick. 21. S. C. 1 P. W. 146. 2 Salk. 512.

Sequestration is first process against peer or member of parliament. *Rushleigh v. Butler*, Dick. 152.

Putting in answer good cause to sequestration nisi against peer; but if answer insufficient, plaintiff must move again for sequestration nisi. *Id.* 16.

Peers and M. P.s, if they trade, are liable to bankrupt laws. *Exp. Meymott*, 1 Atk. 200. BANKRUPT TRADER.

A sequestration nisi is the first process against a peer or member of the house of commons, though this is some hardship; but if there be a sequestration nisi against a peer for want of an answer, and the peer puts in an answer which is insufficient, yet the order for sequestration shall not be absolute, but a new sequestration nisi. *Ld. Clifford's case*, 2 P. W. 385. PR. PROCESS.

A peer disinherited by his ancestor is entitled to the favour of the court, and on bill and answer, to have the family deeds brought before the master, in order to see whether any thing can be discovered for his advantage. *El. Suffolk v. Howard*, id. 177. HEIR AT LAW; PR. PRODUCTION OF DEEDS.

Where the husband was a lunatic, the wife, though an Irish peeress, committed for not producing him. *Ld. Wenman's case*, 1 P. W. 701. LUNATIC, COMMITTEE OF.

Since the union, a Scotch peer cannot, by virtue thereof, sit and vote in parliament. *Queensberry's case*, id. 584.

A peeress ordered to produce deed, confessed, in her answer on honour only, not on oath. *Hamilton v. Ger-rard*, Prec. Chan. 92. PR. PRODUCTION OF DEED.

If one be created a baron, viscount, &c. by patent, and after, in the same patent, the honour is granted to another in remainder, it operates as a new grant, for the king has no reversion of the honour in him, though he has the power of appointing the succession. *Rex v. Ld. Purbeck*, Show. P. C. 5. 11. GRANT FROM CROWN.

Process of contempt cannot issue against a peer. *Phasant v. Phasant*, 2 Vent. 342. CONTEMPT.

Decree served on peer requires no letter missive. *Mackenzie v. Ms. Powis*, 2 Com. 675. PR. LETTER MISSIVE; DECREE, SERVICE OF.

### PENALTY.

See also BOND, V.—INTEREST, III.—PL. BILL, 2 (c).

Interest beyond the penalty of a bond upon a mortgage for the same debt, though by a surety. *Clarke v. Ld. Abingdon*, 17 Ves. 106. INTEREST; BOND.

Party in the master's office not entitled against the assets of a deceased debtor to interest beyond the penalty. *Atkinson v. Atkinson*, 1 Ball & B. 239. INTEREST, WHEN PAYABLE.

A mortgagee had also a bond on which the interest due exceeded the penalty; the mortgagor conveyed the equity of redemption for the use of his creditors, paying this bond first. Nothing beyond the penalty can be claimed. *Lloyd v. Hatchett*, 2 Anst. 525. BOND.

If a man agree not to do an act, and enter into a bond, with a penalty to be forfeited on his doing it, the penalty is never to be considered as the price for doing such act; but the court will relieve by injunction until damage sustained shall be ascertained by an issue. *Hardy v. Martin*, 1 Cox, 26. *Id.*

Sureties relieved, in chancery, against penalties in bond. *Cary*, 12.



Bond does not carry interest beyond amount of penalty. *Grosvenor v. Cook*, Dick. 305. *S. P. Gibson v. Egerton*, Dick. 408. *Kettleby v. Kettleby*, *Rundell v. Pettit*, by revivor. Dick. 514.

Penal laws are not to be construed according to rules of equity. *Harrison v. Southcote*, 1 Atk. 537.

Plaintiff in a charter-party may sue for the whole penalty, though a part only remains due, but on offering to pay principal, interest and costs, defendant at law may be relieved in equity. *Forward v. Duffeld* 3 Atk. 555.

Five shillings per week allowed by way of *nomine pene* if either of the half-yearly payments of an annuity was in arrear forty-two days after it became due, the court will direct it to stand as a security for legal interest when the principal sum is not regularly paid. *Aylet v. Dodd*, 2 Atk. 238.

A court of equity will relieve against the penalty, for not performing an unreasonable contract. *Thomson v. Harcourt*, 1 Bro. P. C. 193. AGREEMENT, UNREASONABLE.

Where bond is tacked to mortgage, mortgagor cannot redeem without paying the whole, though exceeding the penalty. *Peirs v. Baldwin*, 2 Eq. Ab. 611. INTEREST; TACKING SECURITIES; BOND.

Where bond debt and interest have exceeded the penalty, and devisee or trustee to pay neglect payment for unreasonable time, he shall pay interest beyond penalty. *Anon.* 1 Salk. 154. BOND; INTEREST.

A mortgage is made with interest at 5l. per cent, provided that if the interest be not paid within two months after due, then to pay 5l. 10s., this is in nature of a penalty, and the court will relieve against it; otherwise if 5l. 10s. per cent. be reserved originally, and to be lessened to 5l. per cent. if duly paid within two months after due. *Strode v. Parker*, 2 Vern. 316. MORTGAGE; STIPULATED DAMAGES.

Equity, in some cases, carries the debt beyond the penalty, as when a debt is due to a person, and he is kept out of it by an injunction. But a plaintiff in equity cannot charge the debt beyond the penalty any more than he can at law. *Hale v. Thomas*, 1 Vern. 350. 2 Ch. Ca. 162. 186. See also 3 Russ. 598.

### PENDENTE LITE.

See ADMINISTRATOR, III.—ASSIGNMENT, PENDENTE LITE.—LIS PENDENS.

### PENSION FROM CROWN.

Purchaser of pension granted by king George the Third, and which necessarily ceased on king's death, not entitled to pension which was granted by George the Fourth, merely in continuance of the former one. *Clay v. St. John*, 2 S. & S. 32. DEMISE LE ROY; VEND. & PURCH.

A pension for past services may be alienated, but a pension for supporting the grantee in the performance of future duties, is inalienable. *Davis v. D. Marlborough*, 1 Swan. 79. ALIENATION.

Pension to A or his assigns, when assigned is a grant, not a chose in action. *McCarthy v. Gould*, 3 Ball & B. 389.

Sequestrators directed to receive a pension to A and his assigns, payable at the treasury, in the hands of the assignee. *Id.* 387. See *Davis v. D. Marlborough*, 1 Swan. 74. SEQUESTRATION.

To entitle the widow of an officer in the army to the pension from government, the marriage must have taken place before he retired from the service. *Perry v. Woods*, 3 Ves. 204.

### PERFORMANCE.

See CHARITY, I. 3.—CONDITION, VI.—COVENANT, IV.

### PERJURY.

See INDICTMENT.

### PERPETUITIES.

See LEASE, VIII. 2.—POWER, III.

Trusts to be performed after the expiration of a term in gross of twenty years from the decease of the survivor of twenty-eight persons, who were living at the testator's decease, are valid. *Bengough v. Edridge*, 1 Sim. 173. LIMIT. OF TRUSTS.

Trust by deed creating estates tail, after any contract for alienation to raise a sum of money for the persons next in the course of limitation, declared void, as tending to a perpetuity, and inconsistent with the rights of the tenants in tail. *Mainwaring v. Baxter*, 5 Ves. 458. ESTATE TAIL.

Devise of real estates of the annual value of near 5000l. and other estates directed to be purchased with the residue of the personal estate, amounting to above 600,000l., to trustees and their heirs, &c., upon trust during the lives of the testator's sons, A, B, and C, and of his grandson, D, and of such other sons as A now has, or may have, and of such issue as D may have, and of such issue as any other sons of A may have, and of such sons as B and C may have, and of such issue as such sons may have, as shall be living at his decease, or born in due time afterwards; and during the life of the survivor, to receive the rents and profits, and from time to time to invest the same, and the produce of timber, &c. in other purchases of real estates; and after the death of the survivor of the said several persons, that the said estates shall be divided into three lots, and that one lot shall be conveyed to the eldest male lineal descendant then living of A in tail male, remainder to the second, &c. and of all and every other male lineal descendant or descendants then living, who shall be capable of taking as heir in tail male of any of the persons to whom a prior estate is limited of A successively in tail male, remainder, in equal moieties, to the eldest and every other male lineal descendant or descendants then living of B and C, as tenants in common in tail male, in the same manner, with cross remainders; or if but one such male lineal descendant, to him in tail male, remainder to the trustees, &c. The other two lots were directed to be conveyed to the male descendants of B and C, in the same manner, and with similar limitations, to the male descendants of their brothers, and to the trustees in fee; and it was directed that the trustees should stand seised, upon the failure of male lineal descendants of A, B, and C, as aforesaid, upon trust to sell and pay the produce to his majesty, his heirs and successors, to the use of the sinking fund; the accumulation till the purchases or sales can take place, to go to the same purpose, with a direction that all the persons becoming entitled shall use the surname of the testator only. The trusts of the will were established. *Thelwellson v. Woodford*, 4 Ves. 227. Affirmed, 11 Ves. 112. WILL.

J, by will, devises his real estates to trustees, in trust for several persons for life, with remainders to their first and other sons in tail male successively; but directs his trustees, upon the birth of every son of each tenant for life, to revoke the uses before limited to their respective sons in tail male, and to limit the premises to such sons for their lives, with immediate

remainders to the respective sons of such sons in tail male. Held, that this clause of revocation and re-settlement, as tending to a perpetuity, and repugnant to the estate limited, was void and of no effect. *Id. Spencer v. Dk. of Marlborough*, 3 Bro. P. C. 232. WILL, C. OF.

Testator devises his real estates to trustees, to several persons for life, with remainder to their first and other sons in tail male successively; but directs his trustees, upon the birth of every son of each tenant for life, to revoke the uses before limited to their respective sons in tail male, and to limit the premises to such sons for their lives, with immediate remainders to the respective sons of such sons in tail male. Held, that this clause of revocation and re-settlement was void, as tending to a perpetuity, and being repugnant to the estate settled. *Dk. of Marlborough v. El. Godolphin*, 1 Eden, 404. *Id.*

Though the law will not admit a perpetuity, yet the intent of the party, so far as is consistent with its rules, ought to be observed. *Smith v. Packhurst*, 3 Atk. 136. 2 Stra. 105.

The mortgagee for a term of years being in possession, devises the premises, as an estate of inheritance, to three several persons for life successively, with remainder to their first and other sons, remainders over. The remainders over are void, as tending to a perpetuity. *Brett v. Sawbridge*, 3 Bro. P. C. 141. WILL, C. OF; REMAINDER OVER.

A devises lands to the Drapers' Company, in trust to convey to B for life, remainder to his first, &c. sons for their lives successively, and so to their issues male for their lives, remainder over. Though this be a vain attempt of a perpetuity, yet the trustees shall make a strict settlement as may be, making all the persons in being but tenants for life; but the limitation to the son unborn must be in tail. *Humberston v. Humberston*, 2 Vern. 738. S. C. Pre. Ch. 455. Gilb. Eq. Rep. 128. 1 P. W. 332. WILL, C. OF; SETTLEMENT.

Term of years cannot be limited so as to create a perpetuity. *Fletcher's case*, 1 Eq. Ab. 193. TERM OF YEARS, LIMIT. OF.

Limitation of a fee upon a fee, on a contingency to happen within a reasonable compass of time, no perpetuity. *Lloyd v. Curew*, Pre. Chan. 72. LIMITAT.

A devise to a man and the heirs of his body, and if he shall go about to alien, his estate shall cease, and the lands go over to a charity. The devise over is void, it tending to create a perpetuity. *Company of Pewterers v. Governors of Christ's Hospital*, 1 Vern. 161. WILL, C. OF; LIMITAT. OVER VOID.

The trusts of term were limited to J for life, then to E for life, then to L for life, then to the first and other sons of L to be begotten on the body of M, with remainders, &c., remainder over; all limitations after that, to L for life: the sons of L, not being born, are void. *Apprice v. Flower*, Pollexf. 27. LIMITATION VOID.

Bond by tenant in tail not to suffer a recovery void, as tending to perpetuity. *Moor*, 809. 1 Eq. Ab. 87. BOND.

Perpetuity discountenanced in chancery. *Cary*, 8.

### PERSONALS.

See CHATELLE PERSONAL.—ESTATE, IX. 2.

### PERSONAL ASSETS.

See EXECUTORS, X. 1; XI. 3.

### PERSONAL ESTATE.

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### PETITION.

See BANKRUPTCY, VI. 11 (e); XVI. 3 (b); XVII. — CHARITY, IV. — LUNACY, IX. — MONEY TO BE LAID OUT IN LAND. — PL. PETITION.

### PETITIONING CREDITOR.

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5. When Defendant by Answer may refuse to answer further.
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2. Effect of Admissions by.
3. What, and where Defendant is bound to discover and answer, and generally of Sufficiency of Answers. See also "PL. DEMURRER," *passim*.
4. Where Discovery tends to criminate or create Forfeiture.
5. When Defendant by Answer may refuse to answer further.
6. What Facts are put in Issue by.
7. In conjunction with Demurrer.
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10. Uncertainty in.
11. When Answer is a proper Defence.
12. ———— against Statute of Frauds and Limitations.
13. Of Infants and Attorney General.
14. Schedule to Answer.

1. General Form, Nature, and Effect.

An allegation in the answer concerning a fact lying especially within the knowledge of the plaintiffs, does not entitle the defendants to an inquiry on that point. *Walker v. Woodward*, 1 Russ. 107. PR. INQUIRY.

In what way an account settled should be pleaded or stated in the answer. *Capon v. Miles*, 13 Pri. 767. ACCOUNT SETTLED.

Where answer to bill for specific performance raises other objections to performance, besides defect of title, court will not on motion by plaintiff for reference of title after answer, decide whether other objections are frivolous or not, *semb.* *Withy v. Cottle*, 1 S. & S. 174. S. P. *Gordon v. Bull*, id. 178. PR. REF. AS TO TITLE; VEND. & PURCH.

Defendant to a bill of revivor cannot put new matter on the record, which might, if stated in the answer to the original bill, have produced a different decree; it would be impertinent. *Nunney v. Totty*, 11 Price, 117. PR. IMPERTINENCE; PL. BILL OF REVIVOR.

In claiming an exemption from tithes for particular lands, such lands must be accurately described in defendant's pleadings, and their local situation, &c. *Markham v. Smyth*, 11 Pri. 126. TITHES.

Erasures in answer and in jurat, and alteration in commission, do not furnish such an objection to answer as to justify motion for taking it off file; no costs however, were given. *Gwynn v. Bodmer*, 9 Pri. 320. PR. COSTS; PR. TAKING PLEADINGS OFF FILE.

If modus be laid in answer to case resting on endowment as covering several tithable articles, it must be proved to be payable for all of them; a doubt from evidence as to that extent, is not sufficient to direct an issue. *Kempson v. Yorke*, 8 Pri. 13. EVIDENCE; MODUS.

Answer taken off the file, when the title omitted the words "to the bill of complaint of." *Picters v. Thompson*, Chob. 249. PR. TAKING PLEAD. OFF FILE; PR. INTITULING PLEADINGS.

Papers referred to by an answer, read as part of it. *Monk v. Sibbeld*, 2 V. & B. 376. PR. EVID.

When exceptions are answered, the whole taken as one answer. *Edwards v. M<sup>r</sup> Leay*, 2 V. & B. 258.

Answering upon honour in exactly the same situation as another defendant answering on oath. *Gilpin v. Ly. Southampton*, 18 Ves. 469. FEERS.

A general allegation in answer, that defendant could not be affected by notice to determine a composition in any way, is not sufficient intimation to plaintiff, that defendant intended to rely on insufficiency of notice. *Bennett v. Neale*, Wightw. 324. TITHES. NOTICE TO DETERMINE COMPOSITION.

Court will not direct an issue to try composition real, where defendant by his answer only alleged a modus. *Id. ib.* PR. ISSUE AT LAW.

The rule, that the plaintiff being entitled to discovery only, and not to the relief, a general demurrer lies, does not prevent a demurrer to relief, giving the discovery. *Todd v. Gee*, 17 Ves. 273. PR. DEMURRER; PR. RELIEF.

An answer, clearly evasive on the face of it, and no reason assigned for it, is to be considered a contempt. *Thomas v. Lethbridge*, 9 Ves. 463. PR. CONTEMPT OF COURT.

A defendant claiming as a mortgagee, and by his answer denying notice of the plaintiff's title, which was neither alleged by the bill nor proved, an inquiry for the purpose of affecting him with notice was refused, first, upon a petition to vary the minutes; and again upon a re-hearing. An inquiry as to what sums he had advanced upon the security of the mortgage, and at what times respectively, was granted. *Hurdy v. Reeves*, 5 Ves. 426. NOTICE; PR. INQUIRY BEFORE MASTER; MORTGAGE, & MORTGEE.

Modus for clover instead of saying modus for grass, held sufficient, and issue directed to try modus for grass. *Wood v. Harrison*, Amb. 563. TITHES; MODUS.

The original bill brought for discovery only, the amended bill prays relief; the answer to this is to be considered as a part of the answer to the original bill, as much as if engrossed in the same parchment, and a part of the same record. *Hildyard v. Cressy*, 3 Atk. 303. PR. AMENDED BILL.

A charge by answer must be discharged by proof. *Parteriche v. Poulet*, 2 Atk. 383. EVIDENCE.

Where the general traverse is omitted at the end of the answer, such answer is good, and not to be suppressed as improper. *Anon.* 2 P. W. 87.

If defendant pleads statute of frauds against specific performance, he must by answer deny agreement, for otherwise he admits it, and takes it out of statute. *Child v. Godolphin*, Dick. 39.

Answer to bill of revivor must not contest justice of decree, but only show cause against it. *Clare v. Werden*, id. 20.

If a man charges himself by answer, whether his answer shall be allowed as a good discharge. *Audley v. Audley*, 2 Vern. 194.

A man by his answer says he believes, and hopes to prove, the money paid; if the cause is heard on the bill and answer, it shall conclude the plaintiff and he must admit the money paid. *Barker v. Wyld*, 1 Vern. 140.

An answer cannot be demurred to. *Williams v. Owen*, 2 Freem. 181. 2 C. C. 8. PR. DEMURRER.

Answer to bill of review and supplemental, to carry, &c. cannot draw into question, nor have re-examination of decrees. *Id.* Dick. 8.

## 2. Effect of Admissions by.

A bill was filed by a person in possession of certain lands, for specific performance of an alleged parol agreement for a lease for seven years, and for an injunction to restrain an ejectment. The defendant by his answer admitted, that he had been disposed and would have permitted the plaintiff, if he had been satisfied with his conduct, to remain in possession for the time, and on the terms alleged to have been specified in the supposed agreement; and that the plaintiff probably expected to remain in possession for that time, and on those terms; but he expressly denied, that any such agreement had been made, and he insisted, that the plaintiff was tenant only from year to year, and had done many acts which would have been breaches of the covenants of the lease supposed to have been contracted. The court, upon this answer,

continued the injunction upon terms. *Attwood v. Burham*, 2 Russ. 186. INJUNCT.; SPEC. PERF.

A defendant having stated in his answer, that by carrying on business on a farm, and with stock belonging to the assets of an intestate, he had made no profit, but that as he had not kept any accounts, and had blended the transactions of the farm with his other concerns, he could not set forth the amount of the profits; it was ordered, that in taking the accounts against them, annual rests should be made, and interest calculated at 5 per cent. upon those annual rests. *Walker v. Woodward*, 107. ANNUAL RESTS; ACCOUNT.

Trustees and executors, under the will of a testator, who had directed them to invest a share of his residuary estate, either in the public funds, or on mortgage, at 5 per cent., having admitted, by their answer, that they had from time to time balances in their hands, and it being proved, that many years after the death of the testator, they had not invested the share, either in the funds, or on mortgage, inquiries will be directed at the original hearing concerning the balances retained by them, and the prices of 3 per cent. stock at the several times when such balances were in their hands. *Hockley v. Bantock*, 1 Russ. 141. TRUSTEES & EXECUTORS; ACCOUNT.

In moving upon admissions in an answer for the payment of money into court, the plaintiff may shew that upon the case stated in the answer, he has an interest in the sum in question, though the defendant in his answer expressly denies, that the plaintiff has any such interest. *Demoille v. Solley*, 2 Russ. 372. PR. MOTION TO PAY INTO COURT.

Where defendant admits by answer, that there is trust fund in his hands, court will always, on interlocutory application, order payment into court. So, where executor is debtor to testator at latter's death. *Rothwell v. Rothwell*, 2 S. & S. 217. PR. PAYMENT INTO COURT; TRUST.

Where defendant referred to his schedule as containing all deeds, &c., in his custody, &c., there the plaintiff is entitled to the inspection of all such deeds, &c. as of course, unless it appeared by description of any particular instrument, or schedule, or by affidavit, that it was evidence, not of the title of plaintiff, but of the defendant, or that plaintiff had otherwise no interest in its production. *Tyler v. Drayton*, 2 S. & S. 309. PRODUCTION OF DEEDS.

Account of rents and profits of a charity estate, decreed for a period of 200 years against a corporation, who by their answer admitted the receipt, and stated that they had from time to time debited themselves in their books with the amount. *Att. Gen. v. Mayor of Exeter*, 1 Jac. 443. ACCOUNT; LENGTH OF TIME.

Defendants setting up defence of title in landlord, and producing, in evidence on hearing, certain deeds belonging to landlord; ordered on petition to produce such deeds on trial of issue, or that they should admit facts, which as alleged by other parties, deeds would establish, although landlord was no party to suit. *Pulley v. Hilton*, 10 Price, 118. PR. PRODUCTION OF DEEDS; LANDL. & TEN.; PL. PARTY.

Rule that there must be schedule, before court will order production of deeds and papers, applies only in cases of discovery. *Anon.* 6 Mad. 97. PR. PRODUCTION OF DEEDS, &c.; PR. ANSWER; SCHEDULE.

On a bill to set aside a purchase, the answer of the defendants, the devisees of the purchaser, admitting great inadequacy of price, and stating their ignorance as to other circumstances of fraud alleged; a receiver appointed. *Stiwell v. Williams*, 1 Jac. 280. 3 C. C. 6 Mad. 49. Nom. *Stiwell v. Williams*. PR. RECEIVER.

Though defendant makes admissions in his answer, which would entitle plaintiff to decree, plaintiff cannot, on motion, obtain order for payment of money into

court. *Peacham v. Daw*, 6 Mer. 98. PR. PAYMENT INTO COURT; PR. MOTION.

On a motion for a defendant to produce a deed before the examiner, affidavits cannot be read to prove the fact of its being in his possession; it must appear upon his answer. Leave given, though the cause was at issue, to amend the bill, for the purpose of obtaining that admission. *Barnett v. Noble*, 1 Jac. & W. 227. PR. BILL, AMENDMENT; PRODUCTION OF DEEDS.

Where executor had refused an account, but on bill filed he gave one in his answer, and plaintiff took decree for account, and on master's report the account proved correct; court gave plaintiff costs upon decree, and defendant those of subsequent proceedings. *Anon.* 4 Mad. 273. ACCOUNT; COSTS; EXECUTOR.

Defendant cannot offer evidence to disprove admission in his answer. *E. I. Comp. v. Keightley*, 4 Mad. 16. EVIDENCE.

Though a bill states a defendant out of jurisdiction, and infant's defendants admit fact, proof is still requisite. *Wilkinson v. Beal*, 4 Mad. 408. PR. EVID.; INFANT.

Admission in answer, that defendant at some time past had deed in possession, is not sufficient to warrant order for its production. *Heeman v. Midland*, 4 Mad. 391. PR. PRODUCTION OF DEED.

The plaintiff is entitled to the production of documents referred to in the answer, and admitted to be in the custody of the defendant, although an injunction obtained by the plaintiff has been dissolved, on the ground, that the contract which he seeks to enforce is illegal. *Erans v. Richardson*, 1 Swan. 7. PRODUCTION OF DEEDS, &c.

In ordering the production of documents, the court proceeds on the principle that they are, by reference, incorporated into the answer, and become a part of it. *Id.* 8. *Id.*

Answer stating tender before bill filed, but not proved, cannot save costs. *Milnes v. Davison*, 3 Mad. 374. TENDER; PR. COSTS.

Production of books, &c. referred to in answer, ordered; though it was contended, that answer showed plaintiff not entitled to relief. *Unsworth v. Woodcock*, 3 Mad. 432. PR. PRODUCTION OF DEEDS.

An infant is not bound by admissions. *Hawkins v. Luscombe*, 2 Swan. 392. INFANT.

A party charging himself in a schedule to his answer, cannot discharge himself by another schedule, stating his disbursements. *Boardman v. Jackson*, 2 Ball & B. 385. ACCOUNT.

Bill by a widow, devisee in fee, impeaching a mortgage by her, while covert, for amount of a fine. Answer, admitting possession of the will, and the title under it; alleging the loss of the settlement; stating it differently from the bill, by the addition of a power of revocation and appointment of new uses, by the exercise of which a title was not necessary. Production of the will, not being affected by the answer, ordered on motion. *Bird v. Harrison*, 15 Ves. 408. PR. PRODUCTION OF DEEDS.

Motion for production of deeds and papers, referred to as in defendant's possession, but not described by the answer or schedule, and without an offer to produce them, as the court shall direct, refused. *Atkyns v. Wright*, 14 Ves. 211. PR. PRODUCTION OF DEEDS, &c.

Qualified submission to produce a deed, if the court shall require it, does not fix the defendant; and deprive him of the discretion of the court as to the propriety of the production. *Id.* 213.

Defendant insisting upon the statute of frauds, admissions by the answer are immaterial. *Blagden v. Bradbear*, 12 Ves. 466. FRAUDS, STAT. OF.

No relief under an agreement stated by the answer, the bill not being adapted to that agreement, but

framed upon a different ground which failed. *Pilling v. Armitage*, 12 Ves. 78. AGREEMENT; SPEC. PERM.

Defendant, though he might perhaps have objected to answer, compelled to make full disclosure by production of letters mentioned in schedule to answer. *Taylor v. Milner*, 10 Ves. 41. PL. DISCOVERY.

Answer admitting the execution of an instrument, and craving leave to refer to it when produced, is not a ground to move for the production; not admitting, that it is in the possession or power of the defendant. *Darwin v. Clarke*, 8 Ves. 158. PR. PRODUCTION OF DEEDS.

Motion to pay money into court upon the affidavit of an accountant, that from the schedule to the answer, the examination, and the books of account, such a balance was due, refused. *Mills v. Hanson*, 2 Ves. 68. PR. PAYMENT INTO COURT.

Money may be ordered into court on motion, upon the ground of admission, as by schedules or books, containing an account of receipts and payment, and referred to so as to be part of the answer or examination. *Id.* *ib.*

Answer of administrator to creditor's bill, stating that he believes debt to be due. *Qr.* whether sufficient to found a decree. *Hill v. Binney*, 6 Ves. 738.

Where it appears by the answer that the real estate must be responsible, as that there is no personal estate to be first applied to debts, a receiver will be granted in the first instance. *Williams v. McNamara*, 8 Ves. 71. PR. RECEIVER.

Party charged by his answer not permitted to discharge himself by his affidavit of payment to testator, in his lifetime. *Ridgway v. Darwin*, 7 Ves. 404. See *Thompson v. Lamb*, 7 Ves. 587.

Admission of receipt of sums, which sums he had paid, &c. a good discharge. *Id.* *ib.*

After answer admitting agreement, and submitting to perform it, bill being amended in other circumstances, defendant was not permitted to take advantage of statute of frauds. *Spurrier v. Fitzgerald*, 6 Ves. 548. FRAUDS, STAT. OF.

Bill for tithes, answer admitting the right to one-third, and submitting to account, claiming the other two-thirds under a title derived from a grant by Queen Elizabeth, submitting to be examined upon interrogatories, but not setting forth a description of the lands; the defendants having gone into evidence in support of their claim, pressed to have the bill dismissed generally; the plaintiff pressed for a general account. The master of the rolls decreed an account as to one-third, and as to two-thirds, the plaintiff declining to try the right at law, dismissed the bill. *Forcroft v. Parris*, 5 Ves. 221. TITHES; ACCOUNT.

Admission of assets prevents the necessity of setting forth accounts. *Pullen v. Smith*, 5 Ves. 21. ASSETS, ADMON. OF.

There is no instance where a writ of *ne exeat regno* has been applied for upon admissions in the answer, but the admission would certainly do as well as an affidavit. *Roddam v. Hetherington*, 5 Ves. 95. PR. WRIT NE EXEAT REGNO.

A trivial incorrectness in setting out the title of wool, and for which amends had been tendered, and the non-payment of Easter dues, which were never demanded, are not sufficient to prevent a bill from being dismissed. *Baker v. Athili*, 2 Anst. 493. DISMISSAL OF BILL.

Bill for discovery, and delivery of a settlement under which plaintiff claimed other title-deeds, and possession of the estate, demurrer to all the relief and all the discovery, except of the settlement for want of equity, and answer admitting the settlement, and offering to produce it; and denying that defendant had any other, relative to plaintiff's title; the title being legal, the court would only order the settlement to be produced at the trial; the demurrer therefore, going to all the

relief the defendant had leave to amend. *Renison v. Ashley*, 2 Ves. J. 459. PL. DISCOVERY; PR. PRODUCTION OF DEEDS.

Defendant not bound by a mistake in his answer, as to the effect of an instrument where the answer referred to the instrument. *Jones v. Smith*, 2 Ves. J. 372.

Bill for specific performance of a parol agreement, to renew, plaintiff having built a house; the only witness for the plaintiff proved an agreement different from that in the bill; two defendants by an answer stated, that an agreement different from both; in strictness the bill ought to be dismissed, but specific performance was decreed according to the answers, with costs against the plaintiff. *Mortimer v. Orchard*, 2 Ves. J. 242. SPEC. PERF.; AGREEMENT.

The statement of a defendant, by his answer, of the contents of an instrument, is not a sufficient ground for an order for the production without an express admission of the instrument, being in the defendant's custody or power. *Erskine v. Bize*, 2 Cox, 226. PR. PRODUCT. OF DEEDS.

Admission that any timber has been wrongfully cut gives a right to an account. *Lee v. Alston*, 1 Ves. J. 82. ACCOUNT.

Bill filed against a steward for an account of monies received in that capacity, and of the interest made by him of it. By his answer he admitted he received this money and mixed it with his own, and used it accordingly. This admission will induce the court to direct a production of his banker's books, though they may contain many other private matters. *El. Salisbury v. Cecil*, 1 Cox, 277. PR. PRODUCT. OF DEEDS.

A bill prays that a defendant may either admit assets, or that an account may be taken of the testator's personal estate, &c. but does not require the defendant to set forth such account, it was determined that, according to the present practice, he was not bound so to do, but a submission to account is sufficient. *Misener v. Buifoot*, 1 Cox, 58. PL. PRAYER FOR ACCT.

Liberty given to amend answer, by striking out admissions of plaintiff's pedigree after publication. *Kingscote v. Bainsby*, Dick. 485.

Infant heir not bound by admissions in deceased heir's answer. *Cartwright v. Cartwright*, id. 545.

Defendant held to admission of assets by answer. *Roberts v. Roberts*, id. 573.

Bill for performance of written agreement, parol evidence read of different agreement, dismissed with costs, and plaintiff cannot resort to agreement set up by defendant; parol evidence allowed where a hard agreement, or in part executed. *Legal v. Miller*, 2 Ves. 299. SPEC. PERF.

Debt within statute taken out by words, "that defendant will do what is right and just," in answer. *Galway v. El. Barrymore*, id. 163.

Answer of heir believing that a will was made will not prevent the necessity of its being proved. *Potter v. Potter*, 1 Ves. 274. WILL, PROOF OF; HEIR AT LAW.

If a defendant by his answer, admits that he has committed waste before the filing of the bill, though he swears he has committed none since, yet the court will dissolve the injunction. *Anon.* 3 Atk. 485. PR. INJON. AGST. WASTE DISSOLVING.

Plaintiff, while a papist, assigned advowson to defendant for ninety-years, and having conformed, brought his bill for re-assignment of the term, suggesting he had only assigned it in trust for himself to avoid the penalties of the statute, 3 Jac. 1. and 1 W. and M. Defendant pleaded the statute of frauds, in bar to the discovery, but by his answer admitted that the advowson was resigned to him for the purposes charged by the bill. Held the plea must be overruled, being coupled with an answer admitting the facts. *Cottingham v. Fletcher*, 2 Atk. 155. PL. PLEA OF STAT. OF FRAUDS.

Id. H. was inclined to think, if the defendant had

demurred to this part of the bill, such a fraudulent conveyance would, at the hearing, have been made absolute against the grantor. *Id.*

After a possession of a mortgage for twenty-five years, redemption decreed on defendant's submitting, by answer, to be redeemed. *Procter v. Oates*, 2 Atk. 140. MORTGAGE REDEMP.; LENGTH OF TIME.

An answer of impropriator, admitting vicar's right to all tithes, except corn and grain, is not sufficient to establish that right against the occupiers. *Berkley v. Fox*, 3 Bro. P. C. 613. TITHES; EVID.

A trust estate was decreed to be sold for payment of debts and legacies, and to be sold to the best purchaser; A articles to buy the estate of the trustees, and brings a bill to compel them to perform the contract; the trustees by their answer, disclose the matter; the court will make no new decree, but leave the former decree to be pursued. *Annesley v. Ashurst*, 3 P. W. 282. PR. DECREE.

Where an agreement by parol, but confessed in answer, shall be executed, though not in writing. *Hosier v. Read*, 9 Mod. 86. AGREEMENT, PAROL; FRAUDS, STAT. OF.

Liberty given to amend answer so as to explain admissions as to assets. *Dagly v. Crump*, Dick. 35.

A defendant is not bound by an improvident offer in his answer. *Watkins v. Hatchet*, 1 Eq. Ab. 36.

Defendant held to the offer in his answer, though the circumstances of the case were varied from what they were at the time of answer put in. *Holford v. Burnell*, 1 Vern. 448. SPEC. PERF.

A sends goods to his London factor to sell; factor pawns goods; pawnee by answer admits factor pawned some goods, but knows not whether they were the plaintiff's; ordered that A in the presence of two or more, may have a view of them. *Marsden v. Panshall*, 1 Vern. 407. PR. INSPECTION.

The plaintiff may have a decree either according to his equity, or the defendant's offer in the answer, though he replies to it. *Anon.* Mos. 41.

### 3. What and when Defendant is to answer and discover, and generally of sufficiency of Answers.

Bill against assignees of a bankrupt for an account, and an injunction to restrain proceedings at law. One of the assignees put in a separate answer, stating that his name had been used in the action at law without his knowledge or authority; that he had not acted as assignee, except in some trifling particulars not connected with the matter in the bill mentioned; and that he was wholly ignorant of the matter set forth in the bill; exceptions to the answer, because the defendant had not answered each interrogatory; overruled with costs. *Jones v. Wiggins*, 2 Y. & J. 385. PR. EXCEPTIONS TO ANSWER.

The court refused to order an answer to be taken off the file on the alleged ground that it was illusory; the defendant merely stating that he had no knowledge of any of the matters in the bill mentioned, and left the plaintiff to except. *Olding v. Glass*, 1 Y. & J. 340. PR. TAKING PLEADINGS OFF THE FILE.

The rule that party is not bound to discover his own case is confined to matters of title, not to matters of account. *Corbett v. Hawkins*, 1 Y. & J. 426. ACCOUNT.

Where relief is prayed, and discovery as ancillary only to that relief, if the ground for the relief fails, the discovery cannot be obtained. *King v. Rowett*, 2 Y. & J. 33. PL. RELIEF.

A defendant cannot by disclaimer deprive the plaintiff of the right of requiring a full answer from him, unless it is evident that the defendant ought not, after such disclaimer, to be retained as a party to the suit. *Glassington v. Thwaites*, 2 Russ. 458. DISCOVERY; DISCLOSURE.

A conveys lands to trustees on trust to sell, if the unsatisfied debt of a partnership in which he had

been concerned should at a given time exceed 40,000*l.*; the trustees sells and convey to the purchaser by a deed which recites that the debts of the partnership exceeded the specified amount, and that A had died intestate as to his real estate, and the heir at law of A joins in that deed, and enters into a covenant for the title of the trustees, a covenant against all acts done by him or his father, and a covenant for further assurance. It afterwards appears to be uncertain whether A had not devised his real estate, and the purchaser files a bill to have protection against a remedy of the alleged defect in his title which this discovery created: Held, that the purchaser is not entitled to have an account taken of the debts of the partnership in order to establish the fact of their having, at the specified time, exceeded the specified amount. *Hallett v. Middleton*, 1 Russ. 243. **VENDOR & PURCH.; ACCOUNT; PARTNERSHIP.**

Bill by an impropriate rector against occupiers for an account of tithes, and against a portionist requiring a discovery from the latter of the deeds under which he claimed to be entitled to the portion of tithes to which the bill admitted him to be entitled, alleging that the deeds would shew, not only the title of the portionist to the tithes claimed by him, but also the title of the plaintiff to the tithes demanded by him of the occupiers. Demurrer by the portionist to the discovery allowed. *Compton v. El. Grey*, 1 Y. & J. 154.

Bill for establishing lien on deeds drawn for sale of premises, the contract for which had been rescinded, and alleged to have been prepared by plaintiff, charged defendant with denying plaintiff's alleged lien for himself in respect of the same demand and possession of deeds, and other facts tending to show connection with the subject of the suit; and, further, that defendant had contracted with his co-defendant for purchase of the same premises. The defendant answered to last charge only, that he had agreed to purchase as agent, &c., and disclaimed all other interest: answer held insufficient. *Ozenham v. Esdaile*, 1 McClell. & Y. 540.

An answer to circumstances as to which the defendant was not alleged to be privy, that they might be true, for any thing he knew to the contrary, with an averment that he was a stranger to, and could not form any belief respecting them is sufficient. *Aphurast v. King*, 2 S. & S. 183.

Bill alleged that bill of exchange, held by defendant, was an accommodation bill, and required particulars of consideration, pretended to have been given for it, to be set forth. Answer denied the accommodation, and stated that bill was given in way of business to defendant as bankers, and that consideration did not consist of any specific sum, but of cash from time to time drawn out by plaintiff: Held a sufficient answer, and not necessary to set forth the general banking account. *Webster v. Threfull*, 2 S. & S. 190.

In answering an injunction bill, if the particular answer to a particular interrogatory contain an allegation of matter not inquired of by the interrogatory, so that it does not answer the questions directly, but with what amounts to a qualification, and thereby destroys the positive effect of the answer, either as a direct or explicit denial, or admission of the fact interrogated to; it will nevertheless be sufficient if the introduction of the qualifying matter be authorized by any thing in the bill in which the interrogatory is founded. *Bally v. Kendrick*, 13 Price 291.

Exceptions allowed on ground of answer being too general, and not sufficiently meeting the interrogatory in terms and to its full extent. *Daniel v. Bishop*, 13 Price, 15.

An interrogatory requiring whether there were not a *bond fide* consideration, and if not, what was the consideration? Held to have been sufficiently answered by a denial, that there had been a *bond fide*

consideration, the law recognizing no other consideration. *S.C. Id. ib.*

Whether by an interrogatory founded on a charge in the bill, that the defendant, during a partnership with plaintiff as solicitor, had discounted bills whereby he had made a profit; the plaintiff required him to set forth the names of the persons, with whom, &c., and the amount of such profits. Although defendant in his answer noticed the charge, and admitted the transactions to which it referred, yet he refused to answer as to particulars inquired, because plaintiff was not interested in such transaction. The court, on arguing exception taken thereto, overruled it, and held defendant was not bound to answer the interrogatory. *John v. Dacie*, 13 Price, 632.

Answer must not be general, but must answer all particular charges. *Wharton v. Wharton*, 1 S. & S. 235.

An answer to amendments consisting only of a denial of a statement in bill which defendant had already answered in effect in his former answer, ordered, on motion, to be taken off the file. *Neuham v. May*, 10 Price, 117.

*Prima facie* discovery is incidental to relief. *Angell v. Angell*, 1 S. & S. 83. **RELIEF.**

Plea to all relief and part of discovery, and answer to rest; plea overruled. *James v. Sadgrove*, 1 S. & S. 4. **PLEA; RELIEF; ANSWER.**

But, otherwise, if answer had been to matters in bill which would have repelled defence by plea. *Id. ib.*

Where defendant denies charges in bill of fraud, and misconduct in partnership, and explains orders away, and alleges his inability to put in a full answer, by reason that plaintiff withheld improperly the partnership's books, the court refused (but without prejudice to future application) the injunction prayed by the bill. *Littlewood v. Caldwell*, 11 Price, 97. **INJUNCTION; FRAUD, DENIAL OF.**

When it is disputed whether a defendant is, from infirmity of mind incompetent to answer, it will be referred to the master to inquire as to the fact. *Lee v. Ryder*, 6 Mad. 294.

Plea which negatives plaintiff's title, though it protects defendant generally from answer as to the subject of the suit, does not protect him from answer and discovery, as to such matters as are specially charged as evidence of plaintiff's title. *Sanders v. King*, 6 Mad. 65. **PL. PLEA; TITLE; PL. DISCOVERY.**

Plea of a settled account, and a release, to a bill by cestuique trust against trustee, will not extend to the discovery of vouchers. *Clarke v. El. Ormonde*, 1 Jac. 117. **PL. PLEA; ACCOUNT SETTLED, TRUSTEES.**

Where witness is made party merely for purpose of discovery it is demurrable. *Hov v. Best*, 5 Mad. 18. **PL. WITNESS; PL. PARTY; PL. DEMURRER.**

Where bill is for discovery in aid of defence at law, and for equitable relief, plea of title in defendant in equity to whole bill is bad. *Gurt v. Osbaldeston*, 5 Mad. 428. but reversed on appeal, *S.C.* 1 Russ. 158. **PL. PLEA; PL. RELIEF.**

On cross-bill plaintiff cannot compel discovery of defendant's title to tithes, though defendant must answer whether they have or not been conveyed away to another person. *Glegg v. Legh*, 4 Mad. 193. **TITHES.**

Defendant must discover as to his own admissions though contained in case stated by him for the opinion of counsel. *Id.* 206.

Defendant, in answer to bill for account of tithes in kind, must set forth an account of titheable matters taken by him, although he relies on a defence of a composition or modus, or it will be good ground of exception. *Whistler v. Wigney*, 8 Price 1. **ACCOUNT; TITHES; MODUS.**

Professional adviser not bound to discover knowledge communicated by client; but such as he knows

*aliunde*, he must. *Morgan v. Shaw*, 4 Mod. 57. **PROFESSIONAL KNOWLEDGE; SOLICITOR & CLIENT.**

Sufficiency of answer to interrogatories in bill determined upon exceptions. *Lipscomb v. Bateman*, 6 Price, 407.

General demurrer to bill by a widow and infant, customary heir of copyholder, for discovery of title of defendant in possession, allowed for defect of sufficient case for the interference of the court. *Baker v. Booker*, 6 Price, 379. **TITLE.**

Where original bill is amended, stating new case, but containing some of the interrogatories as were in original bill, such interrogatories must be answered again. *Mazarredo v. Mailland*, 3 Mad. 66. **PR. AMENDED BILL.**

In a bill for discovery and relief, a plaintiff not entitled to relief is not entitled to discovery. The converse of the rule will not hold. *Att. Gen. v. Brown*, 1 Swan, 294. **PL. RELIEF.**

Where discovery of particular fact sought by bill, would not, from general denial in answer of circumstances on which that fact would depend, avail plaintiff if set forth, defendant need not answer it. *Ashham v. Thompson*, 4 Price, 330.

To bill (also praying discovery,) stating that partnership subsisted between plaintiff in equity and deceased principal of a banking firm, in another concern, in which plaintiff was chief manager, and that cheques were drawn under special circumstances, founded on mutual understanding, &c., answer denying privity of defendants, or that they were in any way concerned with plaintiff as partners, or otherwise, sufficient to prevent injunction to stay defendant's proceeding at law to recover amount of cheques paid by them on account of plaintiff in equity. *Id. ib.* **INJUNCTION.**

The true test as to whether questions are to be answered or not, are whether the answers might criminate the defendants, and whether they are relevant and material to plaintiff's case. *Mant v. Scott*, 3 Price, 477.

Defendant bound to discover (in aid of action,) where he has charged the plaintiff with larger sums, as paid on his account than have been so paid, notwithstanding length of time in settled accounts, and a strong circumstantial, though indirect answer against the fact. *Id. ib.*

The amount of money-payments laid as moduses, in answer to vicar's claim being totally inconsistent with value of vicarage, as estimated by ancient documents usually put in evidence, is not sufficient (where the payments have been uniform and uninterrupted,) to induce the court to dispense with an issue. It seems no objection to lay a modus, that it excepts articles of modern introduction *speciatim*. See *v. Hockley*, 4 Price, 87. **TITHES.**

Injunction obtained to restrain proceedings at law on a promissory note, on ground of its having been given to plaintiff at law on promise not to sue on it, and an engagement it should never be demanded, &c., dissolved on answer denying fact, "to the best of his recollection and belief." *Hoyle v. Hawkins*, 4 Price, 327.

If it is not stated in answer to bill for tithes, which sets up modus, in respect of what article the modus is laid, it is bad, and no evidence can supply it. But it is sufficient, if from whole answer it can be collected to what article it refers. *Bourke v. Isaac*, 2 Price, 299. **MODUS.**

On bill for specific performance of agreement to purchase, against husband and wife, in which there was a statement that wife had separate estate, &c., and interrogatory as to the fact in support of statement; demurrer by her allowed as to such discovery. *Francis v. Higzell*, 1 Mad. 258. **HUSB. & WIFE; SEP. ESTATE; SPEC. PERF.; DEMURRER.**

Demurrer of a married woman to a bill of discovery against her and her husband, in aid of an action for debt on her account, allowed. *Barrow v. Grillard*, 3 V. & B. 165. **FEME COVERT; DEMURRER; HUSB. & WIFE.**

To bill to stay proceedings in an action brought by defendant, as landlord, on account of dilapidations of buildings by plaintiff as tenant, and for a discovery whether defendant has not since commencement of action assigned his interest in buildings, defendant cannot protect himself from discovery by plea, that when dilapidations were committed defendant was entitled, and that they had ever since continued out of repair. *Dk. of Bedford v. M'Namara*, 1 Price, 208. **PL. PLEA.**

It is not necessary to answer to circumstances tending to the point on which defendant relies, and upon which he tenders an issue by his plea. *Drew v. Drew*, 2 V. & B. 159.

Averment as to belief of transactions of other persons, sufficient. *Id. ib.*

Plaintiff not entitled to relief, cannot have discovery. *Hodde v. Heuty*, 1 V. & B. 539. **PL. RELIEF.**

A plea of purchaser without notice, is a bar to the discovery, as well as the relief, but not insisted on by the defendant, he must answer and confess the notice, or the plaintiff may except to the answer; but if he does not except, the affirmative of proving notice, will be on him, *semble*. *Eyre v. Dolphin*, 2 Ball & B. 303. **PL. PLEA; PL. EVID., ONES PROBAND.**

Counsel or attorney cannot be called upon to reveal the advice given to the client; demurrer therefore overruled, as to the case, and allowed as to the opinion. *Richards v. Jackson*, 18 Ves. 474. **PL. DEMURRER; PROFESSIONAL CONFIDENCE.**

Demurrer to so much of a bill as called for a discovery of cases laid before counsel, and the opinions overruled, as covering facts material to the plaintiff's case. *Id.* 18 Ves. 472. **PL. DEMURRER.**

In a valued policy, unless there is a particular charge in the bill, that the value of the cargo is below the amount insured; it is sufficient if the defendant swears to the value, as stated in the invoice. *Aubert v. Jacobs*, Wightw. 118.

Miller carrying on trade of mealman, is obliged to discover, on suit for tithes, the quantity though not the price of meal ground. *Chapman v. Pitcher*, Wightw. 15. **TITHES.**

To a bill for an account, a settled account was suggested by the answer, but not proved. Liberty given to surcharge and falsify if the master should find any settled account. Bill impeaching an account, to have liberty to surcharge and falsify, must lay a ground by alleging some specific errors. *Kinsman v. Barker*, 14 Ves. 579. **ACCOUNT, LEAVE TO SURCHARGE AND FALSIFY.**

The mayor or other individual member of a corporation, trustee of a rent-charge out of the estate of such member, for a charitable use, must answer not only with the rest under their common seal, but also individually, a charge of having destroyed or cancelled the deed. *Dummer v. Corp. of Chippenham*, 14 Ves. 264. **CORPORATION.**

Demurrer good to relief is good to discovery, sought with a view to the relief. *Baker v. Mellish*, 10 Ves. 544. **DEMURRER; RELIEF.**

Discovery compelled, whether devise was obtained or prevented by undertaking of devisee or heir to do certain acts in favour of individuals, and relief upon the ground of fraud. *Stickland v. Aldridge*, 9 Ves. 619. **FRAUD, WILL OBTAINED BY.**

An insufficient answer is no answer. *Gregor v. Ld. Arundel*, 8 Ves. 88.

In a suit for an account, going no further than to enable the plaintiff to go into the master's office is not



sufficient. He is entitled to the fullest information the defendants can give by the answer, not by long schedules in an oppressive manner, but giving the best account they can, stating that it is so, referring to books, &c. so as to make them part of the answer, and giving the fullest opportunity of inspection, *White v. Williams*, 8 Ves. 193. ACCOUNT.

Plea allowed as to the relief, therefore good to discovery also, according to general rule. *Sutton v. El. Scarborough*, 9 Ves. 71. PL. PLEA; PL. RELIEF.

General denial not enough, there must be an answer to the sifting enquiries upon general question. *Mountfort v. Taylor*, 6 Ves. 792.

Bill by heir at law against residuary devisees, legatees, and executors, suggesting a secret trust undertaken at the request of testator, either not legally declared, or if so, void as to real estate, and written acknowledgments of intended trust for charity purposes by defendants; the will also by equal legacies to them, and some particular expressions importing trust. A general demurrer to discovery and relief overruled. *Muckleston v. Brown*, 6 Ves. 52. PL. DEMURRER.

Demurrer by a married woman to a bill praying discovery only against her, and relief against her husband as to contracts, &c. by her as agent for her husband; alleging the vouchers, &c. to be in her possession; allowed upon the objection, first, to making a mere agent a party; secondly, to admitting the testimony of a wife in her husband's cause. *Le Texier v. Marg. of Anspach*, 15 Ves. 159. S. C. 5 Ves. 322. PL. PARTY; AGENT; HUSB. & WIFE.

Administrator disputing by his answer the foundation of the bill, viz. a balance of accounts against the intestate's estate, need not set forth an account of the personal estate, &c. by way of schedule. *Philips v. Caney*, 4 Ves. 107. ACCOUNT; ADMOR.

The answer need not set forth an account where the ground upon which it is prayed is denied, as where the bill charged a dealing in pictures by commission, and the answer denied that, and stated that the defendant sold them to the plaintiff in the course of his trade. *Marg. of Donegal v. Stewart*, 3 Ves. 446. ACCOUNT.

Pawnee of a bailee must discover, so as to enable the owner to bring an action. *Strude v. Blackburne*, 3 Ves. 226.

Bill against the devisee of mortgaged premises by the heir of mortgagor, for discovery and redemption, charging acknowledgments that the estate was held in mortgage, and that accounts had been kept. Plea of possession for fifty years, under conveyances from the mortgagee; ordered to stand for an answer, *Lake v. Thomas*, 3 Ves. 17. PL. PLEA; LENGTH OF TIME; MORTGAGE, REDEMPTION OF.

After twenty years' possession, and a descent cast, the heir at law of a former owner filed a bill for discovery of title of occupant, suggesting a pretended devise from his ancestor. Demurrer allowed. *Mutloe v. Smith*, 3 Anst. 709. DEMURRER; TITLE; LENGTH OF TIME.

Bill against bankrupt and assignees charging a fraudulent bankruptcy to defeat the plaintiff's execution, and stating, that under an agreement with the assignees for an arbitration, the plaintiff deposited the goods for sale, the produce to be in trust, according to the award; that he had lost his copy, and the assignees had obtained the original from the person with whom it was deposited for the benefit of all parties, and refused inspection; prayed a discovery and injunction; a demurrer by bankrupt disallowed. *King v. Martin*, 2 Ves. J. 641. BANKRUPT; AGREEMENT; PL. PARTY.

Bill prayed that the defendant might state the particulars of his pedigree as heir, and of the births, baptisms, marriages, deaths or burials; demurrer allowed. *Ivy v. Kehewick*, 2 Ves. J. 679. PL. FISHING BILL; TITLE.

The bill having charged that the defendant had written letters to the attorney who was to prepare the conveyance, in which the agreement was admitted; he must answer to that fact. *Cooke v. Tombs*, 2 Anst. 421.

It is sufficient in an answer if it gives the plaintiff notice of the general nature of the case to be made against him. *Baker v. Athily*, 2 Anst. 493.

A court of equity will not compel tenant to make a discovery which may invalidate his title in a court of law. *Lewther v. Troy*, 1 Ridg. L. & S. 192. TITLE.

Bill for discovery of fraud in a policy of insurance, to defend an action at law, and that the policy might be declared void, and be delivered up to be cancelled. Demurree thereto overruled. *French v. Canolly*, 2 Anst. 454. FRAUD; POLICY OF INSURANCE; JURISDICTION.

Where a bill prays relief and discovery, the plaintiff being entitled to discovery, only a general demurrer allowed. *Collis v. Swayne*, 4 Bro. C. C. 480. PL. RELIEF; PL. DEMURRER.

Where a discovery is sought of a correspondence, if the defendants set forth extracts of letters, and swear that those are the only parts of the correspondence upon that subject, this is sufficient. *Campbell v. French*, 1 Anst. 58.

On a bill for discovery, the answer of the party interested cannot be dispensed with, though an infant, and although the person from whom his father purchased the right has answered and denied any knowledge of the circumstances. *Hardcastle v. Shufsto*, 1 Anst. 77. DISCOVERY.

Defendant need not set forth an account of the transactions of a trade in which the plaintiff pretends to have been a partner, if there is a clear denial of the partnership. *Jacobs v. Goodman*, 2 Cox, 282. DISCOVERY; PARTNERSHIP.

Where the account is incidental to the plaintiff's title, the defendant must set it forth. *Hall v. Noyes*, 3 Bro. C. C. 483. ACCOUNT; PL. DISCOVERY.

Where a bill seeks discovery of matter that the defendant is not obliged to answer, he must take the benefit by demurrer. *Selby v. Selby*, 4 Bro. C. C. 11. PL. DEMURRER.

Particular charges must be answered particularly; a general denial is not sufficient. *Prout v. Underwood*, 2 Cox, 135.

Where defendant has answered all the circumstances respecting his own interest, he shall not be compelled to answer the further circumstances in the bill. *Newman v. Godfrey*, 2 Bro. C. C. 332.

The bill stated that a testator intended to republish his will, but was prevented from so doing by the fraud of the heir at law. A demurrer to so much of the bill as required him to discover whether the testator did not intend to republish his will, was, under these circumstances, overruled. *Dixon v. Olmuis*, 1 Cox, 414. DEMURRER.

Assignee of a mortgage from persons not having notice of mortgagor's being only tenant for life, not bound to discover whether he himself had notice. *Sweet v. Southcoats*, 2 Bro. C. C. 66. S. C. 2 Dick. 670. NOTICE.

Demurrer to a bill against the East India company and their secretary, praying a commission to examine witnesses in India, and that the defendants might discover by what authority plaintiff was dispossessed of a lease for supplying Madras with tobacco (the plaintiffs intending to bring an action), overruled. *Mooladay v. Morton*, 1 Bro. C. C. 469. S. C. 2 Dick. 652. PL. DEMURRER.

Where sums are specifically charged in the bill to have been received by the defendant, he must answer specifically to them, and it is not enough to refer to a

schedule of all sums received. *Hepburn v. Durand*, 1 Bro. C. C. 503.

Bill to be relieved against fraud, defendant must answer discovery. *Manningham v. Dollingbroke*, Dick. 533.

Where the plaintiff's title is not apparent, but remains in doubt, an executor is not bound to set out assets in his answer, except in case of a creditor or legatee. *Sweet v. Young*, Amb. 354. EXECUTOR.

Though an offer be made to confirm a widow's jointure, she is not obliged to discover the title deeds by her answer until the offer is effectuated; she must, however, state the date of her jointure deed, whether it was executed at that time, and the premises therein comprised. *Larch v. Tyntlop*, 2 Ves. 662. JOINTURE.

If special notice of title is charged by will, such notice must be denied as specially; a general denial is not sufficient. *Radford v. Wilson*, 3 Atk. 815. NOTICE.

Heir in tail refused discovery of settlement, unless he wants it as auxiliary to relief or remedy at law. *Lempter v. Pomfret*, Dick. 238. S. C. Amb. 154. PAR. & CUR. D.

But if he wants to mortgage, he may have discovery. *Id. ib.*

Also for purposes respecting marriage. *Id. ib.*

Demurrer to discovery, for that plaintiff has not made such a case as entitles him to such discovery, on arguing the demurrer, the court being of opinion the plaintiff was not entitled to relief, allowed the demurrer, though it was to the discovery only. *Jefferys v. Baldwin*, Amb. 164. PL. DEMURRER.

Every heir has a right to enquire by what means, and under what deed, he is disinherited; and, before he has established his title at law, he may come into equity to remove terms out of the way which would prevent his recovering there, and may also come for production and inspection of deeds and writings. *Harrison v. Southcote*, 1 Atk. 540. HEIR; SETTING ASIDE OUTSTANDING TERMS.

Demurrer to discovery of defendant's title under a settlement, in contradiction to which plaintiff claimed, overruled, being unsupported either by answer or plea to a specific charge in the bill. *Stroud v. Deacon*, 1 Ves. 37. PL. DEMURRER.

Demurrer allowed to discovery sought concerning the proceedings before the delegates. *Baker v. Pritchard*, 2 Atk. 387. DELEGATES.

Where there is a dispute as to boundaries or unity of possession, a defendant must set forth how he is entitled. *Chumperum v. Borough of Totness*, 1 Atk. 112.

Testator devised a term for years, and all his personal estate to A an infant; and if A died during his infancy, and his mother should die without any other child, then to B. A died during his infancy, though the mother was living and might have a child, yet the court aided B, the devisee over, by directing an account and discovery of the estate, in order to secure it in case the contingency should happen. *Stidholme v. Hodgson*, 3 P. W. 300. INTEREST, CONTINGENT.

On a bill to set aside a usurious contract, defendant may demur to a discovery of what interest he agreed to take, for he cannot set forth that without discovering the very interest he has taken. *Chancey v. Tahourden*, 2 Atk. 393. PL. DEMURRER; USURY.

Defendant, if sought, must set forth case, with counsel's opinion taken by him for his own private use. *Rudcliffe v. Fursman*, 2 Bro. P. C. 514. *Sed quare*, as to opinion. COUNSEL'S OPINION.

Plea of purchaser for valuable consideration without notice of plaintiff's title is good as a plea in bar, and protects defendant from answering to title set up by plaintiff. *Fitzgerald v. Funconberge*, Fitz. 207. 2 Mad. Ch. 321. PL. PLEA OF PURCHASE.

Claimant under a marriage settlement, without notice of prior incumbrances, shall not be compelled to a discovery. *Williams v. Lane*, 8 Bro. P. C. 291. TITLE.

A is indebted to B; B outlaws A; and C having goods of A's in his hands, B brings a bill against C, to discover what goods of A, C has in his hands; C may demur, for that B makes no title to the goods, as having no grant from the crown; also, for that the attorney general ought to be made a party. — *v. Bromley*, 2 P. W. 269. OUTLAWRY; PL. DEMURRER.

To a bill for tithes, defendant must set out quantities and values of the tithes particularly; it is not sufficient to deny generally the taking the titheable matter. *Baker v. Planner*, Bunb. 108. TITHES.

Goods insured by agreement valued at 600*l.*, and the insured not to be obliged to prove any interest, yet the insured is ordered to discover what goods he put on board, that the value of his goods saved may be deducted out of the 600*l.* *Le Pyre v. Farr*, 2 Vern. 716.

A jointress not bound to answer whether her husband had no other title than as assignee of a mortgage, she denying she had any notice of this mortgage, and that her husband told her he was in by descent. *Stephens v. Gault*, 2 Vern. 701.

Persons claiming lands by a will, or other voluntary disposition, and having the law on their side, are entitled as against the heir at law, to the assistance of a court of equity for a discovery of the deeds and writings relating to the devised estate, and to have them delivered up as following the lands. *De. Newcastle v. Id. Pelham*, 3 Bro. P. C. 460. DELIVERY UP OF DEEDS.

Bill not suggesting wilful usury, but that defendant had miscomputed interest received by him, and praying discovery as to the fact; plea thereto overruled. *Anon.* 2 Eq. Ab. 70. S. P. *Bosanquet v. Dashwood*, id. 534. S. C. *Forres*. 38. USURY; PL. DISCOVERY TENDING TO CRIMINATE.

Court will compel discovery of goods in hands of third persons, in order to subject them to a judgment. *Taylor v. Hill*, 1 Eq. Ab. 132.

Bill for a discovery, whether in a mortgage made by A to B, which had been assigned to the defendant, there was not some trust declared for the benefit of the plaintiff; defendant by answer denied that there was any trust declared for the plaintiff; the answer being replied to, the question at the hearing was, whether the defendant should be obliged to produce the deed? the court would not compel him to do it. *Hall v. Atkinson*, 2 Vern. 463. PR. PRODUCTION OF DEEDS; TRUST.

Bill to discover who was owner of a wharf and lighter to enable the plaintiff to bring action of damages his goods had sustained by the negligence of the lighterman, defendant demurred; demurrer overruled. *Southcote v. Fleete*, 2 Vern. 442. S. P. *Morse v. Buckworth*, id. 443.

Bill to be relieved against an award made by some of the members of the E. I. Company, in which those members and the arbitrators are made defendants, they may demur to the whole bill, without answering to the fraud; for the plaintiff can have no decree against them, nor can their answer be read against the company, but they ought to be examined as witnesses. *Steward v. E. I. Comp.* 2 Vern. 380. S. C. 9 Mod. 387. PL. DEMURRER.

If a plea or demurrer be overruled, the defendant must answer the whole bill, and the ordinary process of contempt issues to compel an answer as in other cases; but if an answer was filed with the plea or demurrer, the defendant, upon his plea or demurrer being overruled, need not put in another answer, till the plaintiff has taken exceptions. *Cotes v. Turner*,

Bunb. 123. PR. PLEA, OVERRULING; PR. EXCEPTIONS TO ANSWER; PR. DEMURRER, OVERRULING.

One claiming under a voluntary conveyance from tenant in tail, not compellable by the issue in tail, to discover the deed of entail. *Bunce v. Phillips*, 2 Vern. 50. TITLE.

The defendant in his answer says, that to his remembrance he had received no other sum than what is mentioned in his answer: held, a good answer. *Hull v. Bodily*, 1 Vern. 470.

If a defendant demurs because the bill contains several distinct matters against several defendants, he must by answer deny combination; if it is charged by the bill. *Powell v. Ardene*, 1 Vern. 416. PR. DEMURRER.

Plaintiff having recovered judgment at law for 1400*l.* against J, brings a bill, charging that J had conveyed his estate to trustees, and lent 1000*l.* to A, in B's name, and praying that this might be liable to plaintiff's debts; defendant demurs, for that in his lifetime he was not bound to discover his personal estate, and demurrer overruled. *Smither v. Lewis*, 1 Vern. 398, 399. S. P. *Angell v. Draper*, id. ib.

Bill by a dowress to remove a trust term, defendant pleads himself a purchaser, but does not deny notice: ordered to answer. *Bodmin v. Fandenbendy*, 1 Vern. 179. DOWER; NOTICE.

Equity will not compel a man to discover what goods he really bought of a bankrupt after the bankruptcy, and before the commission sued out, where the party has no notice of the bankruptcy. *Abery v. Williams*, 1 Vern. 27.

Plea of statute of frauds; bill charges that agreement was in writing; this must be answered. *Leuke v. Morris*, Dick. 14.

A bill may be exhibited in equity against an executor, to discover assets, and he may thereupon be decreed to pay debts and legacies; but plaintiff must charge that goods came to his hands. *Alexander v. Alexander*, 2 Ch. Rep. 37. *Parker v. Dee*, 2 Ch. Ca. 200. *Davis v. Curtis*, 1 Ch. Ca. 266. But *quere* if before suit at law against him? Et vide *Hard*. 115.

The defendant must answer the bill, though excommunicated. *Tichborne v. Edwards*, Toth. 11. EXCOMMUNICATION.

An infant, though a feme covert, may be compelled to answer. *Moore v. Greenrile*, id. 95. INFANT; FEME COVERT.

When the first answer is reported insufficient, the defendant, if he answer again without excepting, is to answer all the points objected to, though the same exceed the bill. *Crispe v. Neville*, 1 C. C. 378. 60. PR. EXCEPTIONS TO REPORT OF INSUFFICIENCY.

Defendant bound to answer as to receipt of rent in chancery. *Dix v. Lintoft*, Cary. 71.

Defendant not to answer till counsel's hand put to bill. *Farly v. Childre*, id. 112.

Defendants not bound to answer, to charge themselves criminally. *Montague v. —*, id. 9.

Defendant not bound to answer charge of secret severance of joint tenancy. *Cromer v. Peniston*, id. 9. Dumb man shall not answer to subpoena. *Altham v. Smith*, id. 93.

#### 4. Where Discovery tends to create a Forfeiture, or to criminate.

The court will not compel a defendant to answer allegations which may subject him to penalties. This protection extends not only to the question which directly may tend to criminate him, but to every link in the chain of proof. Where the chairman of a joint stock company, with a knowledge that the company had been dissolved, and that the managing committee had determined to buy up the shares; sent his shares into the market, and sold them as good and available

shares, the court protected him from answering the allegations, upon the ground that there existed a reasonable probability that he might be indicted for the fraud. *Macallum v. Turton*, 2 Y. & J. 183.

A broker in the city of London must answer a bill of discovery in aid of an action brought against him by his employer, for misconduct, although the discovery will subject him to the penalty of a bond given by him to the corporation on his admission. *Green v. Weaver*, 1 Sim. 404. BROKEN.

Where, in aid of defence to action for a libel, discovery prayed would subject plaintiff at law to indictment, he is not bound to answer; but because bill sought commission to examine abroad, to which plaintiff in equity was entitled, demurrer to whole bill was overruled with liberty to amend. *Thorpe v. Macaulay*, 5 Mad. 219. PR. DEMURRER.

A bankrupt cannot refuse to discover the particulars relating to his estate and effects, although such information may tend to shew that he has committed a criminal act; but if the question put to him be, whether or not he has done an act clearly of a criminal nature, he may refuse to answer it; so where a petition prayed that the creditors might be at liberty to examine the bankrupt whether he, or any persons in trust for him, or for his benefit, have received, or are to receive any sum of money, or other valuable consideration for his having resigned, or as an inducement to resign the office of town clerk of the city of B, it was dismissed. *Exp. Cossens*, Buck, 531. BANKRY. BANKRUPT'S EXAMINATION.

B, a purchaser under a decree, of the first presentation to a living, of which A is seised for life of the ad-vowson, afterwards takes a conveyance from A of the second presentation to the same living, and sells the first presentation to the present incumbent. To a bill by A, to set aside this transaction on the ground of fraud, praying a discovery, B puts in an answer, refusing to make the discovery required, as tending to subject him to forfeiture, on account of simony. B having afterwards died, the suit is revived against his executor, who is held entitled to the same protection that was claimed by B. *Parkhurst v. Lortzen*, 1 Mer. 391.

Protection generally, in every stage of the proceeding, against answering any question having a direct tendency to criminate the party, or subject him to penalty, &c. or forming one step towards it. *Laxton v. Douglas*, 19 Ves. 225. S. C. 16 Ves. 239.

Party demurring to the discovery, or witness refusing to answer facts tending to criminate himself, no admission to the truth of the fact. *Lloyd v. Pasingham*, 16 Ves. 59. PR. DEMURRER; ADMISSION.

Plea that the discovery will subject the defendant to penalties, does not require the support of an answer, as a plea of purchase for valuable consideration without notice does, as to facts, from which notice is inferred. *Claridge v. Hoare*, 14 Ves. 59. PR. ANSWER IN SUPPORT OF PLEA; PR. PLEA.

Transfer of stock under an agreement to satisfy the deficiency in the accounts of a banker's clerk, though he is not a party, amounts to a composition of felony, to prevent a prosecution. Defendant, therefore, may protect himself by plea from discovering not only the broad leading fact, but any fact, the answer to which may form a step in the prosecution. *Id. ib.* COMPOUNDING OF FELONY.

To a bill stating defendant's marriage with a particular woman; plea, that she is his sister, protects him from discovery of any fact forming a link in the chain. *Id.* 65. INCEST; PR. PLEA.

Bill against a corporation, trustees for a charity, for a discovery, and injunction against a resolution depriving the plaintiff of his office of schoolmaster, charged to have been procured by five of the members, including the bailiff, from improper motives, with re-

ference to a parliament election. Demurrer by those five, on the ground that, as title was shewn to discovery against them, and *ore tenus*, that the charge would be the subject of a criminal prosecution, overruled. *Dummer v. Corp. of Chippenham*, 14 Ves. 245. PL. DEMURRER; CORPORATION.

Plea of the stat. 32 H. 8. c. 9. s. 3. against buying and selling pretended titles; and also that there was not any mortgage as mentioned in the bill, to a bill that the defendant might redeem a mortgage upon a covenant in a lease from the defendant to the plaintiff: held good, though a negative plea. *Hitchins v. Launder*, Coop. 34. PL. PLEA, NEGATIVE; CHAMPERTY.

Demurrer allowed to a bill for discovery and injunction against an action, the effect being a contract for participation in an illegal transaction, the result of combination of wholesale grocers, by the title of the "Fruit Club," acting by a select committee of which the defendants were members, to purchase all imported fruit, though not strictly forestalling, regrating or monopoly. *Cousins v. Smith*, 13 Ves. 542. PL. DEMURRER.

Discovery in support of an action to recover money under the stock-jobbing act, stat. 7 Geo. 11. c. 8. confined to those clauses, as to which it is expressly given, with protection from the penalties, and therefore not extended to the 5th and 8th sections. *Bullock v. Richardson*, 11 Ves. 393.

Refusal to answer, on the ground that it tends to criminate the witness, does not amount to an admission. *Exp. Symes*, 11 Ves. 523. ADMISSION OF FACT, WHAT AMOUNTS TO.

No person compelled to answer what has any tendency to criminate him. *Id.* 525.

A bureau delivered for the purpose of repairs to a person who discovered money in a secret drawer, which he converted to his own use; this amounts to a felony, and upon that ground a demurrer to a bill of discovery was allowed. *Cartwright v. Green*, 8 Ves. 405. DEMURRER.

A married woman may demur to a discovery that may subject her husband to a charge of felony. *Id.* 406. HUSB. & WIFE; DEMURRER.

Bill by the East India Company, claiming from a part owner of a ship, freighted by them, double the sum received by him for the sale of the command, to be paid or allowed under the charter party and a by-law, to the company, one moiety to their use, the other to be paid or returned to the person who shall give the company information, and make proof; the deed being, on settling the account, cancelled through ignorance of the fact, demurrer to the discovery, because it might subject the defendant to penalty, covering not only the direct charge, but also circumstances of mere inducement, as the execution and cancellation of the deed, and to the relief generally for want of equity, and for defect of parties, viz. the other part owners, particularly one who executed, and the informer, was overruled. *E. I. Comp. v. Neave*, 5 Ves. 173. E. I. COMP.; PL. DEMURRER.

Demurrer allowed to bill of discovery tending to show maintenance of suit on the part of the defendant. *Kallis v. Dk. Portland*, 8 Bro. P. C. 161. S. C. 3 Ves. 494. PL. DEMURRER; MAINTENANCE OF SUIT.

Demurrer allowed to bill after verdict at law on bond, praying discovery, if consideration was not an illicit connection, and if defendant was not guilty of general incontinence. *Franco v. Holton*, 3 Ves. 368. BONDEX TURPI CAUSA; PL. DEMURRER.

A covenanted servant of the East India Company being senior merchant, and acting as agent of the company, as resident or chief at one of their factories, is incapable of forming any contract whatsoever in which the company is interested, so as to derive profit

to himself, or any otherwise however than for the advantage of the company; and if such contract be actually made between him as a merchant dealing for himself and the company's board of trade in India, in which undue advantage is taken by him, by means of his knowledge and influence as resident at the factory, he cannot demur generally for want of equity to bill by company for discovery and relief. *Hinchman v. E. I. Comp.* 8 Bro. P. C. 85. DEMURRER; PRINC. & AGENT.

Where the stat. of limitation had run against the recovery of the penalty for usury, the usurer cannot protect himself from discovery by demurrer founded on liability of subjecting himself to forfeiture. *Talbot v. Smith*, 1 Ridg. L. & S. 360. USURY; DEMURRER; STAT. OF LIMIT.

Plaintiffs having brought an action against the defendant to recover payments made for insuring lottery tickets, prayed a discovery and account, offering to allow payments made by the defendant; as the defendant could not have that advantage at law, a demurrer was overruled. *Brandon v. Johnson*, 2 Ves. J. 516. ACCOUNT; PL. DEMURRER.

A debtor of a bankrupt, sued at law by the assignees, filed a bill for discovery, whether they had not signed his certificate on consideration of his giving evidence in the action; a demurrer was allowed. *Selby v. Crew*, 2 Anst. 504. BANKRUPT, CERTIFICATE OF.

Demurrer to a discovery of trading overruled. A demurrer good if confined to questions, as to having committed an act of bankruptcy. *Chambers v. Thompson*, 4 Bro. C. C. 434. PL. DEMURRER; BANKCY. TRADING.

Bill for tithes, praying discovery whether defendants had not associated together in their defence; demurrer to the discovery was allowed. *Oliver v. Haywood*, 1 Anst. 82. MAINTENANCE OF SUIT.

The bill prayed a discovery whether the defendant had not contributed to the expences of a suit to try a general question against them. It appeared that by the course of that suit in evidence, no general right could be bound by it. A demurrer was allowed. *Mayor of London v. Ainsley*, 1 Anst. 158. *Id.*

Plea of the stock jobbing act to a bill for discovery of stock transactions overruled, as the second section of the act requires parties to make a discovery whereon to found an action. *Bancroft v. Wentworth*, 3 Bro. C. C. 11. PL. PLEA; STOCK JOBBING.

If bill be for discovery of matters penal at common law, or by statute, the defendant need not demur or plead, but it will be admitted on exceptions; but when the time for suing a penalty expires between the first and second answers, and exception is taken to the second answer for not discovering, the exceptions shall be allowed, and the party is bound to discover. *Williams v. Farrington*, 3 Bro. C. C. 38. S. C. 2 Cox, 202. STAT. OF LIMIT; FORFEITURE; PL. EXCEPTIONS.

Upon *quare impedit* brought against the plaintiff, he filed the present bill to discover whether the clerk presented to him by defendant had not given a general bond of resignation in order to set up that as a defence at law for having refused him institution. To this bill defendant demurred, first, on account of legality of such bond; second, that the discovery was immaterial. Demurrer overruled. *Bp. London v. Fytche*, 1 Bro. C. C. 96. PL. DEMURRER.

Action on a general bond of resignation; bill for discovery whether the advowson was not sold with promise to procure an immediate resignation. Demurrer to the discovery overruled. *Grey v. Hesketh*, Amb. 268. SIMONY.

By the known law of the land, no alien born can take by grant, devise or other purchase, any freehold or chattels real for his own benefit; but can and does, in such cases, take for the benefit of the crown;

yet this disability being neither a penalty or forfeiture, the alien cannot demur to an information filed for discovering the place of his birth in order to establish the fact of alienage. *Duplessis v. Att. Gen.* 1 Bro. P. C. 415. S. C. 2 Ves. 286. ALIEN; DEMURRER.

An information is filed by the Attorney-general against A and B for a discovery of the place of their birth, charging them to be aliens. Demurrer, 1st, to jurisdiction of equity; 2nd, that the defendants were not bound to betray their own title, and, therefore, the king was not entitled to the discovery prayed. Demurrer overruled. The known method of recovering estates, held by aliens for the benefit of the crown, is, by a commission under the great seal, to enquire into the facts; and on the inquest finding them, to seize the estate into the king's hands. And in order to prove these facts, the king has the same right to a discovery, by the assistance of a court of equity, as the subject has, and founded on the same principle of justice; viz. that it is, in general, against conscience for any one to enjoy the property of another by concealing his right. *Id.* 419.

Though parties may demur to discover anything which may prove illicit cohabitation, or what may subject them to pains, penalties or ecclesiastical censures, &c., a charge against persons of a conspiracy or attempt to set up a bastard child, is not demurrable unto, that not being *per se* an indictable offence. *Chetwynd v. Lindon*, 2 Ves. 450. PL. DEMURRER.

Though a defendant is not bound to answer what may subject him to ecclesiastical penalties, or whether he is not married to a woman he cohabits with, or whether he is an alien, &c., he must in a proper case answer whether he hath or not a legitimate son. *Finch v. Finch*, 2 Ves. 491.

Bill to discover whether A, under whose will defendant claimed, was a papist at the time of his purchase from plaintiff's ancestor. Defendant pleaded 11 & 12 W. 3. as to the discovery, by which, if A was a papist, he was disabled to take. Plea allowed. The rule that no man is obliged to accuse himself, implies also, that he is not bound to discover a disability in himself. *Smith v. Read*, 1 Atk. 526. PAPIST.

Plea to bill to discover whether A was not a papist upon conveying to defendant, allowed. *Harrison v. Southcote*, *id.* 528.

The rule of law is, that a man shall not be obliged to discover what *may* subject him to a penalty, not what *must* only. S. C. *id.* 539.

Demurrer to information as subjecting defendant to pains and penalties. *E. I. Comp. v. Campbell*, 1 Ves. 246. PL. DEMURRER.

Demurrer lies to a bill for discovery of an assignment of a lease without licence, if it does not expressly waive the forfeiture. *Uxbridge v. Staveland*, *id.* 566. PL. DEMURRER; COVENANT, BREACH OF.

S gave a bond to pay 800*l.* a year to H during S's enjoying the office of —, or whilst any body held it in trust for him. H puts the bond in suit; S brings a bill for injunction, and a cross bill is brought by H, to discover whether E held the office in trust for S. S insisted, in his answer, he was not obliged to discover what would subject him to incapacities of the several acts to vacate a seat in parliament on a member's accepting a place, he is not obliged to make the discovery, and he did right in answering, for he could not have demurred to this matter, because then he would have admitted the facts to be true. *Honeywood v. Selwin*, 3 Atk. 276. PL. ANSWER; PL. DISCOVERY.

Defendant cannot be obliged to discover facts tending to inflict on him corporal or pecuniary punishment. *Selwyn v. Honeywood*, 9 Mod. 419.

A, by will, gave an estate to his wife *dur. viduit.* with a limitation over in case of her second marriage;

the remainder-man brought a bill of discovery of her second marriage, to which she demurred as subjecting her to a forfeiture. Demurrer overruled; for this is not a condition but a limitation over of an estate, and, therefore, no forfeiture. If it had been a condition for the breach of which a forfeiture would have been incurred, such a demurrer would have been allowed. *Chancey v. Tuhourden*, 2 Atk. 392, 393. PL. DEMURRER.

On bill by executor for discovery of defendant's marriage, who demurred, as it would be a forfeiture of his legacy, which was given conditionally if she married with consent of trustees under the will. Demurrer allowed, as he cannot answer the marriage without shewing at the same time it was against consent. S. C. *id.*

Where bill on policy of insurance charges exportation of prohibited goods absolutely, and no others, and in interrogatory inquires what goods were exported; plea of penalties attaching on such exportation allowed. *Duncalf v. Blake*, 1 Atk. 52.

A defendant not bound to answer that which tended to accuse him of maintenance or of buying pretended rights within 32 H. 8. c. 9. *Sharp v. Carter*, 3 P. W. 375.

Party agreeing not to plead or demur to discovery, bond by it, though it tends to subject him to penalty. *S. S. Comp. v. Bumsted*, 1 Eq. Ab. 77. AGREEMENT. • The right not to discover for fear of penalties attaching, may be waived by agreement. *E. I. Comp. v. Atkins*, 1 Com. 346. S. C. 1 Stra. 168. *Id.*

Where a tenant had cut down timber, and a bill was brought against him for a discovery, he demurred, for that as being waste, his answer would subject him to a forfeiture. Demurrer allowed. *Att. Gen. v. Vincent*, Bunb. 192. LANDL. & TEN.

Plea to discovery tending to convict of bigamy, allowed. *Hatfield v. Hatfield*, 5 Bro. P. C. 103. BIGAMY.

Bill not suggesting wilful usury, but that the defendant had miscomputed interest received by him, and praying discovery as to the fact. Plea *hæretico* overruled. *Anon*, 2 Eq. Ab. 70. PL. DISCOVERY; USURY.

Discovery tending to forfeiture of lease refused. *Fane v. Atlee*, 1 Eq. Ab. 77.

Discovery tending to forfeiture not enforced. *Sir B. Firebrass's case*, 2 Salk. 560.

African company hires the defendant's ship to freight. Defendant covenants not to trade in any of the goods in which the company deal, and in such case covenants to pay double the value for all such goods, with liberty to the company to deduct the same out of the freight. The company bring a bill to discover whether the defendant did trade in any of the said goods. Though this be a penalty, yet it being the defendant's own agreement, the defendant is bound to discover. *African Comp. v. Parish*, 2 Vern. 244.

Bill to establish an agreement for a separate maintenance. To such part as prayed a discovery of hard usage, defendant demurred. Demurrer allowed. *Illicks v. Nelthorpe*, 1 Vern. 204.

A man is not bound to discover what may subject him to the penalty of an act of parliament. *Bird v. Harkwicke*, *id.* 109.

##### 5. When Defendant by Answer may refuse to answer further.

Defendant cannot, by answer, protect himself from answering fully, on ground of his being a purchaser for a valuable consideration. *Ovey v. Leighton*, 2 S. & S. 234.

In the exchequer, a defendant may, by his answer, object to answer any part of the bill, stating, in his answer, the ground of objection: otherwise in chancery. *John v. Ducie*, 13 Price, 632.

If defendant answers, he must answer fully. — *v. Harrison*, 4 *Mad.* 252.

A solicitor may, by his answer to a bill against him and his clients, refuse to discover any deeds or facts confidentially communicated to him. *Straford v. Hogan*, 2 *Ball & B.* 164. SOLICITOR & CLIENT; PROFESSIONAL CONFIDENCE.

Defendant must put in a full answer in all cases, except to criminate himself, or when purchaser for valuable consideration without notice. *Leonard v. Leonard*, 1 *Ball & B.* 325.

A defendant refusing a full discovery, not by plea or demurrer, but by answer, compelled to make a full answer, and, on motion, to produce books, &c. *Sommerville v. Mackay*, 16 *Ves.* 382.

Whether defendant can, by answer, refuse the discovery, insisting that he is not bound to answer, *quare*? *Shaw v. Cing*, 11 *Ves.* 303.

Whether a defendant can, by answer, refuse the discovery, insisting that he is not bound to answer, *quare*? The answer held insufficient, as being argumentative, and not containing positive averment. *Faulder v. Stuart*, 11 *Ves.* 296.

Whether a defendant can, by answer, refuse the discovery, insisting that he is not bound to answer, *quare*? But having given part of the discovery, he was compelled to answer as to the rest. *Dolder v. Ld. Huntingfield*, 11 *Ves.* 283. PL. DISCOVERY.

Defendant stating, by an answer, a purchase for valuable consideration, shall not be compelled to answer further. *Jerrard v. Saunders*, 2 *Ves.* 454. VEND. & PURCH.; CONSON., VALUABLE.

An agent, charged with personal fraud, cannot, by disclaiming interest, avoid answering fully. *Bulkeley v. Dunbar*, 1 *Anst.* 37. FRAUD; AGENT; DISCLAIMER.

Though a defendant cannot, by answer, avoid answering fully to all particulars grounded on the plaintiff's title, he may yet avoid setting forth the particulars of account, if he even, by answer, distinctly negatives having any subject matter of account referable to the plaintiff's title, as stated in the bill. *Shepherd v. Roberts*, 3 *Bro. C. C.* 483. note (2). ACCOUNT.

Defendant to bill for discovery and account objecting, by answer, that he had no concern in the business, must answer fully, though such a plea would bar both discovery and relief: but if the fact is so, there cannot be a decree against him. *Cartwright v. Hatley*, 1 *Ves. J.* 292. S. C. 3 *Bro. C. C.* 238. S. P. *Shepherd v. Roberts*, id. 239, and *Hale v. Noyes*, id. 433. PL. ANSWER.

If an executor, knowing a plaintiff's title, by answer denies it, he is not bound to set out an account of assets; but if the title does not lie in his knowledge, he is. *Sweet v. Young*, *Ambl.* 553. *See quare*. See note there. DISCOVERY.

S gave a bond to pay 800*l.* a year to H during S's enjoying the office of —, or whilst any body held it in trust for him; H puts the bond in suit; S brings a bill for injunction, and a cross bill is brought by H to discover whether E held the office in trust for S. S insisted, in his answer, he was not obliged to discover what would subject him to incapacities of the several acts to vacate a seat in parliament on a member's accepting a place; he is not obliged to make the discovery; and he did right in answering, for he could not have demurred to this matter, because then he would have admitted the facts to be true. *Honeywood v. Selcra*, 3 *Atk.* 276. PL. DISCOVERY TENDING TO CRIMINATE; PL. DISCOVERY.

If a modus decimandi be alleged no otherwise than by answer to a bill for tithes, defendant must answer all other parts of the bill; but if he pleads it, he need not answer any other matter. *Langham v. —*. *Hard.* 130. TITHES MODUS.

Though a modus be pleaded, yet the quantities and

values of the tithes must be set forth. *Cumley v. Fontleroy*, *Bunb.* 60. *Id.*

#### 6. What Facts are put in Issue by Answer.

A brought bill against B for specific performance of covenants in lease, and particularly a covenant to leave a certain quantity of alum on premises at end of term. B, by answer, insisted that covenant was not intended to be performed, but at hearing produced a paper purporting to be a receipt for the alum from the lessor. Court held that no regard ought to be paid to this paper, not only because it had a suspicious appearance in itself, but because it was not insisted on in answer. *Ward v. Dk. Buckingham*, 3 *Bro. P. C.* 581. EVIDENCE.

Circumstances allowed to be proved by evidence by defendant, which he had not put in issue by his answer. *Hodgson v. Thornton*, 1 *Eq. Ab.* 228. PR. EVIDENCE.

Bill by executor to avoid bonds given by testator, on suggestion that they were gained by threats and undue means: defendant, by answer, says they were entered into for money lent and debts due. It appeared, by proof, defendant was a common harlot, and the plaintiff's father had unlawful conversation with her. Held, though this not set forth in the bill, yet the defendant's answer, saying the bonds were given for money lent, this sufficiently puts it in issue, though not laid in the bill. Where the party himself is culpable, and comes for relief against the said bonds, court may refuse; otherwise, where his executor comes. *Matthew v. Hanbury*, 2 *Vern.* 187. EXECUTOR; CONSIDERATION EX TURPI CONTRACTU.

#### 7. Answer in conjunction with Demurrer.

A demurrer to part of a bill of discovery, and an answer to other part of the bill; the demurrer is over-ruled, if the answer extend to any of the facts covered by it. And there is no distinction in this respect between demurrers to bills for relief, and demurrers to bills for discovery only. *Corbett v. Hawkins*, 1 *Y. & J.* 421. PL. DEMURRER.

To bill to set aside award, charging fraud and corruption in arbitration, defendant answered as to fraud and corruption, and demurred to rest of bill. Held, that answer over-ruled demurrer. *Dawson v. Sadler*, 1 *S. & S.* 542. DEMURRER.

In an answer and demurrer, the defendant ought to specify distinctly what parts of the bill it is intended to cover by the demurrer. It is informal to say, "as to so much of the bill as defendant is advised he is bound to answer," and then, after answering some parts, to demur "as to all the rest of the matters charged in the bill," it ought to be precisely stated what part of the bill defendant refuses to answer. *Devonsher v. Newenham*, 2 *Scho. & L.* 199. PL. DEMURRER.

A mere denial of combination, by answer, does not satisfy the undertaking not to demur alone. *Lansdown v. Elderton*, 8 *Ves.* 526. ORDER FOR TIME TO ANSWER, &c.

The rule that, if the plaintiff is not entitled to the relief, though entitled to discovery, a general demurrer holds, does not preclude the defendant from demurring to the relief and answering to the discovery. *Hodgkin v. Longden*, 8 *Ves.* 2. PL. DEMURRER.

Bill by judgment creditors who had sued out elegits, for discovery of freehold estates, charging that defendant, upon his election as M.P., previously to judgments, gave in his qualification, and that if the estates composing it were conveyed away since, it was without consideration. Demurrer as to qualification, &c. and answer as to rest, but not going to charge of conveyance without consideration. Demurrer was over-ruled. *Mouniford v. Taylor*, 6 *Ves.* 788. *Id.*

Bill stating a sequestration, for want of an answer, prayed a discovery and account of all money or other property of the defendant, in the original cause, in the hands of defendants, who were bankers at the time of service of the sequestration or since. Upon demurrer as to the money, and answer as to the rest of the bill, the 1d. Ch. determined against the demurrer upon the form, considering it over-ruled by the answer, and would not, in that stage of the cause, decide the two points; 1st, Whether a sequestration on mesne process can be executed further than to pay the expenses: 2ndly, Whether a chose in action is liable to sequestration, *Simmonds v. Kinnaird*, 4 Ves. 735. PL. DEMURRER; PR. SEQUESTRATION.

A demurrer to the relief is over-ruled by an answer to the discovery of the facts on which the relief is prayed. *Roberts v. Clayton*, 3 Anst. 715. PL. DEMURRER, OVER-RULED BY ANSWER.

### 8. In conjunction with Pleas.

Plea by one defendant to bill by tenants in tail for redemption of estate, of fine levied of part of estate, averring that the part included in the fine was the only part in which the defendant claimed interest, and accompanied with answer, admitting possession of title deeds, &c.: Held, that plea was overruled by answer. *Watkins v. Stone*, 2 S. & S. 560. PL. PLEA OVERRULED BY ANSWER.

After the return of the writ of attachment with proclamations, defendant cannot put in plea and answer. *Sanders v. Murney*, 1 S. & S. 225. PR. ATTACHMENT WITH PROCLAMATIONS; PR. PLEA.

Plea to all relief, and part of discovery, and answer to rest. Plea overruled. *James v. Sadgrove*, 1 S. & S. 4. PL. PLEA; PL. RELIEF; PL. DISCOVERY.

But, otherwise, if answer had been to matter in bill which would have repelled the defence by plea. *Id. ib.*

Where motus is pleaded for a particular description of lands, it must be alleged in the answer, that the defendants occupy such lands. *Stuart v. Greenall*, 9 Price, 106. MOTUS.

Where plaintiff in equity seeks to avoid legal bar upon equitable grounds, there the defendant in equity, pleading the legal bar, must of necessity accompany his plea with averments, generally denying the equitable matter, and must accompany his plea with answer to all special circumstances charged as constituting the equitable ground. *Cork v. Wilcock*, 5 Mad. 330. PL. PLEA; PL. DISCOVERY.

Plea which negatives plaintiff's title, though it protects defendant generally from answer and discovery, as to the subject of the suit, does not protect him from answer and discovery, as to such matters as are specifically charged as evidence of plaintiff's title. *Sanders v. King*, 6 Mad. 65. PL. PLEA; PL. ANSWER; TITLE.

Plea founded on stat. 32 H. 8. c. 2. to bill of discovery overruled, though good in substance, because not specific answer given by it to certain statements in bill. *Crow v. Tyrell*, 2 Mad. 397. PLEA; STAT., C. OF.

Plea, that the discovery will subject the defendant to penalties, does not require the support of an answer as a plea of purchase for valuable consideration without notice does, as to facts from which notice is inferred. *Claridge v. Hoare*, 14 Ves. 59. PL. PLEA; PL. DISCOVERY TENDING TO CRIMINATE.

Bill for specific performance of a parol agreement for a lease within the statute of frauds, charging possession taken under the agreement, and other acts of part performances; plea of the statute, and answer not denying the acts alleged of part performance, but stating that, being advised that he entered as tenant at will, he gave notice to quit. Plea overruled. *Dowers*

*v. Cator*, 4 Ves. 91. PL. PLEA; STAT. OF FRAUDS, SPECIFIC PERF.

If the bill charges fraud, the defendant must support his plea by an answer denying the fraud. *Bicknell v. Gough*, 3 Atk. 558. *Price v. Price*, 1 Vern. 185.

If defendant pleads statute of frauds against specific performance, he must by answer deny agreement, for otherwise, he admits it, and takes it out of statute. *Child v. Godolphin*, Dick. 39.

### 9. Impertinence and Scandal, in what.

Prolixity in setting forth important documents is not impertinence; therefore, where the defendant sets forth verbatim in his answer, a state of facts, and all the affidavits to shew that the demand made in this suit had been disallowed by the master in a former suit; the court held that the answer was not impertinent. *Love v. Williams*, 2 S. & S. 574.

Defendant, in answer to allegation in bill, that some cotton which had been sent by him to plaintiff was of inferior quality, said that, from certain affidavits and certificates made by experienced persons, he believed cotton to be of superior quality, and set forth affidavits and certificates in schedule in *hoc verba*. Held, schedule not impertinent. *Parker v. Fairlie*, 1 S. & S. 295. S. C. 1 T. & R. 362. PL. ANSWER.

Defendant, to a bill of revivor, cannot put new matter on record, which might, if stated in the answer to the original bill, have produced a different decree; it would be impertinent. *Nunney v. Tolly*, 11 Price, 117. PL. ANSWER; PL. BILL OF REVIVOR.

If in answer to common interrogatories defendant annexes to answer a schedule of every particular article of the personal estate, and for what each sold, &c., it is impertinent. *Beaumont v. Beaumont*, 5 Mad. 51. ACCOUNT.

An instrument in possession of defendant, which is material both to plaintiff's and defendant's case, and is inquired of, in certain respects, by the plaintiff's bill filed to restrain process at law on it, must not be set out at length in defendant's answer further than is sufficient fairly to satisfy the plaintiff's interrogations, or it will be subject to reference for impertinence. *King v. Teale*, 7 Price, 278. And as to impertinence in answers, see *Slack v. Evans*, *Id. ib.* note.

It is impertinent in amended bill to set forth part of answer by way of pretence, and interrogate as to it. *Seeley v. Boehm*, 2 Mad. 176. PLEADING.

Bill by a testamentary guardian and husband, against the trustee of the property to be allowed maintenance for minors; exceptions taken to the answer for scandal and impertinence, in stating that the husband of the guardian was not a fit person to have the management of the minors, "being a man of small fortune, increasing family, and also a sectary," allowed. *Corbet v. Tottenham*, 2 Ball & B. 59. GUARDIAN; PL. ANSWER, EXCEPTIONS.

Matter in an answer relevant, according to the case made by the bill, is not scandalous, whatever may be the nature of it. *Ld. St. John v. Ly. St. John*, 11 Ves. 526.

A schedule to an answer containing, at length, a bill of costs, and observations with reference to a bill merely delivered for the same business; held impertinent, though the bill called upon the defendant to set forth how he computes and makes out his demand with all the particulars relating thereto, with interrogatories pointed to the particular items, and to a minute comparison of the two bills. *Alsager v. Johnson*, 4 Ves. 217. S. P. *Morris v. Elliot*, 8 Pri. 674. PL. ANSWER.

As to the practice of giving time to put in a further answer, after a submission to answer exceptions. *Hinckley v. Tomkinson*, 1 Cox, 177. PR. EXCEPTIONS TO ANSWER.

Motion to discharge a demurrer after motion for time to plead answer or demur, but not to demur alone, granted; the answer only denying combination. *Lee v. Pascoe*, 1 Bro. C. C. 78. PL. DEMURRER.

#### 10. Uncertainty.

A bill being filed against an occupier for tithes of certain lands, called Cook's Green; the defendant by his answer states, that the lands in his occupation, together with a certain other close, in the occupation of A, containing nine acres, and separated from the former by a lane, which had been recently laid to the defendant's grounds, were called and well known by the ancient name of Cook's Green; and he then insists, that the lands, called Cook's Green, are covered by a modus. Held, that the lands, comprised in the farm or district alleged to be covered by the modus, are described with sufficient certainty. *Williams v. Wulton*, 1 Russ. 605.

Answer insisting on modus (for a place described only by map annexed) in lieu of all tithes, or at least of tithe hay, is good. *Clarke v. Jennings*, 2 Anst. 498.

A payment set up in an answer as a modus, or composition real, is not had for the uncertainty. *Atkins v. Hatton*, 2 Anst. 388.

#### 11. When an Answer is the proper Defence.

A defendant in a suit by the assignees of a bankrupt, cannot object to the bill as not having been filed with the consent of the creditors, unless the objection is made by the answer. *Baran v. Lewis*, 1 Sim. 376. BANKCY., ASSIGNEES CONSENT TO BILL FILED.

A defence of modus is wholly inconsistent with a defence in *non decimando*. *Norton v. Hammond*, 1 Y. & J. 94.

Where a money payment has been set up as a defence of a modus, it is a denial of plaintiff's title, and therefore cannot, failing as a modus, be used *pro hac vice* to defeat the immediate claim, as being a composition undetermined for want of six months' notice. *Woolley v. Brownhill*, 13 Price, 501. S. C. 1 M'Clel. 317. TITHES, COMPOSITION FOR.

Cause on hearing ordered to stand over for want of parties; defendant not allowed costs of day, because answer did not state that objection. *Mitchell v. Bailey*, 3 Mad. 61. PL. PARTIES; PR. COSTS.

If material fact be charged in injunction-bill, and deposed to in affidavit in support of it, not positively, but as plaintiff has reason to know, and that he believes it to be true, and fact is one which, if true, lies only within knowledge of defendant, and who may, if not true, deny it, the court will grant injunction, it not being denied by him. *Scott v. Becher*, 4 Price, 346. PR. INJUNCT., AFFIDAVIT IN SUPPORT OF.

A defence of compromise or release, is not proper for answer; it is available by way of plea only. *Leonard v. Leonard*, 1 Ball & B. 323. COMPROMISE; RELEASE; PL. PLEA.

Whether a defendant can by answer refuse the discovery, insisting that he is not bound to answer, *quære?* But having given part of the discovery, he was compelled to answer as to the rest. *Dolder v. La. Huntingfield*, 11 Ves. 283. PL. ANSWER.

After answer, plaintiff not compelled to change the next friend on affidavit, that she was worth nothing, and not found till after answer, contradicted by her swearing to 44l. a year: defendant ought not to have answered, but should have said he could not find her. *Anon.* 1 Ves. J. 409. PROC. AMI.

A being entitled under a will to the use of certain articles of plate for her life, pawned them with B who kept an open pawnbroker's shop. Will was filed by representatives of the testator, after the death of

A, against B, for a discovery of the particular articles pawned, in order to enable the plaintiffs to proceed in an action at law, for the recovery of them. To this discovery the defendant pleaded, that certain articles of plate were deposited with him, for certain sums of money *bond fide* lent and advanced thereon, to A; but he did not by his plea (though he did by his answers aver, that he had no other articles of plate in his possession). For this defect in point of form the plea was overruled. The defendant then insisted on the same point by his answer in bar to the discovery, but the court thought, that where a plea to a bill of discovery was overruled, the defendant could never insist on the same thing by answer. *Hoare v. Parker*, 1 Cox, 224. S. C. 1 Bro. C. C. 578. PL. PLEA; PL. BILL OF DISCOVERY.

No second dilatory plea allowed; but answer may insist on what was overruled as a plea. *Finch v. Finch*, 2 Ves. 492. PR. PLEA.

#### 12. When a proper Defence against Statute of Frauds and Statute of Limitations.

Object of bill being to obtain discovery from defendant, to be used at law in order to disprove plea of defendant there, that he has made no promise within six years; this discovery defendant is bound to give; but he has a right to protect himself in equity by stat. of limitations, from discovery as to original constitution of debt, and whether it has since been paid. To such last mentioned matters, defendant should plead statute, and answer fully rest of bill. *Cork v. Wilcock*, 5 Mad. 331. STAT. OF LIMITATIONS.

Defendant to a bill for specific performance of an agreement within the statute of frauds, may, by answer admitting the agreement, take advantage of the stat. *Rouse v. Teed*, 15 Ves. 375. FRAUDS, STAT. OF.

Defendant by answer admitting agreement, if he insists on statute of frauds, may have benefit of it at hearing. *Cooth v. Jackson*, 6 Ves. 17. 37. SPEC. PERF.; STAT. OF FRAUDS.

Denial of parol agreement within statute of frauds by answer, is in equity conclusive. *Id.* 39.

Plea of statute of limitations covers discovery always. *Wilford v. Luddel*, 2 Ves. 400. PL. PLEA OF STAT. OF LIMIT.

Statute of limitation may be pleaded as to a debt, but not to discovery as to when debt was due. *Mackworth v. Clifton*, 2 Atk. 51. S. C. *Downing v. Kirby*, Finch Rep. 14. PL. PLEA; LIMIT., STAT. OF.

If the statute of limitations be neither pleaded nor insisted on by the answer, defendant cannot have the benefit of it in bar to plaintiff's demand. *Prince v. Heylin*, 1 Atk. 494. *Id.*

Where the defendant insists on the benefit of the statute of limitations by way of answer, he shall at the hearing have the like benefit as if he had pleaded it. *Norton v. Turvil*, 2 P. W. 145. LIMIT., STAT. OF.

#### 13. Of Infant and Attorney General.

Infants in answer may state anything they intend to prove, but cannot be themselves called on to answer further. *Per Richards*, C. B. in *Att. Gen. v. Lambeth*, 5 Price, 398. INFANT.

General answer of attorney-general to bill by opposite party, for discovery in aid of his defence in an information at law, cannot be excepted to. *Duvison v. Att. Gen.* cited *id.* note. PR. EXCEPTIONS TO ANSWER; ATT. GEN.

An infant bound by the offer made by him in his answer, if the other side are thereby delayed, and if the infant does not immediately after his coming of age apply to the court in order to retract his offer and amend his answer. *Cecil v. El. Salisbury*, 2 Vern. 224. INFANT.



## 14. Schedule to Answer.

Defendant in answer to allegation in bill, that some cotton which had been sent by him to plaintiff was of inferior quality, said that from certain affidavits and certificates made by experienced persons, he believed cotton to be of superior quality, and set forth affidavits and certificates in schedule in *hæc verba*. Held, schedule not impertinent. *Parker v. Fairlie*, 1 S. & S. 295. S. C. 1 T. & R. 362. PL. IMPERTINENCE.

The bill, required the defendant to set forth an account of all and every the quantities of metals and minerals, dug, &c., distinguishing from which of the mines the same were respectively raised, &c., and when, &c., and the full value thereof, and of every particular, and how he computes the same; and when, and to whom, and for what he has sold and disposed of the same, or so much thereof, as, &c.; and where and in whose custody or power the residue thereof remaining unsold now is, and the costs and expenses of working the mines, and the clear profits made thereby, and how he computes the profits. A schedule to the answer, setting forth a transcript of all the items in tradesmen's bills, &c. was held impertinent; and the master having reported the whole of the schedule impertinent, without distinction of the particular items; exceptions to that report were overruled. *Norway v. Rowe*, 1 Mer. 347.

An answer to a bill for an account, setting out particulars in detail, although in some sense to be called pertinent, yet, if manifestly not called for by the nature of the case, may be held impertinent, as being vexatious and oppressive. *Id. ib.*

Defendant though he might perhaps have objected to answer, compelled to make full disclosure by production of letters mentioned in schedule to answer. *Taylor v. Milner*, 11 Ves. 41. PL. ANSWER.

Defendant cannot be ordered to produce deeds, &c. unless stated in a schedule to his answer, or at least described with certainty. In Ireland it is still the practice to pray in bill a schedule. *Anon.* 1 Smith, 117. PR. PRODUCTION OF DEEDS.

A schedule to an answer, containing at length a bill of costs and observations with reference to a bill, merely delivered for the same business, held impertinent, though the bill called upon the defendant to set forth how he computes and makes out his demand, with all the particulars relating thereto, with interrogatories pointed to the particular items, and to a minute comparison of the two bills. *Alsagar v. Johnson*, 4 Ves. 217. S. P. *Morris v. Elliot*, 8 Price, 674. PL. IMPERTINENCE.

## II. BILL.

See *passim* CHARITY, IV.—PL. DEMURRER.

1. Where proper generally. (And see further, "JURISDICTION."—"BANKRUPTCY.")

2. The general Form.

(a) Generally, and what Facts must be stated, and by what Allegations they are put in issue.

(b) Offer to pay just Demands.

(c) Waiver of Penalties and Forfeiture.

(d) Multifariousness.

(e) What amount to Scandal and Impertinence.

(f) Charging part.

(g) Interrogatories.

(h) The Prayer.

(i) Affidavits annexed.

3. Supplemental.

4. Supplemental in nature of Review and Revisor.

5. Of Review.

6. Of Revisor, and Original in nature of Revisor.

7. Amended.

8. Cross Bill.

9. For Discovery and Relief generally.

10. Bill of Discovery.

11. Of Interpleader.

12. Of Peace and Quia Timet.

13. To Perpetuate.

14. For Partition and other matters.

## 1. Where proper generally.

And see further, PL. PETITION.—BANKRUPTCY.—JURISDICTION.

A bill of foreclosure against the assignees of a bankrupt mortgagor, before the execution of the bargain and sale by the commissioners, will not be dismissed on the ground that the assignees have not any interest that can be the subject of a foreclosure. *Bainbridge v. Pinhorn*, 1 Buck. 135.

A bill to establish a customary payment in lieu of tithes, does not lie upon a simple demand of tithes without suit. *Gordon v. Simkinson*, 11 Ves. 509. TITHES.

Bill so far as not contradicted by plea, is taken as true. *Plunket v. Penon*, 2 Atk. 51.

A lessee of rectory for three lives, who had made a derivative lease, brings a bill for tithe in kind, and to establish a custom of setting out corn in shocks. Held, the bill is properly brought, though the tithes are out in lease to prevent collusion between lessee and occupiers. *Archb. York v. Stapleton*, 2 Atk. 136. LESSOR & LESSEE.

## 2. The General Form.

(a) Generally, and what Facts must be stated, and by what allegations they are put in issue.

(b) Offer to pay just Demands.

(c) Waiver of Penalties and Forfeiture.

(d) Multifariousness.

(e) What amounts to Scandal and Impertinence.

(f) Charging Part.

(g) Interrogatories.

(h) The Prayer.

(i) Affidavits annexed.

(a) Generally, and what Facts must be stated, and by what allegations they are put in issue.

To prevent a demurrer to a bill it was falsely alleged in it, that a revolting colony of Spain had been recognised by Great Britain as an independent state; the court is bound to know judicially that the allegation is false, and not to give it the intended effect. *Taylor v. Barclay*, 2 Sim. 213. PUBLIC POLICY.

Seemeth that the usual allegation in bill in exchequer, that plaintiff is debtor, &c. to crown, is unnecessary. *Cheetham v. Crook*, 1 McClel. & Y. 315.

Unless defect in memorial of annuity is stated in pleadings on evidence, no advantage can be taken of it. *Dunn v. Culcraft*, 2 S. & S. 56. ANNUITY, MEMORIAL.

If bill for specific performance of agreement state, that agreement was in writing, signature will be presumed. *Rist v. Hobson*, 1 S. & S. 543. PRESUMPTION; AGREEMENT; DEEDS, EXEC. OR.

Where the claim of the next of kin is raised on the record, and one person is in that character a party, other persons found by the master to be next of kin, may be heard by the court, though not parties. But where the claim is not raised on the record, and none of the next of kin are, in that character, parties to the cause, there must be a supplemental bill to bring them

before the court. *Waite v. Temple*, 1 S. & S. 319. **PL. PARTIES; NEXT OF KIN.**

Claiming the residue as executor is sufficient to let in parol evidence in support of the legal title, without alleging a title by the effect of the parol evidence. *Lynn v. Beaver*, 1 Turn. & R. 66. **EXORS. BENEFICIALLY INTERESTED; PR. EVID.**

Bill by assignees of bankrupt brought for purpose of restraining bankrupt from disputing validity of commission, not alleging that commission was valid, or that bankrupt brought action with a view only to harass assignees; general demurrer allowed. *Kirkpatrick v. Dennett*, 1 S. & S. 408. **PL. DEMURRER; BANKCY., ASSESS. IN.**

Bill for commission to examine abroad must state that action has been brought. *Angel v. Angel*, 1 S. & S. 83. **COMMISSION TO EXAMINE ABROAD.**

Plaintiff in equity must state in his bill his title, and unless admitted by defendant, must prove it. *Norbury v. Meade*, 3 Bligh, 211. **TITLE.**

Vicar demanding certain specific tithes by his bill, *nominatim*, is not precluded from giving evidence of other tithes due to him for other titheable matters taken by defendant, where there is in the bill a general claim of all other tithes usually denominated small tithes. *Manby v. Lodge*, 9 Price, 231. **IB.**

Where letters are stated in bill as the agreement, no testimony *aliunde* is admissible; otherwise, where stated as evidence of the agreement only. *Bird v. Bletchley*, 6 Mad. 17. **AGREEMENT; EVID.**

Power of attorney to sue in plaintiff's name need not be stated in bill, but if stated proof will be directed of it before master in taking the accounts. *Edney v. Jewell*, 6 Mad. 165. **PR. EVID.; POWER OF ATTORNEY.**

The court is bound by allegation of matter of fact, but not of law. *Cuthbert v. Creasy*, 6 Mad. 189.

Demurrer allowed to a bill stating the alternative; a title at law or in equity. *Edwards v. Edwards*, 1 Jac. 335. **TITLE.**

It is good ground of demurrer that counsel's signature does not appear on the bill. *Kirkley v. Burton*, 5 Mad. 378. **PL. DEMURRER.**

It is most material in equity pleading, that all the evidence intended to be relied on at the hearing should be founded on some allegation distinctly put on record, of fact which it is calculated to support, or otherwise it will not be admitted on the hearing. *Hall v. Matthey*, 6 Price, 240.

A defendant insisting on a modus as an outner, must prove himself to have been such at the time his lands became titheable, his being so described in the bill not sufficient. *Lake v. Skinner*, 1 Jac. & W. 9. **EVID.; TITHES-OUTNER.**

Bill praying reassignment of lease, and stating a clause in assignment of power of redemption, on payment of a sum larger than legal interest, added to original sum given, and in default thereof, a foreclosure is not demurrable on ground of usury. *Metcalf v. Brown*, 5 Price, 560. **USURY.**

Heir at law out of possession cannot raise an equitable jurisdiction for court to decree possession of estate by adding to his bill for that purpose a prayer for delivery up of title deeds. *Taylor v. Glanville*, 3 Mad. 179. **POSSESSION; HEIR AT LAW.**

On hearing of cause an inquiry will not be directed to master, unless ground of it is laid in the pleadings. *Holloway v. Mullard*, 1 Mad. 414. **PR. INQUIRY BEFORE MASTER.**

It is sufficient for purpose of obtaining an injunction to restrain proceedings at law, that bill and affidavit state, that an unsettled account subsists, and that on such account plaintiff at law would be found in debt to plaintiff in equity, though bill shows it might have been set off at law. *Wattleworth v. Pitcher*,

2 Price, 46. **PR. INJUNC. TO RESTRAIN PROCS. AT LAW.**

Variance between affidavit in support of motion for injunction and bill in date of bill of exchange, on which defendant has commenced proceedings at law, is a sufficient ground for dissolving injunction, obtained. *S. C. Id.* 189. **PR. DISSOLVING INJUNCT.; PL. AFFIDAVIT.**

Plaintiff in a bill for an injunction must state at once the whole case within his knowledge, but the court, though very jealous of amendment without prejudice to the injunction, permits even re-amendment; ascertaining precisely its nature, and by clear and positive affidavit that the plaintiff had not a knowledge of the facts, enabling him to bring that case upon the record sooner. *Sharp v. Ashton*, 3 V. & B. 144. **PR. AMENDMENT.**

Demurrer that bill stated defendant's estate with uncertainty, viz. "that he is seised in fee or otherwise well entitled to," and *ore tenus* that reversioner was not party overruled. *Baring v. Nash*, 1 V. & B. 551. **PL. DEMURRER.**

Purchase of a reversionary interest by an attorney from his client, though in the event advantageous, without fraud or any misrepresentation, the proposal coming from the client, and no confidence upon that subject, both ignorant of the value; the bill charging fraud and misrepresentation, confidence and knowledge on one side, with ignorance on the other, and bringing forward the only incorrect circumstance, the receipt taken as for money paid, though the consideration was by deduction from a bill of costs, not then of that amount, dismissed without costs. *Montesquieu v. Sandys*, 18 Ves. 302. **FRAUD FID. SIT.; SOL. & CIL.**

Allegation of the bill that the plaintiff, the tenant, was to pay taxes, and do necessary repairs, not proved, is no substantial variance, being an admission against himself, and immaterial from a tenant's legal liability. *Gregory v. Mighell*, 18 Ves. 328.

No venue nor time is necessary to be stated in Chancery pleadings, per Wood. B. *Sed quere?* See Mitford, Pl. *Migton v. Harris*, Wightw. 111.

A charge in the bill that "A was of a weak and feeble understanding, approaching almost to idiocy," was an allegation sufficiently precise (no demurrer being taken) to put in issue, that A was of "insane memory." It being proved that A was incapable of managing himself or his affairs, he was held to be within the saving of the statute, 7 Geo. 2. c. 14. s. 8. But this allegation would not have been sufficiently precise, on a plea, nor on a bill, if demurred to. The heir of the mortgagor may take advantage of the saving in sect. 8. of the statute. *Curew v. Johnston*, 2 Scho. & L. 280. **LUNATIC; MORTGAGE, FORECLOSURE OF; STAT. C. OF.**

Extraordinary relief against want of form and mistakes of pleading in favour with charities. *Att. Gen. v. Jackson*, 11 Ves. 372. **CHARITY.**

Bill for purpose of raising a charge against the inheritance divided into estates tail. An intermediate remainder coming in *esse*, a bill stating the former proceedings is allegation sufficient to put the facts in issue against him, and even if witnesses examined, he shall have benefit. *Lloyd v. Johnes*, 9 Ves. 59. **TEN. IN TAIL & REM.-MAN.**

Bill by bankrupt against mortgagee of estates in England and Berbice, for an account and payment of the balance to defendants, charging collusion generally, but not averring that there will be a surplus nor charging a direct application to assignees to sue; held demurrable. *Benfield v. Solomons*, 9 Ves. 77. **PL. PARTY; BANKRUPT.**

Bill praying execution of an agreement for a lease for lives, ought to name the lives to be inserted. *Oherlihy v. Hedges*, 1 Scho. & L. 128.

Forty-six years after a decree directing (in execution of the trusts of a will) a conveyance in fee to the tenant in tail male, having also the reversion in fee with consent of the only intermediate remainder-man in tail male, a bill was filed against their devisees the plaintiffs, claiming under an old voluntary grant out of the reversion, the estates tail being spent, and no recovery, and praying a discovery and conveyance; a general demurrer was allowed, though the decree and conveyance were stated only by way of pretence, not expressly charged, the whole right, as against the defendants, being founded upon the conveyance. *Fletcher v. Tollett*, 5 Ves. 3.

Bill stating generally, that under some deeds in the custody of the defendants, plaintiff was entitled to some interest in some estates in their possession, prayed a discovery and delivery of the title deeds, possession of the estates, and an account; demurrer to the whole bill allowed. *Ryves v. Ryves*, 3 Ves. 343.

Testator by codicil in 1796, reciting that he had devised his real estate by his last will, dated 25th November 1752, charged his real estates with his debts and legacies given by the codicil, and appointed executors: the bill was by devisees of the real estate under another will of 1756, one of whom was a legatee in the codicil, stating that the will of 1756 was executed in pursuance of an agreement to make mutual wills; that the testator, by the death of the other party, was bound, if not in law, in honour, and did not mean to revoke the will of 1756, and revive that of 1752, and praying that the will of 1756 and the codicil, might be established, the trusts carried into execution, and the legacy paid: upon an issue directed the will of 1752 was established; evidence of mistake being rejected; on farther directions to plaintiffs, relied on agreement, and offered evidence in support of it; the bill was dismissed, the Ld. Ch. being of opinion that the relief sought was inconsistent with the frame of the bill, and therefore could not be given under the general prayer, that the evidence ought not to be received; and that, upon the evidence, the agreement was uncertain and unfair, and therefore not to be executed. *Ld. Walpole v. Ld. Orford*, 3 Ves. 402. SPEC. PERF.; EVIDENCE.

In a bill of discovery to support an action by a common informer, for money won at play, it is sufficient to state that the defendants, or some of them, for the benefit and on account of all, played and won. In such a bill it is not necessary to state the nature of the action brought; it is enough to say that an action was brought on the stat. 9 Anne, to recover the money, and to shew by the facts, that an action on the statute lay. *Covans v. Phillips*, 3 Anst. 843. But this is overruled, 13 Price, 376. S. C. 1 McClel. 185. GAMING; DISCOVERY.

The bill stated an award, and that no provision was made for a particular event which had taken place, and by which the plaintiff was damaged; plea, the award; the court thought the bill ought to have expressed particularly the damage sustained by the plaintiff, and allowed the plea. *Routh v. Peach*, 2 Anst. 519. PL. PLA; AWARD.

A bill to establish a farm-modus, setting out the abutments of the farm, and stating that the modus had immemorially been paid for the said farm, is good, without stating it expressly to be an ancient farm. *Ld. Stowell v. Atkins*, 2 Anst. 564. MODUS.

On a trust to sell a suggestion in the bill of improper conduct of the trustees, in not giving sufficient notice of the sale, is not a ground for an injunction to stop the intended sale. *Pechel v. Fowler*, 2 Anst. 549. INJUNC. AGAINST SALE.

The plaintiff's equity must appear in the stating part of the bill. *Flint v. Field*, 2 Anst. 643.

On bill for title of agistment of "barren and unprofitable cattle," defendant, from plaintiff's loose

mode of pleading, supposing it not to relate to sheep, made no defence as to them; court refused the account as to them. *Turner v. Williams*, 3 Anst. 829. TITHES; ACCOUNT.

On a bill to redcem, the mortgagee cannot object that the bill does not state a valid legal conveyance to him. *Roberts v. Clayton*, 3 Anst. 715. MORTGAGE, REDEMPTION OF.

Joint and separate demands by the same bill; demurrer allowed. *Quare*, whether the clause in stat. 8 G. 2. c. 13., directing that the date and name shall be engraved on each print, relates to the penalties only, or whether that is necessary to maintain the exclusive property; it so, whether it ought to appear on the bill. *Harrison v. Hogg*, 2 Ves. J. 322. PL. DEMURRER.

A, having an estate in fee of 6000*l.* a year, and being tenant for life without impeachment of waste, of another estate of 5000*l.* a year, with the reversion in fee after an estate in tail male in B, his only son by a former marriage, became indebted by mortgage, annuities and otherwise, to the amount of near 100,000*l.* A and B joined in conveying both estates to trustees upon trust, by sale or mortgage, sale of timber, or by rents and profits to pay debts, and to apply so much of the rents and profits of what should remain unsold, as should seem meet to them, as a sinking fund; and to pay the residue to A, and to settle the remaining trust estates subject to an annuity of 1000*l.* to B, for the joint lives of him and A, upon A for life, without impeachment of waste, with power to lease twenty-one years only; remainder to trustees, to preserve, &c., remainder subject to a jointure to the wife of A, and portions for children by her, to the joint appointment of A and B; in default thereof, to the appointment of B surviving; in default thereof, to B in tail male, remainder to the other sons of A in tail male, remainder to B in tail, remainder to the daughters of A in tail, with cross remainders, remainder to B in fee, with powers of leasing; and full powers of management in the trustees, and a provision for the appointment of new trustees, as vacancies should happen. The trustees raised 50,000*l.* by mortgage of the settled estate, which they applied to the debts, and they paid 2500*l.* a year to A, and 1000*l.* a year to B, from the date of the settlement. Upon the bill of A, to set aside the deed, except the trust for the debts, upon a general charge of fraud, misapprehension and misrepresentation, or to controul the management of the trust, and for an account against the trustees: the court held, first, that the deed could not be set aside partially for fraud, nor under this bill totally, for then the prior estates in the settled estate must be revested, clear of incumbrances; A, being under covenant to exonerate, and the mortgagees, who must either consent to change their securities or be paid, were not parties; secondly, that general charges of fraud required no answer, and could not support a decree, that upon the evidence there was no fraud or mistake, and that B's joining to subject the settled estate, was sufficient consideration; thirdly, that the court would not interfere with the trustees, there being no misbehaviour, and that the payment of the annuity to B was good: the bill, therefore, was dismissed with costs, and the trustees having been always ready to account, the court refused to retain it for that purpose, but without prejudice to a bill for that only. *Myddleton v. Ld. Kenyon*, 2 Ves. J. 391. FRAUD, DEEDS BY.

Creditor by judgment in Jamaica filing bill here for satisfaction from rents and profits remitted, and to be remitted, must show his judgment to differ from judgment here, so that he cannot affect the land. No equity for judgment creditor because there are prior judgments. *Cuthcart v. Lewis*, 1 Ves. J. 463. S. C. 3 Bro. C. C. 516. JUDGMENT; DEMURRER.

A bill to establish a modus for every ancient farm, stating, that the whole parish consisted of ancient farms, but not setting forth the abutment of each, is bad. *Scott v. Allgood*, 1 Anst. 16. TITHES ; MODUS.

In a bill to perpetuate testimony of a right of common and way, the plaintiffs claimed in right of their estates or otherwise : this is too loose ; a demurrer therefore allowed. *Cressett v. Mylton*, 3 Bro. C. C. 481. Vide S. C. 1 Ves. J. 449. TITLE ; AMBIGUITY.

Demurrer allowed, the bill not connecting the fraud with the transaction sufficiently. *E. I. Comp. v. Henshaw*, 1 Ves. J. 287. PL. DEMURRER.

If a lessee comes into equity to compel a specific execution of a covenant in a lease, as running with the estate of the reversioner, he must show that the defendant is personally liable at law in respect of the covenant and of his estate. *Chandos v. Brownlow*, 2 Ridg. P. C. 416. SPEC. PERP.

Bill to open a settled account must state specific errors, not generally that it is erroneous. *Johnson v. Curtis*, 3 Bro. C. C. 266. ACCOUNT SETTLED.

On bill to open a settled account, it is not sufficient to show that the account was signed, "with errors excepted." *Id. ib.*

Upon a general allegation of error in a settled account, without specifying particulars, it cannot be surcharged or falsified, although particular errors be proved in evidence. *Id. ib.*

Want of allegation shall not prevent the court from looking into the consideration. *Colman v. Sarrell*, 1 Ves. J. 51. CONSIDERATION.

Plaintiff claimed as heir at law of A, stating that one person, through whom she made title, had three sons, and that she claimed under the second son, but without alleging that the first son died without issue ; demurrer, "for that the plaintiff had not by her bill sufficiently stated the pedigree by which she made title," was overruled. *Delorne v. Hollingsworth*, 1 Cox, 421. PL. DEMURRER.

Plaintiff's bill only referred to wills, &c. whereon he founded his title ; reference to master to state cause whereon to found decree. *Pauncefort v. El. Lincoln*, Dick. 362.

Profert not necessary in pleading a gift under the statute of uses ; so where the plaintiff not entitled to the deed. *Whitfield v. Fausset*, 1 Ves. 394.

Application to stay disposal of personal property, must show specific right in property, and danger of being lost. *Ximenes v. Franco*, Dick. 149.

Abatement after answer to bill of discovery, suit cannot be revived. *Gould v. Barnes*, ed. 133.

Where a decree for the establishment of a charity should be made, an information will not be dismissed, because it prays wrong relief ; but the court of chancery will not act in many cases, and has no jurisdiction in many others, as foundations under a charter, &c. *Att. Gen. v. Smart*, 1 Ves. 72. CHARITY.

It is sufficient to put in issue a general charge of lewdness, and under this you may give particular evidence, but then it must be pointed and applied to the general charge. *Clarke v. Periam*, 2 Atk. 333. 337. S. C. 9 Mod. 340. PR. EVID.

That a wife has misbehaved herself, does not imply she is an adulteress, and a deposition in that case to prove her own right not to be read. S. C. *Id.*

Saying that a wife did not behave with that duty as became a virtuous woman, will not entitle the husband to enter into proof of her committing adultery, unless there is an express charge of this kind, for that the virtue of a woman does not consist merely in her chastity. S. C. *Id.*

Lessee of tithes filing bill for satisfaction of them, need not set forth his lessor's title. *Crathorne v.*

*Taylor*, 2 Bro. P. C. 512. TITHES ; LESSOR AND LESSEE.

Bill for tithe of corn and grain, demurrer because the single value was not barely demanded, but the bill was for a discovery only, to enable plaintiff to recover the treble value, *non allocatur*, for that tithes were suable in the exchequer before the statute. *Sed quere*, because it is contrary to the practice to have such a bill, without alleging that plaintiff is content to receive the single value only. *Drier v. Man*, Hard. 190. WAIVER OF PENALTIES ; TITHES.

A bill for tithes used formerly to waive the penalties, but not of late, because the single value is only prayed. *Att. Gen. v. Vincent*, Bunb. 393. *Id.*

In a bill for tithes, complainant did not show how he was entitled to them, yet held good. *Stone v. Ludlow*, Hard. 321. TITHES ; TITLE.

A vicar need not set forth how he is entitled to tithe herbage, and small tithes. *Ayde v. Flower*, Bunb. 7. *Id.*

Where defendant admits that a vicar is entitled to all sorts of tithes, but insists on a special exemption, the vicar shall not be obliged to show any special title, either by endowment or presumption. *Pye v. Her*, Bunb. 72. *Id.*

In a bill for tithes by a lay impropriator, the title must be shown. *Penny v. Hoper*, id. 115. *Id.*

The court would not determine whether there was any difference between lay and spiritual impropriator, in setting out his title to tithes. *Burwell v. Coates*, id. 129. *Id.*

Bill to be relieved against a bond, to pay 400l. to a woman whom the plaintiff kept as a mistress ; relief denied : but otherwise, if it had been alleged that the obligee was a common strumpet. But then it must be so charged in the bill, and put in issue ; for otherwise, if it is so proved the depositions cannot be read. *Whaley v. Norton*, 1 Vern. 483. CONSIDERATION EX TURPI CAUSA.

When a bill is in the disjunctive, the defendant by his plea may take it either way. *Cresset v. Kettleby*, 1 Vern. 219. PL. PLEA.

He that comes to redeem a mortgage must shew a title to the equity of redemption. *Lomax v. Bird*, id. 182. MORTGAGE, REDEMPTION OF.

#### (b) Offer to pay just Demand.

It is not now necessary that a bill for an account should contain an offer by the plaintiff to pay the balance, if found against him. *Colombian Govt. v. Rothschild*, 1 Sim. 103.

Bill to stay proceedings at law, and discover usury, charging an agreement to take, but not the taking usurious interest, and not offering to pay the amount which he by bill admitted to be legally due, is demurrable. *Whitmore v. Frances*, 8 Pri. 616. USURY.

The defendant sued at law on an indemnity bond ; the plaintiff filed this bill for an injunction, without offering to make any recompence for the damage actually sustained ; the bill was dismissed. *Godbolt v. Watts*, 2 Anst. 543. INDEMNITY.

Demurrer to a cross bill to have an usurious security delivered up not offering to pay the sum really due, allowed. *Mason v. Gardiner*, 4 Bro. C. C. 436. USURY ; PL. DEMURRER.

Injunction granted restraining sale of estate till answer to bill, alleging parol agreement to exchange, partly performed by plaintiff having purchased estate for that purpose. *Curtis v. Macq. Buckingham*, 3 V. & B. 168. INJUNCT. ; PART PERP.

Suit and costs of plaintiff revived by sci. fa., she having married since decree. *Sayer v. Sayer*, Dick. 42.

Suit revived for taxed costs only. *Edgill v. Brown*, Dick. 62.

(c) *Waiver of Penalties and Forfeiture.*

In a bill for the single value of tithes, it is not necessary expressly to waive the treble value. *Wools v. Walley*, 1 Anst. 100. *TITHE.*

If the executor of a person brings a bill for tithes, he need not offer to accept the single value, he not being entitled by the stat. of Edw. 6. to the treble value. *Anon.* 1 Vern. 60. *EXOR.*

(d) *Multifariousness.*

A, the inventor of a medicine, employed B, a foreigner residing abroad, to manufacture it for him there, and sold it in England for his own sole profit. A label and seal denoting that the medicine was manufactured by B, and sold by A, were affixed to each of the bottles in which it was sold. The defendants imitated the labels and seals. Demurrer allowed to a bill by A and B to restrain the imitation, and for an account of the sales of the spurious labels and seals; A having no interest. *Delondre v. Shaw*, 2 Sim. 237. *INJON.; INFRINGEMENT OF COPYRIGHT, &c.*

At the hearing, the objection that the bill is multifarious, comes too late to prevent the court from making a decree. *Wynne v. Callander*, 1 Russ. 293.

Freehold tenants of a lordship having rights of common for their cattle, *levant and couchant*, and common of turbary and estovers, the lord approved parts of the common, and granted them to other persons; the tenants prostrated the fences, upon which actions of trespass were brought against them, and they filed a bill in the nature of a bill of peace, against the lord and his grantees to be quieted in the enjoyment of their commonable rights. A general demurrer was overruled, the court considering it no objection to the bill that each defendant had a right to make a separate defence, provided that right was a general one, and that the court could not before answer, judge of the nature of the right. *Powell v. El. Powis*, 1 Y. & J. 169.

Demurrer allowed to bill, which includes defence to two separate actions, on two separate libels, in the same commission or commissions. *Shuckell v. Macauley*, 2 S. & S. 79.

It is not uncertain or multifarious in bill for account of tithes, bill having stated as the foundation for plaintiff's claim, a decree made pursuant to act of parliament, also to charge two other distinct sources from which he derives his right, and on which he rests his title, the basis of those two latter being, first an agreement anterior to decree charged to have been confirmed by act of parliament, passed ten years before former act, and secondly, custom, founded on immemorial usage, there being nothing uncertain or null. *Owen v. Nodin*, 13 Price, 478. S. C. 1 M'Clel. 238. *TITHE.*

Two persons averring that the title is in one or the other of them, and each contending that it is in himself, cannot join in a suit as co-plaintiffs, *semble*. *Cholmondeley v. Clinton*, 1 Turn. & R. 116.

Several persons having distinct demands, and not being able to sue on behalf of themselves and others, cannot be co-plaintiffs. *Jones v. Garcia Del Rio*, *Id.* 297.

Two distinct matters cannot be joined in the same suit, where one requires that depositions should not be published till hearing of cause, and other requires immediate publication of same depositions. *Dew v. Clark*, 1 S. & S. 108.

Bill by several, though only one party interested in part of bill, yet whole being properly one suit, it is not multifarious to join them. *Knye v. Moore*, 1 S. & S. 61.

Bill by vendor for specific performance, and praying against third persons claiming an interest in the

estate, that they may join in the conveyance to the purchaser, multifarious. *Mole v. Smith*, 1 Jac. 494.

Where under one will the residuary legatees are also appointees under power, of share of another testator's estate. Bill filed by them on account of both estates, is not multifarious. *Turner v. Robinson*, 1 S. & S. 313.

A bill for an account of a testator's estate, and also to set aside sales made by the executor and trustee to himself and to another person, held multifarious. *Salvidge v. Hyde*, 1 Jac. 161.; overruling, S. C. 5 Mad. 138.

In order to determine whether bill is multifarious, the enquiry is not whether such defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. S. C. *Id.* 146.

It is multifariousness for a rector and vicar to join in a suit for tithes respectively due to them. *Exeter Coll. v. Rowland*, 6 Mad. 94.

Multifariousness cannot be objected to at the hearing; it should be done by demurrer. *Ward v. Cooke*, 5 Mad. 122. *PR. HEARING.*

Whether a devisee and heir at law can join in a bill claiming an equity of redemption, upon the allegation, that questions having arisen as to which of them was entitled to it, they had agreed to divide it between them. *Qu. Cholmondeley v. Clinton*, 2 Jac. & W. 135. *EQUITY OF REDEMPTION.*

Multifarious to join in one bill three distinct lessees under ecclesiastical leases, for the special purpose of setting them aside. *Att. Gen. v. Moses*, 2 Mad. 294.

Bill filed to restrain plaintiff at law from proceeding on five different policies of insurance, effected on different ships, between the same parties at the same time, is not multifarious. *Kensington v. White*, 3 Price, 164.

Demurrer by defendant for multifariousness, the bill being against several distinct purchasers and others, allowed. *Brooks v. Id. Whitworth*, 1 Mad. 86. *PURCHASERS.*

Plea of simony for tithes, ordered to stand for an answer, with liberty to except, as being multifarious. *Wood v. Strickland*, 2 V. & B. 150. *SIMONY; PR. PLEA, ORDERED TO STAND FOR ANSWER.*

Bill by a bankrupt and the assignee under an insolvent act, of which he afterwards took the benefit, against the representative of the deceased assignees and others, for an account of his estate, and various transactions before and since the bankruptcy; no assignee in the bankruptcy being a party; and collusion with persons accountable to the estate, charged against only some of the representatives of the assignees. Demurrer allowed generally for want of equity, and as relief might be had by petition in bankruptcy, and *ore tenus*, the suit being multifarious, as uniting parties, though in some respect connected, having distinct interests. *Laxton v. Davis*, 18 Ves. 72. S. C. 1 Rose, 79. *DEMURRER; PL. PARTIES.*

An allegation merely surplusage, does not support an objection to a plea, as multifarious. *Claridge v. Hoare*, 14 Ves. 59. *PL. PLEA.*

Information against a corporation, stating that they were seised of real estates, partly for purposes of public utility, and other part in trust for private charity; and charging a general misapplication of the funds, and praying relief accordingly: a demurrer for multifariousness was allowed. *Att. Gen. v. Corp. of Carmarthen*, Coop. 30. *PL. INFORMATION.*

Bill for a partition against D; D by his answer sets up a partition made several years ago, as evidence whereof (amongst other things,) he states that plaintiff acted upon a moiety of the premises, as his several estates, and particularly, that he made a lease of part thereof to C; plaintiff amends his bill, making C

a party, charging that the lease to him was made under circumstances of fraud and imposition, and praying as against C, that the lease may be set aside, still praying a partition only as against D ; demurrer by D to the whole bill, for that it is exhibited against several persons, for several and distinct matters allowed, plaintiff ought first to have filed his bill against C only, to impeach the lease. *Whaley v. Dawson*, 2 Scho. & L. 367. *PL. BILL OF PARTITION.*

The proprietor of a copyright must file separate bills against each bookseller, taking copies of a spurious edition for sale. *Dilly v. Doig*, 2 Ves. J. 486. *COPYRIGHT.*

There must be separate bills upon distinct invasions of a patent, otherwise a right of fishery, or the custom of a mill. *Id.* 487.

The plaintiff was tenant to the father of the defendants of a colliery, under a lease and subsequent agreements ; on the father's death, he continued to hold under the defendant, the heir, on the same terms, he filed this bill against the two defendants as executors of their father, and against the one as heir, for an account under the agreement, both in the lifetime of the father, and since his death, the defendants demurred separately, as being improperly joined in the suit, and they were allowed. *Ward v. Dk. Northumberland*, 2 Anst. 469.

Bill by creditors against executor and heir, and several distinct purchasers of distinct parts of testator's real estate, for account and performance of agreements : Held not multifarious. *Reyner v. Julien*, 5 Mad. 144. n. (b). *PL. PARTY.*

Plea of conveyance fine and non-claim, not multifarious, but a good plea to a bill impeaching the conveyance, as not being for valuable consideration. *Doble v. Cridland*, 2 Bro. C. C. 274. *PL. PLEA.*

Bill does not lie against several tenants of a manor for quit-rents, the plaintiff's remedy being at law, and the suit also multifarious as to the different tenants. *Bourrier v. Prentice*, 1 Bro. C. C. 200. *QUIT RENTS ; LANDL. & TENANT.*

An executor being desirous to apply the assets as far as they would go, in satisfying the debts, brings a bill against all the creditors, that they might if they pleased contest each other's debts, and that their preference might be settled. Adjudged on demurrer, to be a proper bill. *Bucels v. Atleo*, 2 Vern. 37. *EXOR.*

#### (e) *What amounts to Scandal or Impertinence.*

In bill for removal of trustee, it is not scandalous or impertinence to challenge every act of trustee as misconduct. *Portsmouth v. Fellows*, 5 Mad. 450. *PL. IMPERTINENCE ; TRUSTEE.*

Nor to impute to him any corrupt or improper motive in execution of trust. *Id. ib.*

Nor to allege that his conduct is the vindictive consequence of some act on the part of the cestuique trust, or of some change in his situation. *Id. ib.*

But it is impertinent, and may be scandalous, to state any circumstances as evidence of general malice or personal hostility. *Id. ib.*

Improper to charge in a bill that a woman had criminal conversation with particular persons, as it would affect the character of strangers, and fill it with private scandal. *Clarke v. Perian*, 2 Atk. 339. S. C. 9 Mod. 340. *PL. BILL.*

#### (f) *Charging part.*

Evidence not admitted of facts not alleged in the pleadings. *Gordon v. Gordon*, 3 Swan. 472. *PR. EVIDENCE.*

A general charge is a sufficient foundation for evidence of any particular facts ; and it is not necessary to charge circumstances minutely. If, however other side should be taken by surprise, the

court would assist by some further enquiry. *Chicot v. Lequesne*, 2 Ves. 318.

What charge of misbehaviour is sufficient to introduce evidence of particular acts. *Wheeler v. Trotter*, 3 Swan. 174. *PR. EVIDENCE.*

#### (g) *Interrogatories in.*

An interrogatory put in the alternative, not pointing to one side of the question more than to the other, held not to be leading, as it would be sometimes impossible otherwise to get an answer to the interrogatory. *Alywar v. Kearney*, 2 Ball & B. 463.

Under the general charge, as to the fact of payment, the plaintiff may interrogate as to all the circumstances that go to prove or disprove the truth of the fact, as when, where, &c., without particular charge. *Faulder v. Stuart*, 11 Ves. 296.

Though under the allegation of the fact by a bill the plaintiff may interrogate to incidental circumstances, he cannot as to a distinct subject. *Bullock v. Richardson*, 11 Ves. 373.

The interrogatory part of bill is to be construed by the alleging part, and not to be considered more extensive. *Muckleston v. Brown*, 6 Ves. 62.

Interrogatory part of a bill must be supported by a substantive charge. *Att. Gen. v. Hornwood*, 1 Ves. 535.

#### (h) *The Prayer.*

Though that part of bill preliminary to prayer for subpoena asks for injunction, yet, if the prayer of process omits it, it is a sufficient ground for refusing injunction. *Anon.* Urged by Mr. Knight, K. G. 6th November, 1829, and acquiesced by V. C. MSS. *INJUNCTION.*

Not necessary to pray process against person charged to be out of jurisdiction of court. *Huddock v. Thomson*, 2 S. & S. 219. *JURISDICTION.*

*Ne exeat regno* will be granted, though not prayed by bill. *Moore v. Hudson*, 6 Mad. 218. *NE EXEAT REGNO.*

An injunction will not be granted to restrain the breach of a covenant in articles of partnership which has not been infringed for any length of time, where the bill does not pray a dissolution of the partnership. Whether the court will in any case grant such an injunction, unless there is ground for, and the bill prays a dissolution of the partnership, *quare?* *Marshall v. Colman*, 2 Jac. & W. 266. See in negative, *Harrison v. Armitage*, 4 Mad. 143. and in affirmative, *Fowman v. Homfray*, 2 V. & B. 329. and *Loscombe v. Russell*, Sittings after T. T. 1830. V. C. *PARTNERSHIP ; INJUNCTION.*

Relief may be had under the general prayer without praying particular relief. *Wilkinson v. Bent*, 4 Mad. 408. *PL. RELIEF.*

Executors charged with interest on balances, though not prayed by the bill. *Turner v. Turner*, 1 Jac. & W. 39. *INTEREST ; EXECUTORS.*

What relief may be granted under the general prayer. *Jones v. Parishes of Montgomery, &c.* 3 Swan. 208.

Prayer for a writ of *ne exeat regno* in the bill not essential, nor affidavit of the debt established by the master's report absolutely confirmed. *Collins v. —* 18 Ves. 353. *PR. WRIT NE EXEAT REGNO.*

Prayer material in construing charges not direct. *Taxton v. Davis*, id. 80.

The proper relief given on an information for a charity without a specific prayer. *Att. Gen. v. Brooke*, id. 319. *PL. INFORMATION ; CHARITY.*

Relief under the general prayer, if consistent with the case made by the bill. *Hiern v. Mill*, 13 Ves. 114.

The plaintiff praying relief to which he is not en-

titled, viz. a sale under a trust, instead of a redemption or foreclosure as a mortgagee, cannot have the different relief under the general prayer; but the proper relief may be obtained by amendment, and for that purpose, another party being necessary, liberty was given to amend by adding parties, which includes the introduction in the statement of facts consequential upon that addition, and praying such relief as he may be advised. *Palk v. Clinton*, 12 Ves. 48. *S. P. Jones v. Jones*, 3 Atk. 110. **PL. AMENDMENT.**

Court will act for benefit of infant, without regard to prayer of petition. *De Manneville v. De Manneville*, 10 Ves. 59. **INFANT.**

Relief not specifically prayed, may be within the prayer for general relief. *Beaumont v. Boulton*, 5 Ves. 495.

Interest refused because not prayed by bill. *Weymouth v. Royer*, 1 Ves. J. 417.

Where there is a prayer for general relief, equity will adapt its relief to the circumstances of the case. *Boyle v. Lysaght*, 1 Ridgw. P. C. 411.

Party is not party to bill unless named in prayer of process. *Windsor v. Windsor*, Dick, 707.

Plaintiffs file a bill to compel the execution of a settlement which was prepared but never executed, by reason of the death of one of the parties; on the hearing it appeared, that the settlement so preferred differed materially from the articles on which it was founded, to the prejudice of the plaintiffs. The court will direct a settlement according to the articles, notwithstanding the plaintiff do not pray relief so beneficial to themselves. *Durant v. Durant*, 1 Cox, 58. **SPEC. PERFE.**

A bill prays that a defendant may either admit assets, or that an account may be taken of the testator's personal estate, &c. but does not require the defendant to set forth such account; it was determined according to the present practice, he was not bound so to do, but a submission to account is sufficient. *Misner v. Burfoot*, 1 Cox, 58. **PL. ANSWER.**

The rule that an information for a charity is not to be dismissed, if the party has failed to pray the proper relief, holds only in those cases which the court thinks proper for its interference at all, and the information here being improper, was dismissed with costs. *Att. Gen. v. Middleton*, 2 Ves. 327. **PL. CHARITY; INFORMATION.**

Proper injunction cannot be granted unless expressly prayed by the bill. *Savory v. Dyer*, Amb. 70. **INJUNC.**

Where the bill was for discovery, and to perpetuate testimony, and plaintiff amended by striking out the discovery and relief, but the bill, in praying process, prayed that defendant might abide such order, and decree, as the court should think proper; it was held a bill for relief, and a demurrer was allowed. *Rose v. Cannel*, 3 Atk. 439. **PL. DEMURRER.**

A person may bring a bill with two different aspects, that if one fail, the other may as effectually answer the purpose for which the bill was brought. *Bennet v. Vade*, 2 Atk. 325.

Injunction must be prayed to stay present waste. *Anon. Loft*, 151. **INJUNC. AGST. WASTE.**

The general prayer for relief will not extend to an injunction which will not be granted, unless expressly prayed for. *Davile v. Peacock*, Barn. 27. *Savory v. Dyer*, Amb. 70. and see *Jesus College v. Bloome*, 3 Atk. 262. **INJUNC.**

Particular relief may, at the bar, be prayed, though by the bill general relief only has been prayed. *Grimes v. French*, 2 Atk. 141.

Infant may have decree according to his case, though not prayed by bill. *Stapleton v. Stapleton*, 1 Atk. 6. **INFANT.**

The court will give proper direction as to a charity

without any regard to an impropriety in the prayer of an information. *Att. Gen. v. Jeunes*, 1 Atk. 355. **CHARITY.**

Prayer for general relief on bill seems sufficient. *Cook v. Martyn*, 2 Atk. 3.

### (i) Affidavit annexed.

Where bill is for delivery of title deeds, and no affidavit is attached to same, relative thereto, defendant must demur. *Hook v. Dorman*, 1 S. & S. 227. **PL. DEMURRER; TITLE DEEDS.**

Variance between affidavit in support of injunction and the bill, in the date of a bill of exchange, on which defendant has commenced proceedings at law, is a sufficient ground for dissolving injunction, obtained. *Wattleworth v. Pitcher*, 2 Price, 189. **PL. VARIANCE; PR. INJUNC.; DISSOLVING.**

No relief in equity on lost instrument, where no affidavit of the loss, and no offer of indemnity. *Walmsley v. Child*, 1 Ves. 341. **DEEDS LOST.**

Where a bill is merely for a discovery of a deed, or for producing it at law, no affidavit is necessary; otherwise, where the plaintiff wants to change the jurisdiction from a court of law to a court of equity. *Dormer v. Fortescue*, 3 Atk. 132.

In a bill purely for the discovery of a deed, or to have the deed delivered up, no need of annexing an affidavit that the deed is lost; secus, if relief be prayed generally as to recover the money on a bond. *Whitchurch v. Golding*, 2 P. W. 541. **MOS. 192.**

When a bill is exhibited for a general discovery of deed; not necessary for the plaintiff to annex the usual affidavit that he has them not in his custody. *Anon. Prec. Chan.* 536.

### 3. Supplemental.

Where a plaintiff, by the present practice of the court, may obtain that relief by petition for which a supplemental bill was formerly necessary, and prefers the latter course, the supplemental bill is not demurrable, but the proceeding will be taken into consideration on the question of costs. *Davies v. Williams*, 1 Sim. 5. **PL. DEMURRER; PR. COSTS.**

Bill stating matter by way of supplement not being in fact such a bill, will not be ordered off the file. Party should demur. *Bowyer v. Bright*, 13 Price, 316.

Where, under order made in a creditor's suit, supplemental bill is filed by a creditor not a party to the original suit on behalf of himself and other creditors to have the benefit of the decree in that suit, the propriety of order which authorized creditor to file supplemental bill cannot be questioned at hearing of supplemental cause. *Houlditch v. Mary. Donegal*, 1 S. & S. 491. **PR. ORDER; PR. CREDITOR'S SUIT.**

Where, under order in creditor's suit, leave is given to file supplemental bill by creditor, not party to original suit on behalf of himself and other creditors, to have benefit of decrees in that suit, plaintiff is entitled to same decree to have benefit of former proceedings, as representatives of the original plaintiff would have been entitled on bill of revivor. *Id.* **PL. BILL OF REVIVOR; PR. DECREE.**

Where new parties are brought before the court by supplemental bill, the original defendants need not be parties to the supplemental bill, unless they have an interest in the supplemental matter. *Bignall v. Atkins*, 6 Mad. 369. **PL. PARTIES.**

Assignee of interest in suit cannot be made party without supplemental bill. *Foster v. Deacon*, id. 59. **PL. PARTY; ASSIGNMENT, PENDENTE LITE.**

Assignees who are brought before court by supplemental bill may be liable to costs of whole suit.

*Whitcomb v. Minchin*, 5 Mad. 91. ASSESS.; PR. COSTS.

Where husband and wife are defendants, and by the death of the husband a new interest arises to the wife, the suit becomes defective; a supplemental bill is necessary, and she is not bound by the answer put in during the coverture. *Mole v. Smith*, 1 Jac. & W. 665. HUSB. & WIFE; PR. ABATEMENT & REVIVOR.

Where supplemental bill is not supplemental suit, but only introduces supplementary matter, the whole record is one cause, and a general replication applies to whole record, and not merely to the original bill. *Catton v. Carlisle*, 5 Mad. 427. PR. REPLICATION.

Supplemental bill after hearing of original bill stating additional facts which arose and were known to plaintiff before he filed his original bill, and praying that other matters might be taken into the account ordered to be taken before master, is demurrable: he should have applied to court for leave to amend, or to file supplemental bill before cause had been suffered to proceed so far. *Swan v. Swan*, 8 Price, 518.

Upon bill to perpetuate testimony, examination of witnesses being complete, and communication closed. Supplemental bill, on ground of new evidence discovered since filing of original bill, must state the particular facts. *Knight v. Knight*, 4 Mad. 1.

On abatement by bankruptcy of defendant, an executor, after decree to account, supplemental bill, in nature of revivor, is necessary. *Russell v. Sharp*, 1 V. & B. 500. EXOR.; PR. DECREE TO ACCOUNT; PR. ABATEMENT & REVIVOR.

Heir at law filing a bill to redeem a mortgage, having also brought in the claim of a third person to the heirship; if he himself is found upon an issue not heir, he cannot, by supplemental bill, have the benefit of the original suit, as the purchaser of the heirship in such third person. On demurrer to supplemental bill. *Tonkin v. Lethbridge*, Coop. 43. HEIR AT LAW.

Demurrer allowed to a supplemental bill, as stating circumstances, subsequent not only to the original bill, but to publication; first, as not properly supplemental matter; secondly, as not material. If material, the benefit might be obtained in another shape: perhaps by a special application for the opportunity of examining witnesses, or a bill of discovery, as the object may be discovery only, or only relief: and in that case that the answer or evidence may be read at the hearing. *Milner v. Ld. Harewood*, 17 Ves. 144.

Bill revived upon marriage; new rights being acquired, a supplemental bill is necessary, therefore plea allowed; but plea being defective in form as not concluding either in bar or abatement, nor stating the necessary parties, leave was given to amend. *Merrett v. Mellish*, 13 Ves. 435.

Tenant in tail claiming upon death of former tenant in tail without issue, not through or under him, but by a new limitation in remainder, is entitled to continue suit of former tenant in tail, and to benefit of proceedings by supplemental bill. *Lloyd v. Jones*, 9 Ves. 37. TEN. IN TAIL; PL. ABATEMENT & REVIVOR.

It is not necessary to file a supplemental bill in order to state that an *adversus* has been executed, and possession changed pending the cause. *O'Connor v. Spaight*, 1 Scho. & L. 306.

Supplemental bill stating facts posterior to original bill, but which were immaterial or might be considered by master under decree to be made in original suit, held demurrable. *Adams v. Dowding*, 2 Mad. 53.

Supplemental bill of discovery held, on demurrer, to be good, it enquiring as to material facts which occurred since filing original bill. *Ushorne v. Baker*, 79. SUPPLEMENTAL BILL.

Where a fact is put in issue by the original cause, and evidence examined to it, no evidence can be adduced upon that fact upon a supplemental bill, neither will equity assist a party to make out a different case upon a second trial at law upon that which he made upon the first. *Cockburn v. Hussey*, 2 Ridg. P. C. 504. PR. EVIDENCE.

New plaintiff by supplemental bill may impeach a decree upon rehearing, on petition of former parties. *Hill v. Chapman*, 1 Ves. J. 405.

Money, the sum being small, ordered to be paid to assignees of a bankrupt on the bankrupt's petition without a supplemental bill. *Secole v. Healey*, 2 Bro. C. C. 322. PR. ABATEMENT & REVIVOR.

Bill of supplement is distinct record from original bill. *Vire v. Glynn*, Dick. 441.

After a cause is set down, the plaintiff can amend by making parties only, but cannot introduce new charges or put a material fact in issue which was not in issue in the cause before; the course is to file a supplemental bill. *Goodwin v. Goodwin*, 3 Atk. 370.

No supplemental bill grounded upon new matter discovered since decree, can be exhibited without special leave of court, and unless party exhibiting same, first deposit with registrar so much money as together with deposit by rules of court to be made in obtaining rehearing, will make up the sum of 50l. to answer costs and damages (if any) to the adverse party. *Astel v. Montgomery*, 2 Atk. 138.

New assignees under a commission of bankruptcy on filing a supplemental bill, shall have the benefit of the proceedings in the suit commenced by the old assignees. *Anon.* 1 Atk. 571. BANKCY. ASSESS.

A purchaser of an estate in controversy in the court of chancery, on filing supplemental bill comes *pro bono et malo*, and is liable to all costs from beginning to the end of a suit. S. C. id. ALIENATIONS, PENDENTE LITTE.

It is a constant rule that matters subsequent to the original bill must come by way of supplemental bill and revivor. *Brown v. Higden*, 1 Atk. 291. PL. BILL OF REVIVOR.

Pending appeal, plaintiff files supplemental bill to carry decree, &c. held regular. *Woodward v. Woodward*, Dick. 33.

#### 4. Supplemental Bill in nature of Review and Revivor.

Leave to file a supplemental bill in the nature of a bill of review, to introduce new evidence, refused, where the proper means of searching for it had not been used previously to the decree. *Bingham v. Dawson*, 1 Jac. 243.

To entitle party to file a supplemental bill in nature of review, it is necessary that the new matter should be discovered after time when it could have been introduced into the cause; and the matter should be not only new but material, and such as if unanswered in point of fact would clearly entitle plaintiff to decree, or would raise question of so much nicety and difficulty, as to be a fit subject of judgment in a cause. *Ord v. Noel*, 6 Mad. 127.

A suit having been instituted by a deviser and revived by a party as devisee, whose supposed right is displaced by the discovery of a later will, the cause cannot be continued for the benefit of the effective devisee, by agreement between that devisee and the plaintiff in the suit, so as to enable the devisee under the second will, (not being a party to the suit), to appeal against the decree; and an appeal cause cannot be heard before the court of appeal until he is made a party in the suit below. In such a case, where the suit had been originally instituted by the deviser, and upon his death revived by the party claiming under the first will, semb. that the proper



course to be adopted by the devisee under the second, is not (as in this case) to file a supplemental bill, praying to have the benefit of the proceedings in the revived suit, but to revive, *de novo*, the suit as abated on the death of the devisor. *Rulands v. Latouche*, 2 Bligh, 566. PR. APPEAL; DEVISEE; PR. DECREE.

The case is different where a decree is defective only because incidental parties are not before the court; as in the case of an assignment in trust for payment of debts, reserving the surplus if the assignee obtains a decree, and afterwards it appears that he had assigned his interest before the decree, his assignees may, by supplemental bill, have the benefit of that decree. *Binks v. Binks*, id. 593. *Id.*

Application by defendant for liberty to file a supplemental bill, in aid of a rehearing, to put in issue evidence discovered during and since the hearing, refused, the evidence discovered being a deed, and proceedings in suits to which the defendant was a party and must have been apprised of their nature, and by negligence lost the benefit of them as a defence, and the object of the supplemental bill being to abandon the original defence, and rely on a new one. *Blake v. Foster*, 2 Ball & B. 457. LACHES; REHEARING.

Upon supplemental bill in nature of a bill of review, the question always is, not what the plaintiff knew, but what, using all due diligence, he might have known. *Id.* 461.

After a great lapse of time and the deaths of parties, from the residence abroad of the defendant, and upon an affidavit by him and his solicitor, that they had not discovered deeds material for his defence, until after issue joined; leave was given to file a supplemental bill to put them in issue, and they were admitted in evidence upon a rehearing. *Barrington v. O'Brien*, 2 Ball & B. 140. LENGTH OF TIME; EVIDENCE; REHEARING.

In giving leave to file supplemental bills, on the grounds of evidence newly discovered, diligence to discover them forms an ingredient in the mind of the court. *Id.* 142. EVIDENCE.

Distinction between a bill of review, and a supplemental bill in nature of it. If the decree is enrolled, it is strictly a bill of review; and prays, that the decree may be reviewed and reversed; if not enrolled, the prayer is, that the cause may be reheard. In either, matter of supplement or revivor may be introduced, with the proper prayer. *Perry v. Phelps*, 17 Ves. 177. PL. BILL OF REVIEW.

Devisee can only revive decree by supplemental bill in nature of revivor. *Whitehear v. Hughes*, Dick. 283.

It is not necessary to make the defendants to an original bill, parties to a supplemental bill in nature of a bill of revivor. *Jones v. Jones*, 3 Atk. 217. PL. PARTIES.

Supplemental bill in nature of review is proper where decree is not enrolled. *Lewellen v. Mackworth*, 2 Atk. 40. S. C. Barn. 445.

When supplemental bill is brought for new matter discovered since hearing of cause, but before decree is enrolled, if defendant is able to show that there is no new matter discovered, he must take advantage of it by plea, &c. and cannot insist on it merely at the hearing. *Id. ib.* PR. HEARING.

##### 5. Bill of Review—Where it lies—Steps necessary for bringing, and by and against whom.

Decisions on bills of review upon facts newly discovered have been on new evidence, which, if produced in time, would have supported the original cause; but not applicable where the original cause does not admit the introduction of the evidence as not being put

originally in issue. *Blake v. Foster*, 2 Ball & B. 462.

An erroneous result in point of law drawn by the court from facts apparent on the record, is the proper subject of a bill of review for error apparent on the decree. A fact misunderstood by the court and not introduced into the decree may be ground for an appeal, but not for a bill of review. *O'Brien v. Connor*, 2 Ball & B. 154. APPEAL.

To a bill of review and reversal for error apparent on the decree, a plea of the decree and a demurrer against opening the inrollment allowed. The facts constituting the error not forming part of the record of the decree, being neither proved or relied on at the original hearing. *Id.* 146. PLEA OF DECREE.

Bill of review may be also a bill of revivor and supplement. *Perry v. Phelps*, 17 Ves. 173.

Error apparent, to support a bill of review, must be plain and obvious; as a decree against an infant without a day to shew cause: not merely an erroneous judgment; which might be the subject of a re-hearing. *Id. ib.*

For a bill of review on newly discovered facts, the leave of the court necessary. *Id.* 177.

Distinction between a bill of review, and a supplemental bill in nature of it. If the decree is enrolled, it is strictly a bill of review; and prays, that the decree may be reviewed and reversed: if not enrolled, the prayer is, that the cause may be reheard. In either, matter of supplement or revivor may be introduced, with the proper prayer. *Id. ib.* PL. SUPPLEMENTAL BILL IN NATURE OF BILL OF REVIEW.

Petition for leave to file bill of review, after a decree, affirmed on rehearing, and pending an appeal to the house of lords for the purpose of introducing evidence, in answer to evidence admitted by surprise; viz. not in answer to an interrogatory, nor the subject directly in issue, the decree not being made upon that evidence, was refused with costs. *Willan v. Willan*, 16 Ves. 72.

Bill of review, or a supplemental bill in nature of review, where the decree has not been enrolled upon new evidence discovered since publication, not permitted to introduce a new case of which the party was sufficiently apprised, to enable him with reasonable diligence to have put it upon the record originally. *Young v. Knight*, 16 Ves. 348.

Grounds of bill of review; error apparent; or new evidence discovered since publication as to a material fact. *Id.* 350.

Petition for rehearing or for bill of review, is bad for uncertainty. *Hyde v. Donne*, 2 Anst. 551. PR. REHEARING; PETITION FOR.

Though a bill of review cannot in general be brought to reverse a decree after twenty years, that bar does not apply to persons having contingent interest, and then not existing, or under disabilities. *Lytton v. Lytton*, 4 Bro. C. C. 441. LENGTH OF TIME; INTERESTS CONTINGENT.

It is in the discretion of the court to give leave to file a bill of review on the discovery of new evidence. It was refused in this case, as it tended to deprive creditors of payment of their just debts. *Wilson v. Webb*, 2 Cox, 3. JURISDICTION.

Mere injustice is no ground for bill of review. There must be injustice apparent on record to a party to suit, for neither assignee nor devisee can have relief by such bill. Though plaintiff is confined to errors on record, defendant is at liberty to allege every matter relevant to his defence, whether in or out of record, by way of release, &c. to prevent disturbing decree. And when pleaded the court is to judge whether the matter alleged, is sufficient to preclude the plaintiff from the review he seeks. *Hartwell v. Townsend*, 2 Bro. P. C. 107. S. P. *Slingsby v. Hale*, 1 Ch. Cas. 122.

Parties to decree, must all be parties to bill of review. *Id. ib.* **PR. PARTIES.**

Bill of review for error apparent will not lie after twenty years from the making of the decree. The time runs from the decree, not from the enrolment. *Smith v. Clay*, Amb. 645. **LENGTH OF TIME.**

Demurrer of length of time, to bill of review after twenty-seven years allowed. *Sherrington v. Smith*, 2 Bro. P. C. 62. *Id.*

As to length of time in general, in bar to bill of review. See *Edwards v. Carroll*, *id.* 98. *Id.*

Allowance of a debt in the master's report which had been obtained by fraud, rectified, the proper mode of proceeding being by original bill, not by bill of review; and held, that it was not necessary to pray specifically, that the act of the court should be set aside, plaintiff having made a sufficient case to obtain that relief under the prayer for general relief. *Manaton v. Molesworth*, 1 Eden, 18. **PR. MASTER'S REPORT.**

A bill of review, with matter come to the party's knowledge since the hearing, lies, where the plaintiff in the bill has since the hearing discovered matter which would vary the decree; and where, if such matter was known to the other party, he was not in conscience obliged to have discovered it to the court. For if the matter was known to the other party, and such as in conscience he ought to have discovered, he obtains the decree by fraud, and it ought to be set aside by original bill. *Id.* 25. **FRAUD, DECREE OBTAINED BY.**

Bill of review granted on new matter discovered. *Portsmouth v. Effingham*, 1 Ves. 430.

Mere negligence or forgetfulness of matter, &c. is no ground for a bill of review. *Judlow v. Macartney*, 2 Bro. P. C. 67.

There are two grounds for review; one, error on decree apparent; and the other, new matter arising after decree, or which could not have been proved when decree passed, and was unknown to either party. *Le Neve v. Norris*, *id.* 73.

Where bill of review is filed without leave for reversing former decree, specifies errors in decree, and contains original matter, it is irregular. *Houghton v. West*, *id.* 88.

It is sufficient to entitle a party to a bill of review, if the new proof did not come to his knowledge till after publication; or, when by the rules of the court he could not make use of it. *Norris v. Le Neve*, 3 Atk. 36. *Ridg.* 322.

If on bill of review facts are put in issue, the party is not obliged to point out what will be the effects of them, for the court is to make the inference of law from them, as *ex facto oritur jus*. *Id.* 36.

Upon application for new bill upon new matter discovered after decree, it must be shewn to be relevant; for being new matter merely, will not entitle them to such a bill. *Bennet v. Jee*, 2 Atk. 529.

Bill of review after two trials, and a decree to establish the will. Upon discovery of new matter another trial ordered, and a verdict for the heir at law and the former decree reversed. *Att. Gen. v. Turner*, Amb. 587.

Bill of review of a decree of foreclosure was dismissed, where it appeared the defendant's agent, attorney and solicitor, had attended the master on his behalf, in taking the account under the decree. *Gould v. Tancred*, 2 Atk. 532.

Leave of the court must be asked, before a bill of review for new matter can be filed; otherwise if brought to reverse a decree upon error appearing on the face of it. S. C. *id.* 534.

To oblige a man to sign and enrol a decree made against himself, in order to entitle him to bring a bill of review, is altogether unnecessary. *Standish v. Radley*, *id.* 177.

Where decree has not been signed and enrolled, a bill in the nature of a bill of review is a proper one. *Id.*

The discovery of new matter in being at the time of the decree, but not known till after, entitles the party to a review. *Id.*

If a decree be obtained and enrolled, so that the cause cannot be reheard, then there is no remedy but by bill of review; which must be on error appearing on the face of the decree, or on some new matter, as a release or a receipt discovered since. *Taylor v. Sharp*, 3 P. W. 371.

On every bill of review the plaintiff must deposit 50*l.* in order to answer costs; but no need of leave of the court for such bill of review, unless it be founded upon new matter, and then the leave of the court is necessary, as well as the depositing of 50*l.* *Anon.* 2 P. W. 283.

After decree for payment of money. Money must be paid before bill of review can be brought. *Bp. of Durham v. Liddell*, 2 Bro. P. C. 63. But court dispensed with rule upon defendant giving good security for payment of money decreed. *Savil v. Darcy*, 1 Ch. Ca. 42. 2 Freem. 172.

As to bill of review. 1 Eq. Ab. 81. 1 Roll. Ab. 332.

A man cannot bring a new bill of review after a demurrer allowed to a former bill of review. *Pitt v. Arglass*, 1 Vern. 441. **PR. DEMURRER.**

Plaintiff allowed to bring a bill of review without paying the costs decreed in the original cause, upon making oath he was not worth 40*l.* besides the matter in question. *Fitton v. Macclesfield*, 1 Vern. 264. 2 Freem. 88. **PR. PAUPER; PR. COSTS.**

Decree cannot be varied by original bill. *Davis v. Larner*, Dick. 42.

Bill of review lies, though decree not signed and enrolled. *Id. ib.*

No limitation of time for bringing a bill of review; yet, after a long acquiescence under a decree, the court will not reverse it but upon very apparent errors. *Fitton v. Macclesfield*, 1 Vern. 287. **LENGTH OF TIME.**

Order for dispensing with costs upon bringing a bill of review, ought to be set out in the bill. *Id.* 292. **PR. COSTS.**

The plaintiff not allowed to bring a bill of review, unless he performed the decree, or would swear he was unable to do it, and would surrender himself to the Fleet, to lie there till the matter on the bill of review was determined. *Williams v. Mellish*, 1 Vern. 117.

Upon a bill of review, the party cannot assign for error, that any of the matters decreed are contrary to the proofs in the cause, but must shew some error appearing in the body of the decree, or new matter discovered since the decree. *Id.* 166.

In a bill of review you may add a supplemental bill. *Price v. Keyte*, 1 Vern. 135. But see note there.

A bill of review lies not after a demurrer to a former bill of review allowed. *Dunne v. Filmore*, 1 Vern. 135. S. C. 2 Ch. Ca. 133. **PR. DEMURRER.**

Bill of review of a decree by consent, dismissed. *Webb v. Webb*, 3 Swan. 658. **CONSENT.**

A bill of review may be sustained by the party in whose favour the decree is made, and who enrolled it. *Vandebende v. Livingston*, 3 Swan. 625.

If a fact be mistaken at the hearing the decretal order, it must be rectified by re-hearing. *Combs v. Proud*, 1 C. C. 54. 2 Free. 182. **PR. RE-HEARING, WHERE GRANTED.**

In a bill of review, all things are to be performed according to the former decree that do not extinguish the right; otherwise, the non-performance is a good plea in bar, as if writings are to be brought into court or costs paid, but not to release the right, or make a

conveyance, as that would destroy the right. *Fittou v. Ld. Macclesfield*, 2 Free. 88. *Anon.* 12 Mod. 343.

The new matter ought to be such as may be used as evidence of what was in issue in the cause. *Patterson v. Slaughter*, Amb. 293. See contra *Anon.* 2 Free. 31.

There can be no bill of review for any matter subsequent to the decree, as the plaintiff's confession. *Curtis v. Smallridge*, 2 Freem. 178. 1 C. C. 43.

Where the matters mentioned in the decree as proved were, in fact, not proved, it is not error to found a bill of review; for if the fact should be mistaken, it should be remedied by hearing before enrolment. *Combs v. Proud*, 1 C. C. 54. 2 Free. 182.

Matter of abatement is not error upon which to found a bill of review. *Slingsby v. Hale*, 1 C. C. 122. *Ly. Cramborne v. Dalmahoy*, 1 C. R. 231. 2 Free. 169.

A bill of review cannot be filed by the party in favour of whom the decree was pronounced. *Glover v. Portington*, 2 Free. 182. But see S. C. 1 C. C. 53, where the demurrer is said to have been over-ruled, and the bill consequently allowed. See also 3 Swan. 625.

The defendant, an infant, appealed, in the house of lords, from a decree obtained without examining witnesses; and a petition for leave to examine witnesses upon the appeal was rejected. This is no objection to the appellants bringing a bill of review. *Needler v. Kendall*, Rep. T. Finch, 468.

A bill of review will not lie against those who were not parties to the original bill. *El. Carlisle v. Goble*, 3 C. R. 94. Nel. 52. 2 Free. 148.

#### 6. Bill of Revivor, and Original in Nature of Revivor.

Where, under order in creditor's suit, leave is given to file supplemental bill by creditor not party to original suit, on behalf of himself and other creditors, to have benefit of decree in that suit, plaintiff is entitled to same decree, to have benefit of former proceedings, as representatives of the original plaintiff would have been entitled on bill of revivor. *Houlditch v. Donegall*, 1 S. & S. 491. PR. DECREE; PR. BILL OF SUPPLEMENT.

Defendant to a bill of revivor cannot put new matter on record; which might, if stated in the answer to the original bill, have produced a different decree; it would be impertinent. *Nanney v. Totty*, 11 Price, 117. PL. ANSWER; PL. IMPERTINENCE.

If a bill be not properly a bill of revivor, or if plaintiff be not a party entitled to file a bill of revivor, the defendant should demur, as, by answering, he waives the objection. *Id. ib.*

Suit for specific performance of contract to purchase freehold; defendant had paid several large sums on account of the purchase-money, and a considerable portion was still due. He died when cause was at issue, leaving real and personal to infant children. Plaintiffs revived against executors only. Held that infant devisees were necessary parties. Suit ordered to stand over to amend, in that respect, by supplemental bill. *Townsend v. Champervorne*, 9 Price, 130. PL. PARTIES; DEVISEES.

Statute of limitations cannot be pleaded in bar to a bill of revivor, after a decree to account. *Egremont v. Hamilton*, 1 Ball & B. 531. STAT. OF LIMITATIONS; PL. PLEA OF STAT. OF LIMITATIONS; PR. DECREE TO ACCOUNT.

Abatement by the death of one of the plaintiffs, tenants in common; bill of revivor by his representative. The survivor, if not co-plaintiff, must be made defendant. *Fallowes v. Williamson*, 11 Ves. 306. PL. PARTIES; TENANTS IN COMMON.

Plea to bill of revivor for costs which had been taxed and ordered to be paid into the bank, overruled. *Hall v. Smith*, 1 Bro. C. C. 438. S. C. 2 Dick. 649. PL. PLEA; COSTS TAXED.

It is a constant rule, that matters subsequent to the original bill must come by way of supplemental bill and revivor. *Brown v. Higden*, 1 Ark. 291. BILL, SUPPLEMENTAL.

Defendant, as well as plaintiff, may bring a bill of revivor. *Finch v. Ld. Winchester*, 1 Eq. Ab. 2. PARTIES.

Bill of revivor must show that plaintiff has proved testator's will. *Humphreys v. Inledon*, Dick. 38.

Original bill, in nature of revivor only, does not open first decree. *Tare v. Wardall*, 1 Eq. Ab. 83. PR. DECREE.

Creditors admitted to come in may revive. *Pitt v. Richmond*, id. 3. PARTIES.

Heir and administrator of intestate must be parties to revive a decree for payment of money, and for conveying of lands. *Ferrers v. Cherry*, id. PL. PARTY.

Revivor of suit against husband and wife, on death of husband against wife, need not be by original bill. *Ruthel v. Litton*, Cary, 70.

Wife, after death of husband, sueth bill of revivor, and good. *Parrot v. Rowdall*, id.

If one defendant is not charged in bill of revivor, ordered he shall be discharged, unless cause shown in a day. *Heines v. Day*, Cary, 55.

#### 7. Amended Bill.

Original bill filed to redeem mortgage, and answer put in showing plaintiff had no title to redeem. Plaintiff afterwards purchases title to redeem, and amends bill, and proceeds on it. Demurrer to amended bill allowed, on ground that it should have been carried on by supplemental bill; on application full costs were given. *Pilkington v. Wignall*, 2 Mad. 240. PL. DEMURRER.

It is not impertinent in amended bill to set forth part of answer by way of pretence, and interrogate as to it. *Seetley v. Boehm*, 2 Mad. 176. PL. IMPERTINENCE.

Defendant in his answer stated facts which had occurred since the filing of the bill, upon which the plaintiff amended his bill, stating facts more fully, on which the defendant pleaded as to part, demurred as to other part, and answered as to rest of amended bill: plea and demurrer overruled. *Knight v. Mathews*, 1 Mad. 566.

An amended bill repeating all the charges and allegations in the original bill, is prolix. *Willis v. Evans*, 2 Ball & B. 225.

In a bill for the specific execution of an agreement the plaintiff may abandon the agreement, and may by amended bill, seek to have the benefit of an agreement, admitted in the answer, and by charging that the allegations in the original are equally applicable to the agreement in the amended bill, may refer to them without repeating them, and thereby obtain all the benefit of the evidence stated as applicable to the first agreement. *Id.* 228. SPEC. PERF.

To an amended bill, a demurrer as to so much as had not been answered in the answer to the original bill, is bad. *Mynd v. Francis*, 1 Anst. 6. PL. DEMURRER.

#### 8. Cross Bill.

Rector of M. claiming tithes in kind, the occupier and landlord filed a cross bill to establish modus payable to rector of S by the lord of the liberty of which the lands were parcel. It was objected, 1st, That the rector of S not disputing the modus, a bill would not lie to establish it; 2d, that the other owners of lands in the liberty should have been parties. Bill dismissed. *Woolston v. Wright*, 3 Anst. 801. TITHES, MODUS; PL. PARTY.

Whenever a defendant wants a discovery of a de-

in the hands of the plaintiff, he must file a cross bill for the purpose, although the deed be referred to by the original bill as being in the plaintiff's custody, and ready to be produced as the court should direct. *Spragg v. Corner*, 2 Cox, 103. **PR. PRODUCTION OF DEEDS; DISCOVERY.**

Where bill prays account, and allowances in that account, a defendant may equally object as if he had filed his cross bill. *Adiff v. Murray*, 2 Atk. 59. **ACCOUNT.**

#### 9. Bill for Discovery and Relief generally.

Where specific relief is prayed, the ground for which fails, the plaintiff under the prayer for general relief can have such relief only as is consistent with the facts clearly and fully stated in the bill. *King v. Rossett*, 2 Y. & J. 33.

Where relief is prayed, and discovery as auxiliary only to that relief, if the ground for relief fails, the discovery cannot be obtained. *Id. ib.* **PL. DISCOVERY.**

*Prima facie* discovery is incidental to relief. *Angell v. Angell*, 1 S. & S. 83. **DISCOVERY.**

Plea to all relief and part of discovery, and answer to rest; plea overruled. *James v. Sadgrove*, 1 S. & S. 4. **PLEA; DISCOVERY; ANSWER.**

But otherwise if answer had been to matter in bill, which would have repelled defence by plea. *Id. ib.*

Where bill is for discovery in aid of defence at law, and for equitable relief, plea of title in defendant in equity to whole bill, though it might be good to relief, is bad to discovery. *Gait v. Osbaldeston*, 5 Mad. 428. But overruled on appeal, 1 Russ. 158. **PL. PLEA; TITLE; PL. DISCOVERY.**

Relief may be had under the general prayer without any particular prayer. *Wilkinson v. Beal*, 4 Mad. 408. **PL. PRAYER.**

In a bill for discovery and relief, a plaintiff not entitled to relief is not entitled to discovery. The converse of the rule will not hold. *Att. Gen. v. Brown*, 1 Swan. 294. **PL. DISCOVERY.**

Plaintiff not entitled to relief cannot have discovery. *Hadley v. Hadley*, 1 V. & B. 539. **IB.**

The rule that the plaintiff being entitled to discovery only, and not to the relief, a general demurrer lies, does not prevent a demurrer to relief giving the discovery. *Trot v. Gee*, 17 Ves. 273. **PL. DEMURRER; PL. DISCOVERY.**

Demurrer good to relief is good to discovery sought with a view to the relief. *Baker v. Mellish*, 10 Ves. 544. **DEMURRER; DISCOVERY.**

Plea allowed as to the relief, therefore good to discovery also, according to general rule. *Sutton v. El. Scarborough*, 9 Ves. 71. **PL. PLEA; PL. DISCOVERY.**

Where the plaintiff is entitled to the discovery he seeks in support of an action, a prayer for general relief, or for relief that is consequential to the prayer for discovery, as an injunction, will not sustain a demurrer. *Brandon v. Sands*, 2 Ves. J. 514. **PL. DISCOVERY; PL. DEMURRER.**

Where a bill prays relief and discovery, the plaintiff being entitled to discovery only, a general demurrer allowed. *Colles v. Swayne*, 4 Bro. C. C. 480. **PL. DISCOVERY; PL. DEMURRER.**

General demurrer allowed to a bill praying discovery and relief, where the relief is at law. *Price v. James*, 2 Bro. C. C. 319. S. C. 2 Dick. 697. **IB.**

A bill proper for discovery only, prays relief, yet a general demurrer was overruled, but without costs. *Fry v. Penn*, 2 Bro. C. C. 280. *Sed quære*, see *id.* 319. **IB.**

Title of purchase for valuable consideration is a good ground of defence, but not for relief. *Patterson v. Slaughter*, Ambli. 293. **VEND. & PURCH.; PL. DEFENCE.**

On bill to discover assets, equity can also give relief by decreeing payment of debt. *Heath v. Percival*, 1 Stra. 403. **DISCOVERY; JURISDICTION.**

#### 10. Bill of Discovery.

A plea that the plaintiff has no interest in the subject of the suit, is a good plea to a bill for discovery and a commission. *Mendizabel v. Machado*, 1 Sim. 68. **PL. PLEA.**

Bill for discovery of money won at play under 9 Anne, c. 14. s. 3. dont lie against common informer suing for penalties. *Orme v. Crockford*, 1 M'Clel. 185. S. C. 13 Price, 376. **GAMING; PL. PARTIS.**

Commission to examine abroad is not incidental to discovery, therefore, though court refused discovery, it may grant commission. *Thorpe v. Macanley*, 5 Mad. 219. **PR. COMMISSION TO EXAMINE ABROAD.**

On bill for discovery and injunction to stay proceedings at law on bill of exchange, and for delivery up of bill to be cancelled, and charging fraud, not answered by defendant: If discovery obtained would be a defence at law, injunction to stay proceedings was refused, but granted to stay execution. *Hoadlitch v. Niss*, 8 Price, 689. **PR. IN EXCH.; INJUNCTION TO STAY PROCEEDINGS AT LAW.**

Bill by under-writers for discovery and commission to examine abroad, and injunction to stay proceedings at law against them on policy in meantime, praying relief, is not a bill for discovery merely, but for relief, and not demurrable as a bill for discovery praying relief for which there was no equity. *Allan v. Copeland*, 8 Price, 522.

Bill of discovery must state for what purpose discovery is sought or demurrable. *Cardall v. Watkins*, 5 Mad. 18.

Where bill prays relief against all defendants but one, against whom it only prays discovery, he cannot after answer, obtain order for costs; such order discharged. *Att. Gen. v. Burch*, 4 Mad. 178. **PR. COSTS; WAIVER.**

After a verdict at law, a bill, with proper charges, may be sustained for the discovery of documents necessary to a fair decision. *Field v. Beaumont*, 1 Swan. 209. **VERDICT AT LAW.**

Seemle, bill dont lie by purchaser from contingent remainder-man, for inspection of title deeds in hands of tenant for life. *Noel v. Ward*, 1 Mad. 322. **TITLE DEEDS; TEN. FOR LIFE & REM.-MAN.**

Plaintiff entitled to discovery only, praying relief, general demurrer lies. *Albrecht v. Susman*, 2 V. & B. 328. **DEMURRER.**

After an order in bankruptcy, for liberty to bring an action, with special direction for a production of papers, and not to set up the bankruptcy, a bill of discovery cannot be filed. *Cooke v. Marsh*, 18 Ves. 209. **PR. ORDER, C. OR.**

Defendant to a bill of discovery is entitled to the costs of the discovery immediately on putting in a full answer, and his right to these costs is not waived by his subsequently accepting the costs of an amendment, nor by his neglecting to serve the plaintiff with the order for costs of discovery, until after he has himself been served with the order to amend. *Coventry v. Bentley*, 3 Mer. 677. **PR. COSTS.**

The proper time to pray for costs of discovery is after the commission is returned. *Banbury v. —*, 9 Ves. 103. **PR. COSTS.**

Equity has no jurisdiction under 9 Anne, c. 14. or 18 G. 2. c. 24. to enforce discovery, prayed by common informer, of money won at play. *Holloway v. Shakespeare*, 1 Smith, 121. **JURISDICTION.**

Account is consequential upon discovery, though there might be a proceeding at law. *Barker v. Dacie*, 6 Ves. 688. **JURISDICTION; ACCOUNT.**

Plaintiff pays the costs upon a bill of discovery. *Simmonds v. Id. Kinnaird*, 4 Ves. 746. **Pr. Costs.**

In a bill of discovery to support an action by a common informer, for money won at play, it is sufficient to state that the defendants, or some of them for the benefit and on account of all, played and won. In such a bill it is not necessary to state the nature of the action brought; it is enough to say that an action was brought on the statute 9 Anne, to recover the money, and to shew by the facts that an action on the statute lay. *Cocan v. Phillips*, 3 Anst. 843. but this is overruled 13 Price, 376. S. C. 1 McClell. 185. **GAMING; Pl. BILL.**

A bill for discovery of the contents of a lost deed, and to have a new one executed, must be accompanied by an affidavit of the loss of the former. *Rotham v. Dawson*, 3 Anst. 859. **LOSS OF DEEDS.**

A bill lies to have discovery of the consideration of a security alleged to be given for money lost at play, and to have it delivered up. *Andrews v. Berry*, 3 Anst. 634. **GAMING.**

After judgment by default in an action upon a dividend under a commission of bankruptcy, the assignees filed a bill for discovery, and to have the proof of the debt expunged; demurrer allowed, the course being by petition. *Clarke v. Capron*, 2 Ves. J. 666. **BANCY. PETITION; BANCY. EXPUNGING PROOF.**

Action on bills of exchange; bill to have them delivered up as being given on a gaming transaction; demurrer was overruled. *Newman v. Franco*, 2 Anst. 519. **Pl. DEMURRER; Pr. DELIVERY UP OF DEEDS.**

Bill against winner of more than 10l. at play must state plaintiff to be the loser, or that three months have elapsed since offence. *Hudson v. Davis*, 2 Anst. 504. **GAMING.**

Plea of alien enemy is good to a bill for discovery. Such a plea stating this nation to be at war with the government of France, and that the plaintiffs are Frenchmen aliens, and enemies of the king, is sufficient. *Doubigny v. Davallon*, 2 Anst. 462. **ALIEN ENEMY; Plea.**

If plaintiff is entitled to the discovery he seeks in support of an action; a prayer for general relief, or for relief that is consequential to the prayer for discovery, as an injunction will not sustain a demurrer. *Brandon v. Sands*, 2 Ves. J. 514. **Pl. RELIEF; Pl. DEMURRER.**

Bill for discovery, and a delivery of a settlement under which plaintiff claimed, and other title deeds and possession of the estate; demurrer to all the relief, and all the discovery, except of the settlement, for want of equity, and answer admitting the settlement, and offering to produce it, and denying that defendant had any other relative to plaintiff's title, the title being legal, the court would only order the settlement to be produced at the trial; the demurrer, therefore, going to all the relief, the defendant had leave to amend. *Renison v. Ashley*, 2 Ves. J. 459. **Pl. ANSWER, AMENDMENT OF; PRODUCTION OF DEEDS.**

Bill of discovery in aid of an action of covenant; plea, a clause in the articles that any dispute should be referred. Plea overruled, discovery being of course while an action is brought and can be maintained. *Mitchell v. Harris*, 2 Ves. J. 129. 4 Bro. C. C. 311. **Pl. Plea.**

Where in a suit for tithes, the title to the rectory is in issue to a cross bill, praying a discovery of the title, the rector cannot demur, although no other title is set up. *Bozman v. Lygon*, 1 Anst. 4. **DEMURRER; TITLE.**

A bill for discovery of money, won at play by a common informer, will not lie till he has commenced some suit for relief. *Mynd v. Francis*, 1 Anst. 5. **COMMON INFORMER; GAMING.**

On a bill for discovery, the answer of the party in-

terested cannot be dispensed with though an infant; and although the person, from whom his father purchased the right, has answered, and denied any knowledge of the circumstances. *Hardcastle v. Shafto*, 1 Anst. 77. **ANSWER.**

On bill for discovery and injunction, and commission abroad, defendant held entitled to costs of discovery, and injunction as incidental thereto, but costs refused to either party, as to commission. *London Assurance Comp. v. Hankey*, 1 Anst. 9. **Pr. COSTS.**

Rule that plaintiff, in bill of discovery, shall pay costs in all cases, is too general; he ought only where he files a bill in the first instance, not where compelled to it by defendant's refusal. *Raymouth v. Boyer*, 1 Ves. J. 423. **COSTS.**

Upon bill by heir at law for discovering and delivering up or depositing title deeds against persons in possession of them as executors, and in possession of the premises by agreement with a tenant by the courtesy, plaintiff need not state every link in his pedigree. *Ford v. Peering*, 1 Ves. J. 72. **HEIR AT LAW.**

General demurrer allowed to a bill, praying discovery and relief, where the relief is at law. *Price v. James*, 2 Bro. C. C. 319. S. C. 2 Dick. 697. **Pl. DEMURRER; Pl. RELIEF.**

Whenever a defendant wants a discovery of a deed in the hands of the plaintiff, he must file a cross bill for the purpose, although the deed be referred to by the original bill, as being in the plaintiff's custody, and ready to be produced as the court should direct. *Spragg v. Comer*, 2 Cox. 109. **Pr. PRODUCTION OF DEEDS; CROSS BILL.**

A bill proper for discovery only prays relief, yet a general demurrer was overruled, but without costs. *Fry v. Penn*, 2 Bro. C. C. 280. *Sed quare.* *Id.* 319. **Pl. DEMURRER; Pl. RELIEF.**

A, being entitled under a will to the use of certain articles of plate for her life, pawned them with B, who kept an open pawnbroker's shop. Bill was filed by the representatives of the testator after the death of A, against B for a discovery of the particular articles pawned, in order to enable the plaintiff to proceed in an action at law for the recovery of them. To this discovery the defendant pleaded certain articles of plate were deposited with him for certain sums of money *bona fide* lent and advanced thereon to A; but he did not, by his plea, (though he did by his answer), aver that he had no other articles of plate in his possession. For this defect in point of form, the plea was overruled. The defendant then insisted on the same point, by his answer in bar to the discovery; but the court thought, that where a plea to a bill of discovery was overruled the defendant could never insist on the same thing by answer. *Horne v. Parker*, 1 Cox, 224. S. C. 1 Bro. C. C. 578. **Pl. Plea; Pl. ANSWER.**

Plea of matter, which would be a good plea to the action at law, is not a good plea here to a bill for discovery leading to legal relief. *Hutcheon v. Taylor*, 2 Bro. C. C. 7. **Pl. Plea.**

A demurrer will not lie to a bill merely for a discovery to enable the plaintiff to go to law, on the ground that the plaintiff had not brought his action. *Mandulay v. Morton*, 1 Bro. C. C. 469. S. C. 2 Dick. 652. **Pl. DEMURRER.**

Plea that a writ of right has been tried, and determined against the plaintiff, a good plea for a bill of discovery of matter relating to the title. *Leicester v. Perry*, 1 Bro. C. C. 305. **Pl. Plea.**

Bill for account of goods landed at a certain quay, the plaintiff claiming a right of toll by prescription. Defendant denied plaintiff's title, and refused to discover the goods: Held, he was not compellable till plaintiff had established his right at law. *Northleg v. Tuscombe*, Amb. 612. **TITLE.**

Bill against children of discovery for sums advanced to them, pendente lite, by their father, an insolvent executor. It appears, on the answers, that two of them received 500*l.* each on their marriage, but two others received 500*l.* each for their maintenance. It was decreed that the two last should refund, although they denied knowledge of their father's insolvency. *Partridge v. Gopp*, Amb. 596. EXECUTOR ; FRAUDULENT GIFTS.

Bill by disinherited heir at law to have inspection of deeds dismissed without costs. *Leman v. Alie*, Amb. 163. HEIR AT LAW ; COSTS.

If heir at law bring bill for discovery, it is not of course that he shall pay costs, but shall be allowed to amend and pray inspection of deeds. *Id. ib.* HEIR AT LAW ; COSTS.

Bill of discovery lies to aid proceedings here or at law, as to a civil right, not indictment or information, nor by a lord for discovery whether this or that person is capable to answer an heriot. *Ld. Montague v. Dudman*, 2 Ves. 398.

Bill lies to discover the title of a person bringing ejectment, and to see if it is not in some other. *Metcalf v. Hervey*, 1 Ves. 249. TITLE.

Abatement after answer to bill of discovery, suit cannot be revived. *Gould v. Barnes*. Dick. 133.

Where a bill is brought for the discovery of concealments of a bankrupt's estate, the court will not allow defendants to look into their depositions taken by the commissioners before they put in their answer. *Roden v. Dellon*, 1 Atk. 289. BANKCY. ; INSPECTION OF PROCEEDINGS.

In a bill to stay waste, a plaintiff is not entitled to discovery unless he waives the double penalty. *Butcher v. Allington*, 3 Atk. 457. WASTE ; WAIVER OF PENALTIES.

Equity will dismiss bill for discovery of matters properly triable at law. *Governors, &c. of Pens v. Hare*, 2 Com. 694.

Defendant voluntarily entered into a bond to pay 500*l.*, or marry M within a twelvemonth. Under pretence of realising it, he carried it off without her consent. M brought her bill which, upon her death, was revived by her mother, the plaintiff: Held, that the plaintiff is not only intitled to a discovery here, but relief by payment of the money with interest from the day of filing the original bill. *Atkins v. Farr*, 1 Atk. 287.

A bill of discovery in aid of the jurisdiction of the ecclesiastical court is not admitted, because they are capable of coming at that discovery themselves. *Dunn v. Coates*, 1 Atk. 288. ECCLESIASTICAL COURT.

While a suit is depending in the ecclesiastical court for an administration, a bill may be brought for an account of the personal estate. Bill is allowed before probate, because the ecclesiastical court cannot secure the effects in the meantime. *Phipps v. Steward*, 1 Atk. 286.

Plea of fine and long possession under it, is a good bar to bill brought for discovery of deeds, declaring the uses of such fine. *Holt v. Lowe*, 5 Bro. P. C. 569. PL. PLEA.

On a bill to discover assets, equity can also give relief by decreeing payment of debt. *Heath v. Percival*, 1 Stra. 403. ACCOUNT ; RELIEF ; JURISDICTION.

If a bill pray discovery only, a plea to the discovery and relief is bad. *Asgill v. Dawson*, Bun. 70. PL. PLEA.

A remainder-man in tail, in a voluntary settlement, brings a bill for the discovery of the deed, and it appearing the entail was discontinued, the court would not relieve him. *Kelley v. Berry*, 2 Vern. 35. REMAINDER IN TAIL.

Bill of discovery lies in equity, though for matters

sounding in trust. *E. I. Comp. v. Evans*, 1 Vern. 307.

Demurrer to a bill, brought to discover the tenant to the *præcipe* on a voluntary conveyance, allowed. *Sherborne v. Clerk*, 1 Vern. 273.

Money paid in part, receipts lost. The whole recovered at law. No discovery after a verdict. *Barbone v. Brent*, 1 Vern. 176.

Bill to discover who is tenant of the freehold in order to bring a formedon, will not lie. *Stapleton v. Sherrard*, 1 Vern. 212. S. C. 2 Ch. Rep. 255.

In what cases a man must make oath of the loss of deed, when he brings a bill for relief, or discovery touching the deed. *Anon.* 1 Vern. 59. *Anon.* id. 180. *Godfrey v. Turner*, id. 247. *Nicholson v. Pattison*, id. 310. These, and many other cases, are collecting on this point. 1 Ch. Ca. 11. *Id.* 231. DEEDS LOST, EVIDENCE.

Bill by an administrator for discovery of the personal estate ; it is no bar to the discovery that the administration is litigated. *Wright v. Bucks*, 1 Vern. 106. ADMINISTRATOR.

### 11. Bill of Interpleader.

Stakeholder seeking to retain part of stake, cannot file interpleader, but must obtain injunction on order for time, & upon the answer. *Mitchell v. Hayne*, 2 S. & S. 63. STAKEHOLDER.

It is no objection to an interpleading bill, that a suit between the same parties, commenced by one of the claimants of the fund, is pending. *Warrington v. Whelstone*, 1 Jac. 202. PR. PENDENTE LITE.

Sheriff levying upon goods, alleged to be in settlement, cannot maintain a bill of interpleader. *Slingsby v. Boulton*, 1 V. & B. 334. SHERIFF.

Debtor on death of creditor is bound to pay to his representative, and cannot file bill for direction. *Darthey v. Winter*, 2 S. & S. 536. DEBTOR & CRED.

A bill of interpleader cannot be sustained upon equities ; the claims must be founded on legal rights, and must refer to precisely the same subject matter, and not to collateral demands arising out of the right immediately in dispute. *Barclay v. Curtis*, 9 Price, 661.

Agent to receive particular monies, is bound to pay the same over to principal, notwithstanding claims of third person ; therefore he cannot file bill of interpleader. *Nicholson v. Knowles*, 5 Mad. 47. PRIN. & AGENT.

Captain of ship may file interpleader where parties claim adversely under bill of lading. But otherwise, where paramount to it. *Low v. Henderson*, 3 Mad. 277. BILL OF LADING.

A debtor of the bankrupt cannot support an interpleading bill against the bankrupt and his assignees. *Harlow v. Crowley*, 1 Buck, 273.

Plaintiff having parted with the property, cannot sustain an interpleading bill against different claimants, upon an undertaking to pay over the value to the party entitled. *Burnett v. Anderson*, 1 Mer. 405.

It is sufficient to support a bill of interpleader, that each of the defendants has a claim to the matter in question, although one only can maintain an action at law ; the principle being, to prevent a plaintiff from being double vexed. It is therefore not necessary that he should have been actually sued. *Morgan v. Morsack*, 2 Mer. 107.

Interpleader allowed by a factor against both defendants residing abroad, and one not appearing. The subject, a policy on a cargo lost, for effecting which, the plaintiffs claimed to be reimbursed their expenses. *Martinius v. Helmutz*, Coop. 245. PRIN. & FACTOR.

Analogy between bills of interpleader, and to re-

strain waste. S. C. cited in *Stevenson v. Anderson*, 2 V. & B. 412. n. (1), 2nd Edit. WASTE.

Bill of interpleader by a factor upon opposite claims, as principals to the benefit of a policy of insurance retained by him, subject to his expences. *Id. ib.* PRIN. & FACTOR.

An equitable claim against a legal right of action, is a ground of interpleader. *Id. ib.*

Interpleader ; all the defendants but one residing out of the jurisdiction in Scotland. The plaintiff after a reasonable time, having used due diligence to bring them in, being decreed to give up the subject to the only defendant appearing ; protected afterwards against the others by injunction and, order that service on the attorney should be good. *Id. ib.* 407. SECURITY ; JURISDICTION.

Bill of interpleader sustained upon bills of exchange, received by the plaintiff, as agent, to procure payment for his principal, in Scotland, to whom they were remitted, against an order for goods, pursued in an action of trover by the party who so remitted them, and by attachment in Scotland by a creditor of that party. *Id. ib.* PRIN. & AGENT ; BILL OF EXCHANGE.

Interpleader may be in favour of an insurance company against the landlord of premises which have been burnt down, but insured by him and the tenant of the premises, under an agreement for a lease, and claiming therefore a right to have the money laid out in rebuilding the premises. *Paris v. Gilham*, Coop. 56. INSURANCE ; LANDL. & TENANT.

Plaintiff in a bill of interpleader admits a title against himself in all the defendants ; and cannot say, that as to some he is a wrong doer. *Slingsby v. Boulton*, 1 V. & B. 534.

Interpleader upon colour of title given to a stranger. *E. I. Comp. v. Edwards*, 18 Ves. 376.

Interpleader on attorney's claim of lien upon a sum awarded as damages, under a judgment obtained by the client against the plaintiff. — *v. Bolton*, 18 Ves. 292. ATTORNEY & CLIENT ; LIEN.

Interpleader upon notice of a variety of claims by persons, among whom an entire charge upon an estate was split, though no suit instituted, and but one legal right of entry ; the principle being, not merely that the payment cannot be safely made, but that the party entitled to be discharged by a single payment should not be harassed by a number of suits. *Angell v. Hadden*, 15 Ves. 244.

The rule that a tenant cannot compel the landlord to interplead, does not prevail where the claim of a third person arises by the act of the landlord, subsequent to the commencement of the relation of landlord and tenant. *Clarke v. Byrne*, 13 Ves. 383. LANDL. & TENANT.

Devises filing a bill to establish a will, and carry the trusts into execution, have no right to call upon persons who claim paramount the will to litigate such claims with them. *Dermisher v. Newenham*, 2 Scho. & L. 199. DEVISEE ; WILL.

Tenant may file interpleader against his landlord, where it arises on act of landlord, subsequent to lease. *Coutan v. Williams*, 9 Ves. 107. LANDL. & TENANT.

A tenant, though threatened with suits at law on a title adverse to his landlord's, cannot make them interplead, Semble. *Smith v. Target*, 2 Anst. 529. LANDL. & TENANT.

A tenant cannot file an interpleading bill against his landlord. Where one claimant seeks a certain rent from the tenant in possession, and the other unliquidated damages for use and occupation, he cannot make them interplead. *Johnson v. Atkinson*, 3 Anst. 798. LANDL. & TENANT.

Tenant cannot file a bill of interpleader against his landlord, on notice of ejectment by a stranger, under a title adverse to that of the landlord. On suspicion

of collusion, an inquiry into the circumstances was directed, and the report confirming the fraud, the bill was dismissed, with costs to the landlord, as between attorney and client, to be paid by the plaintiff and his solicitor, the latter to shew cause why he should not be struck off the roll. *Dungey v. Angore*, 2 Ves. J. 303. LANDL. & TENANT.

Bill of interpleader, is where two persons claim of a third the same debt, or the same duty. *Id.* 309.

An interpleading bill never suggests a case. *Id.* 311.

To support a bill of interpleader by a tenant, two persons must claim the same rent in privity of tenure and contract, as in the case of mortgagor and mortgagee, trustee and cestuique trust, &c. *Id.* 312.

A banker with whom property was deposited for safe custody, refused to deliver it to the owner, in prison under actions brought against him as partner in an insolvent mercantile house ; the banker was then served with attachments by the plaintiffs in those actions, and held to bail in trover by the owner : Held, that he was entitled to relief upon bill of interpleader ; but need not have come into equity ; as at law he would have been discharged on common bail upon bringing the deposit into court ; and proceedings in the action would have been stayed till the attachments were disposed of by the owner of the property, in the flame of the banker. *Langston v. Boylston*, 2 Ves. J. 101.

Where money in the public funds is the subject of a suit, to which the bank is made a defendant, the court will not, on the application of the bank, make any order on the litigating parties to restrain them from proceeding at law against the bank to compel a transfer, but they must file a bill of interpleader. *Birch v. Corbin*, 1 Cox, 144. BANK OF ENGLAND ; INJUNCTION.

Bill of interpleader dismissed with costs, where the question could be determined in the principal suit. *Lloyd v. Tench*, 2 Ves. 213.

Affidavit to bill of interpleader need not swear that it is at the plaintiff's own expence. *Metcalf v. Hervey*, 1 Ves. 248.

An executor, as he is in *autre droit*, unless he has proved testator's will, is not entitled to bring a bill of interpleader, till as standing in his place he has made himself a debtor : neither can he declare before probate, though he may bring an action. *Mitchell v. Smart*, 3 Atk. 606. EXECUTOR.

A demurrer allowed to a bill of interpleader, for that no legal step by distress or otherwise had been taken. *Rowland v. Powell*, Ridgw. 260.

Tenant paying rent into chancery is discharged. *Alnate v. Bettam*, Cary, 46.

Plaintiff in interpleader, if he behave properly, has costs of successful defendant, and latter has them again with his own from unsuccessful defendant. *Hendry v. Key*, Dick. 291.

Plaintiff must compel defendants to answer, and must reply, and have subpoena to rejoin, in order that defendant may examine witnesses. *Id. ib.*

## 12. Bills of Peace and Quia Timet.

A person having in articles of partnership, covenanted not to do certain acts after a specified period of time ; the court will not before the arrival of that period, grant an injunction to restrain him from acting in breach of his agreement, nor for mischief which is no breach at law of the covenant between the parties. *Coates v. Coates*, 6 Mad. 287. INJUNCTION.

The statutes providing for the relief of subject, accountants who have equities against the crown, held not to be confined to cases where the subject be actually sued or impleaded, but he may proceed by bill in equity in the first instance, and as it were

*quia timet*, and that during the passing his accounts before the commissioners of audit. *Colebrooke v. Att. Gen.*, 7 Pri. 146. STAT., C. OF; PUBLIC ACCOUNTANTS.

Colonel of a regiment having taken a bond of indemnity from his agents, with another as surety, in respect of all charges, &c. to which he may become liable by their default, the agents having afterwards become bankrupt, and government having given notice to the representatives of the colonel (deceased) of a demand upon the colonel's estate, by virtue of an unliquidated account, a bill by the representatives of the colonel, against the representatives of the surety to pay the balance due to government, and also to set aside a sufficient sum out of their testator's estate to answer future contingent demands, though attempted to be supported upon the principle of a bill *quia timet*; dismissed with costs. *Antobius v. Davidson*, 3 Mer. 569.

Where title is defective, and acquiesced in with knowledge of its being so, then the possession is quieted. *Hunce v. Gough*, 1 Ball & B. 4. TITLE.

A covenant, that a specific sum should be paid to B, if B survived; A having aliened part of it; on a bill by B, A decreed to give security that it should be forthcoming. *Flight v. Cook*, 2 Ves. 619. SECURITY FOR PEACE, OF COURT.

Demurrer to bill to establish a right to an oyster fishery, as being a matter triable at law, allowed; the dispute being between only two lords of manors. *Id. Tenham v. Herbert*, 2 Atk. 483. JURISDICTION.

Where a man sets up an exclusive right, and the persons who controvert it are numerous, and he cannot by one action at law quiet that right, he may file a bill of peace, and the court will direct an issue to determine the right as between lords of manors and their tenants, or tenants of one manor and another. *S. C. Id.*

A bill of peace praying an injunction to stay the defendants, who have an interest in the manor of Tunbridge, from proceeding at law against the plaintiffs, for building houses on the manor without leave, and that they may accept of such a compensation as the court shall think reasonable. Here the court dissolved the injunction, as it cannot be applied to as an arbitrator, nor have any legislative authority, but acts in a judicial capacity. *Congers v. Lat. Abergavenny*, 1 Atk. 293.

Where there has been a possession of a fishery for a considerable length of time, a person who claims a sole right to it may bring a bill to be quieted in the possession, though he has not established his right at law; and it is no objection on demurrer to such bill, that the defendants have distinct rights, for upon an issue to try the general right, they may at law take advantage of their several exemptions and distinct rights. *Mayor of York v. Pilkington*, 1 Atk. 282. *S. C.* 9 Mod. 273.

A man who has been in possession of a water-course sixty years, may bring a bill against a mortgagee, who foreclosed the equity of redemption to be quieted in his possession, although he had not established his right at law. *Bush v. Western*, Prec. Chan. 630.

The court of chancery may grant a perpetual injunction, after five trials at bar on the same point, and verdicts the same way. *El. Rath v. Sherwin*, 10 Mod. 1. INJUNCT PERPETUAL.

Voluntary devise in possession may file bill against heir at law to quiet his possession. *Woodgate v. Woodgate*, 1 Eq. Ab. 132.

Bill will not lie to quiet one in the possession of a pew in a church, though plaintiff before had a decree before the ordinary for this pew. *Baker v. Child*, 2 Vern. 226.

One gives her son other land in lieu of land in-

tailed, and by her will gives the intailed lands to her daughter, and takes a bond from her son to permit her daughter to enjoy the intailed lands. The son dies leaving an infant son, who being in possession of the lands that came in recompense, brings an ejectment of the intailed lands. By reason of the infancy of the grandson, the bond could not be sued. The daughter brings a bill, and is decreed to be quieted in possession of the intailed lands, until six months after the infant comes of age, and then the infant may shew cause. *Thomas v. Gyles*, 2 Vern. 232. INFANT; BOND; EJECTMENT.

A seized of Blackacre in tail and Whiteacre in fee, by mistake devises the intailed acre, and leaves the fee-simple acre to descend; the devisee upon his bill had a decree to enjoy. *Id.* 233. WILL, MISTAKE.

Bill of peace for preventing multiplicity of suits, proper. *New Elm Hosp. v. Andover*, 1 Vern. 266. *Hove v. Bromsgrove*, *id.* 22. MULTIPLICITY OF SUITS.

No injunction to quiet possession, but where the party has been in possession three years before filing his bill, or where the cause has been heard, and the merits determined. *Lady Poigne's Case*, 1 Vern. 156.

A is bound for B, and has a counter-bond; equity will compel B to pay the debt, though A is not sued. *Ramelagh v. Hayes*, 1 Vern. 190. PRINC. & SURETY.

Account decreed between two who had dealings only circuitously to avoid multiplicity of suits. *Anon. Show. P. C.* 17. PRIVACY OF CONTRACT.

### 13. Bill to perpetuate.

Upon the same principle where lands are devised by will, and there is no opportunity to prove and establish it at law, a bill to perpetuate testimony thereto will lie. *Anon. Prac. Reg.* 74.

Demurrer will lie to bill to perpetuate, if it does not state that no action can be immediately brought. *Angell v. Angell*, 1 S. & S. 83. PL. DEMURRER.

Qu. whether equity has jurisdiction to entertain bill to perpetuate testimony to claims to a dignity? *El. Belfast v. Chichester*, 2 J. & W. 439. DIGNITY; JURISDICTION.

Issue in tail cannot file bill to perpetuate testimony, even in case of an entail that cannot be barred. *Id. ib.* ISSUE IN TAIL.

A dignity is intailed on A, who dies leaving issue two sons, B and C. To bill filed in lifetime of B, by his eldest son, for perpetuating testimony of his father's marriage; demurrers by eldest son of C, who was dead, and attorney-general, were allowed. *Id. ib.* MARRIAGE; ISSUE IN TAIL.

In a suit to perpetuate testimony, motion for a further examination of witnesses as to the facts lately discovered, refused on the ground that a demurrer to a supplemental bill for the same purpose had been allowed. *Knight v. Knight*, 1 Jac. & W. 165. PR. EXAMINATION OF WITNESSES; DEMURRER.

Landlord may file a bill to perpetuate evidence of a demand, made under the tenantry act on his tenant to renew. *Keating v. Sparrow*, 1 Ball & B. 372. LANDL. & TENANT.

To support a bill to perpetuate testimony the plaintiff must have an interest; but the minuteness or remoteness of it is no objection. A mere contingency, however near and valuable (with the exception of the case of a wager,) the expectation of issue in tail, heir apparent, or next of kin of a lunatic, is not sufficient; therefore a demurrer to a bill by tenant in tail in remainder and his issue, to perpetuate testimony of the validity of his marriage, allowed. *Allen v. Allen*, 15 Ves. 130.

Bill to perpetuate testimony of legitimacy of plaintiff, entitled in remainder in tail, after estate for life. Demurrer by 7th and 8th in remainder, after plaintiff



tiffs and other defendants, all infants, overruled; any interest, however slight, being sufficient. *Ld. Dursley v. Berkeley*, 6 Ves. 251.

Next of kin of lunatic, however hopeless his condition, have no interest whatever in the property, and cannot, therefore, restrain bill to perpetuate testimony. So their apparent cannot have a writ *de ventre inspici* in life of his ancestor; but they may contract upon their expectations, and may perpetuate testimony with reference to interest so created. *Id.* 260.

Bill to perpetuate will not lie where defendant might immediately bar that right. *Id.* 262.

This court will not take the least step against a purchaser for valuable consideration without notice, not even to perpetuate testimony against him. *Jerrard v. Saunders*, 2 Ves. J. 458. VALUABLE CONSIDERATION; VEND. & PURCH.

A tenant in tail out of possession, cannot bring bill to perpetuate testimony. *Bradlyn v. Ord*, 1 Atk. 571. ESTATE TAIL.

A man who is in possession of a fishery, may bring a bill to examine his witnesses in *perpetuum rei memoriam*, and establish his right, though he has not recovered an affirmance of it at law. Secus, if he is not in possession. *Dorset v. Girdler*, Prec. Chan. 531.

Bill will not lie to perpetuate testimony, &c. before trial, unless affidavit be made of the witnesses being infirm and unable to travel. *Phillips v. Carver*, 1 P. W. 117.

A man cannot bring a bill to examine witnesses in *in perpetuum rei memoriam* to establish his title, until he has made it good by a verdict at law, if he is under no impediment of trying his title at law. *Parry v. Rogers*, 1 Vern. 441.

Devisee shall not examine witnesses in *perpetuum rei memoriam*, to prove a will against a purchaser without notice, till the will has been established by a verdict at law. *Bechinall v. Arnold*, 1 Vern. 354. DEVISEE; PURCHASER.

Bill to perpetuate cannot pray other relief. *Anon.* 2 Vent. 366.

A bill to examine witnesses in *perpetuum rei memoriam* is not proper, until the party has established his right at law. *Pawlet v. Ingres*, 1 Vern. 308. TITLE.

Upon a bill to perpetuate the testimony of witnesses touching a right to a way, the plaintiff must set out the way exactly in his bill *per et trans*, as he ought to do in a declaration at law. But such a bill ought not to be brought for such trivial things, as right of common, or for ways or water-courses, or at least not till after a recovery at law. *Gell v. Hayward*, 1 Vern. 312. *Id.*

Bill lies to perpetuate the testimony of witnesses to prove a modus; but *qu.* if it will lie to establish a modus. *Somerset v. Fotherby*, 1 Vern. 185. MODUS.

A bill will not lie to perpetuate the testimony of witnesses to a lunatic's will in his lifetime, made before his lunacy. *Sackville v. Ayleworth*, 1 Vern. 105. LUNATIC; WILL.

#### 14. Bill for Partition and other Matters.

A fine and non-claim cannot be pleaded in bar to a bill to prevent the setting up of an outstanding term. *Leigh v. Leigh*, 1 Sim. 349. PL. PLA.; FINE AND NON-CLAIM.

The statute of limitations may be pleaded in bar to a bill, to prevent the setting up outstanding terms. *Jermyn v. Best*, 1 Sim. 373. LIMIT. STAT. OF; PL. PLA.

The defendant, having sold and conveyed land to the plaintiff, suggesting that he had a title, and it afterwards appearing that he was not entitled to part, the same being an encroachment from a common, though no eviction had happened, or was threatened; a bill lies to set aside the conveyance, and for a return

of the purchase money, and all expences. *Edwards v. McLeay*, Coop. 308. MISREPRESENTATION; VEND. & PURCH.; TITLE.

Bill for a partition against D, D by his answer sets up a partition made several years ago, as evidence whereof (amongst other things,) he states that plaintiff acted upon a moiety of the premises, as his several estates, and particularly that he made a lease of part thereof to C; plaintiff amends his bill, making C a party, charging, that the lease to him was made under circumstances of fraud and imposition, and praying, as against C, that the lease may be set aside, still praying a partition only as against D; demurrer by D, to the whole bill, for that it is exhibited against several persons, for several and distinct matters, allowed; plaintiff ought first to have filed his bill against C, only to impeach the lease. *Whaley v. Dawson*, 2 Scho. & L. 367. PL. MULTIFARIOUSNESS.

It is sufficient if the first tenant in tail is a party to a bill of foreclosure. *Reynoldson v. Perkins*, Amb. 564. S. C. 1 Dick. 427. PL. PARTY; TENANT IN TAIL, AND REM.-MAN.

Bill for partition will lie as to tithes: demurrer overruled. *Gibson v. Montfort*, 1 Ves. 494. TITHES.

On a bill for a partition, plaintiff must shew a title in himself, and not allege generally that he is in possession of a moiety. *Cartwright v. Pulteney*, 2 Atk. 380.

A voluntary devisee brings a bill to establish the will against one who is not heir at law; defendant by answer, claimed under some ancient settlement which he could not find, and hoped when he could, he should have the benefit of it: it was insisted for the plaintiff, that the defendant might try his title by a certain time, or in default, that the plaintiff might hold and enjoy against the defendant. Bill dismissed with costs. *Chir v. Philpott*, 2 Vern. 743.

### III. DEMURRER.

1. *The General Form.*
2. *Speaking Demurrer.*
3. *Where it lies.*
4. *When overruled by Answer.* See also PL. ANSWER, 7.

#### 1. The General Form.

Demurrer covering too much, overruled. *Higgin v. Jackson*, 1 McClel. & Y. 35.

By demurrer, defendant may assign as many reasons as he pleases, why plaintiff is not entitled by his own showing, to relief. *Jones v. Frost*, 3 Mad. 8. S. C. 1 Jac. 466.

General demurrer will not lie if plaintiff is on any part of his will entitled to relief. S. C. 3 Mad. 8.

A general demurrer to part of bill is bad pleading. *Metcalf v. Brown*, 5 Pri. 560.

Where defendant demurred generally to bill for discovery as to whether he had not deeds, &c. in his possession, destructive of his title, there being parts of the bill which, whatever should be the fate of the demurrer, ought to be answered, and the demurrer was on that account overruled: the court gave leave to withdraw and demur particularly, and answer on payment of costs, as between party and party. *Wigham v. Leigh*, 6 Pri. 88.

If the plaintiff is entitled to any part of the relief sought, a demurrer to the whole relief must be overruled. *Att. Gen. v. Brown*, 1 Swan. 304.

A demurrer admits as true what is stated by the bill as matter of fact, not what the plaintiff considers as fact, but which is merely inference from matter of law. *Williams v. Steward*, 3 Mer. 503.

Demurrer covering relief, to which plaintiff was en-

titled, and not distinctly pointing out what parts of of bill were demurred to, and what answered, overruled. *Robinson v. Thomson*, 2 V. & B. 118. S. P. *Wetherhead v. Blackburn*, 2 V. & B. 121.

Demurrer to whole bill must clearly state parts demurred to. *Wetherhead v. Blackburn*, 2 V. & B. 124.

Demurrer to so much of a bill as called for a discovery of cases laid before counsel, and the opinions, overruled as covering facts material to the plaintiff's case. *Richards v. Jackson*, 18 Ves. 472. DISCOVERY.

'The rule,' that the plaintiff being entitled to discovery only, and not to the relief, a general demurrer lies, does not prevent a demurrer to relief, giving the discovery. *Todd v. Gee*, 17 Ves. 273. P. L. DISCOVERY; P. L. RELIEF.

Demurrer not good in part, and bad in part, therefore going to relief, to which the plaintiff was entitled, overruled generally; the plaintiff a purchaser, not being barred by a report against the title in another suit, upon a bill against him by the vendors. *Id. ib.*

Demurrer cannot be good in part, and bad in part. *Baker v. Mellish*, 11 Ves. 70.

In an answer and demurrer, the defendant ought to specify distinctly what parts of the bill it is intended to cover by the demurrer. 'It is informal to say "as to so much of the bill as defendant is advised he is bound to answer," and then after answering some parts to demur, as to all the rest of the matters charged in the bill; it ought to be precisely stated what parts of the bill defendant refuses to answer. *Devonsher v. Newenham*, 2 Scho. & L. 199. P. L. ANSWER.

No general rule whether demurrer for want of parties, should state the parties. *Ryle v. Price*, 6 Ves. 781.

The ground of a demurrer must be a short point, upon which it is clear the bill would be dismissed with costs at the hearing; therefore, upon a bill by assignees of a bankrupt, for specific performance of an agreement previous to the bankruptcy, to grant a lease, the case consisting of a combination of circumstances, the evidence might sustain the relief, with some modification, upon which a demurrer was overruled. *Brooke v. Hewitt*, 3 Ves. 253.

Where, in a suit for tithes, the title to the rectory is in issue, to a cross bill praying a discovery of the title, the rector cannot demur, although no other title is set up. *Bowman v. Lygon*, 1 Anst. 4. P. L. DISCOVERY; TITLE.

To an amended bill, a demurrer as to so much as had not been answered in the answer to the original bill, is bad. *Mynd v. Francis*, 1 Anst. 6. P. L. AMENDED BILL.

Demurrer to a discovery of a trading overruled; a demurrer good if confined to questions as to having committed an act of bankruptcy. *Chambers v. Thompson*, 4 Bro. C. C. 434. DISCOVERY; BANKCY. TRADING.

Every thing well pleaded is confessed by demurrer. *E. I. Comp. v. Hensham*, 1 Ves. J. 289.

Demurrer admits only facts well pleaded, and the facts alone without the conclusion of law. *Ford v. Peering*, *id.* 78.

A defendant having demurred to a part only of a bill, and then answered other parts, it is no objection to the allowance of the demurrer, that it is equally applicable to the whole of the bill. *Mayor of Dartmouth v. Seale*, 1 Cox, 416.

There shall not be two demurrers to the same bill, but if a demurrer to the original bill be overruled, there may be a demurrer to the amended bill. *Bancroft v. Wardour*, 2 Bro. C. C. 66. S. C. 2 Dick. 672.

Whether a demurrer for want of parties should be to the whole bill, *qu.?* *E. I. Comp. v. Coles*, 3 Swan. 142. P. L. PARTIES.

A demurrer cannot be good in part, and bad in part, as plea may. *Knight v. Mosely*, Amb. 176.

Demurrer should precisely distinguish each part of the bill demurred to. *Chetwynd v. Lindon*, 2 Ves. 450.

Demurrer must abide by the bill; pleas suggest a fact to be proved. *Brownward v. Edwards*, 2 Ves. 247. P. L. PLEA.

As demurrer cannot be good for part, and bad for part, it was allowed as to the discovery sought in relation to the subornation of perjury, because it had been allowed as to the discovery sought concerning proceedings before the delegates. *Baker v. Pritchard*, 2 Atk. 389.

Demurrer must be good in the whole. *Huggins v. York Building Comp.*, *id.* 44. S. C. Barn. 83.

A demurrer bad in part is void in toto; otherwise, as to a plea. *El. Suffolk v. Green*, 1 Atk. 451.

Demurring for want of jurisdiction is informal and improper; defendant should plead to the jurisdiction. *Robertson v. Rous*, 1 Atk. 544. JURISDICTION; P. L. PLEA.

If a defendant demurs because the bill contains several distinct matters against several defendants, he must, by answer, deny combination if it is charged by the bill. *Poucel v. Ardenne*, 1 Vern. 416. P. L. ANSWER.

Demurrer by witness overruled, he to pay costs. *Wardell v. Dent*, Dick. 334.

Demurrer to bill to perpetuate, and that plaintiff could try right then allowed. *North v. Gray*, Dick. 14.

General demurrer without any cause stated therein, overruled. *Duffield v. Graves*, Cary, 87. *Offley v. Morgan*, Cary, 107.

## 2. Speaking Demurrer.

A speaking demurrer is where a new fact is introduced, which is necessary to support the demurrer. *Davies v. Williams*, 1 Sim. 5.

A speaking demurrer is where, by way of argument or inference, the demurrer suggested a material fact, which was not to be found on the bill. *Cawthorn v. Chalie*, 2 S. & S. 129.

Demurrer only to what appears on face of the bill, else a speaking demurrer. *Brownward v. Edwards*, 2 Ves. 245.

Speaking demurrer over-ruled. *Edsell v. Buchanan*, 2 Ves. J. 83. 4 Bro. C. C. 254.

## 3. Where it lies.

Where a bill charges a defendant with acts which would subject him to a criminal prosecution under a statute, the defendant need not plead the statute, but may demur to the bill. *Fleming v. St. John*, 2 Sim. 181. P. L. PLEA.

A bill in equity does not lie by the assignees of a bankrupt against a judgment creditor and the sheriff, for monies levied under an execution upon a judgment by *nil dicit*. *Mitchell v. Knott*, 1 Sim. 497. BANKCY., ASSIGNEES IN.

A foreign state may sue in this court; but where a bill was filed by "The government of the state of Colombia and Don M. J. Hurtado, a citizen of that state, and minister plenipotentiary from the same to his Britannic majesty, and now residing at 33, Baker street, Portman square, in the county of Middlesex," a general demurrer was allowed to the bill, because the description of the plaintiffs did not enable the defendants to know upon whom process was to be served, in case a cross bill were filed. *Colombian Government v. Rothschild*, 1 Sim. 94.

Where a plaintiff, by the present practice of the court, may obtain that relief by petition for which a

supplemental bill was formerly necessary, and prefers the latter course, the supplemental bill is not demurrable, but the proceeding will be taken into consideration on the question of costs. *Davies v. Williams*, 1 Sim. 5. **PL. SUPPLEMENTAL BILL; PR. COSTS.**

Defendant demurring after process of contempt issued, demurrer ordered off file. *Mellor v. Hull*, 2 S. & S. 321. **CONTENTPT; PR. TAKING PLEADINGS OFF FILE.**

Bill for delivery of title deeds, and injunction to restrain setting up of outstanding term, to which no affidavit as to title deeds was annexed. Plea over-ruled, because it should have been confined to so much of bill as related to outstanding term, and because that part of bill relating to title deeds should have been demurred to for want of affidavit. *Hook v. Dormer*, 1 S. & S. 227. **PL. PLEA; PL. BILL; AFFIDAVIT; TITLE DEEDS.**

An estate being in lease, A enters and receives the rents during the continuance of the lease, and afterwards continues in possession up to a period more than twenty years distant from the time of his entry. Within twenty years after the expiration of the lease, B brings an ejectment, and files a bill for discovery: though the ejectment might be maintained at law, a demurrer to the discovery is good. *Cholmondeley v. Clinton*, 1 Turn. & R. 107.

Demurrer to a bill for a general account to be taken of all dealings and transactions between the parties, and for an injunction to restrain the defendant from taking out execution on a judgment recovered by him in an action at law, allowed, on the grounds that the statement in the bill did not furnish such a case of matter of account between the parties, as to entitle the plaintiff to the interference of the court, on the principles of equity, in that it was nothing more than matter of a set-off, or other defence at law; and if it had been a stronger case, the plaintiff, after having suffered the action at law to be tried and determined at nisi prius, had come too late to ask the interference of the court. *Cooper v. Hatton*, 12 Price, 502. **ACCOUNT; SET-OFF.**

Bill by assignees of bankrupt, brought for purpose of restraining bankrupt from disputing validity of commission by action at law; not alleging that the commission was a valid one, or that the bankrupt brought action only with a view to harass his assignees; general demurrer allowed. *Kirkpatrick v. Dennett*, 1 S. & S. 408. **BANKCY. ASSIGNEES IN; PL. BILL.**

Laches in filing bill cannot be taken advantage of, on arguing demurrer: it should be pleaded. *Ross v. Willoughby*, 10 Price, 2. **LACHES; LENGTH OF TIME.**

Demurrer will lie to bill to perpetuate, if it does not state that no action can be immediately brought. *Angell v. Angell*, 1 S. & S. 83. **PL. BILL TO PERPETUATE.**

Demurrer will hold only where, if matter alleged be taken as true, plaintiff has no title to relief. *Piggott v. Williams*, 6 Mad. 95.

Demurrer to bill, by creditors praying sale of testator's real estate to pay unsatisfied debts for want of sufficiency of personal, where he had directed his debts to be paid by his executors, and devised his real estate, on ground that it was not a charge on real estates, overruled, without prejudice, as being premature. *Sanderson v. Wharton*, 8 Price, 680. **CREDITORS' SUIT.**

It is good ground of demurrer, that counsel's signature does not appear on the bill. *Kirkley v. Burton*, 5 Mad. 378. **PL. BILL; SIGNATURE OF COUNSEL.**

Where witness is made party, merely for the purpose of discovery, it is demurrable. *How v. Best*, 5 Mad. 19. **PL. DISCOVERY; PL. PARTY; PR. WITNESS.**

Where, in aid of defence to action for libel, discovery would subject plaintiff at law to indictment, he

is not bound to answer; but because bill sought commission to examine abroad, to which plaintiff in equity was entitled, demurrer to whole bill was overruled, with liberty to amend. *Thorpe v. Macauley*, 5 Mad. 219. **PL. DISCOVERY AS TO CRIMINAL MATTER.**

Demurrer lies to bill for delivery up of will to be cancelled, which has been pronounced bad by ecclesiastical court, and is therefore unavailable, and for a receiver till letters of administration granted where no reason shown why they cannot be immediately taken out. *Jones v. Frost*, 3 Mad. 1. **PR. RECEIVER; DELIVERY UP OF DEEDS, &c.; ADMINISTRATION.**

General demurrer will not lie to bill against feme covert seeking account of monies received under a will fraudulently obtained by her, and placed out in securities in trustees' names, and that the same may be repaid out of her separate estate. *Greatley v. Noble*, 3 Mad. 79. **HUSB. & WIFE; SEPARATE ESTATE.**

Demurrer for want of equity overruled, the plaintiff by his will claiming under a settlement stated in bill, but which the bill represented as incapable of being set forth with certainty, the same being in defendant's possession. *Wright v. Plumtree*, 3 Mad. 481.

A demurrer and answer, filed by a defendant, attached for want of an answer, after orders for time to plead, answer, or demur, not demurring alone, ordered to be taken off the file. *Curzon v. De la Zouch*, 1 Swan, 185. **PR. TIME TO ANSWER; PR. ATTACHMENT; PR. TAKING PLEADINGS OFF FILE.**

Original bill filed to redeem mortgage, and an answer was put in, showing plaintiff had no title to redeem. Plaintiff afterwards purchases title to redeem, and amends bill and proceeds on it. Demurrer to amended bill allowed, on ground that it should have been shown by supplemental bill: on application, full costs were given. *Pilkington v. Wignall*, 2 Mad. 240. **PL. AMENDED BILL.**

Demurrer to a bill by the heir at law for a discovery, seeking also relief, allowed; the relief sought being, first, that an issue might be directed to try the question in a different county, on an allegation of undue influence, an heir at law not being entitled to any issue, except by consent, and a bill in equity not lying to change the venue; secondly, for the production of title deeds, without its being shown how they can be of service in assisting him to recover at law; thirdly, to restrain the defendant (devisee) from setting up outstanding terms, unsupported by allegation that there are any outstanding terms which may be set up; fourthly, for an injunction to stay waste, &c., and for a receiver, there being no instance of the court so interfering as between heir at law and devisee, where their adverse rights are in litigation, and on the ground of negligence and delay, the bill having been filed more than two years after the death of the presumed testator, and no action yet brought, although the commission of the alleged acts of waste and destruction stated to have been immediately after his death; fifthly, that the plaintiff may be let into possession of copyholds unsundered to the use of the will, that being mere legal relief, although he might have been entitled to the discovery, whether there were any copyholds unsundered. The bill also going on to pray, in the character of one of the next of kin, for an injunction from interfering with the personal estate and a receiver, the injunction asked being for an indefinite period, and no allegation of a suit depending in the ecclesiastical court. And although some of the discovery sought might have been proper to be obtained on a bill for discovery only, yet the demurrer allowed as to that also, upon the ground that, to support a general demurrer to a bill seeking discovery and relief, it is sufficient to shew that the plaintiff is not entitled to the relief he prays. *Jones v. Jones*, 3 Mer. 161.

Demurrer to bill for discovery and relief, if good as

to the relief, is good as to the discovery also. *Williams v. Steward*, 3 Mer. 502.

Demurrer to bill of discovery, in support of an action to recover the expenses of the entertainment given by the plaintiff under an agreement with the defendant, to introduce him to a woman of fortune, with a view of marriage, allowed. *King v. Burr*, id. 639. PUBLIC POLICY.

Demurrer by judgment creditor to bill for injunction to restrain him from taking out execution on his judgment against an estate sold, (before he had obtained judgment) and ineffectually conveyed to a purchaser, (the plaintiff) whereby the legal estate descended to the heir at law, overruled. *Prior v. Penpraze*, 4 Price, 99. INJUNCTION TO STAY EXECUTION.

Defendant to an injunction bill, having suffered the injunction to go against him upon a *dedimus*, the time for answering being expired, although not under an order for time, nor in contempt, *quere*, whether he may demur alone; and it seems that he cannot be allowed to do so. *Hemunds v. Suvery*, 3 Mer. 304. PR. TIME TO ANSWER.

On bill for specific performance of agreement to purchase against husband and wife, in which there was a statement that wife had separate estate, &c., with an interrogatory in support of statement as to the fact, demurrer by her allowed to such discovery. *Francis v. Wiggzell*, 1 Mad. 258. HUSB. & WIFE; SEPARATE ESTATE; SPEC. PERF.; DISCOVERY.

Where the object of a bill *quia timet* is to prevent the assignees of a bankrupt, purchaser of estate, from bringing an action to recover back part of consideration money remaining due to vendor, which had been paid to him subsequent to act of bankruptcy, on the ground of his having waived his equitable lien, by taking a bond for the purchase-money, if the bill charge as a fact, that the bond was given as a further additional or collateral security, the question of law cannot be raised on a general demurrer. *Bruband v. Hoskins*, 3 Price, Exch. 31.

Plea to bill, which is demurrable on face of it, overruled. *Billing v. Flight*, 1 Mad. 230. PLEA.

Demurrer of a married woman to a bill of discovery against her and her husband, in aid of an action for a debt on her account, allowed. *Barron v. Grilant*, 3 V. & B. 165. DISCOVERY; HUSB. & WIFE.

Demurrer by a mortgagee to a bill by a trustee under the will of the mortgagor, to carry into execution the trusts of the will, without offering to redeem the mortgage, allowed. *Donough v. Sheehridge*, 2 Ball & B. 555. MORTGAGE & MORTGEE.

Demurrer by a bankrupt to a bill joining him with his assignee in charges and prayer for relief, viz. the specific performance of a contract, previous to his bankruptcy, allowed. *Whitworth v. Davis*, 1 V. & B. 545. BANKRUPT; PL. PARTY.

Demurrer, that bill stated defendant's estate with uncertainty, viz. that he "is seised in fee, or otherwise well entitled to," and *ore tenus*, that reversioner was not party, overruled. *Baring v. Nash*, id. 551. PL. BILL, UNCERTAINTY.

Plaintiff entitled to discovery only praying relief. General demurrer lies. *Albrecht v. Sussmann*, 2 V. & B. 328. DISCOVERY.

Demurrer upon the statute of limitations to a bill for an account, stating that no demand was made for twelve years. *Foster v. Hudson*, 19 Ves. 180. LIMITATION, STAT. OF.

Counsel or attorney cannot be called upon to reveal the advice given to the client; demurrer, therefore, overruled as to the case and allowed as to the opinion. *Richards v. Jackson*, 18 Ves. 474. DISCOVERY; PROFESSIONAL CONFIDENCE.

Bill by a bankrupt and the assignees under an act, of which he afterwards took the benefit,

against representatives of the deceased assignees and others for an account of his estate, and various transactions before and since the bankruptcy, no assignee in the bankruptcy being a party, and collusion with persons accountable to the estate charged against only some of the representatives of the assignees. Demurrer allowed generally for want of equity, and as relief might be had by petition in bankruptcy, *ore tenus*, the suit being multifarious, as uniting parties, though in some respect connected, having distinct interests. *Sutton v. Davis*, 18 Ves. 72. S. C. 1 Rose, B. C. 79. PL. MULTIFARIOUSNESS; PL. PARTIES.

Bill following life insurance, effected by the plaintiff's clerk with the plaintiff's money, procured by embezzlement, and transferred to the defendants for valuable consideration, but with notice. Demurrer allowed, the transaction amounting to felony by the 39 Geo. 3. c. 85, and therefore not raising a civil contract. Secondly, the policies not being the plaintiff's property. *Cox v. Sutton*, 17 Ves. 329. JURISDICTION; CRIMINAL MATTERS.

General demurrer lies, where the plaintiff, though entitled to discovery, is not entitled to relief. *Speer v. Crawler*, id. 216.

Bill for payment of a promissory note which had been cut in two parts, one being produced, and the other alleged to be lost, and offering an indemnity, dismissed, as proving the loss, an action might be maintained. *Mossop v. Eadon*, 16 Ves. 430. BILL OF EXCHANGE, &c. LOST.

Demurrer allowed to a bill by the bank of England for an injunction against the action of an executor claiming a transfer of stock. Considering the stock as specifically bequeathed (which was doubtful) to trustees in France upon special trusts, if the executor cannot maintain the action upon the nature of the bequest, or as having assented, the injunction is unnecessary: if he can, upon his title to the stock, to be applied as the other property, there is no equity. *Bank of England v. Lunn*, 15 Ves. 569. EXECUTOR; INJUNCTION; BANK OF ENGLAND.

Bill against a corporation, trustees for a charity, for a discovery and injunction against a resolution depriving the plaintiff of his office of schoolmaster, charged to have been procured by five of the members, including the bailiff, from improper motives, with reference to a parliamentary election. Demurrer by those five, on the ground that no title was shewn to discovery against them, and *ore tenus*, that the charge would be the subject of criminal prosecution, overruled. *Dunster v. Corp. of Chippenham*, 14 Vcs. 245. CORPORATION; PL. DISCOVERY.

Demurrer allowed to a bill for discovery and injunction against an action, the effect being a contract for participation in an illegal transaction, the result of combination of wholesale grocers, by the title of the "Fruit Club," acting by a select committee, of which the defendants were members, to purchase all imported fruit, though not strictly forestalling, regrating, or monopoly. *Coxin v. Smith*, 13 Ves. 542. DISCOVERY; FORESTALLING, &c.

If the case, as stated in the bill, does not entitle the plaintiff to a decree, a demurrer will lie. *Hovenden v. Lal. Annesley*, 2 Sch. & L. 638.

A general demurrer holds, where the plaintiff, entitled only to discovery, prays relief also. *Gordon v. Simkinson*, 11 Vcs. 569.

Demurrer good to relief is good to discovery, sought with a view to the relief. *Baker v. Mellish*, 10 Ves. 544. RELIEF; DISCOVERY.

Defendant, having applied and obtained an order for time to answer, cannot put in an answer and demurrer without a special case, as the demurrer, being coupled with answer, could not be taken off the file;

it was moved to expunge or overrule. *Taylor v. Milner*, 18 Ves. 444. PR. TIME TO ANSWER; PR. TAKING PLEADINGS OFF FILE.

A bureau delivered for the purpose of repairs to a person who discovered money in a secret drawer, which he converted to his own use. This amounts to a felony, and upon that ground a demurrer to a bill of discovery was allowed. *Cartwright v. Green*, 8 Ves. 405. DISCOVERY TENDING TO CRIMINATE.

A married woman may demur to a discovery that may subject husband to a charge of felony. *Id.* 406. DISCOVERY TENDING TO CRIMINATE; HUSB. & WIFE.

Demurrer allowed, the bill not alleging with sufficient certainty by whom the duties claimed by the city of London under letters patent, in respect of which a discovery was prayed in aid of an action, were payable. *Mayor, &c. of London v. Levy*, 8 Ves. 398.

Where defendant ought to have demurred to the jurisdiction, the court will make no decree. *Sed quere*, by cross bill that objection is waived; see title "Waiver." *Burker v. Dacie*, 6 Ves. 686. PR. DECREE.

General demurrer lies, the plaintiff being entitled to discovery, but not to relief. *Id. ib.*

Bill by creditors by judgment, who had sued out elegits for discovery of freehold estates, charging that defendant, upon his election as M. P., previously to judgments, gave in his qualification, and that if the estates composing it were conveyed away since, it was without consideration. Demurrer as to qualification, &c., and answer as to rest; but not going to charge of conveyance without consideration. Demurrer was overruled. *Mountford v. Taylor*, 6 Ves. 788. PL. DISCOVERY.

Bill alleging fraud as to quantity and quality of goods sold, not discovered till they were exported to America; that they were in consequence sold at a loss; and that plaintiff, being threatened with an action, paid the original price according to contract, under a protest that he would seek relief in equity; and praying an account and payment in respect of the loss, and a commission to America. Demurrer allowed. *Kemp v. Pryor*, 7 Ves. 237. ACQUISITION BY PAYMENT.

The rule that if the plaintiff is not entitled to the relief, though entitled to discovery, a general demurrer holds, does not preclude the defendant from demurring to the relief, and answering as to the discovery. *Hodgkin v. Longden*, 8 Ves. 2. PL. ANSWER.

Bill by heir at law against residuary devisees, legatees, and executors, suggesting a secret trust, undertaken at the request of testator, either not legally declared, or if so, void as to the real estate and written acknowledgments by defendants of an intended trust for charity purposes, the will also by equal legacies to them, and some particular expressions importing a trust. A general demurrer to discovery and relief was overruled. *Muckleston v. Brown*, 6 Ves. 52. PL. DISCOVERY.

Though plaintiff is entitled to discovery, if he prays relief to which he is not entitled, demurrer will lie. *Id.* 63.

Demurrer allowed to a bill to have a presentation to a living upon the next avoidance delivered up, charging the defendant with gross misconduct in obtaining it, and in other respects, while a private tutor in the family. *M'Namara v. —*, 5 Ves. 824. PRESENTATION TO LIVING; FRAUD, UNDUE INFLUENCE.

Demurrer by a married woman to a bill of discovery of transactions with her as agent to her husband, allowed. *Le Terrier v. Marg. of Anspach*, 5 Ves. 322. PL. DISCOVERY; HUSB. & WIFE.

Bill by the E. I. Comp. claiming from a part-owner of a ship freighted by them double the sum received by him for the sale of the command, to be paid or allowed under the charter-party and a bye-law to the company, one moiety to their use, the other to be paid or returned to the person who shall give the company information, and make proof, the deed being, on settling the account, cancelled through ignorance of the fact. Demurrer to the discovery, because it might subject the defendant to penalty, covering not only the direct charge, but also circumstances of mere inducement, as the execution and cancellation of the deed, and to the relief generally for want of equity, and for defect of parties, viz. the other part owners, particularly one who executed, and the informer, was overruled. *E. I. Comp. v. Neave*, 5 Ves. J. 173. E. I. COMP.; DISCOVERY TENDING TO FORFEITURE.

Demurrer, both to the discovery and relief, if good as to the latter, shall be allowed as to both, though the plaintiff may be entitled to the discovery. *Id.* 185.

Demurrer, on the ground of length of time to bill for redemption of mortgage, is good. *Hardy v. Reeves*, 4 Ves. 479. LENGTH OF TIME; MORTGAGE, REDEMPTION OF.

Demurrer allowed to bill of discovery, tending to shew maintenance of suit on part of defendant. *Wallis v. Dk. Portland*, 8 Bro. P. C. 161. PL. DISCOVERY TENDING TO CRIMINATE; MAINTENANCE OF SUIT.

Demurrer allowed to bill, after verdict at law on bond, praying discovery, if consideration was not an illicit connexion, and if defendant was not guilty of a general incontinence. *Franco v. Bolton*, 3 Ves. 368. PL. DISCOVERY TENDING TO CRIMINATE; BOND EX TURPI CAUSA.

A covenanted servant of the East India Company, being senior merchant, and acting as agent of company, as resident or chief at one of their factories, is incapable of forming any contract whatsoever in which the company is interested so as to derive profit to himself or any otherwise however than for the profit, &c. of the company. And if such contract be actually made between him, as a merchant dealing for himself, and the Company's board of trade in India, in which, undue advantage is taken by him by means of his knowledge and influence as resident at the factory, he cannot demur generally on the ground of want of equity to a bill for discovery and relief by the Company. *Hinchman v. E. I. Comp.*, 8 Bro. P. C. 85. PL. DISCOVERY TENDING TO CRIMINATE; PRINCIPAL & AGENT.

Bill by a partner, under a parol agreement, charging misconduct in the other partner, and praying a dissolution, account and injunction from executing securities in the name of the firm; demurrer to prayer for a dissolution, because there was no writing between them; overruled. *Master v. Kilton*, 3 Ves. 74. PARTNERSHIP.

After twenty years' possession and a descent cast, the heir at law, of former owner, filed bill of discovery of title of occupant, suggesting pretended devise from his ancestor. Demurrer allowed. *Mutlow v. Smith*, 3 Anst. 709. DISCOVERY; TITLE; LENGTH OF TIME.

Bill charging that the defendants had got the title deeds, and mixed the boundaries, prayed a discovery, possession, and an account; demurrer allowed. *Loker v. Rolle*, 3 Ves. 4.

Bill prayed that the defendant might state the particulars of his pedigree as heir, and of the births, baptisms, marriages, deaths, or burials; demurrer allowed. *Joy v. Kekewich*, 2 Ves. J. 679. TITLE; PL. DISCOVERY.

Action on bills of exchange; bill to have them delivered up, as being given on a gaming transaction;

a demurrer was overruled. *Newman v. Franco*, 2 Anst. 519. **PR. DELIVERY UP OF DEEDS**; **PL. DISCOVERY** **TENDING TO CRIMINATE.**

Demurrer for cause that plaintiff has remedy at law will not be entertained if remedy there be doubtful or difficult. *O'Brien v. Irwin*, 1 Ridg. L. & S. 361. **JURISDICTION.**

Where statute of limitation had run against recovery of penalty for usury, the usurer cannot protect himself from discovery by demurrer founded on liability of subjecting himself to forfeiture. *Talbot v. Smith*, 1 Ridg. L. & S. 360. **USURY**; **DISCOVERY**; **STAT. OF LIMITATION.**

Plaintiffs, having brought an action against the defendant to recover payments made for insuring lottery tickets, prayed a discovery and account, offering to allow payments made by the defendant; as the defendant could not have that advantage at law, a demurrer was overruled. *Brandon v. Johnson*, 2 Ves. J. 316. **PL. DISCOVERY**; **ACCOUNT.**

Where the plaintiff is entitled to the discovery he seeks in support of an action, a prayer for general relief, or for relief, that is consequential to the prayer for discovery, as an injunction, will not sustain a demurrer. *Brandon v. Sands*, 2 Ves. J. 514. **PL. DISCOVERY**; **PL. RELIEF.**

Joint and separate demands by the same bill, demurrer allowed. *Quare* whether the clause in statute 8 Geo. 2. c. 17. directing that the date and name shall be engraved on each pint, relates to the penalties only, or whether that is necessary to maintain the exclusive property, if so, whether it ought to appear on the bill. *Harrison v. Hogg*, id. 322. **PL. BILL.**

Where a bill prays relief and discovery, the plaintiff being entitled to discovery only, a general demurrer allowed. *Collis v. Swayne*, 4 Bro. C. C. 480. **PL. RELIEF & DISCOVERY.**

Demurrer to bill for dower overruled, though it stated no impediment to succeeding at law. *Mundy v. Mundy*, id. 294. *Vide* S. C. 2 Ves. J. 122. 128. &c. **DOWER**; **JURISDICTION.**

Demurrer lies where it is clear that taking the charges to be true, the bill would be dismissed at the hearing. *Uttersen v. Mair*, 2 Ves. J. 95. S. C. 4 Bro. C. C. 270.

Demurrer to a cross bill to have an usurious security delivered up, not offering to pay the sum really due, allowed. *Mason v. Gardiner*, 4 Bro. C. C. 436. **USURY**; **PL. BILL.**

Demurrer of another cause pending, overruled; the cause depending being such as would not be effective, and the present bill making new parties. *Law v. Rigby*, id. 60. **LIS PENDENS.**

Testatrix gave the residue of her personal estate to trustees, to "cause to be erected and built a dwelling house to be appropriated for the use of a school-house." To a bill praying that the charity might be carried into effect, a demurrer that the charitable legacies were void allowed. *Att. Gen. v. Nash*, 3 Bro. C. C. 688. **MORTMAIN.**

One of sworn clerks of chancery files bill against all the six clerks, praying that agreement between them regulating practice might be set aside, order of master of rolls rescinded, and other regulations established. Demurrer allowed, that plaintiff had shown no title for court to interfere. *Hill v. Sewell*, 2 Bro. P. C. 541.

Demurrer allowed, the bill not connecting the fraud with the transaction sufficiently. *E. I. Comp. v. Hensham*, 1 Ves. J. 287. **PL. BILL.**

Where a bill seeks discovery of matter that the defendant is not obliged to answer, he must take the benefit of it by demurrer. *Selby v. Selby*, 4 Bro. C. C. 11. **PL. DISCOVERY.**

Demurrer to a bill charging fraud in a misrepres-

entation of the value of an estate to vendor on the ground that the transaction was twenty-seven years old, and had been confirmed by a deed twenty-three years since, disallowed. *Deloraine v. Browne*, 3 Bro. C. C. 633. **LENGTH OF TIME.**

Courts of equity have a current jurisdiction with courts of law in cases of fraud, and, therefore, a demurrer for want of equity will not lie to a bill praying relief against a fraudulent policy of insurance. *Sowerby v. Warden*, 2 Cox, 268. **JURISDICTION**; **FRAUD.**

A mother gives a promissory note to a trustee for the benefit of a child of which she is ancient. This not sufficiently *nudum pactum* for the court to allow a demurrer to a bill by the child, and the trustee to have it carried into execution. *Seton v. Seton*, 2 Bro. C. C. 610. **NUDUM PACTUM.**

General demurrer allowed to a bill praying discovery and relief where the relief is at law. *Price v. James*, id. 319. S. C. 2 Dick. 697. **PL. RELIEF**; **PL. DISCOVERY.**

Plaintiff claimed as heir at law of A, stating that one person through whom she had made title had three sons, and that she claimed under the second son, but without alleging that the first son died without issue. Demurrer, "for that the plaintiff had not by her bill sufficiently stated the pedigree by which she made title," was overruled. *Delorne v. Hollingsworth*, 1 Cox, 421. **PL. TITLE.**

The bill stated that a testator intended to republish his will, but was prevented from so doing by the fraud of the heir at law. A demurrer to so much of the bill as required him to discover whether the testator did not intend to republish his will, was, under these circumstances, overruled. *Dixon v. Olmuis*, id. 414. **PL. DISCOVERY.**

A bill proper for discovery only prays relief, yet a general demurrer was overruled, but without costs. *Fry v. Penn*, 2 Bro. C. C. 280. *Sed quare*, see id. 319. **PL. RELIEF**; **PL. DISCOVERY.**

Promise to renew a lease in consequence of money already laid out is *nudum pactum*, and will not be specifically performed, and money laid out afterwards will not vary it; on this ground a demurrer allowed. *Robertson v. St. John*, id. 140. **LEASE, RENEWAL**; **CONSIDERATION.**

Bill by next of kin, intended legatee, in an unexecuted testamentary paper before probate or administration obtained against the executor in a former will for an account of personal estate of testator (alleging fraud, collusion, &c.) Defendant demurs. Demurrer overruled. *Morgan v. Harris*, 2 Bro. C. C. 121. **ACCOUNT.**

Demurrer to a bill for an injunction to restrain injury to fish-ponds, overruled. The court also in this case restrained a tenant from building so as to interrupt his landlord's prospect. *Bathurst v. Burden*, id. 64. **INJUNCTION AGAINST WASTE, &c.**

Bill stated the plaintiff to be lessee of an ancient mill, and that defendant had erected flood-gates and other works on the river which obstructed plaintiff's mill, and prayed that defendant might be decreed to pull down these works, and be restrained from erecting new ones, such works having been erected about three years. Such a bill will not lie until the right be established at law, and a demurrer for want of equity is good. *Weller v. Smeaton*, 1 Cox, 102. **TITLE**; **NUISANCE.**

A demurrer will not lie to a bill merely for a discovery to enable the plaintiff to go to law, on the ground that the plaintiff had not brought his action. *Moodaly v. Morton*, 1 Bro. C. C. 469. S. C. 2 Dick. 652. **PL. DISCOVERY.**

Demurrer to a bill against the East India company and their secretary, praying a commission to examine witnesses in India, and that the defendants might discover by what authority plaintiff was dispossessed

of a lease for supplying Madras with tobacco (the plaintiffs intending to bring an action), overruled. *Id. ib.*

Bill to be quieted in possession of a mill, and that defendants might pull down works about it, and be restricted from erecting others. Demurrer, because plaintiff had not established his right at law, allowed. *Weller v. Smeaton*, 1 Bro. C. C. 472. TITLE.

Demurrer will not lie to a bill stating a sale of the office of secondary to Wood-street comptroller, and praying an account of the profits of the office; for, upon demurrer, the nature of the office does not appear, nor, consequently, whether such a sale is illegal under stat. 5 & 6 Ed. 6. Demurrer to the whole bill, with an exception to a small part, may be good in point of form. *Hicks v. Raincock*, 1 Cox, 40. SALE OF OFFICES.

W devised to his wife for life, remainder to trustees to preserve contingent remainders; remainder to E for life; remainder to trustees, *ut supra*; remainder to the heirs of her body; remainder over. In a subsequent clause he declared his intention that E should have only a life estate. Upon a bill filed by the remainder-man for a conveyance in which E should take only a life estate, it was demurred to, and the demurrer allowed, because these are all legal estates. *Thong v. Bedford*, 1 Bro. C. C. 313. JURISDICTION; WILL C. OF.

Upon *quare impedit* brought against the plaintiff, he filed the present bill to discover whether the clerk presented to him by defendant had not given a general bond of resignation in order to set up that bond as a defence at law for having refused him institution. To this bill defendant demurred, 1st, on account of legality of such bond; 2dly, that the discovery was immaterial. Demurrer overruled. *Sp. London v. Fytche*, *id.* 96. PL. DISCOVERY TENDING TO CRIMINATE.

Motion to discharge a demurrer after motion for time to plead answer or demur not demurring alone, granted the answer only, denying combination. *Lee v. Pascoe*, *id.* 78. PL. TIME TO ANSWER, &c.

Demurrer to a bill for specific performance of an agreement, insisting on the statute of frauds, overruled on the merits. *Howard v. Okeover*, 3 Swan. 421. STAT. OF FRAUDS; SPEC. PER.

Validity of leases is triable at law; therefore, bill to set lease aside demurrable. *Hutchinson v. Gamble*, 2 Bro. P. C. 518. LEASE.

By the known law of the land, no alien born can take by grant, devise or other purchase, any freehold or chattels real for his own benefit; but can and does, in such cases, take for the benefit of the crown; yet this disability, being neither a penalty or forfeiture, the alien cannot demur to an information filed for discovering the place of his birth, in order to establish the fact of alienage. *Duplexis v. Att. Gen.* 1 Bro. P. C. 415. S. C. 2 Ves. 286. PL. DISCOVERY TENDING TO FORFEITURE; ALIEN.

An information is filed by the Attorney-general against A and B for a discovery of the place of their birth, charging them to be aliens. Demurrer, 1st, to jurisdiction of equity; 2nd, that the defendants were not bound to betray their own title, and, therefore, the king was not entitled to the discovery prayed. Demurrer overruled. The known method of recovering estates, held by aliens, for the benefit of the crown, is by a commission under the great seal, to enquire into the facts; and, on the inquest finding them, to seize the estate into the king's hands. And, in order to prove facts, the king has the same right to a discovery, by the assistance of a court of equity, as the subject has, and founded on the same principle of justice, viz. that it is in general against conscience for any one to enjoy the property of another by concealing his right. *Id.* 419.

Demurrer to discovery, for that plaintiff has not made such a case as entitles him to such discovery; on arguing the demurrer the court being of opinion the plaintiff was not entitled to relief, allowed the demurrer, though it was to the discovery only. *Jefferys v. Baldwin*, Amb. 164. DISCOVERY.

Though parties may demur to discover any thing which may prove illicit cohabitation, or what may subject them to pains, penalties, or ecclesiastical censures, &c., a charge against persons of a conspiracy or attempt to set up a bastard child, is not demurrable unto, not being *per se* an indictable offence. *Chetwynd v. Lindon*, 2 Ves. 450. PL. DISCOVERY TENDING TO CRIMINATE.

On a bill to set aside a usurious contract, defendant may demur to a discovery of what interest he agreed to take, for he cannot set forth that without discovering the very interest he has taken. *Chauncey v. Tahourden*, 2 Atk. 393. PL. DISCOVERY; USURY.

Demurrer to injunction as to a mandamus allowed; so to indictment, information, or prohibition. *Ld. Montague v. Dudman*, 2 Ves. 296.

A demurrer may be put in after a plea is overruled. *E. L. Comp. v. Campbell*, 1 Ves. 246. PR. PLEA OVERRULED.

Demurrer to information as subjecting defendant to pains and penalties. *Id.* 246. PL. DISCOVERY TENDING TO CRIMINATE.

Demurrer lies to a bill for discovery of an assignment of a lease without licence, if it does not expressly waive the forfeiture. *Uxbridge v. Starveland*, 1 Ves. 56. PL. DISCOVERY TENDING TO FORFEITURE; COVENANT, BREACH OF.

Demurrer allowed to a bill for payment of wages of knights of a shire, the remedy being at common law. *Shepherd v. Cotton*, 1 Ves. 38.

Demurrer to discovery of defendant's title under a settlement, in contradiction to which plaintiff claimed, overruled, being unsupported either by answer or plea to a specific charge in the bill. *Stroud v. Deacon*, 1 Ves. 37. PL. DISCOVERY.

Where the bill was for discovery, and to perpetuate testimony, and plaintiff amended by striking out the discovery and relief, but the bill, in praying process, prayed that defendant might abide such order and decree as the court should think proper; it was held a bill for relief, and a demurrer was allowed. *Rose v. Gannell*, 3 Atk. 439. PRAYER FOR RELIEF.

Defendant having examined B, his clerk, in court, plaintiff exhibited interrogatories to cross-examine him, to which he demurred, for that he knew nothing, but as defendant's clerk in court or agent; demurrer overruled, as covering too much, for it ought to conclude that he knew nothing but by the information of his client. *Vaillant v. Dudomead*, 2 Atk. 524. PROFESSIONAL SECRECY; PR. CROSS-EXAMINATION.

Where at law the party calls upon his attorney for a witness, the other side may cross-examine him to the point in the cause. S. C. *ib.*

Counsellor, solicitor, or attorney, may be privileged from being examined in such cases, but not an agent. *Id. ib.*

Demurrer to examination as being counsel for the opposite party was overruled, for that what he knew was as conveyancer only. S. C. *ib.*

A, by will, gave an estate to his wife, *dur. viduat.* with a limitation over, in case of her second marriage. The remainder-man brought a bill for discovery of her second marriage, to which she demurred, as subjecting her to a forfeiture. Demurrer overruled, for this is not a condition, but a limitation over of an estate, and therefore no forfeiture. If it had been a condition for the breach of which a forfeiture would have been incurred, such a demurrer would have been allowed. *Chauncey v. Tahourden*, 2 Atk. 392, 393. PL. DISCOVERY TENDING TO FORFEITURE.

Bill by executor for discovery of defendant's marriage, who demurred as it would be a forfeiture of her legacy, which was given conditionally, if she married with consent of trustees under the will. Demurrer allowed, as she cannot answer the marriage without shewing, at the same time, it was against consent. *S. C. lb.*

Demurrer will lie to bill brought to discover whether there is such a person, or where he is, in order only to make him a party. *Dineley v. Dineley*, 2 Atk. 394. **PL. DISCOVERY.**

Bill brought by principal to discover what goods defendant bought of his agent; he demurred, for that he was not obliged to set out what gain he had made by retail; demurrer overruled. *Lisset v. Reare*, 2 Atk. 394. *lb.*

Whoever comes here for an account of rents and profits, prays a discovery as incident to it, and for that reason a defendant cannot demur and plead to the same matter. *Dorner v. Fortescue*, 2 Atk. 282. See 6 Ves. 290. *S. C. Ridgw.* 176.

A man who demurs at law demurs in chief, and it is a perpetual bar if judgment should be against him, but if a demurrer is overruled, here a defendant may insist afterwards upon the same thing by his answer. *S. C. lb.*

A plea may stand for part, and be overruled for part; otherwise as to a demurrer. *S. C. lb. PLEA.*

After the time for answering is expired, a defendant cannot file a general demurrer. *Cassell v. Tollett*, 3 Swan. 683.

After an attachment for not answering, the court allowed the defendant to file an answer and demurrer. *Id.* 684.

Where defendant has answered to a discovery, he cannot afterwards demur. *Abraham v. Dodgson*, 2 Atk. 157.

Though defendant answer to the discovery, yet he may demur to the relief. *Id.* See 9 Price, 259. *Mif. Pl.* 171. *1 Vern.* 463.

A bill is brought by a lord of a manor to recover a fine for a copyhold, on a suggestion that the defendant was admitted by attorney, but sometimes pretends the attorney had no authority to take such admittance. The defendant answers as to a part, and demurs as to relief; the demurrer held good. *North v. Ft. Stafford*, 3 P. W. 148.

Defendant cannot plead and demur to same part of bill. *Cotter v. Lamer*, 1 Eq. Ab. 42. **PL. PLEA.**

If bill in equity brought in Duchy court, to recover lands granted by the crown, omit to aver that the lands lie within the limits of the duchy, it is good cause of demurrer. *Id. Coningsby's case*, 9 Mod. 95.

A is indebted to B; B outlaws A and C, having goods of A's in his hands. B brings a bill against C, to discover what goods of A, C has in his hands; C may demur, for that B makes no title to the goods, as having no grant from the crown, also for that the attorney-general ought to be made a party. *— v. Bromley*, 2 P. W. 269. **OUTLAWRY; PL. DISCOVERY.**

A will was proved in spiritual court, but executor of former will brought bill in equity to discover by what means the latter will was obtained, and whether testator was not incapable, or imposed upon, and for account. Demurrer to jurisdiction overruled. *Andrews v. Pouis*, 2 Bro. P. C. 504. **WILL, PROOF OF.**

Case of a plaintiff claiming under a will, where it is apparent, upon the construction of it, that he has no title. Demurrer allowed. *Beech v. Crull*, Prec. Chan. 588.

Bill to establish a right of common, and to set aside former decrees; demurrer, for that, if there had been error, a bill of review should have been brought; demurrer allowed. *Id. Granville v. Ramsden*, Bunb. 56. **PL. DECREE SETTING ASIDE.**

Bill to be relieved against an award made by some of the members of the E. T. Company, and those members and the arbitrators are made defendants, they may demur to the whole bill without answering to the fraud, for the plaintiff can have no decree against them, nor can their answer be read against the company, but they ought to be examined as witnesses. *Dr. Steward v. E. T. Comp.* 2 Vern. 380. *S. C.* 9 Mod. 387. **PL. ANSWER.**

Bill brought by an obligee in a bond against the heir of the obligor, for a satisfaction of the debts out of assets, but it is not shewn that the heir was not bound in the bond; a good cause of demurrer. *Crossing v. Honor*, 1 Vern. 180.

No good cause of demurrer that an executor is not a party, when plaintiff alleges in his bill he knows not who is executor, and prays defendant may discover him. *Bouquer v. Corert*, 1 Vern. 95. **PL. PARTIES.**

An infant entitled to the trust of lands in fee, marries without the consent of her father. The father brings a bill against the husband and wife and her trustees, that a provision might be made for her and her children out of these lands. The husband and wife demur, and the demurrer was allowed. *Micoe v. Powell*, 1 Vern. 39. **TITLE.**

A subpoena no record, nor ought to be demurred unto. *Ward v. Lake*, 1 C. C. 50. 2 Free. 180. 3 C. R. 15. *Gillb. Eq. Rep.* 234. **PL. SUBPENA.**

An answer cannot be demurred to. *Williams v. Owen*, 2 Freeman. 181. 2 C. C. 8. **PL. ANSWER.**

#### 4. Where overruled by Answer.

See also **PL. ANSWER**, 7.

A demurrer to part of a bill of discovery and answer to other part of the bill, the demurrer is overruled, if the answer extend to any of the facts covered by it, and there is no distinction in this respect between demurrers to bills for relief, and demurrers to bills for discovery only. *Corbett v. Hawkins*, 1 Y. & J. 421. **PL. ANSWER.**

Where, under a local act, the corporation were bound to pay a certain annual sum to the commissioners under the act, which sum was paid up to 1818, afterwards in 1821, an action was brought for the arrears then due, to which the corporation pleaded, in effect, a deficiency of revenue whereout the commissioners could pay the same; whereupon the commissioners filed a bill stating the facts, upon which the liability arose, and charging that the revenues were not deficient, setting forth various tolls, &c. which before and since the act the corporation had let on leases at large rents, and alleging that since that period it had received beyond the sum due to the commissioners, and leaving a surplus annually, praying a discovery and account, &c. To this the corporation demurred, first, as to the discovery and account prior to 1818, on the ground that any surplus previous thereto was not applicable to the payment of arrears of future years; they also put in an answer, admitting leases and receipts of various tolls, and certain harbouring dues and ferry tolls, contending that the latter were revenues not liable under the act to the payment of the charge, and that upon the other tolls there had been no surplus beyond the expences of collecting: Held, first, that the demurrers were overruled by the answer, and, second, that admitting the surplus of previous years not to be applicable, the discovery of the revenues in such antecedent years might furnish presumptive evidence and material upon the trial of the action. *Archer v. Little*, 1 Bli. N.S. 272.

To bill to set aside award, charging fraud and corruption in arbitrators, defendant answered as to fraud



and corruption, and demurred to rest of bill; held answer overruled demurrer. *Dawson v. Sadler*, 1 S. & S. 542. **PL. ANSWER.**

A general demurrer, for want of equity, to bill for discovery in aid of action, interrogating as to certain facts, is overruled by defendant's answering as to any material fact, though it was done in compliance with the rule, on granting time to answer, &c. not demurring alone. On a special application, however, made before filing or arguing demurrer, leave will be given so as to relax this rule. *Sherwood v. Clark*, 9 Price, 259. **PL. ANSWER; PR. TIME TO ANSWER.**

Bill stating a sequestration for want of an answer, prayed a discovery and account of all money or other property of the defendants in the original cause, in the hands of defendants, who are bankers at the time of service of the sequestration, or since. Upon demurrer as to the money, and answer as to the rest of the bill, the Ld. Ch. determined against the demurrer upon the form, considering it overruled by the answer, and would not, in that stage of the cause, decide the two points, 1st, whether a sequestration on mesne process can be executed farther than to pay the expences; 2nd, whether a chose in action is liable to sequestration. *Simmonds v. Kinnaird*, 4 Ves. 735. **PL. ANSWER; PR. SEQUESTRATION.**

A demurrer to the relief is overruled by an answer to the discovery of the facts on which the relief is prayed. *Roberts v. Clayton*, 3 Aust. 715. **PL. ANSWER.**

Where a man demurs for that the bill contains several matters, not relating one to the other, if he does more by answer than deny combination and confederacy, he overrules his demurrer. *Done v. Peacock*, 3 Atk. 726.

The defendant cannot demur and answer to the same part of the bill, for the answer overrules the demurrer. *Jones v. Stafford*, 3 P. W. 80.

If a defendant demurs because the bill contains distinct matters against several defendants, and answers further than denying combination, he overrules the demurrer. *Hester v. Weston*, 1 Vern. 463. See 2 Atk. 157. **MIF. PL. 171.**

Defendant demurred for that plaintiff had made no title by his bill, and also answered several parts of the bill; demurrer overruled by the answer. *Savage v. Smallbroke*, 1 Vern. 90.

#### IV. INFORMATION.

See also **CHARTY**, IV.

The attorney general may proceed without a relator. *In re Bedford Charity*, 2 Swan. 520. **PL. RELATOR.**

**Qu.** Whether in case of an information filed by the attorney general, where the defendant has put in his answer, and the attorney general has not replied or otherwise proceeded for three terms, the defendant may on motion obtain an order that he may go without day. *Att. Gen. v. Eytton*, 6 Price, 85.

A decree pronounced in 1670, in a suit against the trustees of a charity, impropriate rectors, and persons interested in the due application of the funds, to which the attorney general was not a party, having directed the trustees under the indemnity of the court, to perform an agreement with the plaintiff in that suit, for granting a lease of tithes for 990 years at a fixed pecuniary rent, and an exchange of lands, and the conveyances having been accordingly executed, and the rent constantly paid, and the lands enjoyed in conformity to the decree; an information by the attorney general, at the relation of the present trustees, against the person claiming under the plaintiff in the former

suit, for an account of tithes, not stating the decree of 1670, which was set forth in the answer, was dismissed. *Att. Gen. v. Warren*, 2 Swan, 291. **ATT. GEN.; PL. PARTY. DEFEE, WHO WOUND BY.**

In suits on behalf of charities, the court will not allow informalities prejudicial to the defendant. *Id.* 310. **CHARTY SUIT.**

Commissioners appointed by act of parliament, being authorized to levy a rate (not exceeding a certain proportion of the poor rate) on the occupiers of all houses, &c. in Brighton, for paving, lighting, and watching the town, and another rate not exceeding a fixed sum, on every chaldron of coal, landed on the beach, or otherwise brought into the town, for repairing or building works to protect the coast of Brighton against the encroachment of the sea, (the act reciting that the inhabitants were unable to save money sufficient for that purpose without the aid of parliament) with power of distress for non-payment and liberty to apply any surplus of the coal rate, after payment of the debt contracted on the security of that rate, and the expences of repairs, &c. in aid of the rate for paving, &c.; to an information by the attorney general, at the relation of an inhabitant, filed against forty-eight commissioners (the whole number a hundred), by the description of acting commissioners, stating that the commissioners had, during several years, levied the coal duty at its maximum, and applied a large proportion of the produce in aid of the town rate for paving, &c., instead of the construction and repair of works for the protection of the coasts, and the discharge of the debt contracted on the security of the coal duty, and had distrained the goods of the relator, for non-payment of the duty, and praying an account of the money levied and expended, an injunction against an undue levy, and a direction that the commissioners should replace any sums which they had applied to purposes not warranted by the act, a general demurrer for want of equity, and a demurrer *ave tenus* for defect of parties, were overruled. *Att. Gen. v. Brown*, 1 Swan, 265. **PL. PARTIES.**

Regulation of trust charity supported by voluntary contributions, is proper subject of bill not of information. *Davis v. Jenkins*, 3 V. & B. 151. **TRUST.**

Prince of Wales may file an English information of intrusion by his attorney general, for lands, parcel of the Duchy of Cornwall. *Att. Gen. v. St. Aubyn*, Wightw. 167. **JURISDICTION.**

The proper relief given on an information for a charity without a specific prayer. *Att. Gen. v. Brooke*, 18 Ves. 319. **PL. PRAYER; CHARITY.**

Information against a corporation, stating that they were seized of real estates partly for purposes of public utility, and other part in trust for private charity; and charging a general misapplication of the funds, and praying relief accordingly: a demurrer for multifariousness was allowed. *Att. Gen. v. Corp. of Curnarthen*, Coop. 30. **PL. MULTIFARIOUSNESS.**

In a charity case, though the information prays wrong relief, the court will give proper relief. *Att. Gen. v. Whiteley*, 11 Ves. 247. **CHARITY.**

General objection by the answer to an information, that all the terre tenants of the premises charged with the charity, are not parties without any particular description, the court will direct inquiries what other lands are charged, &c., previously deciding the validity of the charge against the defendants before the court. *Att. Gen. v. Jackson*, 11 Ves. 365. **PL. PARTIES; PR. INQUIRY.**

The jurisdiction of the court of chancery upon informations for establishing charities, arose since the reign of Elizabeth. *Att. Gen. v. Bowyer*, 3 Ves. 726. **CHARITY; JURISDICTION.**

Information decreed to be taken *pro confesso*, upon two insufficient answers. *Att. Gen. v. Young*, *id.* 209.

On information for a charity relator appearing to have no title, there can be no decree but to dismiss the informations; and in that case costs cannot be given out of the charity. *Att. Gen. v. Oglander*, 1 Ves. J. 246. **Pr. Costs.**

Trustees were directed to be inhabitants of A. An information to remove them because not inhabitants, must shew there were proper persons in A to be trustees. *Att. Gen. v. Cowper*, 1 Bro. C. C. 439.

Information at relation of lunatic, bad; he must be party. *Att. Gen. v. Tiler*, Dick. 378.

The rule that an information for a charity is not to be dismissed, if the party has failed to pray the proper relief, holds only in those cases which the court thinks proper for its interference at all; and the information here being improper, was dismissed with costs. *Att. Gen. v. Middleton*, 2 Ves. 327. **Pr. Prayer.**

On information for charity, though the title mistaken, if a title appears, it must be established. *Att. Gen. v. Brereton*, id. 426.

Where there was only a general allegation as to the right of election to accuracy, which was not examined into or proved, the court would not make any decree, but dismissed the information with costs. *Att. Gen. v. Parker*, 3 Atk. 576. 1 Ves. 43.

A charity established, though the information prayed such relief as was refused. *Att. Gen. v. Mayor, &c. of Stamford*, 2 Swan, 591. **Charity.**

If an information for tithes, the value of them must be set forth. *Hardwicke v. Neure*, Hard. 4. **Tithes.**

#### V. PARTIES TO SUIT.

See also **HEIR AT LAW, II.**

1. Generally, and Effect of want of Parties, and how to be taken advantage of.
  2. Assignors and Assignees.
  3. Attorney General.
  4. Bank of England.
  5. Bankrupts and Insolvents and Assignees.
  6. Co-obligors and others, having Joint Interest and Liabilities.
  7. Debtor to Estate of Testator.
  8. Debtors and Creditors.
  9. Ecclesiastical Persons.
  10. Executors and Administrators.
  11. Heirs at Law.
  12. Husband and Wives.
  13. Legatees and Devises, General and Residuary.
  14. Lessors and Lessees and Sub-Lessees.
  15. Lords of Manor.
  16. Incumbrancers. See also **MORTGOR. & MORTGEE.**
  17. Where Numerous.
  18. Partners and Part Owners, Joint Tenants and Tenants in Common.
  19. Parties not interested, as Witnesses, Agents.
  20. Tenants for Life and in Tail, and Remainderman.
  21. Tithe Causes.
  22. Trustees and Cestui que Trust, Guardian, and Infant Lunatic and Committee.
  23. Vendors and Purchasers.
1. Generally, and Effect of want of Parties, and how to be taken Advantage of.

Upon a bill filed originally in the individual names of a corporation, adding their corporate character, and in abatement a bill of revivor in their corporate name only, demurrer for want of privity overruled; the naming of individuals while the proceedings purport to be in a corporate character, and the corporate names added is mere surplusage. *Walker v. Warden, &c. of Christ's Coll.* 1 Bl. N. S. 9. **SURPLUSAGE.**

Where the object of a bill is to restrain proceedings

against the sheriff, it is not improper to make the sheriff a party. *Ferguson v. Pitcher*, 2 Russ. 81.

If person named defendant, but who has never been served with subpoena, or appeared to bill, appears by counsel, and consents to be bound by decree, the defect is cured. *Capel v. Butler*, 2 S. & S. 457. **WAIVER.**

Bill for discovery of money won at play, under 9 Ann. c. 14. s. 3. does not lie at suit of common informer suing for penalties. *Orme v. Crockford*, 1 M'Clel. 185. S. C. 13 Pri. 376. **GAMING.**

It is not of course to amend bill after answer, by adding another person as co-plaintiff, except where he has precisely a similar interest with plaintiff. *Governors of Inceon School v. Scarlett*, 13 Pri. 54. S. C. 1 M'Clel. 17. **Pr. BILL, AMENDMENT AFTER ANSWER.**

After decree in suit, in which lunatic and committee are defendants, committee died, and new one appointed, ordered on motion, that new committee be named as such in all future proceedings. *Lyon v. Mercer*, 1 S. & S. 356. **LUNATIC COMMITTEE.**

Where the claim of the next of kin is raised on the record, and one person in that character is a party, other persons found by the master to be next of kin may be heard by the court, though not parties: but where there is no claim on the record, and none of the next of kin in that character are parties to the cause, there must be a supplemental bill to bring them before the court. *Waite v. Temple*, 1 S. & S. 319. **PL. BILL; NEXT OF KIN.**

Where new parties are brought before the court by supplemental bill, the original defendants need not be parties to the supplemental bill, unless they have an interest in the supplemental matter. *Bignall v. Atkins*, 6 Mad. 369. **Pr. SUPPLEMENTAL BILL.**

Objection for want of parties not being taken till hearing, defendant does not get costs. *Court v. Jeffery*, 1 S. & S. 105. **COSTS.**

To a bill founded on a contract, the parties to the contract are in general the only necessary parties. *Humphreys v. Hollis*, 1 Jac. 75.

Bill by creditor against executor and trustee and mortgagors in possession for an account, and also against one of several purchasers in distinct lots of an estate from the executor and trustee, impeaching such purchase, held not multifarious to make purchaser a party; other purchasers need not be joined. *Salvidge v. Hyde*, 5 Mad. 138. **PL. MULTIFARIOUSNESS.**

It is not right in any case to make a man a party to a suit, unless you can obtain a decree against him. *Per Richards*, Ld. C. B. *Petch v. Dalton*, 8 Pri. 12. See also *Leathes v. Nevitt*, id. 566. S. P.

Right of defendants under a decree reserving costs, to a continued representation of all the original plaintiffs, (though not necessary parties,) as a security for costs. *Blackburn v. Jepson*, 3 Swan. 138. **Pr. COSTS.**

Objections for want of parties, removed by acts of defendants. *Id.* 139. **WAIVER.**

Parties to a bill for a partition. *Id. ib.* **PARTITION.**

Cause on hearing ordered to stand over for want of parties; defendant not allowed costs of day because answer did not state objection. *Mitchell v. Bailey*, 3 Mad. 61. **Pr. COSTS; Pr. ANSWER.**

Persons presenting a petition under statute 52 G. 3. c. 101., must have a direct interest in the charity. *In re Bedford Charity*, 2 Swan. 518. **PETITION CHARITY; STAT. C. OF.**

Persons presenting a petition under an act, empowering "any person or persons whomsoever," to petition against trustees of a charity, must be interested in the fund. *Id.* 525. *Ib.*

Bill by purchaser for specific performance, ordered to be dismissed for defect of title, a necessary party

not choosing to concur in conveying; order to dismiss without costs, it being against the principles of the court to order the defendant to pay the plaintiff his costs in such case. *Lewis v. Lexham*, 3 Mer. 429. SPEC. PERF.; PR. COSTS.

Joint and several answer, including in title, persons who declined joining in it, ordered to be received as answer of those who swore it, without striking out names of the others. *Done v. Read*, 2 V. & B. 310. PR. ANSWER.

A decree always guards the rights of persons not parties to the suit, for it gives relief on the terms that such persons be not prejudiced. *Shire v. Gough*, 1 Ball & B. 447. DECREE.

Equity will not permit a decree to be made use of, to evict the interests of persons not parties, and who were tacitly protected by it. *Id. ib.*

Creditors let in at any time while the fund is in court, though the time has elapsed. *Lashley v. Hogg*, 11 Ves. 602. CREDITOR'S SUIT.

General objection by the answer to an information, that all the terre tenants of the premises charged with the charity, are not parties without any particular description, the court will direct inquiries what other lands are charged, &c., previously deciding the validity of the charge against the defendants before the court. *Att. Gen. v. Jackson*, 11 Ves. 365. PL. INFORMATION; PR. INQUIRY.

Upon an objection for want of parties, not necessary to point them out by name, if described so as to enable the plaintiff to make them parties. *Id.* 369.

A decree obtained without making parties, those, whose rights are affected thereby, is fraudulent and void as to those parties; and a purchaser under it with notice of the defect, is not protected by it. *Gifford v. Hart*, 1 Scho. & L. 386. PR. DECREE.

A purchaser of an equity of redemption filed his bill against the mortgagee to redeem the original mortgage, having made a mortgage of other premises to the same mortgagee for a distinct debt; the purchaser cannot redeem the first, without redeeming the second mortgage, and the parties interested in the equity of redemption of the second mortgage, are necessary parties to the suit. *Ireson v. Dean*, 2 Cox, 425. TACKING SECURITIES; MORTGAGE, REDEMPTION OF.

Injunction cannot be extended to protect one who is not a party in the suit in equity. *Gadd v. Worral*, 2 Anst. 555. S. P. *Dawson v. Princes*, id. 521. INJUNCTION.

A commission to settle the boundaries of a manor, or of a parish, ought not to be granted by a court of equity, where the interest of all parties who may probably be concerned, is not before the court. *Atkins v. Hatton*, 2 Anst. 386. PR. COMMISSION TO SETTLE BOUNDARIES.

An executor who ought to have been a co-plaintiff, was made a defendant, and Ld. Chancellor for some time doubted whether he was entitled to his costs, but at length ordered them to be paid to him. *Blount v. Burrows*, 3 Bro. C. C. 90. EXECUTOR; PR. COSTS.

Parties to bill by creditors against trustees for sale. *Routh v. Kinder*, 3 Swan. 144. TRUSTEES.

Party unless named in prayer of process, is not party in bill. *Windor v. Windsor*, Dick. 707.

Bill by creditors against executor and heir, and several distinct purchasers of distinct parts of testator's real estate, for account and performance of agreements: Held not multifarious. *Reyner v. Julien*, 5 Mad. 144. n. (b). PL. MULTIFARIOUSNESS.

Whether a demurrer for want of parties should be to the whole bill. *Qu?* *E. I. Comp. v. Coles*, 3 Swan. 142. PL. DEMURRER.

Parties to decree must all be parties to bill of review. *Hartwell v. Townsend*, 2 Bro. P. C. 107. PL. BILL OF REVIEW.

None to be made defendant only to pay costs. *Taylor v. Rochfort*, 2 Ves. 284. But see 16 Ves. 164.

A bill for relief against a palpable mistake or miscalculation in an award, must be against the person in whose favour the award is made, and not against the arbitrator. *Anon.* 3 Atk. 644. *Lingood v. Croucher*, 2 Atk. 395. And see *Steward v. E. I. Comp.* 2 Vern. 380. ARBITRATION & AWARD.

The court will not determine the rights of a party who is not before the court, although he be attained, and beyond sea. *Inchiquin v. French*, Amb. 34. S. C. *Ridgw.* 230. and 1 Cox, 1.

There is no need to make persons parties who are out of jurisdiction of court, but it is usual to apply to reserve liberty to alter decree as to them. *Att. Gen. v. Baliol College*, 9 Mod. 407.

If the objection by the defendants in the original cause, for want of parties to the supplemental bill, is not made in the first instance, it is too late to do it when the cause comes on again, where it was put off only for want of formal parties, in order that the decree might be complete. *Jones v. Jones*, 3 Atk. 217.

It is not necessary to make the defendants to an original bill parties to a supplemental bill, in nature of bill of revivor. *Id. ib.* PL. BILL SUPPLEMENTAL, IN NATURE OF REVIVOR.

An objection for want of parties should be taken upon opening the proceedings, and before the merits are disclosed. *Id.* 111.

Where the jurisdiction is drawn out of a court of law into equity, all parties necessary to make the determination complete must be brought before the court. *Poor v. Clark*, 2 Atk. 615.

Where defendant is interested in having another made defendant, plaintiff must make him so: but where plaintiff alone is interested in the addition, he has his option. *Williams v. Williams*, 9 Mod. 299.

If at the hearing plaintiff waives the relief he prays, against a particular person, the objection for want of his being a party, will have no weight. *Paulet v. Bp. of London*, 2 Atk. 296.

On a bill for an account of fees, to establish a right, you must have all persons before the court who have any pretence to a right, for they will be bound by decree here; otherwise, as to a judgment at law, which will not bind the right of a third person. S. C. *Id.*

A person who has a legal interest, need not in every case be a party where the whole equitable interest is assigned over. *Bruce v. Harrington*, 2 Atk. 235.

Any persons, though the most remote in the contemplation of the charity may be relators in an information. *Att. Gen. v. Bucknall*, 2 Atk. 328. CHARITY RELATOR.

It is improper to make a person who acts ministerially only, sole party. *Vernon v. Blackerly*, 2 Atk. 147.

Injunction to stay tenant in possession, not a party, from committing waste. *Att. Gen. v. Dk. of Ancaster*, Dick. 68.

When at hearing of cause, objection is taken for want of parties, court should order cause to stand over, with liberty to amend bill by adding parties; plaintiff paying costs. *Green v. Poole*, 5 Bro. P. C. 604. HEARING.

It is a general rule that no one need be made a party, against whom, if brought to a hearing, the plaintiff can have no decree; thus a residuary legatee need not be made a party; and for the same reason, in a bill brought by the creditors of a bankrupt against the assignees under the commission, the bankrupt himself need not be made a party. By the master of the rolls. *De Colls v. Ward*, cited 3 P. W. 311. note.

Defendant as well as plaintiff may bring bill of revivor. *Finch v. Ld. Winchelsea*, 1 Eq. Ab. 2. PL. BILL OF REVIVOR.

On bill brought by bankrupt against defendant, his

supposed debtor, for an account; the assignees under commission were charged in a proper manner, but the prayer of process was only against the defendant. A good plea in abatement, that the assignees were not made parties. *Faukes v. Pratt*, 1 P. W. 593. PL. PLA.

Where a bill wants proper parties, it is in the power of the court to dismiss the bill without prejudice, or to give leave to amend, paying costs. *Stafford v. City of London*, id. 428. PR. BILL, AMENDMENT.

A person is no party to suit unless process is prayed against and served on him. *Reilly v. Ward*, 5 Bro. P. C. 495. PR. PROCESS.

Creditors admitted to come in, may revive. *Pitt v. Richmond*, 1 Eq. Ab. 3. PL. BILL OF REVIVOR.

Where it is impracticable to serve parties, bill may proceed without them. *Quintine v. Yard*, *Selgard v. Exors. of Harris*, id. 74.

A person interested must be a party to the original suit, it is not sufficient that he is a party to a cross bill. *Hopper v. Lethbridge*, Buob. 291.

A bill by the safety of an officer of the commissioners of excise, after being sued upon his bond for an account, alleging the officer had overpaid; the commissioners must be parties. *Makepeace v. Needler*, id. PRIN. & SURETY.

Bill to be relieved against a bail bond, assigned by the sheriff by fraud; plaintiff in the action at law must be made a party. *Israel v. Nurbourne*, 1 Vern. 87.

A mortgaged his land, and then confessed several judgments; some of the judgment creditors gave the mortgagee notice, and he afterwards obtained a decree to foreclose the mortgage. Those who gave notice may redeem as creditors, for a valuable consideration, but those who gave no previous notice of their judgments are barred of all redemption. *Smith v. Valence*, 1 Ch. Rep. 170. Vide *Welden v. Rallison*, 1 Ch. Rep. 171. MORTGAGE, FORECLOSURE OF.

One not a party to a bill dismissed, may file a new bill upon the same equity, because he cannot have a bill of review. *Doult v. Smith*, 2 C. C. 119.

So also where a bill is dismissed, upon defendant's proving himself a purchaser for valuable consideration, another may be exhibited, charging notice. *Williams v. Williams*, 1 C. C. 252.

King may sue in chancery, 1 Roll. Ab. 373. 1 Eq. Ab. 71.

Chancellor may sue in equity, but not judge his own case. *Id.*

If alien purchases land in name of another, admitting the king is entitled to the trust, yet he must sue in equity to have it executed. *Id.*

Where wrong party is sued, advantage must be taken by plea, and not by motion. *Harrison v. Haute*, Cary, 64.

## 2. Assignors and Assignees.

Mortgagee having assigned the whole of his interest, need not be made a party to a redemption bill. *Norris v. Marshall*, 5 Mad. 475. MORTGAGE ASSIGNMENT; MORTGAGEE; REDEMPTION.

Assignee of interest in suit cannot be made party without supplemental bill. *Foster v. Deacon*, 6 Mad. 69. SUPPLEMENTAL BILL; ASSIGNMENT, PEND. LITE.

He may petition to secure the fund. *Id. ib.*

Where assignment of bond is not available, court will direct obligees to permit their names to be used by plaintiff, assignee, in putting bond in suit. *Jackson v. Ratford*, 4 Price, 274. BOND, ASSIGNMENT OF.

If land is aliened *pendente lite*, though not prejudicial to plaintiff, yet alienee ought to be brought before a court. *Daly v. Kelly*, 4 Dow. 435. ALIENATION, PENDENTE LITE.

A writ of restitution will not be granted to put into possession a person, not a party to the cause, who had been turned out by an injunction, though he had a legal title. He having obtained such possession under a grant from the defendant pending the suit. *Gaskell v. Durden*, 2 Ball & B. 167. WRIT OF RESTITUTION.

In an assignment of mortgage without the authority or privity of mortgagor, the last assignee only is a necessary party to bill by mortgagor to account. *Chambers v. Goldwin*, 9 Ves. 269. MORTGAGE & MORTGAGEE; ASSIGNMENT OF MORTGAGE.

Bill by the assignee of a person who had made a general conveyance in trust for his creditors, and afterwards taken the benefit of an insolvent act in respect of the surplus against the assignee, the trustee and mortgagees, dismissed with costs. *Spragg v. Binks*, 9 Ves. 583. INSOLVENT; SURPLUS.

Demurrer to bill by assignee of judgment, assignor is a necessary party. *Cathcart v. Lewis*, 1 Ves. J. 463. S. C. 3 Bro. C. C. 516. ASSIGNOR & ASSIGNEE.

Bill against a trustee who has assigned his trust. The assignee ought to be made a party as the decree should be first against him, and the trustee to stand as a security. *Burt v. Dennet*, 2 Bro. C. C. 225. TRUST, ASSIGNMENT OF.

Assignee of insolvent cannot file bill of revivor. *Harrison v. Ridley*, 2 Com. 589. REVIVOR, BILL OF; ASSIGNOR & ASSIGNEE.

## 3. Attorney General.

Where a legacy of a sum of stock was bequeathed to the rector, churchwardens and overseers of the poor of a parish, upon trust to lay out and dispose of the interest and dividends in bread, to be given for ever annually to the poorest parishioners at the discretion of the rector, churchwardens and overseers, for the time being: held, that the rector, churchwardens and overseers might file a bill for payment of the legacy, and that an information by the attorney general was not necessary. *Mayor v. Nixon*, 2 Y. & J. 60. CHARITY.

Attorney general is necessary party to all suits for charity legacy, except where legacy is made part of its general funds. *Wellbeloved v. Jones*, 1 S. & S. 40. CHARITY; TRUSTEE.

To petition by householders under stat. 52 G. 3. c. 101, on account of misapplication of funds of parish charity, established by royal charter. Attorney general is not a necessary party: it is sufficient that he certify his allowance of it. *In re Chertsey Market*, 6 Price, 261.

In suit by equitable mortgagee to obtain benefit of mortgage on lands of mortgagor (who was a simple contract debtor of crown, which had been seized by crown and sold, the court ordered the money due to the depositary to be paid out of the proceeds of the sale before the crown should be satisfied; the purchaser under crown-assignee of term therein, the debtor, and the attorney general, were made parties. *Cuskerd v. Ward*, 6 Price, 411.

A decree pronounced in 1670 in a suit against the trustees of a charity, impropiate rectors, and persons interested in the due application of the funds, to which the attorney general was not a party, having directed the trustees under the indemnity of the court, to perform an agreement with the plaintiff in that suit, for granting a lease of tithes for 980 years, at a fixed pecuniary rent, and an exchange of lands, and the conveyances having been accordingly executed, and the rent constantly paid, and the lands enjoyed in conformity to the decree, an information by the attorney general, at the relation of the present trustees, against the person claiming under the plaintiff in the former suit, for an account of tithes, not stating the decree of 1670, which was set forth in the answer, was dis-

missed. *Att. Gen. v. Warren*, 2 Swan, 291. INFORMATION, DECREE, WHO BOUND BY.

Attorney general is not a necessary party to bill, to set aside ecclesiastical leases. *Att. Gen. v. Moses*, 2 Mad. 294. ECCLESIASTICAL LEASES.

When parties claim under too different grants from the crown, each reserving a rent, but of different amounts; inasmuch as the rights of the crown are concerned, the attorney general ought to be before the court. *Hocenden v. Id. Annesley*, 2 Scho. & L. 617.

Court refused to order dividends received before bill filed, of stock purchased by the old government of Switzerland; to be paid into court by the trustees, on application of the present government, without having the attorney general made a party. *Doddler v. Bank of England*, 10 Ves. 352. P.R. PAYMENT INTO COURT.

Bill for a legacy to a charity, without making the attorney general a party. *Chitty v. Parker*, 4 Bro. C. C. 38. CHARITY.

In a suit between the proprietors of provinces granted by the crown to settle boundaries, the attorney general should be a party. *Pen v. Ld. Baltimore*, Ridgw. 332.

A voluntary society entered into with intent to provide by a weekly subscription for such members as should become necessitous, and their widows, is in nature of a private charity, and it is not necessary to make the attorney general a party. *Anon.* 3 Atk. 277.

An inquisition of attainder is only to inform, and does not entitle the crown to any right; therefore the attorney general is not a necessary party to a bill, for an account of the estate of the subject of the inquisition. *Burt v. Brown*, 2 Atk. 309. ATTAINDER.

One having a bastard, leaves a personal estate to her executors in trust for the bastard who dies intestate, and without wife or issue. The executor brings a bill against one who has part of this personal estate in his hands. The defendant demurs, because the attorney general and the administrator of the bastard are not parties; demurrer disallowed, for that the executor has the legal title, and consequently may sue for the estate. *Jones v. Goodchild*, 3 P. W. 33. S. C. 2 Eq. Ab. 168. INTERSTACY; BASTARD.

A having outlawed B, brings a bill against B and C, a trustee for B, with respect to an annuity, to subject this annuity to the plaintiff's debt. The attorney general ought to be made a party, and the plaintiff must get a lease or grant in the court of exchequer from the crown. *Bulch v. Wastall*, 1 P. W. 445. OUTLAWRY.

Bill to avoid a lease, for that the lessor was a lunatic; the attorney general must be a party. *Leigh v. Wood*, Rep. T. Finch, 135. LUNATIC.

#### 4. Bank of England.

Any court of equity may order the bank of England to suffer a transfer of such stock to be made, or to pay dividends belonging to, or standing in the names of any party to a suit; or issue an injunction to restrain such transfer or payment, although the bank be not a party; court being satisfied by the certificate of the accountant of the said corporation, duly signed by him, that the stock is standing in their books, in the name of the person required to transfer the same, and that after due service of a short order upon the said governor and company, &c., which shall contain no recital of their pleadings or other matter, than the title of the cause and the ordering part of such decree or order which respects the said governor and company, and for which the sum of 18s. and no more shall be paid, like process shall issue to enforce such order for decree as to enforce them against any party to a suit depending in such court, 39 & 40 G. 3. c. 36.

s. 1. On request of the clerk in court and solicitor of the party, the bank shall deliver a certificate, stating the amount of such stock or dividends, &c., for which the fees herein specified shall be paid. Act not to extend any further discovery than herein mentioned, nor to any case where the bank claim an interest in the fund, and the bank may state their objections to any transfer by motion or petition. *Id.* s. 2. BANK OF ENGLAND; P.R. STOCK, TRANSFER OF.

The costs of the bank paid out of the capital of a legacy, for the security of which they were made parties. *Hammond v. Neame*, 1 Swan. 38. BANK OF ENGLAND; P.R. COSTS.

Notwithstanding act of parliament, 39 & 40 G. 3. c. 36, bank of England may still be made parties to bill to restrain transfer of stock filed since that act; demurrer by bank overruled. *Temple v. Bank of England*, 6 Ves. 769. BANK OF ENGLAND.

#### 5. Bankrupts and Insolvents, and Assignees.

Though on bankruptcy of mortgagor there was no bargain and sale of estate to assignees, yet bankrupt is not a necessary party to bill of foreclosure. *Lloyd v. Lander*, 5 Mad. 282. BANKRUPTCY ASSIGNMENT; BARGAIN & SALE; MORTGAGE.

• Obligor, though insolvent, and so stated in the bill, may yet be made party defendant, and is not allowed costs. *Haywood v. Orey*, 6 Mad. 113. INSOLVENCY; OBLIGOR; COSTS.

One, of two or more assignees of bankrupt, may sue in equity, without the others joining in the suit. *Wilkins v. Fry*, 1 Mer. 244. S. C. 2. Rose, 371. BANKCY. ASSIGNEES.

A bankrupt may file a bill for an account, and an injunction, without making his assignees parties to the suit. *Larndes v. Taylor*, 2 Rose, 365. BANKCY. ASSIGNEES.

Demurrer by a bankrupt to a bill, joining him with his assignees in charges and prayer for relief, viz. the specific performance of a contract previous to his bankruptcy, allowed. *Whitworth v. Davis*, 1 V. & B. 545. BANKRUPT; P.L. DEMURRER.

Whether a bankrupt can be made a party merely for discovery, and to maintain an injunction; *Quere? Id. ib.*

Bill by bankrupt against mortgagee of estates in England and Wales, for an account and payment of the balance to defendants, charging collusion generally, but not averring that there will be a surplus, nor charging a direct application to assignees to sue: Held demurrable. *Benfield v. Solomons*, 9. Ves. 77. P.L. BILL; BANKRUPT.

Bankrupt stating that apparent incumbrances are not substantial ones, and assignees refusing, or not permitted by other creditors to interfere, permitted to sue in their names, indemnifying them as to costs. *Id.* 84.

A bankrupt, or insolvent debtor, cannot file a bill of redemption in respect of his right to the surplus, but where he has a clear interest, and the assignees refuse, the Ld. Ch. will, upon petition, and an offer of indemnity, compel them to let him use their names. *Spragg v. Binks*, 5 Ves. J. 590. BANKRUPT; INSOLVENT.

Bill against bankrupt and assignees, charging a fraudulent bankruptcy to defraud the plaintiff's execution, and stating that under an agreement with the assignees for an arbitration, the plaintiff deposited the goods for sale, the produce to be in trust according to the award; that he had lost his copy, and the assignees had obtained the original from the person with whom it was deposited for the benefit of all parties, and refused inspection; prayed a discovery and injunction; a demurrer by the bankrupt disal-

lowed. *King v. Martin*, 2 Ves. J. 641. **BANKRUPT; DISCOVERY; AGREEMENT.**

In a suit against assignees, tending to diminish the fund, the bankrupt may be examined as a witness, and ought not, therefore, to be a party. *Griffin v. Archer*, 2 Anst. 478. **BANKRUPT; PR. WITNESS, COMPETENCY OF.**

An uncertificated bankrupt filed a bill without making assignees parties. On circumstances, which raised a doubt as to the validity of the commission, the bill was retained with liberty to add parties. *Govit v. Armitage*, 2 Anst. 412. **BANKRUPTCY; ASSIGNEES**

A man, who has made an assignment of his property under an insolvent act, cannot sue in his own name, unless all his creditors have been paid. *Gill v. Fleming*, Ridgw. P. C. 431. **INSOLVENT DEBTOR.**

An insolvent debtor is not a necessary party to a bill by a purchaser of his interest in stock against his assignee; but if it has been sold for an apparently under price, the court will enquire into the real value previous to decreeing a specific performance. *Collet v. Wollaston*, 3 Bro. C. C. 228. **INSOLVENT; SPECIFIC PERFORM.**

Bill to be relieved against bonds which were assigned by commissioners of bankrupts, the assignee must be a party. *Foord v. Lear*, Barn. 265. Rep. T. Finch, 265. **BANKCY., ASSIGNEE.**

If a bill is brought for discovery of a bankrupt's estate, the bankrupt must be a party. *Sharpe v. Gamon*, 2 Vern. 32. **BANKCY.**

#### 6. *Co-obligors and others having joint Interest and Liability.*

A bill will lie by the last indorsee of a lost bill of exchange to recover the amount from the acceptor; and prior indorsees need not be made parties to the suit. *Macartney v. Graham*, 2 Sim. 284. **BILL OF EXCHANGE; DEEDS LOST.**

To bill by obligee of joint and several bond, all obligors must be parties. *Blund v. Winter*, 1 S. & S. 246. **BOND.**

In bill by indorsee of bill of exchange, which has been lost, against acceptor, it is not necessary to make drawer a party. *Daries v. Dodd*, 4 Price, 176. **LOSS OF DEEDS, &c.; BILL OF EXCHANGE.**

All obligors in joint and several bond, principals and sureties must be parties generally. Exception where the surety is insolvent, or has paid nothing. *Cockburn v. Thomson*, 16 Ves. 326. **PRINCIPAL & SURETY.**

On a bill filed by a surety against his co-surety, and the principal for a contribution from the co-surety, in respect of money actually paid by the plaintiff for the principal, it is not necessary to prove the insolvency of the principal; otherwise, where the principal is not a party to the suit. *Lawson v. Wright*, 1 Cox, 275. **PR. EVIDENCE; PRINCIPAL AND SURETY; CONTRIBUTION.**

Three obligors in a bond: the obligee brought the principal and the representatives of one surety before the court, and stated that the other died insolvent; an objection for want of parties in this case was overruled. But where a debt is joint and several, each debtor must be before the court, for they are entitled to each other's assistance, as well as to a contribution from each other. So, where there are different funds, and plaintiff can sue either heir or executor, both must be made parties; but there are exceptions to this rule, as where some of the obligors are only sureties, for a surety need not be a party, unless he has paid the debt. So, where there are no personal assets, the representatives of an insolvent co-obligor need not be before the court. *Mador v. Jackson*, 2 Ark. 406. **PRINCIPAL & SURETY.**

If obligors are jointly and severally bound, they may be severally sued in equity as well as at law. *Stanley v. Stock*, Mos. 383. **BOND.**

Two obligors in a bond bound jointly and severally, and one dies, the executor of the deceased obligor may be sued in equity for the debt, without making the surviving obligor a party. *Collins v. Griffith*, 2 P. W. 313.

Bill against some parties liable to loss to bear their portion is not demurrable, because are all not made parties. *Anon.* 2 Eq. Ab. 166.

Where parties are jointly liable to account, it may be prayed against one only, as to what he has received, &c. *Corsland v. Cely*, Prec. Chan. 83. **ACCOUNT.**

A co-executor beyond seas need not be made party to a bill for account against the other. S. C. 1 Eq. Ab. 73. **EXECUTOR.**

So a co-factor. *Id. ib.*

A bill on a bond must be against all the obligors. *Anon.* 2 Free. 127.

The rule was dispensed with when the obligors were very numerous. *Ld. Cranborne v. Crispe*, Rep. T. Finch. 105.

#### 7. *Debtor to Estate of Testator.*

Creditor permitted to sue debtor to estate upon collusion with executors. *Benfield v. Solomons*, 9 Ves. 86. **DEBTOR & CRED.**

Principle on which debtor to estate cannot be made defendant to bill by creditors, &c. against executor, equally applies to case of creditor over-paid by executor. *Alsager v. Rowley*, 6 Ves. 748. **PRIVITY OF CONTRACT; DEBTOR & CRED.**

Though, generally, a bill by those interested in the personal estate as creditor or next kin, will not lie against a debtor to the estate, it will, under circumstances, as in the case upon collusion with the representative; the defendant was also liable in the character of trustee and agent. *Dorin v. Simpson*, 4 Ves. 651. **DEBTOR & CRED.; FRAUD, COLLUSION.**

Creditor, filing a bill against executor, cannot make a debtor a party; in case of insolvency of the executor, the court will, on petition, appoint a receiver, and compel the executor to allow his name to be used in bringing actions. *Uttersen v. Mair*, 2 Ves. J. 95. S. C. 4 Bro. C. C. 270. **DEBTOR & CRED.**

A creditor, where there is a collusion between the executor and debtor to the estate, may make the latter a party to bill for account, or in the case of a partner of the testator. *Newland v. Champion*, 1 Ves. 105. **ACCOUNT; DEBTOR & CRED.**

Bill by creditors, and one residuary legatee against a debtor to estate; the executor, and other residuary legatees, to compel debtor to pay debt, is not maintainable. *Bickley v. Donington*, 2 Eq. Ab. 253. **DEBTOR & CRED.; PRIVITY OF CONTRACT.**

#### 8. *Debtor and Creditor.*

To impeach a settlement for fraud, there must be a creditor to complain of it, and he must be enabled to sue by having obtained judgment at law for his debt, and must state that he is defrauded by it. *Colman v. Croker*, 1 Ves. J. 161. **DEEDS, VOLUNTARY; FRAUD ON CRED.**

Where executor of wife has been obliged to pay creditor of wife; on bill for reimbursement against executor of husband, creditor need not be party. *Bertie v. Ld. Chesterfield*, 9 Mod. 32.

If assignees of a bankrupt refused to bring a bill that is for the benefit of the bankrupt's estate, any

creditor has a right to bring such bill under peril of costs. *Franklyn v. Ferne*, Barn. 30. **BANKCY. ASSIGNEES REFUSAL TO SUE.**

### 9. Ecclesiastical Persons.

See also PL. PARTIES, 21.—TITHES, VI. VII. and post, p. 804, subd. 21.

Bill by a vicar against a sequestrator for an account of profits during the vacancy, the bishop must be a party. *Jones v. Barret*, Bun. 192. **SEQUESTRATION; BISHOP.**

### 10. Executors and Administrators.

Where one executor has alone proved, he may sue without making the other executors parties, although they have not renounced. *Davies v. Williams*, 1 Sim. 5.

A testator resident in India, and having all his property there, bequeathed his residuary estate to H L; but if she should die before him, then to her children. H L died before the testator, and the executor, who was also resident in India, proved will there, and remitted residue to his agent in England, with directions to pay it to H L, or her children. A suit having been instituted by the children, who were infants, against the executors and his agents to have the residue secured: Held, that the legacy duty was payable upon it, and that administration to the testator ought to have been taken out in this country, and the administrator made a party to suit. *Logan v. Fairlie*, 2 S. & S. 284. **LEGACY DUTY; ADMINISTRATION.**

Share of an intestate's personal estate was assigned to trustees in trust, for the appointees of husband and wife, and in default of appointment, in trust for them and the survivor. Husband and wife sold and assigned this share. Husband died and then wife, having bequeathed all her personal estate to the plaintiff. Husband's personal representative is not a necessary party to a bill by the legatee to set aside the sale. *Dowlin v. Macdougall* & 1 S. & S. 367.

Two estates being mortgaged together, on the death of the mortgagee, the equity of redemption of the one devolves on A, that of the other on B; B is a necessary party to a bill by A for a redemption. *Chelmondeley v. Clinton*, 2 Jac. & W. 2. **REDEMPTION OF MORTGAGE.**

The personal representative of the mortgagor is a necessary party to a bill for the execution of a trust for sale by way of mortgage. *Christophers v. Sparke*, 2 Jac. & W. 229. **MORTGAGE.**

Testator appointed persons residing in India and Scotland his executors. Will was not proved in England. Executors in India remitted sum of money to agents in England, and creditor of testator filed bill against agents, praying an account and payment in meanwhile of the money to the accountant general. Demurrable because no personal representative of testator was made party. *Lowe v. Farlie*, 2 Mad. 101. **FOREIGN WILL.**

Mortgage by tenant in fee by creating a term, the personal representative ought not to be a party to a bill of foreclosure. *Bradshaw v. Outram*, 13 Ves. 234. **MORTGAGE FORECLOSURE.**

To bill by assignee of deceased executor and residuary legatee, agent to executor and residuary legatee, for moiety of residue. Representative of assignor need not be party, except to dispute assignment. *Blake v. Jones*, 3 Anst. 651. **ASSIGNMENT.**

Administrator not brought before master by motion,

after a decree passed and entered, if there is anything in it affecting him by way of order to pay, otherwise if only for him to witness what is done. *Habergham v. Vincent*, 1 Ves. J. 68. **PR. AMENDMENT; PR. DECREE.**

If a bill be brought against principal and one surety, and it is admitted that the other is dead, insolvent, and there are no personal assets, his representatives need not be made parties. *Madot v. Jackson*, 3 Atk. 406. And see *Angerstein v. Clark*, 2 Dick. 738.

A, gave his real estate to B, and his personal to B and C, his executors, who proved will and acted. B dies. To bill brought for legacy, charged upon real and personal estate, it is not sufficient to make only B's heir at law and C parties, but B's executors likewise. *Williams v. Williams*, 9 Mod. 299.

Where some of the undertakers under the act of 4 Anne, c. 14. in regard to briefs, are dead, on a bill for an account, their representatives need not be brought before the court, for they are each answerable, the one for the other. *Exp. Angel*, 2 Atk. 162.

Though the person is come of age, during whose infancy the will appointed an executor *dur. min.*, yet if he have not collected in the whole estate he must be brought before the court. *Glass v. Oxenham*, 2 Atk. 21. **EXECUTOR DUR. MIN.**

Where representation is contesting in spiritual court, bill for discovery of assets, without making administrator a party, may be brought. *Plunket v. Penson*, 2 Atk. 51. **ADMOR. DISPUTED; ADMOR.**

Plea that representatives of personal estate were not before court, allowed, though suspected to be for delay merely. *Id. ib.* **PL. PLA.**

Administrator though insolvent, is a necessary party to bill for discovery of assets. *Ashurst v. Fyfe*, 2 Atk. 51. **ADMOR.; INSOLVENCY.**

Bill brought to redeem against the defendant, who had notice of the plaintiffs title, but bought of W, who had no notice; the objection allowed for not bringing the representatives of W before the court, or otherwise the defendant would be deprived of that defence. *Lowther v. Carlton*, 2 Atk. 139.

A person acting under a letter of attorney from administrators, may be sued by them in their own right as their bailiff or receiver, and they need not name themselves administrators. *Hudson v. Hudson*, 3 Atk. 462.

A covenant for himself and his heirs, that a jointure house shall remain to the uses in the settlement. The jointress brings a bill against the heir for a performance. The defendant demurs, for that the executor ought to be made a party; held good. *Knight v. Knight*, 3 P. W. 331.

One devises that his executors should sell his land; and leaves two executors, one whereof dies and the other renounces, and administration is granted to A, who brings a bill against the heir to compel a sale; whether the renouncing executor, in whom the power of sale, collateral to the executorship was vested, ought not to be made a party? *Yates v. Compton*, 2 P. W. 308. **EXOR., RENUNCIATION OF.**

Bill for account cannot be filed against one co-executor only, either as a creditor or as residuary legatee. *Scurry v. Morse*, 9 Mod. 89. **ACCOUNT.**

Executor's name added to decree to account, without putting off cause. *Pitt v. Brewster*, Dick. 37.

Executor cannot bring a bill without shewing thereby that he has proved the will in the spiritual court, if he does, this is good cause of demurrer; but it is enough to allege he has duly proved the will, without

saying in what court. *Humphreys v. Ingledon*, 1 P. W. 752. *WILL, PROOF OF.*

Where an executor in trust was outlawed, and a witness proved he had inquired after and could not find him, not necessary to make him a party. *Heath v. Percival*, 1 P. W. 684. 1 Str. 403. *OUTLAWRY.*

Executors of an insolvent lessee were necessary parties to bill against assignee of lessee's devisee for enforcing covenant to repair, &c. *Sainsbury v. Granner*, 2 Eq. Ab. 166.

Heir and administrator of party intestate, must be parties to revive decree for payment of money, and for conveying of lands. *Ferrers v. Cherry*, 1 Eq. Ab. 3. *BILL OF REVIVOR.*

Bill by a creditor against B for a discovery of the estate of H, supposed to be in his hands. Demurrer, for that no executor or administrator was a party, allowed. *Conway v. Stroud*, 2 Freem. 188.

The heir of the mortgagor forecloses the mortgage, the executor being no party. Upon a bill by the executor against the heir of the mortgagee and the mortgagor, the land was decreed to the executor; but if the executor of the mortgagee, after a foreclosure by the heir, brings a bill to have the benefit of the mortgage, the heir, if he thinks fit, may take the benefit of the foreclosure to himself, paying the executor the mortgage-money and interest. *Clerk-on v. Bowyer*, 2 Vern. 67. *MORTGAGE FORECLOSURE.*

A bill may be brought against an executor for discovery of the personal estate before the will is proved, or during the litigation thereof in the spiritual court. *Dulwich College v. Johnson*, 2 Vern. 49.

No good cause of demurrer, that an executor is not a party when plaintiff alleges in his bill he knows not who is executor, and prays defendant may discover him. *Bowyer v. Corert*, 1 Vern. 95. *PR. DEMURRER.*

Although an executor does actually release, yet he must be a party to the suit. *Smithby v. Hinton*, 1 Vern. 31. *RELEASE.*

It is sufficient to make those executors parties who have proved the will, and the other executors if they have demands out of the estate, may come in as creditors before the master. *Brown v. Pitman*, Gilb. Eq. Rep. 75. And see *Wankford v. Wankford*, 1 Salk. 307.

All executors must sue and be sued, though one be an infant. *Offey v. Jenney*, 3 C. R. 92. Nel. 42. *Scurry v. Morse*, 9 Mod. 89.

A demurrer allowed to a bill brought against plaintiff, who was supposed to have some of the deceased's effects in his hands, because there was no executor or administrator party; but if none administer, plaintiff as creditor may. *Conway v. Stroude*, 2 Freem. 188. *EXOR. & ADMINOR.*

A being seized of lands and indebted on judgment, died intestate, leaving a wife and son; the wife took out administration and entered upon the land as guardian and dies, leaving B her executrix, who possesses her personal estate; the son dies, and his heir, the plaintiff, pays the judgment; to a bill for an account of the profits of the land, the administrator de bonis non of A, is a proper party. *Bressenden v. Deereets*, 2 C. C. 197.

If the legatee of a term sue for it, he must make the executor a party, it is not sufficient to charge that he assents to the legacy. *Moor v. Blagrave*, 1 C. C. 277.

To an information on the behalf of a charity, to discover the profits of lands for the satisfaction of a legacy charged thereon, the executor must be a party. *Att. Gen. v. Toisden*, Rep. T. Finch. 336.

A creditor cannot in any case sue a debtor to the testator's estate, without making the executor a party. *Rumney v. Mead*, id. 303. *Griffith v. Bateman*, id. 334.

A creditor or legatee may bring a bill against a

legatee or debtor, if he make the executor a party and charges collusion. *Att. Gen. v. Wynne*, Mos. 126.

A suit by the heir against the widow to compel her to abide by her election, to take a legacy in lieu of dower, an account of the personal estate was decreed, and the plaintiff had leave to amend, by making the executor a party. *Lesquire v. Lesquire*, Rep. T. Finch, 134.

Feme covert by leave of her husband took a bond in the name of her servant, but in trust for herself; her husband died, and the obligor paid the money to his administrator; to a bill of interpleader against the servant and the feme, the administrator must be a party. *Flavell v. Bull*, id. 330.

Bill stated that an estate purchased in defendant's name, was so purchased in trust for plaintiff's ancestor, who paid the purchase-money, and prayed a reconveyance: demurrer, for that the executor of the ancestor was not a party overruled. *Atley v. Fountain*, id. 4.

Suit by one surety against another for contribution, the representatives of another surety, who died insolvent, ought to be parties. *Hole v. Harrison*, id. 15. *PRIN. & SURETY.*

On a bill against the heir of a mortgagee to redeem, the executor or administrator must be made a party. *Anon.* 2 Freem. 52. *MORTGOR. & MORTGEE.*

Where the heir of the mortgagee brings a bill to compel the mortgagor to redeem, or be foreclosed, the executor must be a party. *Freak v. Hearsey*, 1 C. C. 51. 2 Freem. 180. Nel. 93. *Clerkson v. Bowyer*, 2 Vern. 66.

To a bill against the heir of the mortgagor, to have payment or hold without redemption; the personal representative of the mortgagor must be made a party. *Necker v. Tutor*, 2 C. C. 29.

A term of 1000 years was granted, but conditioned to sink and be extinguished upon payment of an annuity for forty-two years. In a bill brought by the heir of the grantor against the heir of the grantee, after the expiration of the forty-two years, for a surrender of the residue of the term, the personal representative of the grantor need not be parties. *Bampfild v. Vaughan*, Rep. T. Finch.

The heir of the obligor demurs, because his administrator was not made a party, and the demurrer was overruled, because he would not administer himself, and had opposed the plaintiff in taking out administration as principal creditor. *D'Aranda v. Whittingham*, Mos. 84.

## 11. *Heir at Law.*

See also *HEIR AT LAW*, II.

It is the practice to keep the heir at law before the court, even though he admit the will. *Jackson v. Radford*, 4 Price, 274. *HEIR AT LAW.*

A second mortgagee, to redeem a prior mortgage, must make the heir of the mortgagor a party, though the second mortgage is only of part of the estates comprised in the first, and under a different title. *Palk v. Ld. Clinton*, 12 Ves. 48. *MORTGAGE, REDEMPTION OF.*

On a bill, filed on behalf of younger children, to raise portions out of the real estate, the infant heir ought to be made a defendant, not a plaintiff. *Plunket v. Joyce*, 2 Scho. & L. 159. *HEIR AT LAW.*

Bill by devisees, in trust to sell for specific performance of an agreement to purchase, that the heir of the devisor is not a party to the suit, is not matter of exception to the report in favour of the title. *Wake-*



*man v. Dr. Rutland*, 3 Ves. 234. HEIR AT LAW; EXCEPTIONS TO MASTER'S REPORT.

The heir of a private founder, who has appointed no visitor, must be made a party to an information for regulating a charity; but the court, in favour of charities, will direct an enquiry for the heir. *Att. Gen. v. Guunt*, 3 Swan. 148. CHARITY INFORMATION; HEIR AT LAW.

Deeds not delivered out of court to a devisee, unless the heir is before the court. *Anon.* 1 Ves. J. 29. PR. DELIVERY OF DEEDS; DEVISEE; HEIR AT LAW.

In a bill by a second mortgage to redeem the first mortgage, the mortgagor or his heirs must be before the court: heir being abroad, the court cannot proceed. *Fell v. Brown*, 2 Bro. C. C. 276. MORTGAGE, REDEMPTION OF.

Though, at law, a specialty creditor may sue either the heir or executor, yet, in equity, he must make both parties. *Mados v. Jackson*, 3 Atk. 406; and see *Plunket v. Penon*, 2 Atk. 51.

To bill against executors of testator, on whose land annuities were charged, seeking arrears accrued due in life of testator, heir need not be party; but for arrears since testator's death, he must. *Weston v. Bowes*, 9 Mod. 309. HEIR AT LAW.

In a bill by creditor, under the statute of fraudulent devises, against the assignee or devisee only, the heir at law is a necessary party; and for want of him, the cause ordered to stand over. *Warren v. Stawell*, 2 Atk. 125. *Id.*

If an action at law be brought, it must be both against the devisee and heir at law, and equity follows the law in this respect. *Id. ib.*

In a devise of lands to pay debts, if the creditors bring a bill to compel a sale, the heir is generally to be made a party. Secus, in case of trust created by deed to pay debts. *Harris v. Ingledew*, 3 P. W. 92. HEIR AT LAW; TRUST TO PAY DEBTS.

One seised of lands in fee binds himself and his heirs in a bond, and devises his lands to J in fee, and dies: in a bill brought by the obligee in the bond, to subject the devisee to the payment of debts, the devisor's heir must be made a party. *Cawler v. Wade*, 1 P. W. 99. HEIR AT LAW.

A, tenant for life, remainder to B in fee; B mortgaged the estate to C, who devised it to D: D need only foreclose against B, for the heir of C had no interest, and need not be made a party. *Williams v. Day*, 2 Ch. Ca. 32. MORTGAGE, FORECLOSURE OF.

## 12. Husband and Wife.

Where feme covert, having separate interest, joins as co-plaintiff or co-defendant with husband, it will not prejudice a future claim by her. *Hughes v. Evans*, 1 S. & S. 185. FEME COVERT.

On the death of a defendant, against whom the bill seeks to set aside a contract entered into by him for the sale of his wife's estate, it is regular to revive against his personal representative, without making wife a party. *Humphreys v. Hollis*, 1 Jac. 73. ABATEMENT & REVIVOR.

Hill filed by feme covert, stating her as a spinster, her solicitor being ignorant of her marriage, and her husband ignorant of this suit till after the decree: on motion, by consent, the husband was permitted to prosecute the decree under terms. *Farer v. Wyatt*, 5 Mad. 449. PR. MISNOMER; PR. DECREE, PROSECUTION.

In suit by feme covert, it is necessary that husband should be a substantive party, as wife's claim to separate estate is against the *jus mariti*. By joining the wife as co-plaintiff, husband admits the statement in bill that it is separate property of wife, and this will answer all the purpose of making him a defendant. *Smith v. Myers*, 3 Mad. 474.

Demurrer by a married woman to a bill praying

discovery only against her, and relief against her husband as to contracts, &c., by her, as agent for her husband, alleging the vouchers, &c., to be in her possession; allowed, upon the objection, first, to making a mere agent a party; secondly, to admitting the testimony of a wife in her husband's cause. *I.e. Testiere v. Marg. Anspach*, 15 Ves. 169. AGENT; DISCOVERY.

Annuity being granted by feme covert, charged upon her separate estate, being void under statute for want of insertion of clause of redemption in the memorial, the consideration cannot be recovered out of her separate estate, though part of the money was applied in paying fines upon admission to copyholds. Plaintiff seeking relief, not merely against husband seised or entitled in right of his wife, but against the separate estate of wife, must serve the wife. *Jones v. Harris*, 9 Ves. 486.

Husband a formal party to bill against wife, in respect of separate estate. *Lillia v. Airey*, 1 Ves. J. 278.

Where a suit is relative to the separate estate of a wife, the bill ought to be filed by her prochein amy: if, however, such a suit be instituted by the husband and wife jointly, the court will secure the fund for the wife in the name of trustees or the accountant-general. *Griffith v. Hood*, 2 Ves. 452.

A husband, tenant for life, remainder to wife for life, brings a bill alone for the opinion of the court upon the settlement: objection, for want of making his wife a party, allowed. *Herring v. Yoe*, 1 Atk. 290.

A man may sue alone, without his wife, for a debt due to her by bond; but if he joins the wife in the action, and recovers judgment, and dies, the judgment will survive to her. *Oglander v. Baston*, 1 Vern. 396. CHOSES IN ACTION.

Regularly, husband and wife ought to join in suit; but if a feme covert demands relief for a separate maintenance settled by the husband, she may sue alone. *Regnes v. Lewes*, 1 C. C. 35.

If a husband sue for choses belonging to the wife as for a bond or legacy, she must be a party to the suit; but otherwise, if suing for a rent accruing in the wife's right after marriage. *Clark v. Ld. Angier*, 1 C. C. 41. S. C. Nel. 78.

Husband need not be joined with wife in her bill against trustee for separate maintenance. *Lanky v. Goulding*, Cary, 87.

## 13. Legatees and Devisees General and Residuary.

The general rule is, that appointees under a will of feme covert are necessary parties to suit concerning fund, which is subject of appointment. *Court v. Jeffery*, 1 S. & S. 105.

In ordinary cases, executor represents whole personal estate, and therefore legatee not necessary party. *Id. ib.* EXOR.; LEGATEE.

Suit for specific performance of contract to purchase freehold; defendant had paid several large sums on account of purchase-money, leaving a considerable portion still due; he died when cause was at issue, leaving real and personal to infant children. Plaintiff revived against executors only. Held, that infant devisees were necessary parties. Suit ordered to stand over to amend, in that respect, by supplemental bill. *Townsend v. Champenowne*, 9 Price, 130. PL. BILL OF REVIVOR.

A decree for redemption and general account, &c., having been made in the original and revived causes in favour of the supposed devisee, it cannot be restricted in the supplemental suit to an account to be taken as between the executors and mortgagees, &c., to the time of the death of the devisor, dismissing the bill as it regards the interest of the devisee; for th

devisee is a necessary party to the account. *Rylands v. Layton*, 2 Bligh, 667. DEVISEE; PR. DECREE; ACCOUNT.

Residuary legatees not necessary parties to suit against executor. *Brown v. Douthwaite*, 1 Mad. 446. RESIDUARY LEGATEES.

Generally, a residuary legatee must bring before the court all persons interested in the residue; exception where not necessary or convenient. *Cockburn v. Thompson*, 16 Ves. 328. *Id.*

Residuary legatee need not be a party to a bill for specific legacy. *Wainwright v. Waterman*, 1 Ves. J. 30. *Id.*

All residuary devisees must be parties. *Parsons v. Neville*, 3 Bro. C. C. 365. RESIDUARY DEVISEES.

In a suit for a moiety of a residue the other persons interested must be before the court. *Sheritt v. Birch*, 3 Bro. C. C. 229.

Every legatee whose legacy is charged on real estate ought to be before the court. *Morse v. Sadler*, 1 Cox, 352. LEGATEES; CHARGE ON REAL ESTATE.

In a bill against the executor either by creditors or legatees, it is not necessary to make the residuary legatee a party. *Lawson v. Barker*, 1 Bro. C. C. 303. RESIDUARY LEGATEE.

Not necessary to make any other than the executors, parties relative to the personal estate, since he sustains the person of the testator to defend the estate for himself, creditors, and legatees. *Peacock v. Monk*, 1 Ves. 127. EXORS.

In a suit for a legacy, it is not necessary to make other legatees parties, although from a deficiency of assets, all the legatees must abate. *Att. Gen. v. Ryder*, 2 C. C. 178. LEGATEES.

Where a legacy is given to two, one cannot sue alone for it; if the residue be given to divers, they must all be parties; but when legacies are given to divers persons, each alone may sue for his own legacy. *Haycock v. Haycock*, 2 C. C. 124. *Id.*

A pecuniary legacy to each of three children, and the residue to be equally divided among them, to a bill by one legatee for the pecuniary legacy, it is not necessary to make the others parties, but if the bill is for the residuary share, the others must be parties. *Dunstall v. Rabbet*, Rep. T. Finch, 243. And see *Atwood v. Hawkins*, Rep. T. Finch, 113. *Id.*

Devise for seven years on condition that devisee should within the time pay devisors' debts, remainder to plaintiff at twenty-one; on a bill to compel payment of debts, or be let into possession, other parties to whom the estate is devised until plaintiff attained twenty-one, are necessary parties. *Pigg v. Cordwell*, Rep. T. Finch, 278. DEVISEES.

Administrator of an executor who was likewise a legatee by the will of the testator, exhibited his bill against the other executor; a demurrer for that the defendant's brothers, also legatees, and charged by the bill as combining with the defendant, were not parties, was allowed. *Calle v. Greenhill*, Rep. T. Finch, 202. LEGATEES; EXORS. & ADMORS.

#### 14. Lessor and Lessee, and Sub-Lessee.

Defendant's setting up defence of title in landlord, and producing in evidence on hearing certain deeds belonging to landlord, ordered, on petition, to produce such deeds on trial of issue, or that they should admit facts which, as alleged by other party, deeds would establish, though landlord was not party to suit. *Pulley v. Hilton*, 10 Pri. 118. PR. PRODUCTION OF DEEDS; LANDL. & TEN.; PL. ADMISSIONS BY ANSWER.

Renewal decreed against a tenant under a bishop's lease without any contribution from his sub-lessee, he having covenanted that as often as the bishop should renew, he would renew without fine with his sub-

lessee. The tenant and his lessor are necessary parties, the sub-lessee deriving his title from their covenants. *Revell v. Hussey*, 2 Ball & B. 280. LEASE, RENEWAL OF, FINE ON; CONTRIBUTION.

To a bill by mortgagee or trustee of a leasehold interest evicted for non-payment of rent, against the landlord, seeking a redemption; a demurrer, the lessee not being a party, allowed. *Adams v. St. Leger*, 1 Ball & B. 181. LANDL. & TEN.; REDEMPTION OF FORFEITED INTEREST.

One tenant in common having leased his share on a bill for partition, the lessee is a necessary party, and his costs must be borne by his lessor. *Cornish v. Gest*, 2 Cox, 27. TENANT IN COMMON; LESSOR & LESSEE.

A bill by a lessee for twenty-one years under the dean and chapter of W. against a lord of a manor and the tenant of a particular house which obstructed plaintiff's way, praying that the house might be pulled down, and that plaintiff be quieted in the possession of the way: held that the dean and chapter of Winchester, who were the owners of the inheritance, were necessary parties. *Poors v. Clark*, 2 Atk. 515. LANDL. & TEN.

On a bill for an injunction to stay an ejectment at law against the plaintiff's tenant, the tenant ought to be a party. *Lawley v. Walden*, 3 Swan, 142. LANDL. & TEN.; EJECTMENT; PR. INJUNCTION.

Lease of lands is granted, reserving mines, &c., and a power of working them, lessor paying for damages done, which mines were leased to B. On bill for performance of covenants against representatives of lessor, B need not be party. *Green v. Poole*, 5 Bro. P. C. 504. LESSOR & LESSEE.

#### 15. Lord of Manor.

Where a bill is brought for surrender of a copyhold estate for lives, the lord must be made a party; because when the surrender is made, the estate is in the lord, and he is under no obligation to regrant it; contra in the case of copyholders of inheritance, there the lord need not be a party. *Anon.* 6 Vin. Ab. 239. COPYHOLD SURRENDER.

#### 16. Incumbrancers, Mortgagor and Mortgagee, &c.

Persons entitled to part only of money due on mortgage, cannot file bill for foreclosure of that part alone of mortgaged premises. *Palmer v. F. Carlisle*, 1 S. & S. 423. MORTGAGE, FORECLOSURE; PARTITION.

There can be no redemption or foreclosure unless parties entitled to the whole of mortgage money are before the court. *Id.* *ib.* MORTGAGE FORECLOSURE; MORTGAGE REDEMPTION.

Mortgagee is not necessary party to bill for partition. *Swan v. Swan*, 8 Price, 518. PARTITION; MORTGOR. & MORTGEE.

A receiver cannot be appointed without mortgagee's being before the court, if a mortgage appears upon the face of pleadings. *Price v. Williams*, Coop. 31. RECEIVER; MORTGOR. & MORTGEE.

The court ordered a bill of foreclosure to stand over to make a judgment creditor, the only incumbrancer not before the court, a party, but would not adopt as a general rule the usual practice to make all incumbrancers parties. *Jp. Winchester v. Beavor*, 3 Ves. 314. INCUMBRANCER; MORTGAGE, FORECLOSURE OF.

Judgment creditor, prior to a mortgage, need not make the subsequent mortgagee party in order to postpone him. *Shepherd v. Guinness*, 3 Swan, 151. JUDGMENT CRED.; MORTGAGE; PRIORITY OF SECURITY.

To bill of foreclosure against the principal mort-

gagor, the mortgagor of another estate, as a collateral security, is a necessary party. *Stokes v. Clendon*, id. 150. SECURITY, COLLATERAL.

Annuitants prior to a mortgage need not be made parties to a suit by the mortgagee against the mortgagor for a sale, but the estate must be sold subject to the annuities. *Delahere v. Norwood*, id. 144. ANNUITANTS; MORTGAGE.

One mortgagee, out of several interested, cannot sustain a bill of foreclosure for his proportion alone, without making the others parties. *Lowe v. Morgan*, 1 Bro. C. C. 360. *Montgomerie v. M. Bath*, 3 Ves. 560. was contra. But see 1 Bro. C. C. 365. note. MORTGAGOR. & MORTGEE.

Where a bond creditor brings a bill against an executor for an account of assets and satisfaction, it is no objection for want of parties that he has not brought other bond creditors or creditors of a superior nature before the court, for the court only decrees an account, with a direction for the executor to pay in a course of administration. *Anon.* 3 Atk. 572.

The mortgagor or his heir should be a party to bill by mortgagee. *Hovew v. Wadham*, Ridg. 199. MORTGAGOR. & MORTGEE.

Prying relief where mortgagee is a party, is the same as praying to redeem, and if on a reference to a master they do not redeem him, the court will dismiss the bill, which is equivalent to a foreclosure. *Cholmley v. De. Orford*, 2 Atk. 267. MORTGAGE, REDEMPTION OF.

Heir of mortgagor need not bring original mortgage before court where latter has assigned without mortgagor's joining. *Hill v. Adams*, 2 Atk. 39. *Id.*

An old mortgage is made to B for 350*l.*, who, in 1705, makes an under mortgage to C for 300*l.* C brings a bill to foreclose; B the original mortgagee, or in case of his death, his representative, ought to be made a party. *Hobart v. Abbot*, 2 P. W. 643.

Where estate is subject to several incumbrances, one incumbrancer may sue without making the rest parties, at least it is cured by a decree directing an account to be taken of all the incumbrances affecting the estate. *Odell v. Graydon*, 6 Bro. P. C. 67.

Where person derives title under a dormant settlement, all remainder-men without settlement, as well as all mesne incumbrancers on estate, must be made parties to suit. *Edgworth v. Edgworth*, 5 Bro. P. C. 498.

A bill to foreclose having been filed in this case, the court made a decree and ordered the mortgaged lands to be sold; afterwards a third person, who had paid off the mortgage and taken an assignment thereof, and of the decree of foreclosure, applied to the court to set aside their order for a sale, which the court refusing, he appealed to the lords, by whom the order of refusal was affirmed with costs. *Crowe v. Hultiday*, 2 Ridg. P. C. 50. MORTGAGE, FORECLOSURE OF.

If a mortgagee in possession assign over, and the mortgagor prefer his bill, suggesting that the debt is fully paid, and for an account of the surplus, he must make the mortgagee and all the assignees parties; but if the bill be brought for an account, and to pay what is due, he need not make the mortgagee a party. *Anon.* 2 Free. 59. MORTGAGOR. & MORTGEE.; ASSGN. & ASSGN.; MORTGAGE, ASSIGNMENT OF.

Second mortgagee contesting, by his bill, the validity of the first mortgage, the mortgagor must be a party. *Thomson v. Baskerville*, 3 C. R. 215.

#### 17. Where numerous.

A few of a large number of persons may institute a suit, on behalf of themselves and the rest, for relief against acts injurious to their common right, although the majority approve of those acts, and

disapprove of the institution of the suit; and the attorney general need not be a party to it, but where the whole body concurs in an abuse, the suit must be instituted by the attorney general. *Bramhall v. Smith*, 1 Sim. 8. ATT. GEN.

If several of the shareholders assign by deed their deposits to others, and appoint the latter their attorneys for recovering their deposits, the assignees cannot sue on behalf of themselves and their assignors; but the latter, however numerous, must be parties to the suit. *Blain v. Agar*, 1 Sim. 374.

One shareholder of canal may file bill on behalf of self and others, to set aside agreement made contrary to provisions of the act of parliament. *Gray v. Chaplin*, 2 S. & S. 267.

Where object of suit is to avoid payment of rate levied on the inhabitants of a town, all having common interest to avoid the rate, any one or more of them may sue on behalf of themselves and the other inhabitants. *Att. Gen. v. Heelis*, id. 76. PARISH RATE.

Bill by some partners against committee of partnership for account, &c., must be on behalf of themselves and other partners not of committee. *Baldwin v. Lawrence*, id. 18. PARTNERSHIP.

Bill to carry trusts of creditor's deed into execution, may be filed on behalf of all creditors by one of them only, where they all executed the deed, but were very numerous. *Wild v. Barham*, id. 91.

The cases in which a bill can be filed by one person on behalf of himself and others, are cases in which the others have a choice between that and nothing. *Jones v. Garcia Del Rio*, 1 Turn. & R. 297.

Appointees being very numerous, and bill filed by some on behalf of all, court will dispense with general rule requiring all appointees to be parties. *Manning v. Thesiger*, 1 S. & S. 106.

A person having a common right against many other persons, may file a bill against some of them; and if the right is fairly established, the court will carry the decree into execution, against other persons not parties to the suit. *Neale v. West Middlesex Waterworks Comp.*, 1 Jac. & W. 369.

But one of several inhabitants of a district, who claim a right under an act of parliament to be supplied with water by a public company, cannot file a bill on behalf of himself and others. *Id. ib.*

A joint stock company, established by act of parliament, vesting in them all property belonging to them, and authorising them to bring actions in the name of their treasurer for the time being, having purchased an estate pending a suit against the vendors, to compel the specific performance of an agreement to grant a lease of part, on a bill by the vendee against the treasurer and directors, the plaintiffs were declared entitled to a lease, and the treasurer was enjoined from disturbing their possession, though the rest of the proprietors, being very numerous, were not parties; but no decree could be made for the execution of a lease. *Menz v. Maltby*, 2 Swan. 277. JOINT STOCK COMPANY; PURCHASE, PENDENTE LITE.

Commissioners appointed by act of parliament, being authorised to levy a rate (not exceeding a certain proportion of the poor rate) on the occupiers of all houses, &c. in Brighton, for paving, lighting, and watching the town, and another rate, not exceeding a fixed sum, on every chaldron of coal landed on the beach, or otherwise brought into the town, for repairing or building works to protect the coast of Brighton against the encroachment of the sea (the act reciting, that the inhabitants were unable to raise money sufficient for that purpose without the aid of parliament), with power of distress for non-payment, and liberty to apply any surplus of the coal rate,

after payment of the debt contracted on the security of that rate, and the expenses of repairs, &c. in aid of the rate for paving, &c., to an information by the attorney general, at the relation of inhabitants, filed against forty-eight commissioners (the whole number being a hundred), by the description of acting commissioners, stating that the commissioners had, during several years, levied the coal duty at its maximum, and applied a large proportion of the produce in aid of the town rate for paving, &c., instead of the construction and repair of works for the protection of the coast, and the discharge of the debt contracted on the security of the coal duty, and had distrained the goods of the relator for non-payment of the duty, and praying an account of the money levied and expended; an injunction against an undue levy, and a direction that the commissioners should replace any sums which they had applied to purposes not warranted by the act; a general demurrer for want of equity, and a demurrer *ot tenus* for defect of parties, were overruled. *Att. Gen. v. Brown*, 1 Swan. 265. PL. INFORMATION.

Society for relief in sickness, &c., by means of a fund raised by subscription of the members, considered merely as a partnership, having no corporate character. In a suit, therefore, against the trustees by some members for an account, alleging a dissolution contrary to the articles, all other members must be parties. *Beaumont v. Meredith*, 3 V. & B. 180. FRIENDLY SOCIETY; ACCOUNT.

The strict rule, that all persons materially interested must be parties, dispensed with, where it is impracticable, or very inconvenient, as in the case of a very numerous association in a joint concern, in effect a partnership. Defect of parties the subject of demurrer or plea, as it appears or not on the face of the bill. *Cockburn v. Thompson*, 16 Ves. 321.

Parties dispensed with for convenience in the first instance, coming in after institution of suit, must have opportunity of supporting their interests, rehearing, &c., a creditor, for instance; and if partner with debtor, subject to account. *Id.* 327.

Various cases, where parties dispensed with; bills by or against some tenants of a manor, as for suit to a mill, &c., some parishioners for tithes, or a modus, societies for insuring each other, which was not within the statute 6 Geo. 1. c. 18. *Id.* 328.

Bill by one of the officers and crew of a privateer against the owner, for an account of captures, according to the articles. Leave given to amend, by stating that the bill was on behalf of the plaintiff and all others; and upon that amendment, the account was decreed. *Good v. Blewitt*, 13 Ves. 397. ACCOUNT.

Upon a bill for equitable relief as to a rent charge, all the persons whose estates are liable must be parties. The rule dispensed with, under circumstances, making it impracticable, or highly inconvenient. *Att. Gen. v. Jackson*, 11 Ves. 367. RENT CHARGE.

General rule, requiring all persons interested to be parties, dispensed with, where it is impracticable or extremely difficult; in such a case to obtain a decree, to establish right of suit to a mill, for instance, court only requires parties sufficient to secure a fair contest, and right being established in that way, consequential relief may be had against the rest in another suit. *Adair v. New River Comp.*, *id.* 429.

Demurrer (to bill by some members of lodge of freemasons against others, to have the dresses, &c. delivered up, and an injunction) was allowed on ground that they affected to sue as a corporate body; but leave was given to amend, the court holding jurisdiction for delivery of chattel; and where there is an interest, permitting some to sue as individuals

representing the rest, in other instances than those of creditors and legatees, if convenient to justice that all should be parties. *Lloyd v. Loaring*, 6 Ves. 773. CHATTELS; PARTNERS.

A corporation may join in a suit to establish a claim of exemption on behalf of its individual members. *Corp. of London v. Corp. of Liverpool*, 3 Aust. 738. CORPORATION.

Any creditor may obtain an order for prosecuting a decree for an account. *Crense v. Hunter*, 2 Ves. J. 165. 4 Bro. C. C. 157. ACCOUNT; PR. DECREE, CARRYING INTO EXECUTION.

Where A, B, and C, on behalf of themselves and other members of a club, enter into articles with D to provide necessaries for the use and accommodation of the club, they are personally bound by such articles; and D is not obliged to resort to any of the other members for satisfaction of his demands. *Dk. Queensbury v. Cullen*, 1 Bro. P. C. 396. Affirming 1 Bro. C. C. 101.

Bill by a legatee, wrongly described by the testator, for his legacy, one of the next of kin being a party: a decree was made without requiring the other next of kin, who were numerous, to be brought before the court. *Brulwin v. Harpur*, Ambl. 374. LEGATEES.

Part of a ship's crew appointed two to be agents. On bill for account by such agents in their own names, and not "on behalf of themselves and the rest," a demurrer was allowed for not having made the whole parties. *Leigh v. Thomas*, 2 Ves. 312.

A few creditors may sue for themselves and rest, and the suit abates not by death of one. *Id.* 313.

Though some members of a corporate body be wanting, equity will decree execution of an agreement to grant a lease if the money is paid, for corporations differ from private persons, and the same rule in executing agreements will not hold. *Winne v. Bampton*, 3 Atk. 475. CORPORATION.

Bill by one tenant of the manor of A, suggesting a custom for the tenants of that manor to cut turf in the manor of B. Where several persons have the same right, and are disturbed, such bills are entertained to avoid a multiplicity of suits, since one or two determinations will establish the rights of all parties on the footing of one common interest; but in all such bills, all parties, or a determinable number, join in the name of the rest. Here, only one brings a bill in the general right, and not in a distinct right. Bill dismissed. *Baker v. Rogers*, Sel. Ch. Ca. 74. MULTIPLICITY OF SUITS.

Part of the proprietors of an undertaking may bring some others of them to an account, without making all the members parties, especially if they sue on behalf of themselves and others. *Chancey v. May*, Prec. Chan. 592. ACCOUNT.

In a suit on behalf of a charity for the arrears of a rent charge, it is not necessary to make all the terre-tenants of the land, out of which the rent issues, parties. *Att. Gen. v. Wyburgh*, 1 P. W. 599.

To bill for charitable uses, all the terre-tenants need not be made parties. *Att. Gen. v. Shelly*, 1 Salk. 162. CHARITY.

A agrees in writing with B and C to pave the streets in the parish of D; B and C, on behalf of themselves and the rest of the parish, agree to pay A. The agreement is lodged in the hands of B. A shall have his remedy against B and C, and they must resort to the rest of the parish. *Meriel v. Wymondshall*, Hard. 205. AGREEMENT, WHO BOUND.

Bill on bond must be against all the obligors. *Anon.* 2 Freem. but dispensed with where numerous. *Cranbourne v. Crisp*, Finch. 105.

## 18. Partners and Part-owners, Joint Tenants and Tenants in Common.

A B and C, being partners together, A agrees with D, to give him a moiety of his share in the concern ; an account may be decreed between A and D, without making B and C parties. *Brown v. De Tastet*, 1 Jac. 294. ACCOUNT BETWEEN WHOM ; PARTNERS.

One partner may file bill against his co-partner for account, without seeking a dissolution of partnership. *Harrison v. Armitage*, 4 Mad. 143. *Sed quere*. PARTNERSHIP, DISSOLUTION ; ACCOUNT.

One of two part-owners of a ship having assigned his share to the other, the former is a necessary party to a bill by a creditor of both against the representatives of the latter. *Pierson v. Robinson*, 3 Swan. 139. ASSIGNMT.

Abatement by the death of one of the plaintiffs, tenants in common, bill of revivor by his representative ; the survivor, if not a co-plaintiff must be made defendant. *Fallowes v. Williamson*, 11 Ves. 306. TENANTS IN COMMON ; REVIVOR, BILL OF.

Joint owner not necessary party to bill against factor, on a demand against the other moiety, defendant having kept separate accounts, and admitted the produce of that moiety to be in his possession. *Weymouth v. Boyer*, 1 Ves. J. 416.

A, stated by books in evidence for defendant to be a merchant abroad, and one witness swearing he knew him late a merchant abroad, and no evidence of his return sufficiently proved, out of the jurisdiction, as would be presumed at law, and defendant precluded from objecting that he was not a party. *Id. ib.*

One part-owner of a ship cannot bring a bill on behalf of himself and the other part-owners, but they must all be parties. *Moffat v. Farquharson*, 2 Bro. C. C. 338. PARTNERSHIP.

To a bill against a bailee for re-delivery of jewels, persons entitled to a part of them, are not necessary parties. *Saville v. Tuncred*, 3 Swan. 141. BAILEE ; PART-OWNERS.

In a suit for a share of a partnership adventure, all the parties having shares must be parties. *Ireton v. Leves*, Rep. T. Finch, 96. PARTNERS.

In a bill to establish a title of fish, all persons interested in any one particular adventure must be parties. *Coppard v. Page*, For. Exch. 1. *Id.*

Two joint tenants for life, if one of them exhibit a bill, the other must be made a party, without the bill shows that he is dead. *Weston v. Keighley*, Rep. T. Finch, 82. JOINT TENANTS.

## 19. Parties not interested as Witnesses, Agents, &amp;c.

If a motion is intended to lay the foundation for a subsequent application against the solicitor of some of the parties, the solicitor in his personal capacity ought to be made a party to that motion. *Van Sandau v. Moore*, 1 Russ. 441. PR. MOTION.

Where witness is made party, merely for purpose of discovery, it is demurrable. *Hou v. Best*, 5 Mad. 19. PL. DISCOVERY ; WITNESS ; PL. DEMURRER.

Chief clerk to company, though he has no interest, and may be examined as witness, may nevertheless be made a party in suit against such company for discovery. *Gibbons v. Waterloo Bridge Comp.* 5 Price, 491.

Demurrer to bill by annuitant, against an incorporated company and their clerk for discovery of funds not appropriated, overruled, on account of clerk joining in demurrer. *Id. ib.* PRINC. & AGENT.

Generally, it is not necessary to make an attorney a party, because he has title-deeds in his possession, although it may become so under particular circum-

stances. *Fenwick v. Reed*, 1 Mer. 114. SOL. & CLIENT.

Rule that mere witness, having no interest, ought not to be made party, is not without exception. *Whitworth v. Davis*, 1 V. & B. 550. WITNESS.

The only case in which a person, against whom no relief is prayed, is allowed to be made a party, is that of the agent of a corporation ; where an agent is so involved in a fraud, that the court will charge him with costs ; though relief cannot be prayed against him ; yet if the costs are not prayed against him, a demurrer lies. *Le Teulier v. Marg. Anspach*, 15 Ves. 164. But see 2 Ves. 284. AGENT.

General rule that a mere witness is not to be made a party ; exceptions in the cases of arbitrators and attorneys, and corporations, whose officers and servants are made parties. *Dummer v. Corp. of Chippenham*, 14 Ves. 252. WITNESS.

A solicitor assisting his client in obtaining a fraudulent release is properly made a party, and liable to costs, if the principal be not solvent. *Bowles v. Stewart*, 1 Scho. & L. 227. SOL. & CLIENT ; FRAUD.

Bill for discovery, in aid of an action ; demurrer by mere witness allowed, though discovery would be more beneficial than an examination at law, and notwithstanding a charge of interest in defendant as to which he may be called by plaintiff, waiving the objection, and if called against him, may be examined on the *voir dire*. *Fenton v. Hughes*, 7 Ves. 287. PR. WITNESS.

To bill for relief, mere witness cannot be party, except in the case of a secretary, &c. of a corporation. *Id.* 288. *Id.*

To bill against vendor for specific performance, his stewards and receivers ought not to be made parties, a specific performance being decreed, bill as against them dismissed with costs. *McNamara v. Williams*, 6 Ves. 143. SPEC. PERF.

An agent who was to have no emolument beyond his salary, decreed to account for profit made by a clandestine sale to his principal on his account. Timber purchased for a colliery ; before it was applied to the use of the colliery, some of the owners retired, and it was paid for by those only who remained : the former owners are not necessary parties to a suit by those who remained against the vendor on account of sale. *Mussey v. Davies*, 2 Ves. J. 317. PRINC. & AGENT ; ACCOUNT.

It is no answer on exceptions, that the defendant is a mere witness, and ought not to have been made a party ; for having submitted to answer, he must answer fully. *Cookson v. Ellison*, 2 Bro. C. C. 252. WITNESS ; WAIVER ; PR. EXCEPTIONS TO ANSWER.

The parent is not a necessary party to a suit to set aside a deed fraudulent on marriage, but is a competent witness to prove the fraud on a bill filed by the husband and wife. *Scott v. Scott*, 1 Cox, 367. FRAUD ON MARRIAGE ; PR. EVID. WITNESS, COMPETENCY OF.

A mere witness cannot be made a defendant for discovery of what he is examinable to, unless he is interested. If the bill charges he is interested, the defendant must plead and support it by an answer denying that allegation, and cannot demur. *Plummer v. May*, 1 Ves. 426. WITNESS ; PL. PLEA.

To a bill by representative of the pawnee of a chattel against a third person, merely for a delivery of it, the owner need not be a party. *Saville v. Tankred*, 1 Ves. 101.

An agent being prosecuted for contempt in disobeying an order of which he had no notice, may join in an appeal from that order, though no party to the cause in which the order was made. *Stone v. Byrne*, 5 Bro. P. C. 213. PR. APPEAL.

In an issue directed to try whether M made a contract for his own use, or in trust for B C and D, M is

very properly made a party, and ought not to be a witness; because, as a witness, he was to answer to his own advantage, viz. to lessen the number of his partners in a beneficial contract. *Dawson v. Franklyn*, 4 Bro. P. C. 626. *ISSUE AT LAW.*

J, of K, caused a sum in S. S. stock, belonging to another person of the same name, to be transferred into his own name, and then into the name of a broker for sale, and who accordingly sold it for him: in a bill against the representative of J of K, and the S. S. company, the solicitor for the broker is not a necessary party. *Harrison v. Pryse*, Barn. 324. *PRIN. & BROKER.*

## 26. *Tenant for Life; in Tail, and Remainder-man.*

In a suit concerning the inheritance of a trust estate, settled on B for life, and after remainders to his unborn children, upon the person who should then be entitled to claim as Baron C in tail, with an ultimate remainder to the present baron C in fee; the person presumptively entitled to the barony, although no person entitled to a prior estate of inheritance is before the court, is not a necessary party. *Cholmondeley v. Clinton*, 2 Jac. & W. 2. *REM.-MAN.*

It is sufficient to bring the first tenant in tail before the court. *Lloyd v. Jones*, 9 Ves. 55. *TEN. IN TAIL & REM.-MAN.*

Tenant for life having made a lease of coal mines, amounting to a forfeiture, cannot join the remainder-man in a bill for an injunction. *Wentworth v. Turner*, 3 Ves. 3.

It is sufficient if the first tenant in tail is a party to a bill of foreclosure. *Reynoldson v. Perkins*, Amb. 664. S. C. 1 Dick. 427. *PL. BILL OF FORECLOSURE; TEN. IN TAIL & REM.-MAN.*

A party who is plaintiff has no right, in order to clear his own title, to bring remainder-man before the court, upon a discussion whether a prior remainder-man has title or not, and therefore a bill against them dismissed. *Pelham v. Gregory*, 1 Eden, 518.

On bill to execute trust, the first entitled to inheritance is a necessary party, if in being. *Finch v. Finch*, 2 Ves. 492.

Where a remainder-man brings a bill against tenants for life, to have the title deeds brought into court, parties claiming under the trust deed must be parties to the suit. *Pyncent v. Pyncent*, 3 Atk. 571. *TEN. FOR LIFE & REM.-MAN.*

Where mortgage in fee has made an absolute conveyance, with several limitations and remainders over, the first tenant in tail at least must be brought before the court. *Yates v. Hambly*, 2 Atk. 237. *TEN. IN TAIL.*

Bill to impeach settlement is not demurrable because remainder-man, expectant on an estate tail, is not made party. *Anon.* 2 Eq. Ab. 166. *REM.-MAN.*

Injunction to stay waste in cutting trees, granted on bill by party who was only tenant for life, and had no right to trees, and though party entitled to inheritance, was not joined. *Dayrell v. Champness*, 1 Eq. Ab. 400. *INJUNC. TO STAY WASTE.*

A made a mortgage, and then made a marriage settlement of the equity of redemption, wherein he limited it to his wife, then to the issue of his body, remainder in tail to his brother. The mortgagee brought his bill against the mortgagor for a foreclosure, but he did not make the brother a party, yet he had a decree. The mortgagor afterwards died without issue, and the lands remained to the brother by the settlement, who brought his bill to redeem, which was dismissed. *Cartwright v. Barton*, 1 Ch. Ca. 217. 220. *MORTGAGE, FORECLOSURE OF.*

## 21. *Tithe Causes.*

Bill praying account of tithes, and merely stating that impropriator demised tithes to plaintiff, demurred to for want of title; but on argument plaintiff was allowed to amend, by making the impropriator a party, on payment of 5*l.* costs. *Jackson v. Benson*, 1 M'Clel. 62. S. C. 13 Price, 131. *TITLE; PL. BILL AMENDMENT.*

Landowner, not being an occupier, made defendant in a suit for tithes, is entitled to have the bill dismissed as against him, with costs, but if he mixes in defence, &c. it will be dismissed without costs. *Markham v. Smith*, 11 Price, 126. *PR. COSTS.*

Plaintiff in tithe cause, lessee of vicar, ordered on motion on part of defendant, to bring in and deliver to clerk in court, books, papers, &c. stated in affidavits to be in his possession, and to belong to vicar, who was not a party to suit. *Foreman v. Cooper*, 11 Price, 515. *PR. PRODUCTION OF DEEDS.*

Ordinary is a necessary party defendant to bill for establishing modus. *Cook v. Butt*, 6 Mad. 53. *MODUS.*

In a suit by an impropriator for tithes, when the defence is, that the tithe in question is vicarial, and the vicar, who is a defendant, dies during the suit, it is not necessary to make the new vicar a party, if the plaintiff will waive the account subsequent to his induction. *Davis v. Benn*, 1 Jac. 95.

The vicar is a necessary party to a bill for tithes by the impropriator against an occupier, when the defence made is, that the tithes in question are payable to him. S. C. 1 Jac. & W. 513.

A bill to establish a modus should be filed by certain owners and occupiers of land within the parish, on behalf of themselves, of all other owners, occupiers, &c., and the ordinary should always be a party. *Hales v. Pomfret*, Dan. 142.

An impropriator is not a necessary party to a bill by a vicar, against occupiers; and if made one, he may demur. Bill dismissed against him, but under circumstances, without costs. *Williamson v. J. d. Lonsdale*, Dan. 171. *IMPROPRIATOR OF TITHES.*

On bill to establish modus against dean and chapter as rector, the ordinary and parson are necessary parties. *De Whelpdale v. Milburn*, 5 Price, 485. *MODUS.*

Where a lay impropriator is not a necessary party, and ought to demur; if he does not but suffers the cause to go to the hearing, the court will not give him costs. *Williamson v. Hutton*, 9 Price, 187. *PR. COSTS.*

Rector ought not to be made party defendant in vicar's suit for an account of small tithes withheld by occupiers on a claim by rector. *Williams v. Price*, 4 Price, 156. *ACCOUNT.*

To a bill to establish a customary payment in lieu of the tithes, the ordinary must be a party. *Gordon v. Simkinson*, 11 Ves. 509.

One owner of lands in a township may sue for himself and the others, to establish a contributory modus for all the lands there. *Chaytor v. Trinity College*, 3 Anst. 841. *MODUS.*

Rector of M claiming tithes in kind, the occupier and landlord filed a cross bill to establish modus payable to rector of S by the lord of the liberty of which the lands were parcel. It was objected, 1st, that the rector of S not disputing the modus, a bill would not lie to establish it, and 2nd, that the other owners of the land in the liberty should have been parties; bill therefore dismissed. *Woolston v. Wright*, 3 Anst. 801. *MODUS; PL. CROSS BILL.*

Where an impropriator's right does not come in question, he need not be made a party to a bill for subtraction of tithes. *Carter v. Bull*, 3 Atk. 600.

Though a modus be laid in all the occupiers, yet

suing part of the occupiers is sufficient, each being liable for the whole. *Hardcastle v. Smithson*, 3 Atk. 247.

To a bill for a portion of tithes in a neighbouring parish, the vicar of that parish must be a party. *Bailey v. Worrall*, Bunb. 115.

To a bill for tithes by the bishop and sequestrator during the incapacity of the incumbent, the incumbent must be a party. *Bp. of London v. Nichols*, Bunb. 141. And if a sequestrator file a bill for subtraction of tithes during the vacancy, the bishop of the diocese must be made a party, because the sequestrator must account to him for his receipts. *Jones v. Barrett*, Bunb. 192.

The improprator must be a party to a bill against his lessee, to establish a modus. *Glanvil v. Trelawney*, Bunb. 70. MODUS.

Bill to establish a custom, the owner of the inheritance must be a party. *Spendler v. Potter*, Bunb. 181. LOCAL CUSTOM.

Bill for tithes by the bishop and sequestrator, during the incapacity of the incumbent, dismissed, the incumbent not being a party. *Bp. of London v. Nicholls*, Bun. 141. INCUMBENT.

Bill by plaintiffs as lessees of the rector of W, for a portion of great and small tithes in S a neighbouring parish, the vicar of S, who might be entitled to the small tithes, is a necessary party. *Bailey v. Worrall*, Bun. 115. *lb.*

In a bill to establish a modus against the lessee of the improprator, the owners of the impropriation must be parties. *Glanvil v. Trelawney*, Bun. 70. IMPROPRIATION OF TITHES.

Decree, in time of Charles I., for payment of 40l. per annum out of particular lands, formerly part of the forest of Bladen, to the vicar, in lieu of tithes. In a bill against the land-owners to establish a right for this 40l. per annum, it is not necessary that the occupiers, as well as landowners, should be made parties to the bill. *Cuthbert v. Westwood*, Gilb. Eq. Rep. 320. LANDLORD AND TENANT.

## 22. Trustee and Cestui que trust, Guardian and Infant, Lunatic and Committee.

The trustees of a charity were made, as individuals, defendants to a suit for the administration of the charity, afterwards the information was amended, and they were made defendants in their corporate capacity, but the suit was not dismissed against them as individuals; at the hearing, the record was considered as constituting two different causes, and the cause against the trustees as individuals was dismissed with costs, though in the cause against them in their corporate capacity, a decree was made remedying abuses which had grown up in the charity, and regulating its future administration. *Att. Gen. v. Mansfield*, 2 Russ. 501. TRUSTEES OF CHARITY.

Trustee cannot file a bill concerning trust, without making cestuique trust parties, if they are numerous it ought to be filed by some on behalf of themselves and the rest. *Douglas v. Horsfull*, 2 S. & S. 184. TRUSTEE AND CESTUI QUE TRUST.

A testatrix gives a legacy in trust for the minister of a chapel, but directs that, upon a specified contingency, the legacy is to go to the trustees of a certain college; the interest is paid during many years to the minister of the chapel: Held, that the charity for the chapel may be established upon a bill and information to which the trustees of the college are not parties. *Att. Gen. v. Goddards*, 1 Turn. & R. 348. CHARITY.

Generally all persons interested are necessary parties to bill of foreclosure; and where equity of redemption was conveyed to trustees to sell, &c. with power to discharge purchaser, by receipt, it does not dispense

with necessity of making cestui que trust parties. *Calverley v. Phelps*, 6 Mad. 229. FORECLOSURE; TRUSTEES; DEEDS, PARTIES TO.

Where there is no imputation of breach of trust in trustee's suffering deed to get out of his possession, he need not be party to bill for its restitution. *Kaye v. Moore*, 1 S. & S. 61. TRUSTEE.

In a bill to compel performance of covenant to surrender copyhold estate to A in trust for others, A must be a party. *Cope v. Parry*, 2 J. & W. 638. SPEC. PERF.; TRUSTEE.

In suit against trustees of charity, all the trustees must be parties, though they do not act. *In re Chertsey Market*, 6 Price, 261. TRUSTEES.

In bill to foreclose mortgage, trustee for mortgagee is a necessary party. *Wood v. Williams*, 4 Mad. 186. *lb.*

Right of a cestuique trust to proceed separately against one trustee implicated in a joint breach of trust. *Walker v. Symonds*, 3 Swan, 75. BR. OF TRUST; TRUSTEE.

To bill by person entitled to a certain aliquot portion of a certain ascertained sum in hands of trustees, co-cestuique trusts are not necessary parties. *Smith v. Snow*, 3 Mad. 10. CESTUI QUE TRUSTS.

If there are cestui que trusts who ought in strictness to be made parties to such a suit, and they are not so brought before court, their interests may be ascertained and protected (by indulgence of court) by a petition to be presented by them for that purpose, to obviate further delay and expence. *Drew v. Harman*, 5 Price, 319. CESTUI QUE TRUSTS.

Specific performance decreed at the instance of a person entitled to the benefit of an agreement, though not a party to it. *Hook v. Kinneir*, 3 Swan, 417. SPEC. PERF.; STRANGER.

A trustee laid out the money of different persons on a mortgage; foreclosure by cestuique trust as to his share, allowed. *Montgonerie v. Marq. of Bath*, 3 Ves. 560. but see *Love v. Morgan*, 1 Bro. C. C. 368, and note there contra. MORTGAGE, REDEMPTION OF.

Bill by one trustee of stock against the other, to compel him to replace it or give security according to his engagement, when the plaintiff joined in transferring the stock into his name, demurrer because the cestui que trusts were not parties, overruled with costs. *Franco v. Franco*, 3 Ves. 75. TRUST & CESTUI QUE TRUST.

In a devise to sell and the produce to be divided, all the persons interested in the fund must be made parties, though the land is sold before suit. *Faithful v. Hunt*, 3 Anst. 751.

A trustee in a will, who released and never acted, ought not to be made a party in a suit to set aside the will on ground of fraud, and therefore need not answer as to the fraud alleged. *Richardson v. Hulbert*, 1 Anst. 65. TRUSTEE.

If the trustees of a term and the cestui que trust are before the court, an intermediate trustee of the equitable interest need not be the party to a bill filed to carry the trusts of the term into execution. *Head v. Teynham*, 1 Cox, 57. TRUSTEES.

A bill charges forgery in a lease, and prays relief, the trustees who were parties to the lease, and to whom the fraud and breach of trust is imputed, must be parties. *Jones v. Jones*, 3 Atk. 110. *lb.*

Bill brought by the purchaser of annuity charged on bank stock, in trustees' names, to be paid the annuity and decreed. *Floyer v. Sheppard*, Amb. 18. TRUSTEE.

Where the real estate is in the hands of trustees, and the trustees convey it over without notice of the trust, if a bill is brought by the cestui que trust, the trustees must be made defendants. *Harrison*

v. *Pryse*, Barn. 324. VEND. & PURCH.; TRUSTEE & CESTUI QUE TRUST.

Bill of redemption against the trustee is not sufficient, the cestuique trust must be a party. *Whistler v. Webb*, Bun. 53. TRUSTEE & CESTUI QUE TRUST.

A cestui que trust must in all cases be a party, but the trustee need not, especially if cestui que trust undertakes for him. *Kirk v. Clark*, Prec. Chan. 275. *Id.*

Upon a bill for a specific performance of a covenant with A for the benefit of B, A must be a party. *Cooke v. Cooke*, 2 Vern. 36.

In a bill against executors who are only executors in trust, it is not necessary to make the cestui que trusts or security legatees parties. *Anon.* 1 Vern. 261. CESTUI QUE TRUSTS.

A trustee for three persons is called to account. All the cestuique trusts must be parties. *Hamm v. Stevens*, 1 Vern. 110.

It was found a lunatic by inquisition with a retrospect of seventeen years. It was also found that he had assigned a debt due to him for the purchase of a manor: on a bill by the attorney general, it was held that the lunatic ought to be relieved, but that he need not be made a party, though the defendant should have leave to traverse the inquisition. *Att. Gen. v. Parkhurst*, 1 Ch. Ca. 113. Et vide S. C. *ib.* 153, where it was held necessary that the lunatic should be made a party; sed secus of an idiot, for he shall not be admitted to stultify himself. LUNATIC.

A lunatic must be a party to a suit for his own benefit; otherwise, perhaps, in case of an idiot. *Att. Gen. v. Woolrich*, 1 C. C. 153. LUNATICS & IDIOTS.

But where the suit is to be relieved against an act done by the lunatics, as assigning a debt, he need not be a party. *Att. Gen. v. Smith*, 1 C. C. 113. *Id.*

Where a committee sue in the right of the lunatic, in such case the committee and the lunatic are made parties. *Fuller v. Lance*, 1 C. C. 18. LUNATIC, COMMITTEE OF.

### 23. Vendor and Purchaser.

Premises held under a demise containing a proviso, that lessees shall not assign without the licence of the landlord in writing, are sold under a decree to a purchaser, who pays his purchase money into court, and is let into possession, the landlord having refused to concur in the assignment, the representatives of the lessee filed a bill against him, alleging, that his conduct, with respect to the sale, had been such as to deprive him in equity of any right to an act on the legal construction of the covenant and proviso against assignment, and praying that he might be decreed to give his licence in writing for the transfer of the interest: the purchasers are necessary parties to such a bill. *Mauie v. Dk. Beaufort*, 1 Russ. 349. VEND. & PURCH.

To bill by creditors to set aside purchase from debtor on ground of fraud, mortgagee of purchaser ought to be made party. *Copis v. Middleton*, 2 Mad. 410. FRAUD; MORTGOR. & MORTGEE.

## VI. PETITIONS.

See also BANKCY. VI. 11. (c); XVI. 3. (b); XVII. —CHARITY, IV. —LUNACY, IX. —MONEY TO BE LAID OUT IN LANDS.

A petition may be framed in the alternative, and the respondent cannot call upon the petitioner to elect to proceed for only one of the objects of the petition,

unless under special circumstances. *Exp. Schooley, Buck*, 476.

The general rule in bankruptcy is, that if the petitioner do not pray his costs, he cannot have them. *Exp. Atkinson*, Buck, 215. BANKCY. COSTS; BANKCY. PETITION.

A petition to enforce a claim of proof ought to state the grounds of rejection by the commissioners. *Exp. Schmaling*, 1 Buck, 93. BANKCY. PETITION.

Petition for a rehearing, ordered to be taken off the file, on the ground of its making a different case from that on which the decree was pronounced. *Qu.* Whether by consenting to an order consequential on a decree, the party so consenting precludes himself from the right of appeal? *Wood v. Griffith*, 1 Mer. 35. WAIVER.

Petition of appeal may state the grounds in the answer against the decree. S. C. 19 Ves. 551.

Equitable relief against an uncertificated bankrupt, with suggestion of property subsequently acquired in trade, and ignorance of former bankruptcy in such subsequent creditors, refused on petition with liberty to file bill. *Exp. Storks*, 3 V. & B. 105. S. C. 2 Rose, 179. CERTIFICATE.

Petition for rehearing ought to state the grounds on which it is sought to rehear the cause; *sed quare*. *Giffard v. Hott*, 1 Scho. & L. 398.

Petition for rehearing, or for bill of review, is bad for uncertainty. *Hyde v. Donne*, 2 Aust. 551. BILL OF REVIEW, PETITION FOR.

On petitions in bankruptcy to be admitted to prove debts, which have been rejected by the commissioners, the petitioners ought to state to the court in the first instance the grounds of the commissioners' objection. *Exp. Wilson*, 1 Cox, 308. BANKCY., PROOF IN.

Upon a petition of appeal from an inferior court, the appellant need not assign particular errors as he must upon a bill of review. *Addison v. Hindmarsh*, 1 Vern. 442.

Bill of appeal from inferior courts must be upon the same evidence, and there can be no examination *de novo*, no more than there may be on a bill of review; but in the spiritual courts they allow new evidence upon appeals. *Id.* 443.

Appeals lie from the court of equity at Lancaster to the duchy court. *Id.* *ib.*

## VII. PLEA.

See also INFANT, II. 1. —PL. ANSWER, 8. —TITHES, X.

### 1. Form and Validity.

- (a) Generally.
- (b) False Plea.
- (c) Uncertainty.
- (d) Surplusage.
- (e) Double.
- (f) Negative.

### 2. Of Accounts stated or settled.

### 3. Of Agreement.

### 4. Of Attainder, Alien Enemy.

### 5. Of Award.

### 6. Of Bankruptcy and Insolvency.

### 7. Discovery tending to criminate, and Forfeiture.

### 8. Of Statute of Frauds.

### 9. Of Jurisdiction.

### 10. Of Statute of Limitations, and Length of Time.

### 11. Lis Pendens, Former Suit, and Decree.

### 12. Of Lunacy.

### 13. Of Outlawry.

### 14. For Want of Parties.

### 15. Of Purchase.

### 16. Of Release, Payment, Compromise.

### 17. Of Title.



18. Where it lies generally.  
 19. Ordered to stand for Answer.  
 20. When overruled by Answer.

### 1. Form and Validity.

- (a) Generally.  
 (b) False Plea.  
 (c) Uncertainty.  
 (d) Surplusage.  
 (e) Double.  
 (f) Negative.

#### (a) Generally.

To a bill praying a reconveyance of four estates, the defendant put in a plea of a fine as to one, concluding with a disclaimer as to the others: the plea was overruled. *Watkins v. Stone*, 2 Sim. 49. **DISCLAIMER.**

Defendant cannot plead a payment as a modus, and afterwards insist upon the same payment as a composition, requiring six months to determine it. *Wolley v. Brownhill*, 1 M'Clel. 317. S. C. 13 Pri. 500.

Bill for delivery of title deeds and injunction to restrain setting up outstanding terms, to which no affidavit as to title deeds was annexed. Plea overruled, because it should have been confined to so much of bill as related to outstanding terms, and because that part of bill which related to title deeds should be demurred to for want of affidavit. *Hook v. Dormer*, 1 S. & S. 227. **PL. BILL; AFFIDAVIT; TITLE DEEDS; PL. DEMURREN.**

A plea not being a short answer to the demand bringing the question between the parties to a single point precisely meeting the allegations in the bill, overruled and ordered to stand for an answer, with liberty to plaintiff to except. *Wing v. Murrells*, 11 Pri. 723.

Plea to bill by person suing as Earl of S (earldom being a Scotch dignity) that he is not Earl of S, but that defendant is Earl of S and K, and averring that plaintiff is the natural son of the late Earl of S and K and M M, who were resident and domiciled in England at time of his birth, and were not married for several years after, overruled, there being no averment either that the title of S and K was the same, or that the plaintiff was born in England. *Quære* whether the plea should conclude in bar or abatement? *E. Strathmore v. Cs. Strathmore*, 2 J. & W. 541.

It is not correct to plead that by certain custom, used and approved in P and nineteen other parishes, no tithes of a particular kind were due and payable to rectors of P. *Page v. Wilson*, 2 J. & W. 521. **TITHES, CUSTOM.**

Where plea to the whole bill did not cover the whole relief prayed by bill, it was overruled. *Barker v. Ray*, 5 Mad. 64.

Plea founded on stat. 32 H. 8. c. 2. to bill of discovery overruled, though good in substance, because no specific answer given to certain statements in bill. *Crow v. Tyrell*, 2 Mad. 397. **PL. DISCOVERY; STAT. C. OF.**

Plea covering too much overruled. *Noel v. Ward*, 1 Mad. 322.

In pleading, case proved should correspond with case laid. Therefore, where in answer to bill for tithes certain customary payments were alleged, and some payments which, from their smallness appeared customary, were shown in evidence without making out moduses as laid, court of exchequer, without issue, decreed for plaintiff. *Blake v. Veysie*, 3 Dow. 189. **TITHES.**

Plea with an exception, not requiring a reference to the answer, allowed. *Hove v. Duppa*, 1 V. & B. 511.

Two inconsistent facts cannot be joined in one plea. Cited in *Wood v. Strickland*, 2 V. & B. 153. note (e). S. P. 1 Bro. C. C. 416. n.

Various facts cannot be joined in one plea unless conducive to a single point of defence, as several deeds tending to establish the single point of title, &c. *Id. ib.*

Plea supported by answer must also contain a denial generally by averment. *Morrison v. Turnour*, 18 Ves. 182.

In plea of payment of composition to bill for tithes, time when or where are not necessary to be stated. *Mylton v. Harris*, Wightw. 111.

Office of a plea generally not to deny the equity, but to bring forward a fact, the result, perhaps, of a combination of circumstances, which, if true, displaces the equity. *Rouse v. Tord*, 15 Ves. 377.

A plea must reduce the defence to a single point, which, however, may consist of a variety of facts. *Ritchie v. Aylwin*, id. 82.

To a plea in bar of a fine, a direct positive averment of seisin is necessary. *Hobson v. Leubeaer*, 13 Ves. 230. **FINE & NONCLAIM.**

Plea may be merely a negation of the circumstances stated by the bill. *Shaw v. Ching*, 11 Ves. 305.

Want of averment in plea of statute of limitations, that money was not received within six years, supplied, in substance, by averment that cause of action, if any, arose above six years before bill. *Sutton v. E. Scarborough*, 9 Ves. 77. **LIMIT. STAT. OF.**

Plea may be good in part, and bad in part, as to the difference in this respect between plea and demurrer. *Mayor of London v. Levy*, 8 Ves. 403.

Office of plea in bar at law, is to confess the right, and avoid it by matter *dehors*, so in this court in general cases. The excepted cases, where the plea must be supported by answer. *Bayley v. Adams*, 6 Ves. 594.

Plea of a fine overruled, because no seisin was stated. *Page v. Lever*, 2 Ves. J. 450.

Bill of foreclosure as to messuage and forty acres of land. Plea deducing title to premises, and stating them to be a messuage and tenement: plea held bad as not relating to land demanded. *Wedlake v. Hutton*, 3 Aust. 633.

Plea to discovery, that it may subject defendant to penalties of a statute, and also of articles of impeachment exhibited against him by the commissioners, and therefore void. *Nobbissen v. Hastings*, 2 Ves. J. 84. S. C. 4 Bro. C. C. 252.

To a charge in the bill that A died seized in fee of estates in D and elsewhere, plea of fine of all the estates charged in the bill, and of which A died seized in fee, sufficient, without averments that they were in D, and none elsewhere: court will not intend that there are advowsons merely because mentioned in the fine. *Butler v. Ebery*, 1 Ves. J. 136. **FINE.**

Plea by the East India company to a bill for an account filed by the Nabob of Arcot, that by charters confirmed by act of parliament they had certain powers by virtue of which the acts were doing, overruled, it not setting forth the contents of the charters and acts of parliament. *Nabob of Arcot v. E. I. Comp.* 3 Bro. C. C. 292. Vide S. C. 1 Ves. J. 371. **JURISDICTION.**

A plea against the jurisdiction of the court must shew what court has the proper jurisdiction. *Id. ib.*

Plea of conveyance, fine and non-claim, not multifarious, but a good plea to a bill impeaching the conveyance, as not being for a valuable consideration. *Doble v. Cridland*, 2 Bro. C. C. 274. **PL. MULTIFARIOUSNESS.**

A being entitled under a will to the use of certain articles of plate for her life, pawned them with B who kept an open pawnbroker's shop. Bill was filed by the representatives of the testator, after the death of

A against B, for a discovery of the particular articles pawned, in order to enable the plaintiffs to proceed in an action at law for the recovery of them. To this discovery the defendant pleaded, that certain articles of plate were deposited with him, for certain sums of money *bona fide* lent and advanced thereon to A; but he did not by his plea (though he did by his answer) aver that he had no other articles of plate in his possession. For this defect in point of form, the plea was overruled. The defendant then insisted on the same point by his answer in bar to the discovery; but the court thought that where a plea to a bill of discovery was overruled, the defendant could never insist on the same thing by answer. *Hoare v. Parker*, 1 Cox, 224. S. C. 1 Bro. C. C. 578. PL. ANSWER; PL. BILL OF DISCOVERY.

Plea allowed in part, in part overruled. *Turner v. Mitchell*, Dick. 249.

Plea of former suit must aver that both suits are for same matter. *Devie v. Ld. Brownlow*, id. 611.

Plea may be good in part, and overruled in part. *Welford v. Leddet*, 2 Ves. 400.

What averments are necessary to support plea. *Brownwood v. Edwards*, id. 243.

Demurrer must abide by the bill. Pleas suggest a fact to be proved. *Id.* 247. PL. DEMURRER.

As to averments necessary to support a plea of usury. *Wortley v. Pit*, 1 Ves. 164. USURY.

Plea to jurisdiction must show what court has jurisdiction. *E. Derby v. D<sup>r</sup> Athol*, Dick. 129.

A bill brought by a creditor of an intestate for 100*l.* on note charging that administratrix promised to pay it as soon as she could get in effects, to which she pleaded the statute of limitations, and that she had made no promise to pay the note, too general, for she should have pleaded she made no promise to pay out of assets. *Anon.* 3 Atk. 70. ADMOR.

If the principal be barred so is the interest. *Id.* 71.

Pleading to all except such parts of the bill as are not hereinafter answered, is too general. *Id. ib.*

A plea may stand for part, and overruled for part, otherwise as to a demurrer. *Dormer v. Fortescue*, 2 Atk. 284. DEMURRER.

Plea by widow to bill by creditors of testator, to discover her title to settlement, and offer to discover if they would confirm her title, overruled as not setting out the date, nor the lands contained in the settlement. *Chamberlain v. Knapp*, 1 Atk. 52.

Plea must aver matter pleaded positively. *Hastings v. Draper*, 1 Eq. Ab. 39.

A pleaded an inquisition *post mortem* E; whereby it appeared that B, under whom A claimed, was tenant in tail. The plaintiff objected that A ought to have pleaded the settlement whereby B was tenant in tail, and not to have pleaded that he was tenant in tail as appeared by the inquisition *post mortem*, finding the settlement. But plea was allowed. *Kennedy v. Piggott*, 6 Bro. P. C. 8.

Defendant put in answer, plaintiff after amends bill: defendant put in plea to whole bill; held regular. *Gambier v. Leheup*, Dick. 44.

If the bill pray discovery only, a plea to the discovery and relief is bad. *Asgill v. Dawson*, Bun. 70. PL. DISCOVERY, BILL OF.

Plea overruled because the fraud alleged in the bill was denied in the plea, and not by way of answer. *Price v. Price*, 1 Vern. 185.

When a bill is in the disjunctive, the defendant by his plea may take it either way. *Cresset v. Kettleby*, id. 219. PL. BILL.

Defendant pleads settlement made after marriage in pursuance of an agreement made before, and does not shew what the agreement was. No good plea. *Keeper v. Wyld*, id. 139.

Husband puts in plea in his name and wife's; she

refuses to swear it, it shall stand as to husband. *Pavie v. Acourt*, Dick. 13.

#### (b) False Plea.

After decree for administration of assets, executor pleaded false plea to action brought against him by creditors of testator, in order to have an opportunity of applying for injunction to restrain action. Court granted injunction, and held creditor not entitled to judgment against executor, *de bonis propriis*. *Fielden v. Fielden*, 1 S. & S. 255. INJUNCTION; EXECUTOR.

False plea, put in for delay, ordered to be taken off the file, with costs to be paid by the solicitor. *Aubrey v. Aspinall*, 1 Jac. 441.

An action at law by creditor, against an administrator; defendant, by mistake of his attorney, pleads false plea, and verdict for the plaintiff, though merits never tried, yet equity will not relieve. *Stephenson v. Wilson*, 2 Vern. 325. ADMINISTRATOR; ACTION AT LAW.

Defendant puts in sham plea for delay, ordered on short day, either to be sworn to plea, or put in issuable plea. *Lovell v. Hopkins*, Cary, 70.

#### (c) Uncertainty.

Modus laid to be payable by "certain occupiers" uncertain, and not sufficient. *De Whelpdale v. Milburn*, 5 Price, 485. MODUS.

Moduses introduced by stating, that they are payable by occupiers in lieu of tithes within and throughout parish, (except the occupiers of several other farms and lands), not otherwise described than by their respective names: Held, ill-pleaded for uncertainty. *Wright v. Southwood*, 5 Price, 607. MODUS.

Uncertainty as to modus and bounds, in pleading modus, is bad. *Gillebrand v. Scotson*, 4 Price, 267. MODUS.

#### (d) Surplusage.

Upon a bill filed originally in the individual names of a corporation, adding their corporate character, and, on abatement, a bill of revivor in their corporate name only; demurrer, for want of privity, overruled; the naming of individuals, while the proceedings purport to be in a corporate character, and the corporate names added, is mere surplusage. *Walker v. Warden, &c. of Christ Coll.*, 1 Bli. N. S. 9. PL. PARTIES.

Plea by husband and wife, entitled as joint and several plea; word "several" mere surplusage, and does not vitiate the plea. *Fitch v. Chapman*, 2 S. & S. 31. INTITULING PLEADING.

An allegation, merely surplusage, does not support an objection to a plea as multifarious. *Claridge v. Hoare*, 14 Ves. 59. MULTIFARIOUSNESS.

Unnecessary words, used in the laying a modus, which would make it indefinite, may be expunged. *Ellis v. Saul*, 1 Anst. 341. MODUS; PL. PLEA.

#### (e) Double.

On a special application under circumstances, court will allow pleading double. *Gibson v. Whitehead*, 4 Mad. 241.

Double pleas not allowed in equity, because, if case cannot be reduced to a single point, the defence may be more conveniently made by answer. *Jones v. Frost*, 3 Mad. 8.

Defendant, in title cause, having set up defence of composition real, cannot afterwards rely on its being in fact a *modus*; such defence being double, and too uncertain. *Ward v. Shepherd*, 3 Price, 608. TITHES.

Plea of statute of frauds, coupled with another defence to bill for specific performance, was ordered.

to stand till the hearing. *Cooth v. Jackson*, 6 Ves. 12. STAT. OF FRAUDS.

As to the effect of pleading many inconsistent defences, see *Nagle v. Edwards*, 3 Anst. 702.

A plea, stating that the plaintiffs, who claimed as citizens of London, never were resident there, or paying scot and lot; and that they were admitted freemen by fraud, for the purpose of enjoying the exemption claimed, is bad for duplicity. *Corp. of London v. Corp. of Liverpool*, 3 Anst. 738.

Plea of the statute of frauds averring, first, that there was no contract in writing; secondly, that there had been no acts done in part performance; overruled as double, and ordered to stand for an answer with liberty to except. *Whitbread v. Brockhurst*, 1 Bro. C. C. 404. PL. PLEA ORDERED TO STAND FOR ANSWER.

### (f) Negative.

Answer to negative plea must be confined to facts specifically charged as evidence of plaintiff's title. *Thring v. Edgar*, 2 S. & S. 274.

Negative plea to belief of no mortgage, not going to material collateral charges tending to that point, is too loose and general, and overruled. *Arnold v. Heasford*, 1 M'Clel. & Y. 331.

Plea to the principal ground of relief, as the statute of frauds, with averment of no agreement in writing, not going to collateral circumstances charged as evidence of it; overruled. *Evans v. Harris*, 2 V. & B. 361. FRAUDS, STAT. OF.

Negative plea, as no partnership, not going to collateral circumstances charged as evidence of it, insufficient. *Id. ib.* PARTNERSHIP.

To a bill charging corruption of arbitrators, plea of the award merely not sufficient. *Id. ib.* AWARD.

Negative plea destroying whole foundation of the relief and discovery prayed, allowed. *Drew v. Drew*, 2 V. & B. 159.

The bill alleging the suppression of a codicil, on assurance by the testator, that he had directed his executors and residuary legatees to pay an annuity, and their promise to him accordingly repeated after his death, and acted upon by actual payment for several years; plea, merely denying the execution of any codicil, and any such direction, overruled. *Chamberlain v. Agar*, 2 V. & B. 259.

Negative plea to a bill for an account of stone taken from the plaintiff's quarry under a promise to account, alleging assurance that accounts were kept; plea, denying only the promise to account, but not that the accounts had been kept, overruled. *Jones v. Davis*, 16 Ves. 262.

Plea of the statute, 32 H. 8. c. 9. s. 3. against buying and selling pretended titles; and, also, that there was not any mortgage, as mentioned in the bill, to a bill that the defendant might redeem a mortgage upon a covenant in a lease from the defendant to the plaintiff: Held good, though a negative plea. *Hitchins v. Lauder*, Coop. 34. CHAMPERTY; DISCOVERY TENDING TO CRIMINATE.

A plea of a negative, that a plaintiff is not the person, or in the situation alleged, as "of no partner nor heir," is good. *Hall v. Noyes*, 3 Bro. C. C. 483. TITLE.

Negative plea disallowed. *Gunn v. Prior*, Dick. 657.

## 2. Pleas of Accounts stated or settled.

### See also ACCOUNT.

In what way an account settled should be pleaded, or stated in answer. *Capon v. Miles*, 13 Price, 767. ACCOUNT SETTLED; PL. ANSWER.

Plea by a trustee of a settled account and release to inquiries, as to the execution of a trust: Held, bad for want of averment, that the matters enquired after would appear from the account. *Clarke v. Earl Ormonde*, 1 Jac. 116.

Plea of a settled account and release to a bill by cestuique trust against trustee, will not extend to the discovery of vouchers. *Id.* 117. PL. DISCOVERY.

How an account settled must be pleaded, and by what averments supported. *Hadder v. Watts*, 4 Price, Exch. 8.

Plea of a general agreement, and composition of accounts good without its being a minute strict settlement of items. *Sewell v. Bridge*, 1 Ves. 297.

A plea of a stated account to all matters before accounted for is bad; it should aver that it is just and true to the best of defendant's knowledge and belief. *Anon.* 3 Atk. 70.

Plea of a stated account must state that it was in writing, and set forth the amount of the balance. *Burk v. Brown*, 2 Atk. 399.

Plea of stated account is a bar to bill for general one, until specific errors are assigned; but it is not sufficient for purpose of setting up a stated account, merely to prove there has been a dividend between the parties. *Dawson v. Dawson*, 1 Atk. 1.

Where there is a plea of a stated account to bill brought for general one, plaintiff must amend. *Sumner v. Thorpe*, 2 Atk. 1. *Id.*

Bill for an account of money received for one who became a bankrupt; defendant pleaded, he received the money as a menial servant to the bankrupt, and had accounted for it to him. Plea overruled. *Wagstaffe v. Belford*, 1 Vern. 95.

## 3. Of Agreement.

### See also AGREEMENT.

A bill being filed against two parties, praying accounts and relief against both; after one of the defendants had put in an answer, an agreement is made between the plaintiff and the two defendants by their agent, who is also interested as a party to the agreement, containing various provisions as to the transactions of mortgage and partnership in mines, which were the subject of the bill, besides other matters of agreement; and providing that "all proceedings in law and equity shall cease between the plaintiff and the two defendants;" this agreement that all proceedings, &c., shall cease, &c., cannot be pleaded in bar to the whole suit by the defendant who has not answered. Such a plea may operate to displace the equitable relief sought by the bill, so far as it regards the party who pleads, but as a bar to the whole suit it cannot be pleaded. Such a plea is, in effect a plea of one part of the agreement in bar of the whole suit, which is inadmissible. *Wood v. Rowe*, 2 Bligh, 595. S. C. 1 Jac. & W. 315. AGREEMENT TO STAY PROCEEDINGS.

The object of a plea to a bill in equity is to reduce the subject-matter of litigation to a single point, and to avoid the expense which would be incurred by entering into all the subject-matter of the dispute, which is not effected by a plea of an agreement, making provisions as to the subjects of the suit in a way which the decree in the cause could not effect. *Id. ib.*

If an agreement be made subsequent to the filing of a bill between the parties to the suit and other parties, for the purpose of putting an end to the proceedings in the suit, and other purposes, it cannot be pleaded in bar to the bill by one of the parties. If it could be so pleaded, it must contain averments that

the conditions of the agreement have been performed, or from circumstances could not be performed; and that the other parties not joining in the plea are ready to perform the agreement; and events by which the agreement is affected ought also to be noticed in the averments. But semble, that in such a case the court not having the power to compel the performance of the agreement on the plea, a bill must be filed for the purpose, including all the parties, and all the subjects of the agreement. *Id. ib.*

A plea of an executory agreement, containing no averments, that all the parties to the agreement are ready to perform it, is not only insufficient for want of proper averments, but could not be made a good plea by any amendment; because it is not a proper subject of plea, but a mere right of action, and cannot be a bar to another suit instituted by the party against whom the right of action is claimed, especially where a long time has elapsed between the date of the agreement and the pleading of it. *Id.* 596. AGREEMENT EXECUTORY.

An executory agreement is a cause of action, and cannot be pleaded in bar to another cause of action. *Id. ib.*

Such an agreement is totally different from a release under seal, but considered as in the nature of a release, it could only be applied to such part of the relief sought by the bill, as relates to the questions at issue between the plaintiff and the party who proposes to have the benefit of the agreement by way of plea. It could not be pleaded in bar to the whole relief; for the cause must, at all events, proceed as to the relief sought against the other parties. *Id. ib.*

To plea for discovery and relief, plea of agreement to refer to arbitration overruled. *Street v. Rigby*, 6 Ves. 815.

Bill for specific performance of a parol agreement for a lease within the statute of frauds, charging possession taken under the agreement and other acts of part performance; plea of the statute and answer, not denying the acts alleged of part performance, but stating that being advised that he entered only as tenant at will, he gave notice to quit: plea overruled. *Bowers v. Cutor*, 4 Ves. 91. STAT. OF FRAUDS; PL. ANSWER; SPEC. PERF.

Bill of discovery in aid of an action of covenant; plea, a clause in the articles, that any dispute should be referred: plea overruled, discovery being of course, while an action is brought and can be maintained. *Mitchell v. Harris*, 2 Ves. J. 129. 4 Bro. C. C. 311. DISCOVERY.

The plea of an agreement at law, and that the defendant (then plaintiff) would not bring error for delay or file bill for injunction, a bad plea; but the court after such an agreement, will not grant an injunction as to that suit. *Anth v. Sambourne*, 4 Bro. C. C. 498. AGREEMENT.

Plea to a bill for an account of a partnership, that all matters in controversy were to be determined by arbitrators; allowed. *Halfhide v. Fenning*, 2 Bro. C. C. 336.

Agreement as to distribution of personal estate set aside, although ratified, the value appearing much greater than was known to the plaintiff at the time. Plea of inventory delivered and approved, and of agreement found on it without fraud; allowed. *Cocking v. Pratt*, 1 Ves. 401. AGREEMENT; FRAUD; MISCONCEPTION OF RIGHTS.

#### 4. Of Attainder and Alien Enemy.

See also ALIENS. — ATTAINDER.

Alien carrying on trade in an enemy's country though resident there, also in the character of consul

of a neutral state considered an alien enemy, and as such disabled to sue and liable to confiscation: plea of alien enemy allowed to a bill for relief, whether to a bill for discovery merely as a defence to an action. *Quere? Albrecht v. Sussmann*; 2 V. & B. 323. ALIEN.

Plea without oath, of plaintiff's conviction for felony, to a bill by the residuary legatee for an account of the personal estate of a testatrix who died after the conviction; but before sentence of transportation completed, allowed; the conviction is proved by the record alone; and it is not necessary to state even the identity upon oath. — *v. Davis*, 19 Ves. 81. PL. PLEA, ATTESTATION OF.

Plea of alien enemy is good to a bill for discovery. Such a plea stating this nation to be at war with the government of France, and that the plaintiffs are Frenchmen, aliens, and enemies of the king, is sufficient. *Daubigny and Others v. Davallon and Others*. 2 Anst. 462. ALIEN ENEMY; DISCOVERY.

If plea goes to show that no title was ever vested in plaintiff, though for that purpose it states an offence committed; conviction of the offence is not essential to the plea, and the same strictness is not required as in a case of forfeiture. *Fall v. —*. Mitf. Pl. 189.

On an information being filed against a person who had been in the service of the E. I. company abroad, for an account of his dealings and transactions, the defendant pleaded that he was an alien, but the plea was overruled; it appearing that the defendant had acted both in a civil and judicial capacity, and had taken the oath of allegiance. *Bolts v. Att. Gen.* 1 Bro. P. C. 421. ALIEN.

In a plea of conviction for capital offence, court of equity must judge with equal strictness, as if it were a plea at common law. *Hark v. Brown*, 2 Atk. 399. ATTAINDER.

Saying that A gave a mortal wound to B, of which he died, without mentioning in what part B received the wound, is bad: so saying that A was tried at G. assizes, without saying the persons who tried him had a commission of gaol delivery, is also bad. *S. C. ib.*

A plea of alien, the defendant must aver the party was an alien, or it is no bar. *Id.* 397.

#### 5. Of Award.

See also ARBITRATION AND AWARD.

An award made under an agreement entered into after bill filed, to refer to arbitration, may be pleaded to bills. But where all the parties to a suit were not parties to award, (although plaintiff was a party,) and where part of prayer of bill was for execution of trusts of deed, under which some of parties to suit were interested, who were not parties to award; plea of award was ordered to stand for an answer, with liberty to except. *Dryden v. Robinson*, 2 S. & S. 529.

To bill for account, defendant may plead an award, averring that matter in question was comprehended in it. *Farrington v. Chute*, 1 Vern. 72. *Burton v. Ellington*, 3 Anst. 196.

So to a bill to set aside an award. *Brown v. Brown*, 2 Ch. Ca. 140. *Allard v. Campbell*, Bunb. 265. *Anon.* 3 Atk. 644.

But if there be particular charges of partiality, there must be an answer to them in support of plea. *Allard v. Campbell*, *supra*.

The bill stated an award, and that no provision was made for a particular event which had taken place, and by which the plaintiff was damaged. Plea, the award, the court thought the bill ought to have expressed particularly the damage sustained by the plain-

tiff, and allowed the plea. *Routh v. Peach*, 2 Anst. 519. PL. BILL.

On bill for account after award, on ground of matters stated not to have been comprehended in it, it must clearly appear the award is not final, or plea of award will be good. *Id.* 3 Anst. 637.

A submission to arbitration was made a rule of this court, and an award made. The bill stated the award to have been obtained by misrepresentation of facts not then known to the plaintiff. Plea, the award alone, and no answer; the plea is bad. *Gurtside v. Gartside*, 3 Anst. 735.

An award, impeached in the bill, must be pleaded nakedly. *Edmunson v. Hartley*, 1 Anst. 97.

Where the bill charged an award to have been obtained corruptly, the plea setting up the award and denying the specific charges of fraud is bad, as not bringing the cause to one point, and an answer to the same charges overrules the plea. *Pope v. Bish*, 1 Anst. 59. PLEA OVERRULED BY ANSWER.

To a bill to be relieved against an award, upon suggestion of misbehaviour, &c. in the arbitrators, a plea by the arbitrators of the submission and award, with an averment of impartiality, &c., overruled. *Rybolt v. Barrell*, 2 Eden, 131. *Butcher v. Cole*, cited 1 Anst. 95. *Gartside v. Gartside*, 3 Anst. 735. *Evans v. Harris*, 2 V. & B. 364.

A plea of an award to a bill for the same matter, allowed where it did not appear there was any discovery of new evidence subsequent to the award, or any fraudulent concealment of evidence by the defendant at the time of the award. *Herbert v. Bulkeley*, Ridg. 296.

If arbitrators plead their award to a bill charging partiality, they must support their plea, or pay costs. *Lingood v. Croucher*, 2 Atk. 395.

Where parties have agreed to make the submission to an award a rule of court, and to be restrained from bringing a bill in equity, the arbitrators, notwithstanding the award may be defective in point of law, may plead it in bar to a bill in equity. *Id.* ib.

## 6. Bankruptcy and Insolvency.

See also BANKRUPTCY, II.—INSOLVENCY.

Plea of bankruptcy good, though commission issued after filing of bill. *Turner v. Robinson*, 1 S. & S. 3.

Plea of certificate allowed, where before bankruptcy plaintiff had a remedy either by assumpsit or by action for tort. *De Tastet v. Sharpe*, 3 Mad. 51. S. C. Buck, 153. BANKCY. CERTIFICATE.

Plea of bankruptcy to bill by bankrupt seeking discovery, in aid of defence of action at law, and payment of balance found due to them in taking accounts, and injunction in meantime overruled. *Lowndes v. Taylor*, 1 Mad. 423.

Plea of bankruptcy to a bill by heir at law against devisee, overruled as bad in point of form, not averring distinctly and in succession the facts upon which the bankruptcy rested. Not sufficient for the purpose of such a plea to state that the plaintiff was duly found a bankrupt under the commission. *Carlton v. Leighton*, 3 Mer. 667.

Bill by an insolvent debtor against his assignees, under the 14 Geo. 3. and a debtor to his estate, stating collusion between them in not recovering the debt, praying that the assignees might be removed, and that specific performance of an agreement for a lease might be decreed against the debtor; plea, by the debtor, the assignment under the act, and that the right to sue was vested in the assignees; that the estate is insufficient, and denying collusion, held good. *Bow-*

*ser v. Hughes*, 1 Anst. 101. INSOLVENCY, ASSIGNMENT IN.

Plea of the plaintiff's bankruptcy must be put in upon oath. *Joseph v. Tuckay*, 2 Cox, 44. PR. PLEA, JURAT.

A bankrupt having his certificate allowed, and having slipped his time of pleading it at law to a debt precedent to the bankruptcy, is not to be relieved in equity. *Exp. Goodwin*, 2 Vern. 696. LACHES.

Court of equity will not relieve against mispleading or neglect of pleading a proper plea at law. *Id.* ib.

## 7. Discovery tending to criminate or to create Forfeiture.

Where a bill charges a defendant with acts which would subject him to a criminal prosecution under a statute, the defendants need not plead the statute, but may demur to the bill. *Fleming v. St. John*, 2 Sim. 181. PL. DEMURRER.

Plea that the discovery will subject the defendant to penalties, does not require the support of an answer, as a plea of purchase for valuable consideration without notice does, as to facts from which notice is inferred. *Claridge v. Houre*, 14 Ves. 59. PL. ANSWER IN SUPPORT OF PLEA.

To a bill stating defendant's marriage with a particular woman; plea, she is his sister, protects him from discovery of any fact forming a link in the chain. *Id.* 651. INCEST.

Plea allowed to discovery of a marriage, which would subject one of the parties to punishment in the ecclesiastical court, the other being dead. *Brownsword v. Edwards*, 2 Ves. 243.

Plea on the ground of forfeiture must be confined to protect against a discovery of the act causing it, and not extend to matters collateral. *Weaver v. Meath*, 2 Ves. 108.

## 8. Statute of Frauds.

See also FRAUD, STATUTE OF.

Bill for specific performance, plea to the relief and to the discovery, except (stating the particulars of the statute of frauds, with an averment that there was no contract in writing, signed, &c., unless the note in the bill mentioned, can be so considered, and for answer,) as to the accepted particulars, admitting the note, &c., overruled, as tendering an immaterial issue. *Morrison v. Turnour*, 18 Ves. 175. STAT. OF FRAUDS; SPEC. PERF.

Bill for specific performance of a parol agreement to grant a lease for twenty years; plea of the statute of frauds and answer, denying that facts alleged as part performance, where done in part performance, the plea was saved to the hearing, with liberty to except; Ld. Chancellor inclining to the opinion, that though the agreement is admitted, the statute may be used as a defence to the suit. *Moore v. Edwards*, 4 Ves. 23. *Id.*

Bill by the tenant of a farm for a specific performance of a parol agreement for a new lease stating improvements made at a considerable expence, and continuance of possession after the expiration of the old lease and payment of an increased rent under the agreement; plea of the statute of frauds ordered to stand for an answer, with liberty to except. *Willis v. Stradling*, 3 Ves. 378. PR. PLEA ORDERED TO STAND FOR ANSWER; STATUTE OF FRAUDS; SPEC. PERF.

Plea of statute of frauds, a good defence to parol variation of agreement for a lease, not if it only amounts to waiver of part or to a declaration of trust. *Jordan v. Sawkins*, 1 Ves. J. 402.

\*Plea of the statute of frauds to an executory contract overruled. *Rondeau v. Wyntt*, 3 Bro. C. C. 154. CONTRACT, EXECUTORY; FRAUDS, STAT. OF.

Plea of the statute of frauds to a bill for execution of a parol agreement for sale of lands, alleging certain acts as a part performance. The plea averring that there was no agreement in writing, and supported by an answer, insisting that such alleged acts did not amount to part performance; allowed on re-argument after much consideration. *Whitechurch v. Beris*, 2 Bro. C. C. 559. S. C. 2 Dick. 664. FRAUDS, STAT. OF.

Administratrix and her two children entitled to a lease of a house, agree by parol to make a lease to J, and the administratrix execute sa lease. Upon a bill to compel the children to join, they cannot plead the statute of frauds. *Heigher v. Sturman*, 1 Vern. 210.

A agrees by parol with B for the purchase of lands; B delivers a rent-roll, which was dated and altered in his own handwriting, and shewed by the title of it, that an agreement had been made between them for the sale of the estate, at twenty-one years' purchase. An abstract of the title was also delivered to A, together with the deeds, in order to be compared with the rent-roll. B likewise wrote letters to several of his creditors, informing them, that he had contracted with A for the sale of his estate, at twenty-one years purchase, and sent the tenants to treat with A for a renewal of their leases. Notwithstanding all these circumstances, upon A's filing a bill for a specific execution of the agreement; B pleaded the statute of frauds in bar to both the discovery and relief; and the plea was allowed. *Whaley v. Baguel*, 1 Bro. P. C. 345. SPEC. PERF.

Plea of statute of frauds to discovery of a parol agreement, not allowed where part performance. *Taylor v. Beech*, 1 Ves. 297. FRAUDS, STAT. OF; PART PERF.

Plaintiff whilst a papist assigned advowson to defendant for ninety-nine years, and having conformed, brought his bill for re-assignment of the term, suggesting he had only assigned it in trust for himself, to avoid the penalties of the statutes 3 Jac. 1. and 1 W. & M. Defendant pleaded the statute of frauds in bar to the discovery, but by his answer admitted that the advowson was assigned to him for the purposes charged by the bill: Held, the plea must be overruled, being coupled with an answer admitting the facts. *Cottington v. Fletcher*, 2 Atk. 155. PL. ANSWER, ADMISSIONS &c.

Lord Hardwicke was inclined to think if the defendant had demurred to this part of the bill, such a fraudulent conveyance would at the hearing have been made absolute against the grantor. *Id.*

If defendant pleads statute of frauds against specific performance, he must by answer deny agreement, for otherwise he admits it, and takes it out of statute. *Child v. Godolphin*, Dick. 39.

To a bill for specific performance, a plea that there was no agreement in writing, was overruled. *Child v. Comber*, 3 Swan. 423. STATUTE OF FRAUDS; SPEC. PERF.

In pleading the statute of frauds, it is necessary to say that the agreement was not reduced into writing. *Mussell v. Cook*, Proc. Chan. 533.

### 9. To Jurisdiction.

See also JURISDICTION.

In an ecclesiastical court a party is cited as respondent within the jurisdiction, and appears, and pleads without objection, he cannot afterward put that fact in issue; and in such case an interverner is not at

liberty to raise an objection to the jurisdiction on that ground. *Chichester v. Donegal*, 6 Mad. 375. JURISDICTION OF ECCLESIASTICAL COURT; WAIVER.

Plea of the stock-jobbing act to a bill for discovery of stock transactions, overruled, as the second section of the act requires parties to make a discovery whereon to found an action. *Bancroft v. Wentworth*, 3 Bro. C. C. 11. STOCK-JOBGING; DISCOVERY, TENDING TO CRIMINATE.

A, by lease, grants B a liberty of mining for coals for 100 years, paying rent by the eighth part of coals. The colliery is worked and then discontinued. C claiming the land under A, works the mine, whereupon those claiming under B, file bill to restrain C, and discovery of B's title to maintain action of trespass. Plea in bar by C to discovery and relief, that B, and those under him, had ceased working mine for 55 years, and had, therefore, waived right and benefit of lease; overruled, matter being properly triable at law. *Crang v. Adams*, 5 Bro. P. C. 588.

Plea to jurisdiction of a general court must show where it is: not so of inferior court. *Rp. Sodor and Man v. El. Derby*, 2 Ves. 357.

Plea to jurisdiction overruled in toto, as a demurrer covering too much. *Id. ib.*

Devise of a rectory to a college on trust (*inter alia*) to present the senior divine, then a fellow. Plea to jurisdiction, as being in the visitor, overruled. *Green v. Rutherford*, 1 Ves. 462. CHARITY.

On a plea to the jurisdiction it must be shewn what other court has jurisdiction. *Derby v. Athol*, 1 Ves. 202. S. C. Dick. 129.

Demurring for want of jurisdiction is informal and improper. Defendant should plead to the jurisdiction. *Robertson v. Rous*, 1 Atk. 544. JURISDICT.; PL. DEMURRER.

Bill, that the defendant might redeem a mortgage of the island of Sark, or be foreclosed, defendant pleaded to the jurisdiction of the court, that the island was part of the duchy of Normandy, and had laws of their own, and were under the jurisdiction of the courts of Guernsey. Plea overruled, because the mortgage was of the whole island, and for that the defendant was served here for *equitas agit in personam*. *Toller v. Carteret*, 2 Vern. 494.

If the party insists the court of chancery has not jurisdiction of the matter in question, he must plead to the jurisdiction of the court, and not object it at the hearing. *Trelawny v. Williams*, 2 Vern. 484.

If the plaintiff, captain of a man of war, seizes the defendant's ship (being an interloper) out of the limits of the East India company's charter, and she and her goods condemned in the admiralty, and delivered over to the king's use. The defendant, the owner and freighter of the ship, brings trover, and recovers 1300*l.* damages. The plaintiff brings a bill to be relieved against this judgment. Defendant pleads the judgment and proceedings at law. Plea overruled. *Tyrrel v. Blake*, 2 Vern. 155.

Indebitatus assumpsit for goods sold and delivered, and verdict for plaintiff, defendant brought a bill suggesting that he was master of the buck hounds, and acted only in relation to his office, and that the king ought to pay for these goods, defendant pleaded the verdict, and demand, for that the matter was consumable at law. Plea overruled. *Graham v. Stamper*, 2 Vern. 146.

Bill for an account of the profits of mines. Defendant pleads an act of parliament which had given an exclusive jurisdiction of all matters arising within the mines to the court of A, but had not averred there was a court of equity there. Plea overruled. *Strade v. Little*, 1 Vern. 59.

To a bill for a distribution of an intestate's estate, defendant pleaded that the ordinary is made judge,

and appointed to take security. *Plea overruled.* *Pumpkin v. Green*, 2 Ch. Ca. 95. *DISTRIBUTION.*

If a cause has been heard in the exchequer, and two issues directed, viz. *will or no will*, and a verdict for plaintiff in both, and the court had dismissed the bill, yet an original bill may be brought in chancery for relief in those matters. *Anon.* 1 Ch. Ca. 155. A bill was brought in chancery concerning tithes and parish bounds, which proceeded to answer and replication; then plaintiff exhibited another bill in the exchequer, and examined witnesses; then he proceeded again in chancery, and replied. Defendant pleaded the proceedings in the exchequer. *Plea allowed* as to the examination of the same matters which shall not be examined again in chancery. *Id. ib.*

The plaintiff brought a *certiorari* bill: the defendant pleaded a decree in the mayor's court, and an enrolment which was said to be only pronuncial, and it was referred to a master to certify, whether it was before the bill. *Cook v. Delebere*, 3 C. R. 67. *PR. CERTIORARI.*

### 10. Statute of Limitations, and Length of Time.

See also LENGTH OF TIME.—LIMIT. STAT. OF.

If tenant for life has rendered accounts to the remainder-man of timber cut by him during more than six years before bill is filed against him for account of such timber and its value, statute of limitations cannot be pleaded to bill. *Hony v. Hony*, 1 S. & S. 568. *ACCOUNT; WASTE.*

The statute of limitations may be pleaded in bar to a bill to prevent the setting up outstanding terms. *Jerny v. Best*, 1 Sim. 373. *BILL TO PREVENT SETTING UP OUTSTANDING TERMS.*

Statute of limitation cannot be pleaded to breach of trust. *Milnes v. Cowley*, 4 Price, 103. *BREACH OF TRUST.*

Statute of limitations cannot be pleaded in bar to a bill of revivor after decree to account. *Egremont v. Hamilton*, 1 Ball & B. 531. *BILL OF REVIVOR; PR. DECREE TO ACCT.*

Plea of the statute of limitations to a bill of discovery overruled, upon letters assigning reasons for declining to pay, and recommending the plaintiff to bring an action, as amounting to an acknowledgement of the debt, sufficient to take it out of the statute upon the authorities, though against principle. *Baillie v. Sibbald*, 15 Ves. 185; but see 9 G. 4. c. 14.

Where there is a suit pending for forty years, and not abated, but remaining in such a situation that the defendant might at any time have applied to dismiss the bill if he had thought fit; he shall not avail himself of laches in the plaintiff in not proceeding in bar of the relief sought. *Secus* semble, if the suit had abated in the mean time. *Giffard v. Hart*, 1 Scho. & L. 386. *LACHES.*

Plea of statute of limitations by an executor, the testator having died in 1786, though probate was not taken till 1802; allowed: the allegation of the bill upon a fair construction being that the defendant had possessed the personal estate, and therefore might have been sued as executor *de son tort*, previously to 1792. *Webster v. Webster*, 10 Ves. 93. *EXOR.*

Plea of statute of limitations supported by answer ordered to stand for answer, with liberty to except; the charges in bill not being sufficiently answered. *Bayley v. Adams*, 6 Ves. 586. *PLEA ORDERED TO STAND FOR ANSWER.*

Bill by annuitant under a will for an account for arrears against two administrators with the will an-

nexed; one pleaded the statute of limitations to so much as sought satisfaction for the arrears, or so much as was stated to have accrued due previous to six years before the bill; he also, by answer, set up an agreement to relinquish the annuity: plea overruled, without prejudice to insisting on the same matter by answer. *Higgins v. Crawford*, 2 Ves. J. 570. *ACCOUNT, HOW FAR.*

Defendant pleaded forty years' possession without account or admission of any debt; to a bill setting up an old mortgage, and stating an account settled, and that owing to infancy, coverture and other disabilities plaintiffs' could not proceed: the plea was allowed. *Blewitt v. Thomas*, 2 Ves. J. 669. *LENGTH OF TIME.*

Bill against the devise of mortgaged premises, by the heir of mortgagor, for discovery and redemption, charging acknowledgements, that the estate was held in mortgage, and that accounts had been kept. Plea of possession for fifty years under conveyances from the mortgagee, ordered to stand for an answer. *Lake v. Thomas*, 3 Ves. 17. *LENGTH OF TIME; DISCOVERY; MORTGAGE, REDEMPTION OF.*

Plea to bill of review of length of time since enrolment of decree, under which part of estate had been sold to *bona fide* purchaser, who had had possession for twenty-seven years. On argument of plea, and on appeal, leave was given to withdraw plea, with liberty to plead and demur, answer, or demur alone without introduction of new matter. *Gorman v. McCulloch*, 5 Bro. P. C. 597. *PR. BILL OF REVIEW; LENGTH OF TIME; PR. LEAVE TO WITHDRAW PLEA AND PLEAD, DEMUR, &c.*

Plea of statute of limitations covers discovery always. *Welford v. Liddle*, 2 Ves. 400. *PL. DISCOVERY.*

Length of time, proper for plea, not demurrer. *Gregor v. Molesworth*, 2 Ves. 109.

Where, in execution of power, *cestuique* trust appoints trustees to convey to use of A, and charges estate with annuities, it is a conveyance of the legal estate to A, and not a trust; so that length of time will run against annuities, if not demanded. *Weldon v. Bowes*, 9 Mod. 309. *LENGTH OF TIME; TRUST.*

Statute of limitations may be pleaded as to a debt, but not to discovery as to when debt was due. *Mackworth v. Clifton*, 2 Atk. 51. *S. P. Downing v. Kirby*, Finch. Rep. 14. *DISCOVERY.*

If the statute of limitations be neither pleaded nor insisted on by the answer, defendant cannot have benefit of it in bar to plaintiff's demand. *Prince v. Heylin*, 1 Atk. 494. *PL. ANSWER.*

The statute of limitations no good plea where the bill charges a fraud; but then it should be charged by the bill that the fraud was discovered within six years before the bill was filed. *S. S. Comp. v. Wyndmull*, 3 P. W. 143. *FRAUD; LIMIT. STAT. OF.*

Statute of limitations cannot be pleaded where estate in law is in trustees. *Lawley v. Lawley*, 9 Mod. 33. *TRUST.*

The statute of limitations cannot be pleaded to a bill for tithes. *Marston v. Cleypole*, Bunb. 213. *TITHES.*

The statute of limitations is no plea in bar to an open account. *Scudenore v. White*, 1 Vern. 456. *ACCOUNT.*

### 11. Lis Pendens, former Suit, or Decree.

See also LIS PENDENS.

Suit by husband and wife against trustees of latter's separate property cannot be pleaded in bar to a subsequent suit by her and her next friend against her

trustees and husband, although the relief prayed in both suits is the same. *Reeve v. Dalby*, 2 S. & S. 464. FORMER SUIT.

To a bill of review and reversal for error apparent on the decree, a plea of the decree and a demurrer against opening the enrolment allowed; the facts constituting the error not forming part of the record of the decree, being neither proved or relied on at the original hearing. *O'Brien v. Connor*, 2 Ball & B. 146. DECREE; REVIEW, BILL OF.

Decree in former suit cannot be pleaded to bill for tithes of any subsequent year. *Minor Canons of St. Paul's v. Crickell*, Wightw. 30. PR. DECREE.

Plea of a suit depending in the court of chancery in Ireland, for the same matter, overruled. *Ld. Dillon v. Alvaes*, 4 Ves. 357. JURISDICTION.

A suit pending in England is not a good plea in bar to a subsequent suit in the plantations for the same matter. *Bayley v. Edwards*, 3 Swan. 703. LIS PENDENS.

Plea of former decree for payment of tithes, where a modus and lands alleged to be covered by it were improperly stated, so that the court could not direct an issue, is not a good plea in bar to bill brought for establishing the modus. *Collins v. Gough*, 7 Bro. P. C. 94. MODUS.

Plea of former suit must aver both suits for same matter. *Devie v. Ld. Brownlow*, Dick. 611.

Plea that a writ of right has been tried and determined against the plaintiff, a good plea for a bill for discovery of matter relative to the title. *Leicester v. Perry*, 1 Bro. C. C. 305. DISCOVERY.

Plea of the sentence of the court of admiralty mentioned in the bill, overruled, as bringing no new matter before the court. *Roberts v. Hartley*, 1 Bro. C. C. 57.

Register's minutes of decree, dismissing a bill, are not pleadable to another suit for same matter. *Charles v. Rowley*, 2 Bro. P. C. 485.

A plea of a former decree overruled, the same matter not being in issue in the former suit. *Moore v. Battie*, Amb. 372. S. C. 1 Eden, 273.

A decree cannot be pleaded (in bar of the suit) unless it has been signed and enrolled. *Kinsey v. Kinsey*, 2 Ves. 577. S. C. 1 Atk. 809. PR. DECREE, ENROLMENT OF.

A plea of former suit depending is good against a creditor coming in before the master, he being a *quasi* party to such suit. *Nere v. Weston*, 3 Atk. 557. LIS PENDENS.

To a bill against defendant, as executor, for an account, he pleaded a suit in the chancery of Jamaica, for the same matter, to which he had put in an answer, with the account annexed, and soon after quitted Jamaica, for the sake of his health, but left his attorney there to manage his suit, which was still depending. *Ld. Hardwicke* said, that neither the term, nor even the year in which the suit was instituted, being set out for certain, there is not that averment which courts of law and equity both require in pleas; and as it was therefore defective in form, he over-ruled the plea. *Foster v. Fassall*, 3 Atk. 587. FOREIGN COURT; LIS PENDENS.

Though an action has been brought in Ireland on a bond, and sued to judgment there, it cannot be pleaded to an action here. *Id.* 589. *Id.*

A plea of former decree must set forth so much of the former bill and answer as to show that the same point was then in issue. *Child v. Gibson*, 2 Atk. 603.

A co-administrator, who was a plaintiff in a bill in 1732, brings, in 1739, a bill, partly of revivor and partly supplemental, to nearly the same purpose as the original. *Ld. Hardwicke* allowed the plea of a former dismission. *Bowden v. Beauchamp*, 2 Atk. 82.

Plea of bill being for same matter overruled, where the last was brought in a different right. *Huggins v.*

*York Building Company*, 2 Atk. 44. S. C. Barn. 83. LIS PENDENS.

Where a purchaser pleads a former suit, he must shew it was *res judicata*, and absolutely determined by the court that plaintiff had no title. *Brandlin v. Ord*, 1 Atk. 571.

A bill, dropped for want of prosecution, cannot be pleaded as a decree of dismission. S. C. *Id.* PR. BILL, DISMISSAL OF.

An original independent decree may be had in this court, where all the facts are stated by the bill, notwithstanding a former decree for the same matter in Wales. *Morgan v. —*, 1 Atk. 408. JURISDICTION.

Bill to redeem, mortgage being overpaid, decree of foreclosure, signed and enrolled, is good plea in bar. *Malloch v. Galton*, Dick. 65.

Plea of former suit depending must aver that defendant appeared and put in his answer, &c., to such former suit. *Moor v. Welsh Copper Company*, 1 Eq. Ab. 39.

Pleading the decree is unnecessary, if it is fairly set forth in the bill of review. See 5 Bro. P. C. 397. (n.) Mitf. 166. PR. BILL OF REVIEW.

A decree was made in the court of exchequer against tenant for life, to hinder him from committing waste, which decree was founded on a deed of settlement; and, upon a bill now brought to set aside that deed, the defendant pleaded the decree in the exchequer, which was overruled. *Wing v. Wing*, 9 Mod. 109. DECREE IN EXCHEQUER, EFFECT OF.

On suggestion of a gross fraud, the court will, upon an original bill, overrule a plea of a decree, and a report made and confirmed thereon, if the suggestion of fraud be not denied. *Lloyd v. Mansell*, 2 P. W. 73. FRAUD, DECREE OBTAINED BY.

Not necessary, in a plea of a former suit brought for the same matter, to aver that such suit is depending. *Umlin v. Hudson*, 1 Vern. 332.

A decree of dismission may be pleaded in bar to a new bill, though it is not signed and enrolled. *Prettyman v. Prettyman*, 1 Vern. 310. PR. DECREE, ENROLMENT OF.

After a bill brought in the exchequer to foreclose, the defendants may bring a bill in this court to redeem; the pendency of the former suit is not pleadable. *Neuburg v. Wren*, 1 Vern. 220. MORTGAGE, REDEMPTION OF.

If an infant legatee sues in the ecclesiastical court, and afterwards in chancery, the suit depending in the ecclesiastical court cannot be pleaded in bar, for there is no such security for the infant's advantage as in chancery, especially as to interest. *Howell v. Waldron*, 2 Ch. Ca. 85.

## 12. Of Lunacy.

See also LUNACY.

Lunatic may stultify himself as to acts done in prejudice of himself, though not of others, especially where his committee joins with him in the suit. *Ridler v. Ridler*, 1 Eq. Ab. 279. LUNATIC.

## 13. Of Outlawry.

See also OUTLAWRY.

Defendant against whom attachment has issued for want of answer, may file plea of outlawry. *Waters v. Chambers*, 1 S. & S. 225. PRACTICE; ATTACHMENT.

Plea of outlawry to which neither office copy of record of outlawry, nor of *capius utlegatum* was an-



nixed, but only certificate from clerk of outlawries, held bad, but leave given to amend, because defect arose from clerk of outlawries, and not defendant, and did not affect substance of plea. *Waters v. Mayhew*, 1 S. & S. 220.

No plea of outlawry in a suit for the same duty or thing, for which relief is sought by the bill. *Philips v. Gibbons*, 1 V. & B. 184.

The attorney-general of the duchy court exhibits an information in the behalf of one part-owner of coal mines against the other; outlawry in the relator is a good plea. *Att. Gen. v. Heath*, Prec. Chan. 13. RELATOR.

Outlawry no bar to the suit of an executor. *Killigrew v. Killigrew*, 1 Vern. 184.

#### 14. For want of Parties.

See also PL. PARTIES.

Plea for want of parties is in bar, and goes to whole bill, as well to discovery as relief. *Plunkett v. Pen-son*, 2 Atk. 51.

Plea that personal representatives were not before court, allowed, though suspected to be for delay merely. *Id. ib.*

On bill brought by bankrupt against defendant, his supposed debtor, for an account, the assignees under commission were charged in a proper manner, but the prayer of process was only against the defendant, a good plea in abatement that the assignees were not made parties. *Fawkes v. Pratt*, 1 P. W. 593.

#### 15. Of Purchase.

See also AGREEMENT.—VENDOR AND PURCHASER.

Plea of valuable consideration without notice, no protection against adverse claim of which purchaser might have had notice, by using due diligence. *Jackson v. Rowe*, 2 S. & S. 472. VEND. & PURCH.; NOTICE.

In plea of purchase for valuable consideration without notice, it is enough to deny notice generally, in plea, unless facts are specially charged in bill as evidence of notice. *Pennington v. Beechy*, 2 S. & S. 282.

Where in a plea of purchase for valuable consideration, the purchaser omitted to deny notice, and the plaintiff replied to it, instead of setting it down for argument: if the defendant prove what he has pleaded, the bill as against him must be dismissed with costs. *Eyre v. Dolphin*, 2 Ball & B. 302. WAIVER.

So of an answer to that effect unless fraud proved. *Id.* 303.

A plea of purchaser without notice is a bar to the discovery as well as the relief, but if not insisted on by the defendant, he must answer and confess the notice, or the plaintiff may except to the answer, but if he does not except, the affirmative of proving notice will be on him. Comme semble. *Id. ib.* PL. DISCOVERY; PR. EVID. ONUS PROBANDI.

Defendant pleading purchase for valuable consideration, without notice, must aver that the vendor was seised and was in possession, which would be satisfied by possession of his tenant. *Daniels v. Davison*, 16 Ves. 252. S. P. Att. Gen. v. Backhouse, 17 Ves. 290.

Whoever has the best right to call for the legal title can avail himself of the plea of purchaser for valuable consideration, without notice. *Medlicott v. O'Donel*, 1 Ball & B. 171.

Bill by tenant in tail in possession under marriage

settlement, for discovery and delivery of title deeds; plea, mortgage by tenant for life alleging himself to be seised in fee, and in possession of premises and deeds as apparent owner, allowed. *Walwyn v. Lee*, 9 Ves. 24. VENDOR & PURCH.; NOTICE.

Averments necessary to plea of purchase for valuable consideration, without notice that vendor or mortgagor was owner, or pretended owner, and that he was in possession, not that purchaser was. *Id.* 32. VENDOR & PURCH.; NOTICE.

Bill by tenant for life in possession for discovery and delivery of the title deeds; plea, a mortgage in fee, by a former tenant for life, alleging himself to be seised in fee without notice; ordered to stand for an answer, with liberty to except, *Strode v. Blackburn*, 3 Ves. 222. TITLE; PLEA ORDER TO STAND FOR ANSWER.

Plea averring in answer to a charge of constructive notice, that to the defendant's knowledge and belief there was no notice, disallowed. He ought to answer the facts, and the court is to make the construction. *Jerrard v. Saunders*, 2 Ves. P. 187. 4 Bro. C. C. 322.

Plea of purchase for valuable consideration not good to a bill for a dower. *Williams v. Lamb*, 3 Bro. C. C. 264. DOWER.

Purchase for a valuable consideration bona fide paid, held a good defence, though the consideration was much less than the real value. *Bullock v. Sadler*, Ambl. 764. CONSON. INADEQUACY OF; VENDOR & PURCH.

Plea of purchase from one having a reversionary estate, and consequently not in possession, overruled, because it did not set out how the person from whom the title was deduced became entitled. *Hughes v. Garth*, 2 Eden, 168. S. C. Ambl. 421. TITLE.

Title of purchaser for valuable consideration is a good ground of defence, but not for relief. *Patterson v. Slaughter*, Ambl. 293. VENDOR & PURCH.; PL. RELIEF.

The plea must be of a purchase for valuable consideration without notice, upon money actually paid; otherwise it is disallowed. *Harrison v. Southcote*, 1 Atk. 538.

On plea of purchase for valuable consideration, the consideration must be actually paid; if in fact it is only secured to be paid, the plea will be overruled. *Hardingham v. Nicholls*, 3 Atk. 304.

A plea of purchase for valuable consideration, without notice of plaintiff's title, it is sufficient to aver that the person who conveyed was seised, or pretended to be seised, when he executed the purchase deeds; but where a fine or non-claim is the bar, averment of actual seisin is necessary. *Story v. Id. Windsor*, 2 Atk. 630. S. C. 1 Ch. Ca. 34. VENDOR & PURCH.; NOTICE.

A purchaser denying notice at or before the execution of the deeds, is not sufficient; he must aver that he had none at or before the payment of the money. S. C. *Id.* NOTICE.

In pleading there is the same strictness in equity as at law. S. C. 2 Atk. 632.

If a person purchases an estate which he sees has a defect upon the face of the deed, yet a fine will be a bar, for that defect is the very occasion of levying the fine; secus as to a purchase from a trustee or mortgagee. S. C. *Id.*

Denying notice of plaintiff's title at the time of the execution of the deed, or payment of the consideration money, is not sufficient; you must swear you had no notice at or before the execution. *Fitzgerald v. Burk*, 2 Atk. 397. NOTICE.

In the pleading of a purchase or mortgage the defendant must plead that the seller or mortgagor was, or pretended to be, seised in fee. *Head v. Egerton*, 3 P. W. 281.

In a plea of a purchase it is a sufficient denial of notice to say, that at the time of the purchase he had no notice, without saying, or any time before. *Jones v. Thomas*, 3 P. W. 243. NOTICE; VENDOR & PURCH.

He who would entitle himself to protection of equity as a purchaser, must claim under actual conveyance, but need not have the legal estate. *Fitzgerald v. Fauconberge*, Fitzgib. 207, 213.

He that is purchaser in law, as by taking estate in right of wife by his marriage, is not a purchaser in notion of equity. *Id.* 212.

Plea of purchaser for valuable consideration without notice of plaintiff's title, is good as a plea in bar, and protects the defendant from giving an answer to title set up by plaintiff. *Id.* 207. 2 Mad. Ch. 321. DISCOVERY.

Purchase for valuable consideration, without notice of any incumbrance, is a good plea. *Anon.* 3 Salk. 85.

The bishop brings a bill against one that was an assignee of a lease, charging that defendant knew that the lease was expired, and that the same did appear by writing in his custody. Defendant pleads that he was a purchaser of the lease, and was then informed that there were fifty-seven years to come in the lease, and therefore gave nineteen years' purchase for it; allowed, a good plea. *Bp. of Worcester v. Parker*, 2 Vern. 255.

Plea of a purchase for valuable consideration must allege seisin and possession in the vendor. *Trevanian v. Morse*, 1 Vern. 246.

A man who purchases without notice of a prior incumbrance, or prior right, shall not have his title impeached in equity, nor shall he be compelled to discover any writings which may weaken his title, neither shall any advantage be taken from him, which may defend him at law. *Harding v. Hardres*, Rep. temp. Finch. 9. *Hayman v. Gomedon*, id. 34. *Snelling v. Squibb*, 2 Ch. Ca. 47. *Wilkerv. Bodington*, 2 Vern. 509. *Stephens v. Gaul*, id. 701. He must plead himself a purchaser without notice. *Bodmin v. Vendebn*, 1 Vern. 179. But he need not set forth the consideration he paid. *Morr v. Mayhew*, 1 Ch. Ca. 34. 2 Freem. 175. VENDOR & PURCH.; NOTICE.

#### 16. Of Release, Payment, Compromise.

See also these titles, ante and post.

A plea of release, if the consideration be impeached, must contain averments supported fully by answer, covering the grounds upon which the consideration is impugned, and cannot extend to a discovery of the consideration. *Parker v. Alcock*, 1 Y. & J. 432. RELEASE.

To bill filed by residuary legatee (to whom, with others, the debts due from a concern in which the testator had been a partner with one of his legatees, had been bequeathed) against the others for an account of monies due from the partnership to the testator, charging defendant with owing the concern various sums of money, having possession of the partnership books: it is not a good plea that all the monies due from the partnership of the testator at the time of his death, consisted wholly of money lent by him to defendant, and that (as was the fact,) the testator by his will had forgiven and released defendant from all monies lent and advanced by him during his lifetime, the release by the will being treated as referring to specific sums advanced independently of the partnership debts. *Hanson v. Hanson*, 4 Pri. 168.

A defence of compromise or release is not proper for answer; it is available by way of plea only.

*Leonard v. Leonard*, 1 Ball & B. 323. PL. ANSWER; COMPROMISE; RELEASE.

To a bill stating various dealings between M and R, from 1788 to 1794, imputing fraud and unfair dealing, and various usurious charges, over-charges, and mistakes in accounts delivered, and praying a discovery of the several transactions, and a general account; the defendant, to so much of the bill as sought a discovery, and prayed an account of the dealings and transactions prior to, and upon the 27th of May, 1791; and as to all relief and discovery grounded thereon, pleaded a release made and executed on the 8th of June 1791, with an averment that said release was prepared with the consent of, and freely and voluntarily executed by M, and without any fraud or undue practice on the part of R: plea ordered to stand for an answer, with liberty to except. *Rooke v. Morgell*, 2 Scho. & L. 721.

Bill, charging fraud in obtaining a release; plea, the release, supported by an answer denying the fraud: the benefit of the plea was saved to the hearing. *Lloyd v. Smith*, 1 Anst. 258. RELEASE.

Plea of payment of a sum into the ecclesiastical court, to prevent a commission of appraisement, and accepted, a receipt given, disallowed as a plea in bar to a suit; it not shewing that the party had no farther demand. *Samuda v. Furtado*, 3 Bro. C. C. 70.

Plea of payment to bill of discovery overruled as issue triable at law. *Hurdman v. Taylor*, Dick. 651.

If one obligor pays and sues the other at law, in name of obligee, payment may be pleaded, but not payment by a stranger, as representative of deceased obligor in joint bond is. *Church v. Bishop*, 2 Ves. 372.

As a plea containing an exception of matters thereafter mentioned is bad, and must be overruled, so a plea of a release "further, and other than in the plea set forth," is incorrect, though not sufficient to overrule it; it was therefore ordered to stand for an answer with liberty to except. *Salkeld v. Science*, 2 Ves. 107.

Plea of a general release, containing the words "decrees and orders of the court of chancery," is a good bar to any demand set up under a decree of that court made prior to the date of the release; and if the defendant by his answer denies all charges of fraud, &c. in obtaining the release, such answer is sufficient to corroborate the plea. *Walter v. Glanville*, 5 Bro. P. C. 555. RELEASE.

#### 17. Of Title.

See also TITLE.

A plea that the plaintiff has no interest in the subject of the suit, is a good plea to a bill for discovery and a commission. *Mendizabel v. Muchado*, 1 Sim. 68. PL. DISCOVERY, BILL OF.

Where bill is for discovery in aid of defence at law, and for equitable relief; plea of title in defendant in equity to whole bill is bad. *Gait v. Osbaldeston*, 5 Mad. 428. But reversed on appeal. S. C. 1 Russ. 158. TITLE; PL. DISCOVERY; PR. RELIEF.

Plea of title to bill by improper rector for account of tithes, overruled. *Heathcote v. Aldridge*, 1 Mad. 236. TITLE; TITHES.

Plea that there are no outstanding leases allowed to ejectment bill, which stated outstanding leases and prayed relief. *Armitage v. Wadsworth*, 1 Mad. 189.

To a bill to set aside a conveyance for fraud, &c.; plea of title paramount under a former conveyance of all the estate and interest under which the plaintiff

claimed, allowed. *Hove v. Duppa*, 1 V. & B. 511. as to the subject of the suit, does not protect him from TITLE.

Plea, that the plaintiff is not heir, was held in this case, and in *Gunn v. Prior*, 2 Dick. 657. 1 Cox, 197. and Forr. Exch. Rep. 88. note, a bad plea; but Lord Thurlow afterwards altered his opinion. *Newman v. Wallis*, 2 Bro. C. C. 143. HEIR AT LAW.

Where a bill is filed by a person claiming as heir at law, *quare*, whether a plea that the plaintiff is not heir, is a good plea? It seems, that if the plea goes on to shake a pedigree by way of showing that the plaintiff is not heir, and adds at the end, that the plaintiff is not in manner aforesaid, or in any other manner heir, that is a good plea in point of form, although the title of the plaintiff is not concluded by the pedigree. *Gunn v. Prior*, 1 Cox. 197. HEIR AT LAW.

Where the statute of mortmain, 9 G. 2. is pleaded to an information by a defendant who is in possession, he need not show title in himself, but only want of title in the relators. *Att. Gen. v. Weymouth*, Amb. 22. TITLE; MORTMAIN.

A plea of a bare title only, without setting forth any consideration, will not protect a defendant from giving an answer to the title set up by the plaintiff. *Brereton v. Gamul*, 2 Atk. 241.

Plaintiff entitles himself as administrator; defendant pleads plaintiff is not administrator: a good plea in abatement in equity, as well as at law. *Winn v. Fletcher*, 1 Vern. 473. TITLE.

A died beyond the sea, and made a nuncupative will; B took administration here, and brought his bill for a discovery of the supposed intestate's personal estate; the defendant pleaded the will, and that he was executor, and that A left no assets but what were beyond seas: plea allowed. *Jauncy v. Sealey*, 1 Vern. 397. ADMINISTRATION; FOREIGN COUNTRY, PERSONAL ESTATE IN.

The defendant pleaded himself heir on the part of the mother, and did not say he was heir of the whole blood: plea overruled. *Addison v. Hindmarsh*, 1 Vern. 442. HEIR AT LAW.

A freeman of London dies intestate, leaving a wife, and no child; bill is brought against the widow, who was administratrix, for a distribution of the testamentary part; defendant pleads, that by the custom it belonged to her as administratrix, and was not distributable by the statute: plea allowed. *Matthews v. Newly*, 1 Vern. 133. CUSTOM OF LONDON.

#### 18. Where it lies generally.

An executor filed a bill before probate; plea that he had not proved the will, allowed. *Simons v. Milman*, 2 Sim. 241. EXOR.; WILL, PROBATE OF.

To a bill by assignees of a bankrupt, a plea that the suit had been instituted without the consent of the creditors, or of the commissioners, as required by the statutes 5 Geo. 2. c. 30. and the 6 Geo. 4. c. 16., was allowed, chiefly on the ground of a similar plea, having been allowed in the court of chancery in *Ockleston v. Benson*, 2 Sim. & Stu. 265. *Boxon v. Williams*, 2 Y. & J. 475. BANKCY., POWER OF ASSIGNEES TO BRING ACTIONS.

A fine and non-claim cannot be pleaded in bar to a bill to prevent the setting up of an outstanding term. *Leigh v. Leigh*, 1 Sim. 349. FINE & NON-CLAIM; BILL TO PREVENT SETTING UP OUTSTANDING TERMS.

To bill by assignees of bankrupt against creditor, a plea that suit was not instituted according to 5 G. 2. c. 30. s. 38. (See 6 G. 4. c. 16. s. 88.): Held good. *Ockleston v. Benson*, 2 S. & S. 265. But see contra, *Bevan v. Lewis*, 2 G. & J. 245. BANKCY.

Matters pleadable which arise after filing of bill. *Turner v. Robinson*, 1 S. & S. 3. TIME.

Plea which negatives plaintiff's title, though it protects defendant generally, from answer and discovery,

#### TITLE.

It is not by the practice of this court required of a party charged by a bill, to have deeds and documents, &c., in his possession, material to the case on the other side, that he should protect himself from producing them by plea. The court will take care that he be not called on without good reason to produce his securities, for they watch with jealousy proceedings instituted for that purpose, and will require an unanswerable case to warrant their interference in making an order for their production. *Vansittart v. Barber*, 9 Price, 641. PRODUCTION OF DEEDS.

To bill against occupier, for amount of tithes arising from farms and lands, situate within the township of K., in the parish of L.; a plea, that defendant did not occupy any lands or farm within parish of L., or the titheable places thereof, allowed. *Warrington v. Mothersill*, 7 Price, 666. TITHES.

Plea to bill which is demurrable on face of it, overruled. *Billing v. Flight*, 1 Mad. 230. DEMURRER.

If bill is open to demurrer, plea cannot be resorted to. Plea to be good must state some new matter, which is a bar to plaintiff. *Stiff v. Andrews*, 2 Mad. 10.

Plea of plenarty. *Qu.*, if it will hold to a bill seeking possession of a donative living? *Mutter v. Chauvel*, 1 Mer. 475. PLENARTY.

To bill to stay proceedings in action, brought by defendant as landlord, on account of dilapidations of buildings by plaintiff as tenant, and for discovery, whether defendant has not, since commencement of action, assigned his interest in buildings; defendant cannot protect himself from discovery by plea, that when dilapidations were committed defendant was entitled, and that they ever since continued out of repair. *Dk. of Bedford v. Macnamara*, 1 Price, 208. DISCOVERY.

Plea filed under an order for time to answer, regular. *De Minckhuys v. Udney*, 16 Ves. 356. TIME TO ANSWER.

Motion to take off the file for irregularity, a plea to a bill, amended under the usual order, after exceptions allowed, refused; as a case for a plea may arise, either from the amendments themselves, or from their effect upon the original part of the bill. *Ritchie v. Aylwin*, 15 Ves. 79. PR. TAKING PROC. OFF FILE.

Plea allowed as to the relief, therefore good to discovery also, according to general rule. *Sutton v. Ld. Scarborough*, 9 Ves. 71. PL. DISCOVERY; PL. RELIEF.

The refusal of a summary application to set aside an annuity, is no objection to the same ground being taken again, upon an attempt to enforce it. *Bromley v. Holland*, 5 Ves. 617.

Plea to bill of discovery in support of an action, under stat. 9 Anne, c. 14., for money lost at play by the assignee of the loser, a bankrupt, that the action was not commenced, and the bill exhibited within three months, overruled. *Brandon v. Sands*, 2 Ves. J. 514. STAT. C. OF; GAMING.

A defendant to a bill of revivor, cannot plead to that suit a plea which has been pleaded by the original defendant, and overruled. *Samuda v. Furtado*, 3 Bro. C. C. 70. PR. PLEA; PR. ABATEMENT & REVIVOR.

Plea to bill of revivor for costs, which had been taxed and ordered to be paid into the bank, overruled. *Hall v. Smith*, 1 Bro. C. C. 438. S. C. 2 Dick. 649. PR. COSTS TAXED; REVIVOR, BILL OF.

Plea of matter, which would be a good plea to the action at law, is not a good plea here to a bill for discovery leading to legal relief. *Hindman v. Taylor*, 2 Bro. C. C. 7. DISCOVERY.

No second dilatory plea allowed; but answer may

insist on what was overruled as a plea. *Finch v. Finch*, 2 Ves. 492. *PL. ANSWER.*

A mere witness cannot be made a defendant for discovery of what he is examinable to, unless he is interested. If the bill charges, he is interested, the defendant must plead and support it by an answer denying that allegation, and cannot demur. *Plummer v. May*, 1 Ves. 426. *PL. PARTY; WITNESS.*

Defence proper for plea should reduce the cause to a particular point, and from thence create a bar to the suit. *Chapman v. Turner*, 1 Atk. 54.

In what case plea proper. *Anon.* 2 Eq. Ab. 76.

The plea of a fine and long possession under it, is a good bar to a bill brought for discovery of deeds, declaring the uses of such fine. *Holt v. Loue*, 5 Bro. P. C. 569. *PL. DISCOVERY.*

Where the testator had pleaded to a bill, and died before the plea was argued, the executor may plead *de novo*, for the first plea cannot be now argued. *Micklethwaite v. Calverly*, *Forres*, 3.

But if executor has assets he will be bound. *Id. ib.* *EXECUTOR; PR. ABATEMENT & REVIVOR.*

Defendant cannot plead and demur to same part of bill. *Cotter v. Laver*, 1 Eq. Ab. 42. *PLEAD. DEMURRER.*

Plea of 13 El. c. 20. for non-residence allowed to bill by lessee of tithes. *Bockenham v. Bentfield*, 1 Com. 392. *TITHES; STAT. C. OF.*

Plea of non-residence in bar to a bill for tithes, is good. *Quilter v. Mussendine*, *Gilh.* Exch. Rep. 228. *Mills v. Etheridge*, *Bunb.* 210. *S. P. TITHES.*

A plea of the stat. of 13 Eliz. c. 20. is good to a bill brought by a lessee for tithes. *Bockenham v. Bentfield*, 1 Com. Rep. 392. *Id.*

Possession under a decree of foreclosure inrolled is a good plea. *Nicholls v. Short*, 15 Vin. 478. pl. 2.

Solicitor brings a bill for his fees. Plea of statute 3 Jac., that the plaintiff had not signed his bill. Good plea. *Norris v. Bacon*, 1 Vern. 312. *SOL. & CLIENT, SIGNATURE OF BILL OF COSTS; PR. COSTS.*

Plea of privilege by some of the defendants is not good, if there is another defendant not privileged. *Fanshaw v. Fanshaw*, 1 Vern. 246. *OFFICERS OF COURT.*

### 19. Ordered to stand for Answer.

To bill against two defendants to redeem an estate tail, plea by one defendant, 1st, averring as to one tenement undisputed possession since 1775, and 2nd, denying as to the other all interest. The first plea being bad, held that second could not be sustained as separate defence. Plea therefore overruled, and ordered to stand for an answer with liberty to except. *Cowne v. Douglas*, 1 McClel. & Y. 321. *LENGTH OF TIME.*

Plea of simony for tithes ordered to stand for an answer with liberty to except as being multifarious. *Wood v. Strickland*, 2 V. & B. 150. *SIMONY; MULTIFARIOUSNESS.*

Plea (to a bill to redeem a mortgage,) of a conveyance by the mortgagor of the equity of redemption, in trust to sell and pay the mortgage, and a bond debt from him and two other persons, and a conveyance from the trustee to the mortgagee, nobody offering at an auction so much as was due for the mortgage-money with interest and costs: ordered to stand for an answer with liberty to except. *Stubback v. Leatt*, *Coop.* 46. *MORTGGE. REDEMP. OF.*

To bill by heir against devisee, alleging that devise was upon a secret trust or undertaking for charity against 9 G. 2. c. 36. a plea of statute of frauds was ordered to stand for an answer, with liberty to

except. *Stickland v. Aldridge*, 9 Ves. 516. *STAT. OF FRAUDS.*

Plea of statute of limitation supported by answer, ordered to stand for answer with liberty to except, the charges in bill not being sufficiently answered. *Bayley v. Adams*, 6 Ves. 586. *PL. PLEA; STAT. OF LIMIT.*

Plea covering too much ordered to stand for answer with liberty to except. *Jones v. Pengree*, 6 Ves. 580.

Bill by the tenant of a farm for a specific performance of a parol agreement for a new lease, stating improvements made at a considerable expence, and continuance of possession after the expiration of the old lease, and payment of an increased rent under the agreement. Plea of the statute of frauds ordered to stand for an answer, with liberty to except. *Wills v. Stradling*, 3 Ves. 378. *PL. PLEA; STAT. OF FRAUDS; SPEC. PERF.*

Bill by tenant for life in possession for discovery and delivery of the title deeds. Plea a mortgage in fee by a former tenant for life, alleging himself to be seised in fee without notice, ordered to stand for an answer with liberty to except. *Strode v. Blackburn*, 3 Ves. 222. *PL. PLEA; TITLE.*

Plea that the person through whom the plaintiff claimed, died a bachelor, and without issue, ordered to stand for an answer with liberty to except. *King v. Holcombe*, 4 Bro. C. C. 439.

Plea of an award and release to a bill to open an account; ordered to stand for an answer with liberty to except. *Burton v. Ellington*, 3 Bro. C. C. 196. *ACCOUNT.*

Plea of the statute of frauds, averring 1st, that there was no contract in writing; 2nd, that there had been no acts done in part performance; overruled as double, and ordered to stand for an answer, with liberty to except. *Whitread v. Brockhurst*, 1 Bro. C. C. 404. *PL. PLEA DOUBLE.*

### 20. When overruled by Answer.

When to creditor's bill, defendant pleaded that deceased was not indebted to plaintiff at death, and accompanied plea by answer denying existence of debt, and the manner in which it was alleged to have been contracted: Held that the answer overruled the plea. *Thring v. Edgar*, 2 S. & S. 274.

Plea by one defendant to bill by tenant in tail for redemption of estate, if fine levied of part of estate, averring that the part included in the fine was the only part in which the defendant claimed interest, and accompanied with answer, admitting possession of title deeds, &c. Held that plea was overruled by answer. *Watkins v. Stone*, 2 S. & S. 560.

Plea to all relief and part of discovery and answer to restrain, plea overruled. *James v. Sudgrove*, 1 S. & S. 4. *RELIEF; DISCOVERY; ANSWER.*

But otherwise if answer had been to matter in bill which would have repelled defence by plea. *Id. ib.*

Where the bill charged an award to have been obtained corruptly, the plea setting up the award and denying the specific charges of fraud is bad, as not bringing the cause to one point, and an answer to the same charges overrules the plea. *Pope v. Bish*, 1 Anst. 59. *PL. PLEA.*

Where a plea is a bar to the whole bill, if at all, an answer to any matters which ought to have been covered by the plea, overrules it. *Blacket v. Langlands*, 1 Anst. 14.

Where defendant by plea insists that he ought not be obliged to discover several matters therein mentioned, and yet by answer discovers those very par-

ticalars, plea is bad in form and cannot be supported.  
*Dobbyn v. Barker*, 5 Bro. P. C. 573.

### VIII. REPLICATIONS.

Where a supplemental bill is not a supplemental suit, but only introduces supplementary matter, the whole record is one cause, and a general replication applies to whole record, and not merely to the original bill. *Cutton v. Carlisle*, 5 Mad. 427. **PL. SUPPLEMENTAL BILL.**

Where there is a plea and answer, and the plaintiff replies, the replication must be to the answer, as well as the plea. *Nicol v. Wiseman*, 2 Vern. 46.

Bill for an account of a co-partnership, defendant pleaded an award averring the matter in question, comprised in the award. Plaintiff replied generally to the plea, and though the plaintiff ought to have set down the plea to be argued, and not to have replied to it, yet court decreed defendant to account. But afterwards though this decree was signed and enrolled, court ordered defendant only to answer. *Farrington v. Chute*, 1 Vern. 72. **PARTNERSHIP; ACCOUNT.**

### IX. PLEADING IN GENERAL.

Pleadings where scandalous or impertinent to be suppressed. *Beames' Ord.* 25.

— on being filed with attorney to be personally referred to attorney of other side. *Id.* 100.

Not to be copied till filed, and hand of six clerk put to them. *Id.* 110, 123, 187.

To be filed with six clerk. *Id.* 140, 144, 168, 187, 231.

Not to be impertinent. *Id.* 25, 70, 166.

Nor scandalous. *Id.* 25, 167.

Must be filed with six clerk to be of record. *Id.* 168.

Those which six clerks are entitled to receive, to be delivered to them. *Id.* 190.

Ought to be placed in custody of six clerks. *Id.* 191.

Are to be filed and not copied until filed. *Id.* 240.

Draughts of party's own pleadings by ancient rule permitted to be used by such party. *Id.* 241.

To be filed before hearing. *Id.* 287.

To be signed by proper officer before read at hearing. *Id.* 298.

In a bill to perpetuate testimony of a right of common and way, the plaintiffs claimed in right of their estates, or otherwise, this is too loose, a demurrer therefore allowed. *Cressett v. Mytton*, 2 Bro. C. C. 481. Vide S. C. 1 Ves. J. 449. **PLEADING; BILL; TITLE.**

True way of pleading is to plead facts. *Hilton v. Barrow*, 1 Ves. J. 284.

After issue joined publication passed, and the cause heard, the same matter or the same title shall not be drawn into question again by another original bill. *Peterborough v. Germaine*, 6 Bro. P. C. 1.

### POLICY OF INSURANCE.

See **INSURANCE.**

### POOR.

See **STAT., C. OF. II. 38.**

### POPERY.

See **PAPIST.**

### PORTIONS.

See also **INTEREST IN PROPERTY.—INTEREST PECUNIARY, I. 4.**

#### I. GENERALLY.

II. **CONDITIONAL, WHEN NO DEVISE OVER.**

III. **WHEN VESTED, AND DIFFERENCE WHEN NOT CHARGED ON LAND.**

IV. **VESTED, BUT NOT IMMEDIATELY PAYABLE.**

V. **SURVIVORSHIP AND ACCRUER OF.**

VI. **WHEN AND HOW RAISEABLE.**

VII. **WHEN LANDS ARE LIABLE.**

VIII. **MERGER OF, IN LANDS CHARGED.**

IX. **WHEN A SATISFACTION OF DEBT OR LEGACY.**

X. **DOUBLE.** See also **post, XI.**

XI. **SATISFACTION.** See also **ante, X.**

XII. **WHEN SUBJECT TO DEBTS.**

#### I. GENERALLY.

Will directed settlement to be made of real estate on A and his first and other sons in tail, with powers of jointuring, leasing, sale, and exchange, and all other clauses, powers, and provisos usually inserted in settlements of some kind: Held, the last words did not give power to charge with portions. *Higginson v. Barnaby*, 2 S. & S. 516. **POWERS, WILL; C. OF.**

Portions by will, governed by rules from the civil law, not applicable to a deed. *Hubert v. Parsons*, 2 Ves. 261.

Construction of a trust, surplus rents, &c. not included in the term, "portion." *Fane v. l'ane*, 1 Ves. 57.

Portion, not only implies a fortune out of the father's estate, but may also relate to what the wife brings with her in marriage, and answers to the Latin word *dos*. *Wood v. Bryant*, 2 Atk. 522.

In marriage settlement, it was agreed that if there should be but one daughter, she should have 500*l.* for her portion, and 200*l.* each should be paid to every of the other younger daughters. There were three daughters: Held, each were only entitled to 200*l.* *Chamberlain v. White*, 6 Bro. P. C. 61. **SETTLEMENT, C. OF.**

A, by letter, says he will give 1500*l.* with his daughter; the daughter marries, and A is privy to it, and seems to approve of it. The daughter dies, and the husband takes administration. The father decreed to pay the 1500*l.* portion. *Wankford v. Fotheroy* 2 Vern. 822. **SEEC. PERE.**

One, by his will, gives 3000*l.* to his younger children, which was secured by mortgage from A, and declares that if his eldest son does not pay this 3000*l.*, then his lands shall go to the younger children. A brings a bill to redeem his mortgage, and to pay in his mortgage money, and pays it pursuant to the decree; and the master puts it out upon a security, that proves ill. The eldest son shall not be compelled to pay it over again to his younger brothers. *Oldfield v. Oldfield*, 1 Vern. 336. **INVESTMENT DEFECTIVE.**

Marriage portion recovered at common law, and reversed in exchequer, and holpen in chancery. *Cutting v. —*, Cary, 8.

#### II. CONDITIONAL, WHEN NO DEVISE OVER.

The rule that a condition to marry with consent is in *terrorem* only when no devise over, must be understood of legacies only, and not of portions. *Harvey*

*v. Aston*, 1 Atk. 379. S. C. *Forres*, 212, and note (i) *Id.* 217. **CONDITION, MARRIAGE WITH CONSENT.**

A, by will, gives portions to his daughters, but mentions no time when to be paid, but adds a proviso, that his daughter should marry with consent of his wife, and if any married without such consent, her portion to go over. On a bill, brought by the daughters for their portions, the court decreed the portions to be paid, but on security, to refund if the condition should be broken. *Aston v. Aston*, 2 Vern. 452. 1 Ch. Rep. 164. Pre. Ch. 226. S. C. *WILL, C. OF; CONDITION, SUBSEQUENT; SECURITY.*

Portions at twenty-one or marriage, "when C and his wife should die without issue male." Held, a condition precedent, and not to be raised till both are dead; though one die, and the other remain tenant in tail after possibility of issue extinct. *Champney v. Champney*, 10 Mod. 314. **CONDON, PRECEDENT; SETTLEMENT, C. OF; TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED.**

### III. WHEN VESTED, AND DIFFERENCE WHEN NOT CHARGED ON LAND.

Terms to commence after the father's death, to raise portions for younger children in such shares and portions as he should appoint, for want of appointment, equally, to sons at twenty-one, to daughters at twenty-one or marriage, to be paid immediately after the decease of its father; with survivorship in case of a child before the portion should become due and payable. The father died without making any appointment: Held, the portions vested at twenty-one or marriage during his life. *Cholmondeley v. Meyrick*, 1 Eden. 77. S. C. cit. 3 Bro. C. C. 253. n. **SETTLEMENT, C. OF.**

Power to father to raise for younger children, not exceeding 3000*l.*; if no appointment, the estate charged with 3000*l.*, for the sons at twenty-one, for the daughters at twenty-one or marriage. Nothing vested in the father's lifetime, and representatives of one who attained twenty-one, and became elder, but died in father's life, not intitled to a share. *Loder v. Loder*, 2 Ves. 531.

Trust "to raise" 5000*l.* portion, "and pay it" to such younger child as the father should appoint, for want of appointment, to the younger children at twenty-one, with interest for their maintenance, &c. in the meantime, &c. &c. The only younger child died at two years old: Held, not to be vested in him so as to be claimed by the father as his representative. *Hubert v. Parsons*, 2 Ves. 261. **INTEREST VESTED.**

Marriage settlement on husband and wife for life, and trust term if no issue male, or if all should die without issue male before twenty-one years, to raise portions for daughters, &c. A son attained twenty-one, but died in father's lifetime without issue male. The portions not raiseable. *Worsley v. El. Granville*, 2 Ves. 331.

Portions not to be raised for representative of child dying before he wanted it. *Ld. Teynham v. Webb*, 2 Ves. 209.

Portions in a settlement by a term after mother's death for defendants, to grow due, and payable at twenty-one, or marriage, &c. One daughter having, after twenty-one and marriage, died in life of mother, her portion shall go to her representatives, and not to her sister. *Emperor v. Rolfe*, 1 Ves. 208. **SETTLEMENT, C. OF.**

By settlement on the marriage of A with C, in case there was no issue male, and there should be daughters living at the death of the father, who should attain twenty-one, or be married, then such daughters should have 2000*l.* a-piece; there were three daughters and no sons; defendant, one of the daughters,

married D, and previous to her marriage, covenanted to assign (with D's consent) 500*l.* to trustees in trust, after the death of D and the defendant, to pay it amongst the children of the bodies of the defendant and D; and that D should, after the marriage, assign to the trustees all the monies and securities for it, then due and belonging to defendant. A died in 1744.—D, in 1745, intestate, to whom defendant administered, and received the 2000*l.* Held, that the children, who were a son and daughter, have a right to the portion, which was decreed to be secured for their benefit, though under the articles, the real estate was in the mother's power, and vested in her in tail; yet, in equity, it is to be carried into strict settlement to the wife for life, then to the first, &c. sons in tail, and, in default of issue male, to daughters. *Bush v. Dalway*, 3 Atk. 530. **INTEREST VESTED.**

When a portion is to be raised out of land, if the person die before the day of payment, it sinks for the benefit of the heir. *Lowther v. Conder*, 1 Atk. 131.

A reasonable distinction may be made between a time of payment that has been denied from the circumstances of the fund. *Id.*

If a father enter into a bond to pay 1000*l.* to his daughter after his wife's death, it would have been forfeited if the executors had refused to pay after wife's death, notwithstanding she survived the daughter. When no time of payment is fixed, a legacy in general is held to be paid immediately, unless the end for which it was given ceased. *Id.*

A devised all his land to B and C, and their heirs, in trust to sell part of his lands, and pay his debts, as far as the produce would go; and as to the rest in trust to receive the rents and make leases for ninety-nine years, determinable on three lives, and therewith to pay his debts and legacies, then to the use of D's wife for life, remainder to her issue; and he made the trustees executors; he likewise gave 500*l.* to his nephew E, to be paid at twenty-one, or marriage, who died under twenty-one. The lands directed to be sold were insufficient to pay the debts, and testator's personal estate was only 700*l.*: Held, the nephew's legacy being charged on real as well as personal estate, cannot be raised, as he did not live to attain twenty-one. *Prowes v. Abington*, 1 Atk. 482.

The resolutions that there is no difference between a charge on the real estate only, and a charge on the real and personal estate too, are so strong that they are not to be shaken. S. C. 2 Atk. 485.

\* Whether charge on land be created by deed or will, whether given by way of portion for a child, or merely as a legacy by collateral relations or others, if the party die before the day of payment, cannot be raised. The reason is, that the court of equity governs itself by the rules of the common law, for then if A covenant to pay money to B at a future day, and B die before the day the money is not due to his representative. *Id.* 485.

Whether portion charged on land be given with or without interest by deed or by will, if the person die before it becomes payable, it shall sink in the estate. *Boycot v. Cotton*, 1 Atk. 555. **CHARGE ON LAND.**

If a party die before a portion becomes payable, if out of land, it shall not be raised; but if a personal legacy, and legatee dies before the time of payment, it shall go to the executor. *Harvey v. Aston*, 1 Atk. 379. S. C. *Forres*, 212, and note (i) 217.

Portions charged on land do not vest till the time of payment comes, therefore in the case of a marriage with consent, and the consent is not obtained, there is no rule of law or equity which can excuse the want of it so as to claim the portion. *Id.* 561. S. C. *Forres*, 212, and note (i) 217. **CONDITION OF CONSENT.**

A, the father, and B, the eldest son, re-settle an estate, to the use of A for life as to part, then to trustees for two hundred years, to raise 1100*l.* to be paid to the second son within six years after A's death, or as soon after as the same could be raised, and in the meantime interest from A's death, for and towards his maintenance, remainder to B, the eldest, &c.; C died indebted, and two years after him, A died, from whom a good estate came to B: the creditors cannot have this portion raised, the contingency upon which it was payable, never happening. *Brudley v. Powell*, *Forres*. 193.

A settles his estate on his sister B for life, remainder to her second and other sons in tail, &c., and gives her a power, with the consent of C, her husband, and for C surviving B, to charge it with a sum not exceeding 12,000*l.* for their children; and if they, or the survivor of them do not appoint the provision, then 2000*l.* each to be raised for younger sons, and 3000*l.* each for daughters, at their ages of twenty-one, with interest at 5 per cent. for their maintenance, to commence from the time of the appointment; and if no appointment, then from the death of the survivor of B and C, and if any of the younger children die before their shares become payable, the same to go to the survivor; A dies; C dies, leaving four younger sons, and two daughters, one of which died an infant soon after her father; then B dies, without making any appointment: the whole 14000*l.* shall be raised, and carry interest from the death of B. *Rolt v. Rolt*, *Forres*. 189.

Term of 1000 years, to secure daughters' portions, payable at sixteen, proviso if no daughter at the time of failure of issue male the portion to sink; there is a daughter who attains to sixteen, and marries without consent, and no son by the marriage; but the daughter dies in the lifetime of the father and mother, and consequently, while there might be a son, the portion sinks. *Gordon v. Raynes*, 3 P. W. 134.

Portion secured out of the land, and the daughter dies before the portion becomes payable, it sinks into the land. So, if a legacy be given out of land to J S, payable at twenty-one, and J S dies before twenty-one, the legacy sinks: secus, in both cases where the legacy or portion is given out of a personal estate. *Id. ib.*

If I secure a portion to a child by deed, payable at twenty-one, out of land, and the child dies before twenty-one, the portion shall sink into the land, and not go to the executor: so, if I devise a portion to a child out of land, payable at twenty-one, and the child dies before twenty-one, the portion shall sink; also, the portion shall sink as well for the benefit of *heres factus*, as of the *heres natus*. So, though the money given to the child, be not said to be for a portion, if it appear to be so in fact, if by the will the portion be given out of a real and personal estate payable to the child at twenty-one, and the child die before twenty-one, then so much as will arise out of the personal estate, shall go to the executor or administrator, but what would arise out of the land must sink. *Jennings v. Locks*, 2 P. W. 276. PORTION, WHEN LAYED.

Term raised to secure daughters' portions; trust thereof declared, that if the husband should leave no heir male by the marriage, and should leave a daughter or daughters, then the trustees to raise portions payable to daughters at twenty-one or marriage; proviso that if the husband should die without leaving a daughter living at his death, then the term to cease; there is no issue male by the marriage, but there is a daughter who attains twenty-one and marries; mother dies, and daughter dies in the father's lifetime, leaving issue, her husband administers to her; he shall have no portion. *Wingrave v. Pelgrave*, 1 P. W. 401.

By marriage settlement a term is created for raising 400*l.* a piece for younger children, to be paid them within a year after the father's death, and with interest from his death; one of the children dies after the father, but within a year after his death, the portion not being raised: held, that it should sink in the inheritance, and not be raised for the benefit of its representative. *Tournay v. Tournay*, *Pre. Chan.* 290. SETTLED. C. OF.

A term is limited to raise portions for daughters if no sons, provided such daughters survive their father; a daughter dies in the life of her father: her portion shall not be raised. *Hickman v. Anderson*, 2 Vern. 654.

A term is limited in remainder after the father's death, &c. trust if he died without issue male, and there should be one or more daughters unmarried or unprovided for at his death; the trustees were to raise 2000*l.* for their portions, to be paid at eighteen or marriage. The mother being dead, and there being one daughter who was married, and no issue male, the court would not decree the portion to be raised in the life of the father, it not vesting till his death. *Corbett v. Maydwell*, 2 Vern. 640. 3 Ch. Rep. 190. 1 Salk. 159. S. C.

A term is created by marriage settlement, to raise 3000*l.* for daughter's portions, within twelve months after death of the survivor of the husband and wife; there being one daughter, the father devises the trust lands to make good his wife's jointure, and to raise 5000*l.* for his daughter's portion; the daughter shall not have two portions of 3000*l.*, and she dying at the age of five years, and the portion to be raised out of land; it shall not be raised for her administrator, but the interest or maintenance the child was entitled to shall. *Brewin v. Brewin*, *Pre. Ch.* 195. S. C. 2 Vern. 439. DOUBLE PORTIONS.

Portions provided by marriage settlement for younger children, to be paid at such time as the trustees shall think proper. One of the children dying at seventeen, before any apportionment, his portion shall sink in the inheritance, but maintenance, and a sum paid in placing him out apprentice to be allowed out of the trust estate. *Warr v. Warr*, *Pre. Chan.* 213.

A, by will, gives 500*l.* to his daughter, to be paid by his executors at her age of twenty-one, out of his personal estate and rents of his real, and if not raised by that time, the executors to stand seised and take the rents till the 500*l.* was raised, and after payment gives the land to his son. The daughter marries at eighteen, and dies under twenty-one; the husband takes administration: decreed the portion to be raised, and that by a sale, though the land, by reason of the incumbrances, would produce little more than the 500*l.* *Jackson v. Farrand*, 2 Vern. 424. *Pre. Ch.* 109. S. C. WILL, C. OF; INTEREST VESTED.

A having entailed his land on his son, subject to a mortgage, by will devises his leasehold and personal estate to pay his debts and legacies, and directs, if his personal estate is applied to pay the mortgage, it should be kept on foot to make good his daughter's portion, and gives her 3000*l.* to be paid at twenty-one or marriage, if married with consent, if not, but 1000*l.* She died at six years of age: the portion shall not be raised for the benefit of her administrator. *Yates v. Phetipplace*, 2 Vern. 416. *Pre. Ch.* 140. S. C. WILL, C. OF.

One charges his lands with 6000*l.* for the child, of which his wife was *privement encient*, if it proved a daughter, with a clause of entry for non-payment. A daughter is born and dies; the 6000*l.* shall go to her administrator. *Norfolk v. Gifford*, 2 Vern. 208. *Id.*

One devises 100*l.* to his daughter for her portion, charged upon a real estate, and payable at twenty-one;

daughter dies before twenty-one: the portion shall sink in the land; otherwise if no time had been limited for the payment of the portion, for in that case it goes to the executor of the daughter; no difference where the portion is secured by a settlement or a will, if secured out of a real estate, and the party dies before it is payable; in either case it sinks in the lands. *Smith v. Smith*, 2 Vern. 92. WILL., C. OF.

Term limited by a settlement to raise portions for younger children, payable at twenty-one or marriage; one of them dies under twenty-one and unmarried: her portion shall not be raised for the benefit of the administratrix; otherwise, if the portion was to be raised out of a personal estate. *Poulet v. Poulet*, 1 Vern. 204. SETTLE., C. OF.

#### IV. VESTED, BUT NOT PAYABLE.

Where portions were provided for daughters on failure of issue male, to be paid at twenty-one or marriage, after the death of the survivor of the father or mother; the father having died, and there being an only daughter who had attained twenty-one, it was held, from the clear indication of the intention to postpone the raising till after the death of the survivor, that the portion should not be raised during the lifetime of the mother. *Verney v. El. Verney*, 2 Eden, 25. SETTLE., C. OF.

Under marriage articles, 2000*l.* part of 3000*l.* vested in trustees, was to be paid to such son as should attain the age of twenty-one, when, and at such time as he should have attained the age of twenty-three. The eldest son attained twenty-one, but died before twenty-three: held, that he became absolutely entitled to the money, and the time of payment only was postponed to the age of twenty-three. *Combe v. Combe*, 2 Atk. 185.

Term created for daughters' portions, commencing after the death of the father and mother, upon trust to raise the portions from and after the commencement of the term. Father dies, leaving a daughter: decreed, the portion is vested, but not raiseable during the life of the mother. *Butler v. Duncomb*, 1 P. W. 448. 2 Vern. 760. 10 Mod. 432. S. C.

#### V. SURVIVORSHIP, AND ACCRUAL OF.

Father having power under marriage settlement to appoint shares, in which his younger children were to take a sum to be raised for their portions, having exercised that power by will, afterwards advances one of daughters, took release from her of her portion, and by codicil revoked his appointment by will as to her: held, her portion was to go to the other children. *Noel v. Id. Walsingham*, 2 S. & S. 99. PARENT & CHILD; ADVANCEMENT.

When father has power to appoint among children, and one died in his lifetime, held, that share which lapsed by death should go among all, as in default of appointment, notwithstanding a direction that each receiving a share should release the fund, and there is no presumption of satisfaction or purchase from another provision, which was expressly made in satisfaction of different interest. *Burges v. Mawbey*, 10 Ves. 319. POWER, EXECUTION OF; LAPSE.

Portions held vested in the case of parent and child, by implication from the whole settlement against express words; and a clause of survivorship upon death of child before the portion should become payable, was upon the authorities construed before it should be vested. *Hope v. Id. Chyden*, 6 Ves. 499. SETTLE., C. OF.

#### VI. WHEN AND HOW RAISEABLE.

Where real estates are devised in strict settlement, subject to trust for raising portions to younger children, during minority of tenant for life, out of rents and profits, or by sale or mortgage; held certain funds, that had arisen from rents during such minority, were applicable to payment of the portions, and that deficiency only could be raised by sale or mortgage. *Warter v. Hutchinson*, 1 S. & S. 276. WILL., C. OF.

Where parent is tenant for life of settled estate, with remainder to trustees for 500 years, upon trust to raise portions for younger children, and parent has power to appoint portions by deed or will, they cannot be raised during parent's lifetime, and whole sum cannot be raised until they have attained twenty-one. *Wynter v. Bold*, 1 S. & S. 507. TRUST.

Portions to be raised by a trust term in a marriage settlement: the real estate held the primary fund, and a covenant by the settlor to pay them, auxiliary only. *Lechmere v. Churilton*, 15 Ves. 193.

Portion raised out of reversionary term: the rule is, that it depends upon the particular penning of the trust, and a fair construction of the whole instrument, as to the intention. Upon limitation to parent for life, with a term to raise portions at twenty-one, or marriage; if there is nothing more, and the interests are vested, and the contingencies happened, at which the portions are to be paid, upon the general rule the interest is payable, and the portions must be raised by sale or mortgage of the term. *Codrington v. Id. Foley*, 6 Ves. 364.

The court leans against the construction for raising portions or maintenance out of a reversionary term; and upon that principle, when the term fell into possession, and the portion was raised, refused to charge the difference between the sum annually allowed by the infant's grandfather for her maintenance, and the sum charged. *Clinton v. Seymour*, 4 Ves. 440. REVERSION; MAINTENANCE.

Portions charged on a reversionary fund shall not in general be raised till the term comes into possession, yet when it is expressly directed, under a power, that they shall be raised as soon as may be, they shall bear interest from the death of testator. *Comney v. Conway*, 3 Bro. C. C. 267. But see note there.

A power in a settlement to raise a portion for a younger child, at such time as the parent should direct: he directs it to be raised when she is fourteen, and, she dying, files his bill for it as her administrator. The portion shall not be raised for the father. *Hinchinbroke v. Seymour*, 1 Bro. C. C. 396. POWER, ILLUSORY APPOINTMENT.

Estate settled on husband and wife for life, and then to trustees for a term to raise portions for daughter, by leasing, assigning, or mortgaging: the husband dies, leaving daughters at his death, and no issue male. Her portions shall be raised in the life of the mother out of the reversion. *Smith v. Evans*, Amb. 533. SETTLEMENT, C. OF.

Term to raise daughter's portion, to daughters of son, on failure of issue male of grandson, with power for grandson to jointure: Held, the portions not raiseable, nor interest payable, till after the death of the jointress. *Churchman v. Harvey*, Amb. 336. Id.

One having two sons, G and C, and a daughter, devises several estates to his two sons and their issue, with cross remainders, and declared, that if either of them should die without issue living at his death, so that his estate should come to his brother, the surviving brother should pay 2000*l.* to his daughter within one year after his brother's death, and charged the estate with it: G died, leaving two sons; afterwards, C died, without issue. *Quere?* Whether the



2000*l.* should be raised : Held it should. *Tollett v. Tollett*, Amb. 177. WILL, C. *op.*

The court in late cases have thought it hard to raise daughters' portions in the father's lifetime, and therefore refused to do it. *Hall v. Carter*, 2 Atk. 356. S. C. 9 Mod. 347.

In late cases, where the portion was large, the court have refused it in favour of the remainder-man. S. C. *Id.*

A jointress having, on the execution of the power creating her jointure, an estate precedent to a term for raising portions, the portions cannot be raised in the lifetime of the jointress, so as to affect her. S. C. *Id.*

Conveyancers now insert negative words, to prevent portions being raised in a father and mother's lifetime. S. C. *Id.*

A power in trustees of raising portions by rents or by mortgage, is no reason for postponing the raising, in order that they may make their election. S. C. *Id.*

Directing a gross sum to be raised does not imply that it shall be raised at once, for it may be raised out of the rents and profits, and so laid up till it amounts to that sum. *Okeden v. Okeden*, 1 Atk. 550.

The court of equity lays great stress upon a particular time being appointed for payment of a portion, and have enlarged the power of trustees to raise it within the time. *Id.* 551.

Where land was originally charged with daughters' portions, it must bear the burthen, and they shall not be paid out of the personal estate. *Burgoyne v. Fox*, 1 Atk. 576. CHARGE ON LAND.

Where there is a term for years for raising daughters' portions, payable at a certain time, and a vested interest, they shall not stay till the death of the father and mother ; but the court will lay hold of the slightest circumstance in a settlement that shows an intention to postpone raising them in the life of father and mother. *Stanley v. Stanley*, 1 Atk. 549.

A, upon his marriage with B, settles his estate to the use of himself for life, remainder to first and other sons in tail male, remainder to trustees for one thousand years, remainder to his brother C for life, remainder to the heirs male of his body, hereafter to be begotten ; and then declares the trust of the term, that if there should be no issue male of the bodies of A & B begotten, that should live to the age of twenty-one years, or be married and have issue, and that there should be a daughter or daughters of the bodies of A & B, such daughter should have 4000*l.* for her portion ; and if two or more, they to have 5000*l.* equally to be divided at their ages of twenty-one, or days of marriage, which should first happen ; and if only one daughter, she to have the yearly sum of 100*l.* to be paid her half yearly for her maintenance : if two or more, the like sum to be paid them half yearly, in equal shares, until their respective portions paid ; if the portions not paid, the trustees to raise them out of the rents, or by sale, or mortgage of the premises, or of part. Provided, that if the father should, in his life-time, prefer them in marriage with portions equivalent, or the remainder-man should, after the father's death, or that there should be no daughter who should attain the age of twenty-one, or be married, then the term to cease. B died in the life-time of A, leaving no son, but three daughters, who are all unmarried : C took an estate tail under this settlement ; and the portions may be raised for the daughters in the life-time of A, their father. *Ilebbethwaite v. Cartwright*, *Forres*. 30. SETTLE. C. *OP.* WHAT ESTATE ; ESTATE TAIL.

Where portions were directed to be raised " as soon as conveniently may be," court decreed a sale of the lands. *Ashion v. —*, 10 Mod. 401. SETTLE. C. *OP.*

As to how and when portions are to be raised.  
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*Feelyn v. Feelyn*, Fitzgib. 131. S. C. 2 P. W. 659, Kelw. 18.

Upon a marriage settlement, lands are limited to the use of the husband and wife for their lives, remainder to their first and every other son in tail, and in default of issue male of the marriage, to trustees in trust to raise 2,500*l.* for daughters, payable at twenty-one or marriage, which shall first happen, and out of the profits to pay 100*l.* per annum for maintenance, the first payment of the maintenance to commence after the estate of the trustees shall have come into possession : husband dies without issue male, leaving a daughter, and a wife who is jointured in the premises ; the portion shall not be raised in the mother's life-time. *Brome v. Berkley*, 2 P. W. 484. affd. 6 Bro. P. C. 108. SETTLE. C. *OP.*

Portions secured by settlement out of lands, or articulated so to be, are not to be paid out of the personal estate. *Edwards v. Freeman*, 2 P. W. 437.

One has several daughters, and, being seised in fee, charges his lands with 1000*l.* a piece to his daughters, payable at twenty-one, or marriage ; and if any die, then to the survivors, but no time limited when the additional portion should be paid to the surviving daughters. If one die unmarried before twenty-one, the additional portion shall not be paid to the surviving daughters until the deceased daughter should have come to twenty-one. *Feltham v. Feltham*, 2 P. W. 271.

The trust of a term is to raise daughters' portions by rents, issues, and profits, or by making leases for three lives, at the ancient rent, or by granting copyholds on fines, the money to be paid to the daughters at the age of eighteen, or marriage, or as soon after as the same could be raised out of the premises as aforesaid. The portions, as it seems, may not be raised by sale or mortgage. *Mills v. Banks*, 3 P. W. 1.

A reversionary term, raised for securing maintenance and portions of daughters, shall, in cases of necessity, be mortgaged to pay either ; and when fallen into possession, shall pay all the arrears of maintenance incurred before it came into possession. *Ravenhill v. Dansey*, 2 P. W. 179.

The trust of a term was for raising a portion for a daughter, in default of issue male, payable at eighteen, or marriage, or so soon after as the same might conveniently be raised ; the mother died, leaving only one daughter. The court was of opinion that the portion could not be conveniently raised by sale of the reversion. *Reresby v. Newland*, 2 P. W. 93. Affd. 6 Bro. P. C. 75.

The court will not go farther than warranted by precedents, in selling reversionary terms to pay portions. *Id.* *ib.*

A trust term for raising daughters' portions ; if it direct a particular method of raising the portions, it implies a negative that they shall not be raised any other way. *Joy v. Gilbert*, 2 P. W. 13. Pro. Cha. 583. Affd. 6 Bro. P. C. 68.

A trust term to raise portions out of the rents, &c., as well as by leasing for three lives, or twenty-one years, at the old rent : this extends only to raise the portions by annual profits, or by leasing, and not by mortgage or sale ; and if the trustee in such trust term mortgage for the portion, the mortgage is void when the portion might have been raised by the profits. *Id.* *ib.*

Where a portion is to be raised by the annual profits or fines, if no time be appointed, the portion is not due till such time as it might be so raised. *Id.* 20. Pro. Cha. 583. Affd. 6 Bro. P. C. 68.

A reversionary term sold for the raising of daughter's portion. *Sandys v. Sandys*, 1 P. W. 707.

Under what circumstances payment of portion under a will shall be postponed until all the father's debts

are satisfied. *Duty v. French*, 6 Bro. P. C. 55. ADMON. OF ASSETS.

Term limited in remainder after father's death, in trust for raising portions for daughters at eighteen, or marriage: portions may be raised during life of father. *Cobett v. Maidwell*, 1 Salk. 158.

A portion, charged on lands by virtue of a power, shall be raised by a sale or mortgage, and not by the rents and profits of the lands charged; because it could not thereby be received in any reasonable time: the party entitled might be abridged of half the value of the portion by that manner of raising it. *Kelly v. Id. Bellew*, 4 Bro. P. C. 504.

By marriage settlement, lands are limited to husband and wife for their lives, remainder to the heirs male of their bodies; and if there should be no issue male of their bodies, and one or more daughters, then to trustees for 500 years from the decease of the survivor, in trust, by sale or mortgage to raise 1000*l.* for daughters' portions; but there is no time appointed for the payment of them: the father dies, leaving a daughter only. The portion vesting in the daughter in the lifetime of the mother, it was decreed to be raised by a sale, with reasonable maintenance in the mean time, though no maintenance is provided by a settlement. *Staniforth v. Staniforth*, 2 Vern. 460. MAINTENANCE; SETTLEMENT, C. OF.

By marriage settlement, a term is limited to raise 5000*l.*; if but one daughter, to be paid at twenty-one, or marriage, which should first happen after the death of the father and mother, or within six months after either of those days or times. There being one daughter only, and she having attained twenty one, and her father being dead, her portion was decreed to be raised in the lifetime of her mother. *Gerrard v. Gerrard*, 2 Vern. 458. SETTLEMENT, C. OF.

Where a term is limited to raise portions for younger children by rents and profits, the heir may have the portions raised by a sale, though the younger children oppose it, as well as he may insist on a sale if he think fit. *Warburton v. Warburton*, 2 Vern. 420.

Where there is a trust for raising portions out of rents and profits, the lands may be sold. *Sheldon v. Dormer*, 2 Vern. 310. POWER OF SALE.

Where the ordinary profits of a term are not sufficient to raise a portion, timber may be felled, or a mine worked for it, against the heir. *Offley v. Offley*, Prec. Chan. 27.

Portions raised in the lifetime of the father. *Hillier v. Jones*, 1 Eq. Ab. 337.

Lands are settled on marriage, upon condition, if there should be a daughter, the persons in remainder should pay her 2000*l.* at sixteen, with power for the daughter, in case of non-payment, to distrain for the 2000*l.* and damages. Though no power to sell, yet a sale decreed for raising the portion. *Wharton v. Wharton*, 2 Vern. 1. SETTLEMENT, C. OF; POWER OF SALE.

Lands of an heir are charged with portions to infants at twenty-one, or marriage. The portions shall not be admitted to be paid in before they grow due in case of the land. *Oldfield v. Oldfield*, 1 Vern. 337.

If lands are devised to a wife for life, and afterwards to be sold by the executor to pay younger children's portions, and the executor and the wife die, the younger children may compel the heir to sell, though the executor had only an authority. *Garfoot v. Garfoot*, 1 Ch. Ca. 35. 2 Freem. 176. HAIN, WHEN DECREED TO JOIN IN SALE.

## VII. WHERE LANDS ARE LIABLE.

A by several deeds charges different parts of his real estates with portions for his younger children,

and afterwards by his will confirms the charges so made, and then gives the residue of his personal estate, after payment of his debts and legacies, to trustees in trust to lay out the same in purchase of land to be settled to particular uses. The eldest son brings bill controverting the validity of the deeds, and insisting that the personal estate was liable to make good the several charges so far as it would extend: Held, that personal estate should go according to will, and that each particular estate should bear the specific charge made upon it. *Ferrers v. Ferrers*, 6 Bro. P. C. 97. CHARGE ON REAL ESTATE; EXEMPTION OF PERSONAL ESTATE.

A devises 500*l.* a piece to his three daughters at their ages of twenty-one, or marriage, to be paid out of his stock, and devises the rents of his real estate to his wife for life, in lieu of dower, and for the maintenance of his children, and towards making up their portions; and after his debts and legacies paid, devises the lands to his son, who, together with his wife, he made executors. The stock was but of 100*l.* value; the wife being dead, and the two eldest daughters having had their portions paid them, hold that the lands were liable in the hands of the son to the youngest daughter's portion. *Tomkins v. Tomkins*, Prec. Chan. 397. S. C. Gilb. Eq. Rep. 90. WILL, C. OF; CHARGE ON LANDS.

A, on marriage of his son, settles lands which he covenants to be worth 800*l.* per annum, reserving to himself a power of charging the same with 1200*l.* for the portions of his younger children. A charged the estate with only 600*l.*; but because the value of the lands was defective, the son refused to pay these portions: Held, that the portions were well charged, as they only amounted to a moiety of what the father had power to charge; and if there was a deficiency in the value of the lands, the son ought to sue upon the covenant for satisfaction out of his father's assets. *Ormsby v. Dodwell*, 6 Bro. P. C. 41. CHARGE ON LAND.

By a marriage settlement a freehold estate was settled on husband and wife for their lives, remainder to the first, &c. son in tail, remainder to trustees for 500 years to raise portions for daughters, remainders over; covenant from the husband to settle his copyhold estate to the same uses. A surrender is made, but no term is limited. The freehold estate not being sufficient to raise the daughter's portions, decreed, the copyhold estate should be charged, and liable to raise the portions. *Shouldham v. Shouldham*, 2 Vern. 321. SETTLEMENT, MARRIAGE C. OF; COPYHOLD, CHARGE ON.

## VIII. MERGER OF, IN LANDS CHARGED.

Lands charged with portion for A, afterwards descending to A, held not to extinguish or satisfy the portion. *Rushout v. Rushout*, 6 Bro. P. C. 89.

A daughter's portion secured by a trust term, not extinguished by a devise of the lands to the daughter in tail. *Lawrance v. Blatchford*, 2 Vern. 457.

By a marriage settlement lands are limited to the husband and wife, with remainder to their first, &c. son, and then a term for years to secure portions for daughters. The husband dies, leaving only a daughter, upon whom the inheritance descends. The daughter dies an infant, and indebted, and disposes of her portion by her will. Equity relieves against the merger of the portion. *Powell v. Morgan*, id. 90. MERGER.

## IX. WHEN SATISFACTION OF A DEBT OR LEGACY.

Implied satisfaction of a debt from a father to his child, by a marriage portion of a greater amount,

*Chave v. Farrent*, 18 Ves. 8. DEBT, SATISFACTION; PARENT & CHILD; DEBTOR & CRED.

Portion a satisfaction of a legacy from the father to the same amount, the evidence not being sufficient to repel the presumption. *Ellison v. Cookson*, 1 Ves. J. 100. LEGACY, SATISFACTION OF; PARENT & CHILD.

2000*l.* paid by testator on marriage of daughter, with covenant to pay 4000*l.* more at death, is extinguishment of two legacies given to her by prior will. *Clarke v. Burgoine*, Dick. 353.

#### X. DOUBLE.

##### See PORTIONS, XI.

A power upon marriage was reserved to the father to appoint 1000*l.*, charged upon certain lands, amongst the younger children of the marriage. Upon his second marriage, he charged other lands with 5000*l.* for the younger children (naming them) of the first marriage. These portions are not accumulative, and the latter only to be raised. A younger son, though named as one to take part of the 5000*l.* afterwards becoming the eldest before the portions raised, and as heir taking the estate charged, not entitled to any part of the charge. *Savage v. Carball*, 1 Ball & B. 265.

In cases of portions, courts of equity lean against double provisions moving from the father to the same persons, and for the same purposes. *Id.* 276.

Every appointment to a younger son, is under a condition that he become not the eldest son and heir. *Id. ib.*

Gift of 500*l.* by father to daughter, held not a satisfaction in part of legacy of 1000*l.* by previous will, the presumption against double portions in case of parent and child being repelled by circumstances, the gift not being by way of portion, but after marriage, and from a particular motive appearing by declaration of testator to wife, which she proved. *Robinson v. Whitley*, 9 Ves. 577. WILL, C. OF; LEGACY, SATISFACTION OF.

C provided by his will a maintenance for his second son out of the real estate; he afterwards gave large legacies to his younger children, with maintenance out of the interest: the second son entitled to both maintenances. *Clive v. Walsh*, 1 Bro. C. C. 146. WILL, C. OF.

A, upon his second marriage, settles lands to raise 5000*l.* for the children of the marriage. Having four children by that marriage, he by his will, in which he takes no notice of the settlement, gives 1000*l.* to each of them as his or her portion: Held, that they were not entitled to portions under both instruments, and that as they had accepted the provision by the will, they were bound by such acceptance. *Byde v. Byde*, 2 Eden, 18. S. C. 1 Cox, 44.

The court leans against double portions, yet regard must be had to circumstances, as where there is an eldest son, or more children, and the demand would be to their prejudice: otherwise, in the case of an only child. *Bellasis v. Uthbatt*, 1 Atk. 427. WILL, C. OF, GENERALLY.

A man has one daughter, to whom 8000*l.* is secured by marriage settlement, and afterwards he gives 8000*l.* by his will for her portion, and 200*l.* per annum. The daughter shall have but one 8000*l.*, though she may elect which of the portions she pleases. *Copley v. Copley*, 1 P. W. 147. PORTION, SATISFACTION OF.

A makes two of his daughters executrixes, and directs them to distribute a sum of 400*l.*, and also

the residue of his personal estate, among themselves, and their brothers and sisters, according to their needs and necessities, as they in their discretion should think fit. The court restrained the exercise of this power, by decreeing a double share to the eldest son and heir, looking upon him as necessitous person. *Warburton v. Warburton*, 4 Bro. P. C. 1. WILL, DISCRETIONARY JURISDICTION.

A term is created by marriage settlement to raise 3000*l.* for daughters' portions within twelve months after the death of the survivor of the husband and wife. There being one daughter, the father devises the trust lands to make good his wife's jointure, and to raise 3000*l.* for his daughter's portion: the daughter shall not have two portions of 3000*l.*; and she dying at the age of five years, and the portion to be raised out of land, it shall not be raised for her administrator, but the interest or maintenance the child was entitled to, shall. *Brewin v. Brewin*, Prec. Chan. 195. S. C. 2 Vern. 439. PORTIONS, WHEN AND HOW RAISEABLE.

A cumulative provision *in will* shall not double a portion, unless plainly proved that testator intended it to be so. *Blois v. Blois*, 2 Vent. 347. LEGACY, ACCUMULATIVE.

A, by settlement, was made tenant in tail, and a provision was made of 3000*l.* a-piece to his daughters. A docked the entail, and bequeathed to his daughters 3000*l.* a-piece. It was proved that A had declared he would augment his daughters' portions. Decreed, the daughters to have both sums. *Pile v. Pile*, 1 Ch. Rep. 199.

#### XI. SATISFACTION.

##### See PORTIONS, X.

Portion by settlement vested at twenty-one or marriage of daughters, to be paid at the death of the surviving partner; if the parents, or either, should, in their or either of their life-time, settle, give, or advance money, land, &c. on marriage, or otherwise, such advancement to be taken as part or the whole of the portion, unless the contrary declared in writing. A legacy payable at twenty-one, a satisfaction *pro tanto*. *Onslow v. Mitchell*, 18 Ves. 490. SETTLE, C. OF.

Rule as to satisfaction of portion by a legacy, that there must be some express evidence, or at least a strong presumption that it was intended as such, slight variation in the time of payment, between twenty-one and twenty-one or marriage, immaterial. *Id. ib.*

Though generally a satisfaction by will of a portion must be of the same nature, and equally certain, a bequest of a share in powder works, to be made up in value 10,000*l.* charged with an annuity of 20*l.* for a life, was held a satisfaction of a portion of 2000*l.* *Bengough v. Walker*, 15 Ves. 507.

Portion by will *prima facie* a satisfaction of a portion by settlement. *Tolson v. Collins*, 4 Ves. 491. SETTLE, SATISFACTION OF; WILL.

Bequest of the residue of testator's personal estate, to a younger son, being greater than the provision by the father's marriage settlement, is a satisfaction of that portion. *Kirkman v. Morgan*, 2 Bro. C. C. 394.

By marriage settlement part of wife's fortune was advanced to husband for the purpose of his trade, for which he secured her an annuity, the rest being settled upon the children, after the decease of husband and wife, in such proportions as the wife should direct; by will he directed the wife should relinquish her claim under the settlement, and left a larger sum to trustees, the interest to be paid to her while sole, with a power to her to dispose of the whole among the children; that is a satisfaction for their portions under

the settlement. *Moulson v. Moulson*, 1 Bro. C. C. 82. SETTLEMENT, SATISFACTION OF.

Declaration in the deed providing portions for daughters, that if any lands should come from the father they should be taken as part of the portions; an estate tail being devised, it is to be considered as part satisfaction, according to the value of it. *Watson v. Lincoln*, Amb. 328. DEEDS, C. OF.

Portions for younger children under a settlement; father provides otherwise for one; intending 10,000*l.* a piece for the rest; they are confined to that, and not also to claim an equivalent for the other's share out of provision made; otherwise if they had other satisfaction. *Dk. Bridgewater v. Egerton*, 2 Ves. 123.

L, previous to his marriage with A, covenanted that he would, by will or by some good assurance, grant to D or her mother, or her executors, &c. in trust for D, 1000*l.* to be paid to her after his decease, for her separate use; and in case he should not by deed or will assure the same, then his executors, &c. should pay the 1000*l.* L died without such deed or will: Held, that D was not entitled to the 1000*l.* and her distributive share of L's personal estate also, it being meant by L not as a debt, but as a security only for his wife's provision. *Lee v. Cox*, 3 Atk. 419. SETTLEMENT, C. OF.

In a settlement a term was raised for daughters' portions, viz. 10,000*l.* with a proviso, that if the father, by deed or will, should give or leave the sum of 10,000*l.* to his said daughter, it should be a satisfaction; the father leaves land to the daughters of the value of 10,000*l.*, this no satisfaction. *Chuplin v. Chaplin*, 3 P. W. 245. *Id.*

In a settlement made on the second marriage of S was a proviso, that "if any estate of inheritance shall descend from the father to the daughters (of the marriage) of as great value (to be sold) as their portions, then the trust (term created to raise such portions) shall cease for the benefit of the person who shall be entitled to the settled lands as next in remainder." S the father, being seised of other lands in fee, devised them to his daughters in tail: Held, this not such an estate of inheritance as will be a satisfaction of the portions for the daughters of S, by his second wife, because the daughters claim those lands by purchase, and the proviso in the marriage settlement restrains the satisfaction to lands coming to the daughters by descent from their father. *Saville v. Saville*, 2 Atk. 458. Sel. Ch. Ca. 32.

Held also that the valuation of lands descending from the father to the daughters, and which would have to go in satisfaction of the portions, must be made according to the value of the lands at the time of the descent; for till valuation made, it could not be known whether they were a full or a partial satisfaction. S. C. 2 Atk. 461.

Lands descended to the daughter in tail are not such an estate of inheritance as is within the meaning of the proviso, for such an inheritance was intended as of certain value, an inheritance in fee simple. S. C. *Id.*

Reversions in tail, expectant on the deaths of others, are not such estates of inheritance descended from the father as are within the intent of the proviso. *Id.* 463.

Tenant for life shall keep down interest by rents and profits; but portions or principal money due on any other incumbrance, shall be borne by the whole estate; therefore, tenant for life shall not account for rents, or value of timber cut down, in order that they might be applied towards raising portions. S. C. *Id.*

TENANT FOR LIFE; PAYING OFF INCUMBRANCES. A man has one daughter to whom 8,000*l.* is secured by marriage settlement, and afterwards he gives 8000*l.* by his will, for her portion, and 200*l.* per annum; the daughter shall have but one 8000*l.*, though she may

elect which of the portions she pleases. *Copley v. Copley*, 1 P. W. 147. DOUBLE PORTION.

A legacy of 150*l.* given by a collateral ancestor to the daughter of A, which was paid A, and who after gave her 1000*l.* portion, settled a church lease on her, and maintained her and her husband fourteen years, yet held no satisfaction. *Chidley v. Lee*, Prec. Chan. 228.

By a marriage, in case of failure of issue male, a remainder is limited to the daughters until they should raise 3000*l.* for portions. There is issue a son and two daughters; the father, by will, gives the daughters 700*l.* a-piece and dies; the son gives by his will to the daughters to the amount of 7000*l.*, and devises the land to his male heirs, and dies without issue. The father or son's legacies to the daughters shall not be a bar and satisfaction of the 3000*l.* secured by the marriage settlement. *Duffield v. Smith*, 2 Vern. 258.

By a marriage settlement a term for years, expectant on failure of issue male, is raised for securing 3000*l.* portions for daughters, not preferred in the life of the father, payable at eighteen or marriage; there are a son and two daughters. The father in his lifetime, by a sale of part of his estate, raises 1800*l.* for his daughters, which, by another deed, was made payable at twenty-one or marriage, and dies, leaving also a son by a former marriage, who dies an infant, without issue. This 1800*l.* though payable at a different time, and though not intended to go as part of the portion (there being a son then living), shall be taken as part of the 3000*l.* portion. *Jesson v. Jesson*, 2 Vern. 255.

## XII. WHEN SUBJECT TO DEBTS.

A lent B and C 200*l.* and took their bond for 800*l.* payable on the marriage of either, or on the death of either's father; B's father died, and C married, but his portion was vested in trustees; equity would not subject this portion to the payment of C's bond. *Rich v. Sydenham*, 3 Ch. Rep. 76. BOND, NOW PAYABLE.

## POSSESSION.

See also MORTGAGE, III. 2.—PR. SALES, JUDICIAL, 5.—VENDOR & PURCH. VII.

Where there has been adverse possession, not accounted for by some disability, as coverture or infancy, for twenty years, a court of equity ought not to interfere. *Cholmondeley v. Clinton*, 1 Turn. & R. 107. LENGTH OF TIME; JURISDICTION.

Where a trustee of a term of years, upon the usual trusts for securing annuities, has taken possession of the estates under the trusts, the court, although all arrears of the annuities may afterwards be paid, will not order possession to be given up to the grantor, except upon such terms as will enable the trustee to resume it, and to receive the rents, the moment the annuities are again in arrear. *Jenkins v. Mitford*, 1 Jac. & W. 629. SECURITY FOR ANNUITY.

Mortgagee has a right to retain possession against all the world, except him who, at his own cost, proves himself entitled to equity of redemption. *James v. Binn*, 3 Swan. 237. MORTGAGE; EQUITY OF REDEMPTION.

Heir at law out of possession cannot raise an equitable jurisdiction for court to decree possession of estate, by adding to his bill, for that purpose, a prayer for delivery up of title deeds. *Taylor v. Glanville*, 3 Mad. 179. HEIR AT LAW; PR. BILL.

Possession of some owners is possession of all. *Exp. Machill*, 2 V. & B. 216. S. C. 1 Rose, 447. PARTNERS.

On possessory bill it is sufficient for grounding decree for restitution, to prove a triennial possession by virtue of a title still subsisting, though a defeasible one, and a forcible entry and detainer. *Edgworth v. Edgworth*, 2 Bro. P. C. 27. IRELAND.

Where the entry of the mother as guardian in seque to her infant son, shall gain a possession *fratris*. *Whitcombe v. Whitcombe*, Prec. Chan. 280.

Continued possession of bastard *eisne* shall prevail in conscience against right of *mulier puine*. Cary, 4.

Injunction against plaintiff for defendant's possession. *Id.* 35. S. P. *Dowche v. Perratt*, *id.* 45.

Injunction for plaintiff's possession as at time of filing bill, and three years before. *Sapcote v. Newport*, *id.* 47.

Suit dismissed after 100 years' possession. *Kinston v. Pigot*. Cary, 110.

Possession *sororis* in copyhold, effect of. Cary, 5. Dyer, 291.

Possession of the mother for collateral heir. *Id.* 6.

## POSSIBILITIES.

See INTERESTS CONTINGENT.

## POST OBIT BONDS.

See also HEIR AT LAW, III.

Where a tenant in tail in remainder had agreed to pay a sum of money after the death and failure of issue of his brother, the tenant in tail in possession, and had secured the money by a mortgage of the estate, and covenanted to levy a fine and suffer a recovery, to give effect to the mortgage, but coming into possession of the estate, refused to perform this covenant, the court appointed a receiver of the rents. *Free v. Hinde*, 2 Sim. 7. PR. RECEIVER.

In a suit to set aside post obit securities, an injunction being granted, the principal and interest will be ordered into court, and will not be paid to the defendant. *Marsack v. Farlow*, 1 Jac. 572.

An action on a post obit, as contrary to the principles of this court, was restrained, and subsequent motion to set aside the injunction was refused with costs, such case being against general rule, that costs of motion for injunction, or to dissolve injunction, refused, are costs in cause. *Marsack v. Reeves*, 6 Mad. 108. PR. INJUNC. TO STAY PROCS. AT LAW; PR. COSTS.

Post obit security, though not on reasonable terms, may be valid, but on grounds of public policy strictly examined. *Curling v. Townshend*, 19 Ves. 628.

Under circumstances post obit bonds from an expectant heir, set aside, and allowed only to stand for sum actually advanced, with interest. *Bernal v. Marq. Donegal*, 3 Dow. 133. S. C. 1 Bli. N. S. 594. EXPECTANT HEIRS.

Post obit bonds, though upon terms of gross inequality, established; such securities not being liable to impeachment on the ground of usury. *Whariton v. May*, 5 Ves. 27.

A, aged thirty, borrows 5000*l.* on bond, to pay 1000*l.* if he survives B, aged 78. A survives a year and eight months, having, on death of B, confirmed the bargain by a new bond, &c. freely, and paying part. No relief given in this case, except as to the penalty. *El. Chesterfield v. Janson*, 2 Ves. 125.

Post obit security bond by A in 1720, for payment

in six months after his father's death, if he survived; otherwise to be void; the father, then seventy, dies in 1731; A in 1734. No relief against the penalty, there being no proof of imposition, although suspicious circumstances in it. *Hill v. Caillovel*, 1 Ves. 122.

## POSTHUMOUS CHILDREN, THEIR RIGHTS AND INCAPACITIES.

Bequest to all children "born in the lifetime of testator," includes child of which the feme was *en-ciente* at death of testator. *Trowers v. Butts*, 1 S. & S. 181. WILL, C. OF.

Legacy in trust for the children of A to be equally divided between them, with benefit of survivorship, and a provision for maintenance out of the interest; A having no children at the death of the testator, held, that after-born children would take, and that the interest, till the birth of a child, fell into the residue. *Harris v. Lloyd*, 1 Turn. & R. 310. WILL, C. OF, WHO TAKE; INTERMEDIATE PROFITS.

Devise in favour of children of testator's sister held, on construction of the whole will, to apply to such children only as were living at the testator's death, and not to include after-born children. *Scott v. Harwood*, 5 Mad. 332. WILL, C. OF.

Gift to all and every the children of nephews and nieces lawfully begotten, includes after-born children. *Browne v. Groombridge*, 4 Mad. 495. WILL, C. OF, WHO TAKE.

Devise to S for life, and after her decease estate to be settled by counsel, and go amongst testator's grandchildren of male kind, and issue in tail male with remainder over. Only one grandchild was born in testator's lifetime, but two were born afterwards before death of S: Held, such after-born children were entitled. *Marshall v. Bousfield*, 2 Mad. 166. *Id.*

Bequest of residue, after death of A, to five children, and to the son of my son T and his other children that were living, held to pass shares to children of son born after the testator's death, and before death of wife. *Tebbs v. Carpenter*, 1 Mad. 290. *Id.*

Legacies to all the children of the testator's sister of 2000*l.* each, payable at twenty-one or marriage of daughters; and until the shares become payable, the interest, &c. thereof respectively to be paid to his sister for her separate use; a fund to be set apart for paying the legacies to his said sister's children as they became due, and in case he shall die before all her sons shall attain twenty-one, or before all the daughters attain that age or marry, the interest, &c. of the legacies for such sons and daughters as should be under age or unmarried, to be applied towards their education, &c.: all children, including those born after the testator's death, entitled, and an inquiry was directed what would be a proper sum to be set apart to answer the legacies to future children. *Deffis v. Goldschmidt*, 19 Ves. 566. *Id.*

Under a devise by a married man having no legitimate children, "to the children which I may have by A, and living at my decease," natural children who had acquired the reputation of being his children by her before the date of the will, entitled as upon the whole will intended and sufficiently described, rejecting as a description of the devisees, passages in a written book, unattested, of which probate was admitted under a reference in the will to "the observations and directions which I shall leave in a written book." Whether, if there were also legitimate children by the same mother, they could take together under the same description, and whether future illegitimate children can take under any description in a will, *Qu.?* *Wilkinson v. Adam*, 1 V. & B. 422. Affirmed, 12 Pri. 470. *Id.*

Where there is an immediate devise to children

and grandchildren generally vesting in possession on death of the testator, after-born children are excluded. But if the vesting in possession be postponed, then after-born children *in esse* at the time of distribution are entitled, though devise immediate. *Crone v. Odell*, 1 Ball & B. 483. Affl. 3 Dow, P. R. 61. WILL, C. OF, WHO TAKE.

Where devise immediate, and the description of persons to take general, those answering it on testator's death alone can take, and after-born children are excluded. But where the enjoyments are postponed to a particular period, or until a particular event happen, those then answering the description will take, and after-born children will be included. *Crone v. Odell*, 1 Ball & B. 459. Affl. 3 Dow, 61. Id.

When life estate is interposed between the death of testator and the enjoyment by the children of the tenant for life, and there is nothing to limit the general description, after-born children will be included. Id. *ib.*

In a legacy to the children of A, those born before the time of distribution are entitled to share, unless a time of distribution is expressly provided, excluding those born afterwards by the necessity of a previous distribution. *Walker v. Shure*, 15 Ves. 125. WILL, C. OF, WHO TAKE.

Trust, by will, for all the children of A, when and as they shall severally attain sixteen, with a direction for the maintenance; those born after the eldest attain sixteen were excluded: maintenance was directed without regard to the father's ability. *Hoots v. Pratt*, 3 Ves. 730. WILL, C. OF, WHO TAKE; MAINTENANCE.

Testator gave to each and every of his children born or thereafter to be born, and who should be living at the time of his death, 5000*l.* a-piece to be paid at their ages of twenty-one, &c. with interest from the day of his death. A child *en ventre sa mere* is entitled to a legacy of 5000*l.*, but the interest is to be computed only from the birth. *Rawlins v. Rawlins*, 2 Cox, 425. WILL, C. OF.

Under a devise to all the children of A except B, a posthumous child is entitled. *Clarke v. Blake*, 2 Ves. J. 672. Id.

The testator gave to A B's children, 50*l.* to every child he hath by his wife, to be paid them as they come of age: there were eleven children at the date of the will, thirteen at the testator's death, and three born afterwards. The thirteen children living at the death of the testator are entitled to their legacies, but not those born afterwards. *Ringrose v. Bramham*, 2 Cox, 384. Id.

Child born after death of testator decreed to take under a general gift to A for life, then to the children of A, but this point not contested. *Simmons v. Valance*, 4 Bro. C. C. 345. WILL, C. OF, WHO TAKE.

Gift by will of a specific sum among the six children of A. A had six children at the time, one more was born after the testator's will, but before the codicils; she shall not take a share with the six born before. *Sherer v. Bishop*, id. 55. Id.

Testator gave the residue of his real and personal estate to his wife for life, and upon her decease he bequeathed it to the children of A and his wife Jane, to be equally divided amongst them, the said Jane's children, and not to any children by any other marriage of either party: the residue is divisible amongst the children of A and his wife, who were living at the death of the wife, but will not extend to children born after that time. *Ayton v. Ayton*, 1 Cox, 327. Id.

An immediate devise to great-grandchildren will not include a great-grandchild *in ventre sa mere* at the testator's death. *Freemantle v. Freemantle*, id. 248. WILL, C. OF.

Testator gave 350*l.* to the children of his sister at twenty-one (with interest), and if any died before, to the survivor or survivors. A child born after the testator's death, but during the infancy of the others, is entitled to a share. *Gilmore v. Severn*, 1 Bro. C. C. 583. WILL, C. OF, WHO ENTITLED.

E devised all her real estates to trustees for a term of 500 years to raise 200*l.* for the purposes in the will mentioned; and after the determination of that term, and subject thereto, to other trustees for 1000 years, in trust to pay out of the rents certain annuities; and subject to the said two terms, she gave the premises to all and every the child and children of her brother T, and the heirs of their bodies, &c. T had two children at the death of the testatrix, and one born afterwards, but before the death of the annuitant. This is an immediate devise, and the last mentioned child being born after the testatrix's death, is not entitled to any share of the premises. *Singleton v. Gilbert*, 1 Cox, 68. WILL, C. OF, WHO TAKE.

Bequest, "and after death, &c. I give and leave to each of the children of R and of B his wife, 50*l.*, which shall be paid to them when they shall be of age:" Held, vested legacies, and that after-born child shall take. *Att. Gen. v. Crespin*, 1 Bro. C. C. 386. WILL, C. OF; INTEREST, VESTED.

Devise to all the children of A at the respective ages of twenty-one; a child born after the death of the testatrix shall take. *Congreve v. Congreve*, id. 530. WILL, C. OF, WHO TAKE.

20,000*l.* left to executors in trust to dispose, or in such proportions, &c. as they should think fit amongst such of the testator's relations as should not be worth 2000*l.*, and should apply within two years after the testator's death. One within the description applied and had a sum ordered her, but died before it was paid: Held, her representative entitled to it. A child born after the death of the testator, who was of consanguinity, claimed and died without issue; held not within the description, though *en ventre sa mere* at testator's death. *Bennett v. Honeywood*, Ambl. 708. Id.

One devises to his son then living, and if he dies under twenty-one, and testator's wife shall be *enicient* at his death with other child or children, then to such at twenty-one; but if no such, then over to his nephews. Two children were born after the will in the lifetime of the testator: held to take under the devise. *White v. Barber*, id. 701. Id.

Legacy to children of A lawfully begotten, or to be begotten, extends only to those born in lifetime of testator. *Sprackling v. Rainer*, Dick. 344.

Devise of real estate to H, his daughter, for life; and after her death, without issue, to sell and divide the money among all and every the children of his two sisters. The sisters had several children born in the lifetime of testator; one of them had a child born afterwards, but in the lifetime of H. H died without issue: Held, the after-born child entitled. *Bartlett v. Hollister*, Ambl. 334. S. C. 1 Bro. C. C. 530. in note. WILL, C. OF.

Bequest of residue to children of A, the interest to be paid for their learning, and, at the age of twenty, to be equally divided between them; but if A have no children, the interest to be paid to A for seven years, and then the whole to be paid to her. Whether after-born child shall take, *Quæ?* A new bill by the husband after the death of his wife, and several children to whom he was administrator, to have the question determined; and Id. Camden, Ch. was clear of opinion that the interest vested at the death of the testator, being given *per verba de presenti*, and that the after-born child was excluded. *Hodges v. Isaac*, Ambl. 348. Id.

Legacy to children of S, he having but one born.

Those born after held entitled. *Maddison v. Andrews*, 1 Ves. 58. WILL, C. OF, WHO TAKE.

A posthumous child within a provision in marriage articles, for such children of the marriage as should be living at the death of the father or mother. *Millar v. Turner*, id. 85. MARRIAGE SETTLEMENT, WHO TAKE.

A posthumous child born after the next rent day, and since the death of the father, is entitled under 10 & 11 W. 3. c. 16. to the intermediate profits of the lands settled, as well as the lands themselves, and the court will consider an uncle as a receiver, or a trustee for an afterborn son, though the point at law be against him. The profits of an estate descended belongs to a posthumous child from his birth only. *Rassett v. Bassett*, 3 Atk. 203. 206. 207. Vide *Goodtitle v. Neumann*, 3 Wils. 526. It is evident that all skillful conveyancers have considered that the statute carries the intermediate profits as well as the estate; for before that statute, and before the case of *Reere v. Long*, 3 Lev. 408, they always inserted a limitation to preserve contingent remainders to posthumous children, but since that time they have omitted it. *Bussell v. Bassett*, sup. Et vide *Robinson v. Robinson*, 2 Ves. 231. INTERMEDIATE PROFITS.

Testator bequeathed 500*l.* to be paid to his grandson P if he lived to be twenty-one, and in case he died before then, to the other child or children of his daughter equally, arriving at such age. P died before twenty-one, and no child of P was born or living at testator's death. The grandchildren, born after the death of testator were held entitled to the 500*l.* for not being *in esse* in his lifetime, he must have had in his view the future children of his daughter. *Haughton v. Harrison*, 2 Atk. 329. WILL, C. OF, WHO TAKE.

A parent is bound by nature to support a child, but this has not been intended to grandchildren, and therefore not entitled to interest. S. C. *Id.*

If the child or children of P arrive at twenty-one, then the 500*l.* was directed to be paid to them, and interest from the time it becomes payable. S. C. *Id.*

J died intestate, and left issue who died within a week after his father and his wife *enient*; and on the 20th May following the plaintiff was born, and is entitled to her share under the statute of distributions, as much as if she had existed in his lifetime. *Wallis v. Hodson*, 2 Atk. 114. DISTRIBUTION, STAT. OF.

A will can never relate to a child who was not *in esse* till some years after testator's death. *Heathe v. Heathe*, 2 Atk. 122. WILL, C. OF.

A parent's duty to provide for all his children will extend to posthumous ones. *Wallis v. Hodson*, 2 Atk. 116. PARENT & CHILD.

Distributory share vests on the intestate's death, but not so as to exclude a posthumous child. *Edwards v. Freeman* 2 P. W. 446. DISTRIBUTION; INTEREST VESTED.

One devises, in case he have no son at the time of his death, to S. The testator dies, leaves his wife *privement enient* with a son; this posthumous son is a son living at the testator's death, and S not entitled. *Burdet v. Hopegood*, 1 P. W. 486. WILLS, C. OF; WHO TAKE.

An after-born child of a freeman of London shall come in with the others for a customary share. *Wal-sam v. Skinner*, Prec. Chan. 499. S. C. Gilb. Eq. Rep. 153. CUSTOM OF LONDON.

One devises the surplus of his estate to his grandchildren living at his death. Grandchildren born after his decease shall not take. *Musgrave v. Parry*, 2 Vern. 710. WILL, C. OF; WHO TAKE.

One devises the surplus of his personal estate to the children of A and B: neither of them has a child at the making of the will, or the death of testator. The devise is executory, and shall extend to any children that A and B shall afterwards have, and the

children of each shall take *per capita*, and not *per stirpes*. *Weld v. Bradbury*, 2 Vern. 705. WILL, C. OF; WHO TAKE; DISTRIBUTION.

Lands by marriage settlement are limited to the son in tail male, remainder to A, the husband, in fee, provided if A and his wife, or either of them die without issue male living at the time of his or her death, leaving only one daughter unmarried, the trustees to stand seised till they have raised 1500*l.* for such daughter, and if more daughters unmarried at the death of A and his wife, or either of them, and no issue male being begotten between them, then 3000*l.* for such daughters. A dies leaving daughters, and his wife *enient* of a son which is afterwards born, whether the daughters are entitled to the 3000*l.* *Palmer v. Cracroft*, 2 Vern. 578. SETTLEMENT, C. OF, WHO TAKE.

A devise to J and his heirs; if he has children, they take with their father; but if he has none, it is an estate tail: or devise to a man and his children of his personal estate; a child born after the death of the testator shall not take. A devises to two and the heirs of their bodies: it is a joint estate for life, and several inheritances; and so it is if there is a devise over; but if there is a devise over, and one of them dies without issue, a moiety shall go over to the remainder. A devise to the issue of A, and, for want of such issue, to B; A has a son and a daughter: they shall take as persons described, but shall take only an estate for their lives. *Cook v. Cook*, 2 Vern. 545. WILL, C. OF, WHO TAKE.

Devise thus: "All the rest of my estate I give to be equally divided between my three daughters, F, G, and A, and all my grandchildren and great-grandchildren, or so many of them as shall be living within two years next after my decease." This was held to extend only to those then born, and not to any to be born within two years after testator's death. *Trelawney v. Molesworth*, Colles' P. C. 163. WILL, C. OF, WHO TAKE.

A legacy of 500*l.* is given to the eldest son of A, to be begotten, to place him out apprentice: A has a son born after the testator's death, who brings a bill for the legacy; and it is decreed to be paid him forthwith, though not born in the testator's lifetime, and though the 500*l.* was given for a particular purpose. *Nevill v. Nevill*, 2 Vern. 431. *Id.*

A devised a term for years to his daughter and her children, (she having then three children), "and also to such other children as she should have, and the children of those children." She had other children afterwards. *Per cur.*, the woman and her three children took jointly each a fourth part, and that the after-born children took nothing. *Alcock v. Ellen*, 2 Freem. 186. Vide *Minshull v. Minshull*, 1 Atk. 413. *Id.*

A conveys a term for years, in trust to raise 1500*l.* for such child or children as should be living at his death. A posthumous child held a child living at his death, to take within the meaning of that trust, which was not to be construed so strictly as a limitation at law. *Hale v. Hale*, Proc. Chan. 50.

## POWERS.

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### I. EXECUTION OF POWERS.

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#### 1. *Effect of, as to Assets, Dower, Priority, &c.*

Power of appointment by will executed; appointee is a trustee for creditors of testator at time of his death; but not at time of making will. *Jenney v. Andrews*, 6 Mad. 264. DEBT. & CRED.; ASSETS.

Certain lands were conveyed to A B, his heirs, &c. to such uses as C D should by deed appoint, and in default of, and until appointment, to the use of C D in fee. C D afterwards, in execution of power, appoints lands in favour of E F in fee. C D was married at time of making the appointment. Qu. is wife dowerable? *Ran v. Pung*, 5 Mad. 310. Held she is not. S. C. 5 Barn. & Ald. 561. DOWER, OF WHAT.

Execution of a power is a limitation of a use, which must arise, if at all, at the time of execution, and is as if expressed in the original settlement. *Wright v. Wakeford*, 17 Ves. 457.

An annuity granted by a feme covert, having a power to dispose of her separate estates to A, a young lady, upon her marriage, for whom she promised to provide, is a specific lien on the grantor's estate. *Power v. Bailey*, 1 Ball & B. 49. FEME COVERT, SEPARATE ESTATES; SPEC. LIEN.

A power when executed takes place according to the original deed creating it. *Mosley v. Mosley*, 5 Ves. 249. PRIORITY OF SERV.

Distinction between a power and absolute property. A power, unless executed, not assets for debts. *Holmes v. Coghill*, 12 Ves. 206. ASSETS.

Power by marriage settlement to husband to charge, is not confined to the immediately preceding limitations of the reversion to him, but held to overreach all the prior limitations. Construction of a charge by will, if the reversion should never fall to testator, viz. if it should not come to him personally in his life, the charge is therefore ineffectual, though the reversion came to his heir. *Stackhouse v. Barnston*, 10 Ves. 453. CHARGE.

Execution of power by will is revoked by subsequent conveyance upon a sale by the tenant for life having obtained the legal estate, and that not being an execution within the intent of the power, the estate

passed under a general residuary devise against the purchaser. *Reid v. Shergold*, 10 Ves. 370. POWER; REVOCATION.

Where father has power to appoint among children, and one died in his lifetime. Held, that share which lapsed by death should go among all, as in default of appointment, notwithstanding a direction that each receiving a share should release the fund; and there is no presumption of satisfaction or purchase from another provision, which was expressly made in satisfaction of different interest. *Burges v. Mawbey*, 10 Ves. 319. SATISFACTION OF PORTION; LAPSE.

The execution of power of appointment operates by way of limitation of a use, under and by the effect of the instrument, reserving the power; the fee vesting in the mean time. *Maundrell v. Maundrell*, 10 Ves. 255.

The execution of a power of appointment operates as a limitation of a use, attaching upon the seisin in the feoffees, &c. under the old instrument. *Id.* 10 Ves. 264.

An appointment is made to all and every the daughter and daughters of R, and the heirs of their body and bodies, and in default of such issue to A. There were only two daughters, and one of them died under twenty-one, *sans* issue. Held, that the surviving daughter was entitled, though there were no cross remainders between them. *Wright v. Ld. Cadogan*, 1 Bro. P. C. 486.

A general power of appointment over an estate, in lieu of a present interest in it, having been executed voluntarily, though for a daughter, was held to be assets in favour of creditors. *Townshend v. Windham*, 2 Ves. 1. ASSETS; DEBT. & CRED.

Devise of 30,000*l.* to testator's wife for life, and afterwards to be distributed among his children, as she by deed, will, or instrument in nature of a will, should appoint. She having married again, appoints by will (*inter alia*) unto two of the children, who died in her lifetime. Held, that their representatives were not entitled, and that the shares so appointed to them lapsed and fell into the residue. *Dk. Marlborough v. Godolphin*, 2 Ves. 61. LEGACY LAPSED.

Appointee under a power must claim also according to nature of the instrument. *Id.* 77.

Appointee takes under the power, as if inserted therein: but not so as to take by relation from creation of the power, as in assignment on commission of bankruptcy, or in bargain and sale inrolled. *Id.* ib.

Naked powers construed strictly; powers coupled with interest liberally. *Id.* ib.

Appointment by will under a power, void by the death of the appointee in the life of testatrix; and if a power is preferred to be executed by a will, such instrument must have all the qualities of a will. *Oke v. Heath*, 1 Ves. 139.

Where there is general power given or reserved to a person for such uses, &c. as he shall appoint, this makes it his absolute estate, and it will be subject to his debts. *Troughton v. Troughton*, 3 Atk. 656. 1 Ves. 86. ASSETS.

A had a power to charge a sum of money on land, by deed or will, and executed it by a voluntary deed. The court, in favour of the creditors of A, will consider it as personal assets, and lay hold of it for their benefit. *Pack v. Bathurst*, 3 Atk. 269. ASSETS; DEEDS VOLUNTARY.

A wife having power to appoint 4000*l.* to any of her kin, and for want of appointment to go according to the statute, appoints it by will to her nephew, "upon condition" that he paid his mother an annuity of 100*l.*; she then bequeathed to her niece, S, all the real and residue of what she had power to dispose of. The nephew dying in her lifetime, the appointment as to him was void; but not so as to the annuitant, and



the remainder was held to pass by the above residuary bequest. *Oke v. Henth*, 1 Ves. 135.

G having a power to charge his estate with 2000*l.*, by his will gave 500*l.* a piece to his two sisters, and died in debt to the plaintiffs; considered as the personal estate of G, and subject to his debts. *Bainton v. Ward*, 2 Atk. 172. **ASSETS.**

If a power to dispose by appointment of a reversion in fee be not made use of, yet it shall be assets. *Id.*

Nothing is more certain in law, than that when any act is done under a power, that act is deemed to be done by the grantor of the power, and to have its validity from him, and not from the person who executes it. *Middleton v. Crofts*, 2 Atk. 661.

A, by marriage settlement, having a power to charge the estate with any sum not exceeding 3000*l.*, for such purposes as he thought fit, by deed appoints the 3000*l.* as a collateral security for quiet enjoyment of an estate he had sold, and if no incumbrance did appear, the appointment to be void, and by will devises the 3000*l.* to his daughter; and upon a bill by the creditors of A, the 3000*l.* was decreed to be applied to the payment of his debts. *Tassells v. Cornwallis*, 2 Vern. 465. **PRE. CH. 432. S. C. ADMON. OF ASSETS.**

Where a man has a power to dispose of money by his will, this is assets and liable to his debts. *Thompson v. Towne*, 2 Vern. 319. **PRE. CH. 52. S. C. ASSETS.**

## 2. What amounts to an Execution.

A, having power to appoint by will certain funds in such manner as should think fit, he by his will so executed and attested as required by the power, gives and bequeaths to his relations sums of money, amounting in the whole to precisely the sum of which he had the power to dispose, but without any reference or allusion in his will to the power, or any words indicative of his intention to execute it: Held that the will was a good execution of the power. *Quære*, if the court, in deciding whether a will is a good execution of a power, can look at the state of the testator's property at the time of making his will, as a guide to his intention? *Lownds v. Lownds*, 1 Y. & J. 445. **WILL, C. OF.**

Where husband having in articles power to appoint wife's real estate, and by other articles, to appoint his own real estate, by will, reciting power over his own estates in exercise of that power and all other powers, appointed his own real estates and all other real estates over which he had power in trust, and making no mention in any part of will of wife's estates or of his power over them, and expressing that all persons taking under his will should be bound by the doctrine of election: Held, that wife's estate was included in the appointment by will. *Trollope v. Linton*, 1 S. & S. 477. **WILL, C. OF.**

Power for husband to appoint estates to children of marriage, for such estates, and in such parts, and in such manner and form as he should by deed or will appoint, is exercised by appointment to trustees for term of 500 years, upon trusts to raise sums by way of portions for children, and words, "manner and form," enable husband to give them equitable estate. *Id. ib.*

A testator having a power of appointment over certain freehold and copyhold estates, and being seised of other freehold estates, devises all his freehold and copyhold estates, without reference to the power: Held an execution of the power as to the copyhold estates, but not as to the freehold estates, which were subject to the power. *Lewis v. Lewellyn*, 1 Turn. & R. 104.

A, being possessed of two freehold houses, and having power of appointment over lands, and money to be laid out in land, by her will devises "all and every her freehold messuages, lands, tenements, and

hereditaments" for sale: Held not an execution of the power. *Hoste v. Blackman*, 6 Mad. 190.

A testator having a general power over a sum in the funds, limited in default of appointment to his children, and having no other funded property, bequeaths all his personal estate, "consisting of money invested in any of the public funds, household furniture, &c." This is not an execution of the power. The circumstance of his having no other funded property is not to be adverted to, on the question, whether he was or was not executing the power. *Webb v. Honnor*, 1 Jac. & W. 352.

To execute a power over personal estate, it is not necessary to refer to it, but there must be very clear internal evidence of the intention. *Id.* 357.

The will (attested by three witnesses) of a person having a power to dispose of a fund consisting partly of real estates, and partly of household furniture, linen, and plate, containing a gift of "all my estates and effects of whatsoever denomination," and of "my household furniture, with linen and plate," is not an execution of the power. *Jones v. Curry*, 1 Swan. 66. **WILL, C. OF.**

M gives to the defendant all her freehold and copyhold estates, upon trust to permit S to receive the rents, &c. during her life, and after her death to sell, and out of the produce to pay 100*l.* to such person as she should by will appoint. S by will, without reference to the power, gives 100*l.* and the whole of her household furniture to the plaintiff. It was charged by the bill, and not denied, that the testatrix had no personal property at the time of her death, besides some household furniture to a very small amount in value; but no evidence was gone into, and an inquiry was asked as to the state of the property at the time of making the will, with the view of ascertaining that the testatrix must have intended the gift of the 100*l.* as in execution of her power. But the inquiry was refused and the bill dismissed. *Jones v. Tucker*, 2 Mer. 533. **PR. INQUIRY AS TO THE TESTATOR'S PERSONAL ESTATE; WILL, C. OF.**

No inquiry as to the quantum of personal property, to determine whether a gift is, or is not, in execution of a power. *Secus*, as to an inquiry whether there be anything but copyhold to answer a devise of land; the question there being, whether there was anything for the will to operate upon at the time when it was made; whereas a will of personalty speaks at the death. *Id. ib.*

Copyhold conveyed in trust to sell the money to be deemed part of his personal estate, and in trust for such uses as he should by deed or will appoint, and in default for his right heir. A will executed on the same day but not referring to the deed, directing a sale of particular property, and disposing of personal estate in general terms, held not applicable to the estate conveyed by the deed which went to the heir, no use being by the subsequent instrument declared if the estate was converted. *Lowes v. Hackward*, 18 Ves. 168. **WILL, C. OF.**

A rent-charge till a debt paid, granted by a tenant for life having a power to raise by sale or mortgage a certain sum for payment of his debts, a good execution of the power, though referrible to his interest as well as to his power. Parol evidence to shew that the deed was not intended to be in execution of the power inadmissible as going to contradict it. *Blake v. Marrell*, 2 Ball. & B. 35. **affd. 4 Dow, P. Rep. 248. EVIDENCE, PAROL.**

The recital of a power not necessary to the due execution of it. *Id.* 44.

On the execution of a power it is not requisite to refer to a power, it is sufficient if reference be had to the subject of it. *Dillon v. Dillon*, 1 Ball & B. 92.

Power of appointment not executed by general

words in a will, "all my personal estate, &c. and all my estate and interest therein." *Bradley v. Westcott*, 13 Ves. 445.

Power of appointment not executed by appointing an executor. *Id.* 452.

Power may be executed by will applying to the subject without an express reference to the power. *Id. ib.*

By fine and deed declaring the uses, the estate of a feme covert is conveyed to a trustee, to discharge certain specified debts, and "other sums borrowed or to be borrowed by the husband and wife for the like or other purposes," and subject thereto, "to such uses as the wife should appoint by deed under hand and seal." A joint bond and warrant to confess judgment executed by husband and wife, was a good execution of the particular power given to both, or semble, of the general power given to the wife. *Dillon v. Grace*, *Hearn v. Cavanagh*, 2 Scho. & L. 456.

A power to husband alone to appoint a sum of 4000*l.* which in default of appointment was limited in a particular way, was not well executed by an appointment by husband and wife of 6000*l.* given in lieu of the 4000*l.* by a subsequent deed, and which 6000*l.* was to go differently in default of appointment. *Hamilton v. Royse*, 2 Scho. & L. 315. *HUSB. & WIFE.*

It is not necessary to recite an intention to execute a power, if the act can be done only by that authority, but where the act purports to pass the interest, it shall be considered so intended and not to exercise an authority. *Maundrell v. Maundrell*, 10 Ves. 257.

Though to effect the execution of a power by will a direct reference to the power is not necessary, the intention must distinctly point to the subject of it, as if something is included which the testator had not otherwise than under the power; and part of the will, unless applied to it, would be wholly inoperative. *Beninet v. Barrow*, 8 Ves. 609. *WILL. C. OF.*

Power not executed by general bequest of "my estate and effects," which will pass only what the testator has an interest in, not what he has an authority over. *Rouch v. Haynes*, 8 Ves. 588. *WILL. C. OF.*

Power executed by will but afterwards discharged and a new power created. A subsequent codicil will not, by the mere effect of republishing the will, be an execution of the power. *Holmes v. Coghall*, 7 Ves. 499.

Power of appointment not executed by will, having no reference to the power or the subject of it, and the court will not inquire into the circumstances of the property. *Namock v. Horton*, 7 Ves. 391.

Covenant to settle an estate in strict settlement, subject to a power to the father, tenant for life, in case there should be any younger child or children, to charge such sum or sums for such younger child or children, payable in such proportions, and at such times as he should appoint. The power was held well executed by a will directing a sale and appointing the money. *Long v. Long*, 5 Ves. 445.

A, by a voluntary deed, assigned all the personal estate which he was then or might at any time afterwards be possessed of or entitled to, upon trust to pay the interest, &c. to himself for life, and after his decease to such persons as he should appoint by will for their lives, and subject thereto, to pay the principal to his next of kin, who should be living at his decease, his, her, or their executors, &c. Soon afterwards the testator by his will gave some legacies, and gave the residue to the persons by name who were his next of kin at the execution of the deed, and at his death, upon whose bill claiming under the deed, an account of the trust estate received by the trustees, and of the personal estate, &c. and to set aside the

legacies, it was held that the power was not executed by the will; but one of the plaintiffs being clearly affected with notice and acquiescence in the plan of giving the legacies, instead of executing the power, the cause was ordered to stand over with liberty to file a bill to establish the legacies, the court inclining, in case the other plaintiff could be affected with notice, at all events to apply the interest of the personal estate during the lives of the legatees in payment of the legacies; they were afterwards paid under a compromise. *Griffin v. Nanson*, 4 Ves. 343. *FRAUD; NOTICE.*

Power attempted to be executed by invalid instruments, held not executed by the general words of a will containing no reference to it. *Macleoth v. Bacon*, 5 Ves. 159. *WILL. C. OF.*

Three powers by settlement, first to husband and wife jointly, to raise and appoint 3000*l.*; secondly, to husband alone to raise and appoint such sum as would, with the sum before raised make 5000*l.* the wife joining in raising 3000*l.* under the joint power for the husband, he covenanted not to charge by the power reserved to him alone, or any other power whatsoever during her life, and so long as said 3000*l.* should remain unpaid with her consent. After her death he, by deed-poll, did charge with 2000*l.* more to be paid to his executors for debts, &c. and otherwise in performance of his will, or as he should appoint by it, and died leaving his second wife executrix, without taking notice by his will of the charge, but the deed-poll was found uncanceled among his papers; the 2000*l.* well charged, and went to the executrix without a special appointment. *El. Uxbridge v. Bayly*, 1 Ves. J. 499. 4 Bro. C.C. 13.

Devise properly attested of land, upon several trusts, remainder to such trusts as testator should by deed appoint, whether land would pass by the deed of appointment? Sent to law upon a case stating the devise to be to uses. *Hubergham v. l'incert*, 1 Ves. J. 410. *WILL. C. OF.*

The testator having a power over 3000*l.* originally the property of his wife, gave several legacies, and then after the death of his wife the residue to the defendant, his estate was not sufficient to pay the legacies, yet held that the will was not an execution of the power, the same not being referred to, nor any thing by which an intention appeared in testator to execute it. Evidence to shew the testator's own estate was insufficient for the purposes of his will without the 3000*l.* rejected. *Andrews v. Emmet*, 2 Bro. C.C. 297. *PR. EVID.*

Power to charge a particular sum reserved by owner of the inheritance, not executed in his lifetime, held to be executed in substance by his will, charging debts and legacies on all his real and personal estate, though it did not refer to the power. *Maddison v. Andrew*, 1 Ves. 56.

Power reserved by the owner of an estate to be construed liberally, and no occasion to refer to the power if it is done in substance. *Id.* 61.

A man may execute a power without reciting it; but he should mention the estate he disposes of. *Exp. Caswall*, 1 Atk. 559. *Molton v. Hutchinson*, *id.* 558. *Probert v. Morgan*, *id.* 441.

C, by will, gave the produce of 1000*l.* stock to F for life, with a power to dispose of 400*l.* thereof by writing, signed in the presence of three witnesses; and if F made no appointment, then the 400*l.* to go to a charity; F by will gave several legacies, and then the residue among his nearest relations: Held, no execution of the power, and that the 400*l.* would not pass by the bequest of the residue, neither could parol evidence be admitted of the intent: Decreed, the 400*l.* to go according to the will of C, the first testator. *Molton v. Hutchinson*, 1 Atk. 558. *Andrews v. Emmet*, 2 Bro. C.C. 297.

If a person, in the execution of a power, sufficiently describes the estate he had a power to charge, the estate is bound, though there is no reference to the deed out of which the power arises. *Probert v. Morgan*, 1 Atk. 441.

If one has made himself tenant for life of lands in Dale, with a power by any writing, &c. to revoke these uses and limit new ones, and he afterwards by will devises all his lands in Dale, &c. to S, having no other lands in Dale, excepting these, they shall pass if the will be circumstanced, as the power requires, though no mention be made of the power. *Deg v. Deg*, 2 P. W. 415.

### 3. Compliance with Conditions.

Where power was to be executed by will, signed and published in the presence of, and attested by three witnesses: Held, that will concluding with declaration, "this is my last will and testament," and expressed to be signed by testatrix in the presence of three witnesses, was not a good appointment, because publication not attested. *Stanhope v. Ker*, 2 S. & S. 37. WILL, ATTESTATION OF.

By a marriage settlement, containing the usual limitations, the husband, having a life estate in reversion, expectant upon the death of his father, was empowered when in possession under the limitations of the settlement, to revoke, &c. as to so much and such part of the premises conveyed, "as shall be then in possession of any one or more tenants, by virtue of any one or more lease or leases, whereon a rent or rents, not exceeding 300*l.* by the year in the whole, shall be reserved, &c. so as there shall not, at the time of such revocation, be less than twenty years, or three lives, unexpired of such lease or leases." The clause of the settlement conferring the power concluded, with a declaration, that it was the true intent and meaning of the parties, that the husband should, at any time during his life, after he should come into, and be in the actual possession of the premises (settled), have absolute power and dominion over so much thereof as should be of the clear yearly value of 300*l.* sterling, and be at full liberty to dispose of the same in such manner, and to such uses and purposes, as he should think proper. The husband (donee of the power), after the death of his father, when he was in possession under the trusts of the settlement, by a deed of revocation, purporting to be an execution of the power, and reciting that certain lands therein specified then produced a clear yearly rent of 300*l.* or thereabouts, revoked the uses of the settlement as to those lands, and appointed the same in trust for him (the donee), his heirs, and assigns. Afterwards the donee died indebted to an amount exceeding the value of the lands so appointed, and having no other estate or effects, by his will duly attested, and reciting his title and power to dispose of the lands specified in the deed of revocation and appointment, he devised to trustees his right and interest therein, upon trust, to sell the same, and out of the purchase money to pay his debts, &c. The lands revoked, appointed, and devised, except a very small part, to the value of 8*l.* a year, were not (as recited in the deed of revocation) under lease at the time of the appointment by that deed, nor at the date of the will; but in a suit instituted on behalf of creditors and legatees, to carry the trusts of the will into execution, it was found and reported by the officer of the court, that the lands so appointed and devised were of the value of 300*l.* a year. By the decree in that suit the will was established, and the revocation and appointment held valid; and, upon appeal, to the house of lords against the decree, it was held that the power was rightly applied to the subject, and that the appointment was well executed.

*Lidwell v. Holland*, 2 Bligh, 99. SETTLEMENT, MARRIAGE.

*Quere*, Whether a power to revoke uses "from time to time during his natural life," such revocations and re-appointment "to be sealed, signed and delivered, in the presence of, and attested by two or more credible witnesses" can be executed by will, *Edwards v. Edwards*, 3 Mad. 197.

Power to trustees to advance to A 1,000*l.*, with consent of B, under her hand, signed by two witnesses. Trustees advance the sum without consent. Subsequent acquiescence by such deed not sufficient, and trustees ordered to refund. *Bateman v. Davis*, 3 Mad. 98. ACQUIESCENCE; TRUSTEES, LIABILITY.

Power to A to dispose of estate by will duly executed and attested, and in default of appointment, to A's executors or administrators to their own benefit; will not signed, sealed or attested; held, no execution of power; and no executor being named in such will, A's administratrix entitled beneficially. *Sanders v. Franks*, 2 Mad. 147.

*Quere*, Whether power given to be executed by will, "signed and published in presence of, and attested by two or more credible witnesses;" is executed by will, signed by testatrix, and attested generally: "witness A B, and C D"? (held not, by court of C. P. 2 Mad. 156.) *Moodie v. Reid*, 1 Mad. 516.

Legacy in trust to be laid out in stock, the dividends as they came due to A for life; and after her decease, to pay the principal according to her appointment by will or otherwise, with power to her to purchase with it an annuity with the approbation of the trustees, but not to sell it: A has an absolute power of disposition, and her will was held a sufficient indication of her intention to take the whole, making a formal appointment or writing unnecessary. *Irwin v. Farrar*, 19 Ves. 86. WILL, C. OF, WHAT INTEREST.

Under a power of sale, with a consent of parties testified by any writing, &c. under their and his hands, &c. attested by two or more witnesses; the attestation going only to sealing and delivery; held, not sufficient, nor a subsequent attestation that they also signed, but a case was directed. *Wright v. Wakeford*, 17 Ves. 454.

Power to be executed by a deed, signed and sealed in the presence of witnesses, and the deed expressed to be so executed, though the attestation appeared to be only to the sealing and delivery, signature in the presence of the witnesses presumed. *Id.* 458.

An express estate for life, with a power to dispose by will, does not give an absolute interest so as to preclude the necessity of executing the power. *Reid v. Shergold*, 10 Ves. 370. WILL, C. OF; POWER, EXECUTION OF; ESTATE FOR LIFE.

Power of appointment by deed, to be signed and sealed in the presence of witnesses; the attestation applying only to sealing and delivery, though the deed purported to be signed sealed and executed; it was presumed that the signature was in the presence of the witnesses. *McQueen v. Farquhar*, 11 Ves. 467.

Under a power to alter uses, the new use will not arise except in the very circumstances prescribed by the contract. *Id.* 475.

Power of appointment in such shares and proportions as husband and wife should by any deed in writing direct, not well executed by appointment by the will of the husband, with a written indorsement thereon, made by the wife after his death, expressing her approbation; nor would it have been better if the wife had ratified it at the time of the execution, it being revocable by the husband during his life. *Bushell v. Bushell*, 1 Scho. & L. 96.

Power to revoke uses substituting other estates; *quere*, whether a substitution of equitable for legal estates, though a bad execution at law, is sufficient in equity, as where it is done by appointing under a

power, and declaring uses upon the appointment which are consequently mere trusts. *Cox v. Chamberlain*, 4 Ves. 632.

Money invested in trust for a married woman to pay her interest for life to her separate use, and after her decease to such person, and subject to such powers, &c. as she should by any instrument in writing from time to time, or by will appoint (during her present coverture;) she cannot dispose of the principal at once by deed, but a revocable act only. *Sackett v. Wray*, 4 Bro. C. C. 483. SETTLEMENT, C. OF.

Where a seal is required by the power, an appointment among children without seal is bad; as to supplying the want of due execution of such a power for favoured objects, *quære?* *M'Adam v. Logan*, 3 Bro. C. C. 310.

Will made under a power, but not duly attested to pass real estate, a good execution of the power *quoad* the personalty. *Duff v. Dalzell*, 1 Bro. C. C. 147.

Power contained in a will, for the devisees for life, when in possession, to cut down timber, as four trustees, or the survivors or survivor of them should assign, allow of, or direct; all the four trustees being dead, held, that the court would execute the trust by referring it to a master, to see what timber was fit to be cut down from time to time. *Hewett v. Hewett*, 2 Eden, 332. S. C. Ambl. 508. WILL, CONSTRUCTION OF; *PR. REFERENCE TO MASTER.*

An affirmative power must be strictly pursued, but a negative one by way of restriction need not. *Churchman v. Harvey*, Ambl. 340.

Power for tenant for life to appoint to his wife for life as a jointure, and the appointment is for ninety-nine years if she should so long live, is not a good execution of power at law. *Id. ib.*

Where a wife has a power to dispose of her separate estate, her disposition of it must be by acts strictly pursuing the power. *Ross v. Ever*, 3 Atk. 601. *Burnett v. Mann*, 1 Ves. 157. HUSB. & WIFE, SEPARATE ESTATE.

Power over land by deed or will "duly" executed requires three witnesses; but where will is to operate by way of appointment, taking no effect from the statute, such defect may be cured in equity. *Wilkes v. Holmes*, 9 Mod. 485.

Father tenant for life and two sons, article to charge with a sum for younger children after father's death, as he by will duly executed should direct; he directs by will with two witnesses only; good execution of the power, nothing passing from the father; otherwise if by owner of the estate. *Jones v. Clunghs*, 2 Vcs. 365. *Sed quære*, see Belt's Supplement, 360.

Will to pass lands by virtue of a power, must be executed according to the statute of frauds. *Dk. of Marlborough v. Ld. Godolphin*, 2 Ves. 76.

Where a testator orders his money to be laid out in land in a particular county, and his trustees cannot purchase in that county, the court, after a convenient time, will deviate from the strict terms of the trust. So, where trustees cannot purchase a freehold without great disadvantage, unless they take a college-holding with it, the court will dispense with the strict directions of the will. *Maynwaring v. Maynwaring*, 3 Atk. 414. *PERF. CY PRES.*

A power of revocation is reserved to A by any writing under hand and seal, and of appointing new uses, by the same or any other deed: A, by his will, without taking any notice of power, devises to B: held, a good execution. *Roscommon v. Foulke*, 6 Bro. P. C. 158.

By settlement before marriage 3000*l.* stock belonging to the wife, was vested in trustees, who were to transfer one moiety to such person, &c. and for such uses, &c. as she should by her last will in writing, or other writing under hand and seal, to be attested by two or more credible witnesses, appoint, &c. and for

want of such appointment, &c. then in trust to transfer all such stocks to her executors or administrators. After death a paper was found in her closet of her hand-writing, by which she gave different sums to different persons, but not signed or sealed by her, nor attested by witnesses. Lord H. held, that the words under her hand and seal, to be attested by two or more credible witnesses, are referrible to the will, as well as to the other writing; and for want of the ceremony of sealing and attestation by witnesses, this paper was not a good execution of the power. *Ross v. Ever*, 3 Atk. 156. Held, that a stamp was equal to a seal in the execution of a power which requires sealing. *Sprange v. Bernard*, 2 Bro. C. C. 585.

Baron and feme seised in fee, in right of the feme by deed and fine, settled the premises to the use of the baron and feme for their lives, remainder to the first, &c. son in tail, remainder to daughters in tail, remainder to the husband and wife and their heirs, with power to the baron, during the joint lives of him and his wife, by his last will or any writing purporting to be his last will under hand and seal attested by three witnesses, if baron dies before his wife, to charge the premises with 2000*l.*; the like power (*mutatis mutandis*) to his wife if she die first, to charge the premises with the like sum; husband by will under his hand attested by three witnesses, but not sealed, charges the premises with 2000*l.* held void, being without a seal. *Taylor v. Johnson*, 2 P. W. 506. See note, *id.* 511.

Power to appoint an use of land by deed or will; a will attested by two witnesses not a good appointment, because in such case "by a will" must be intended, such a will as is proper to dispose of land; so though the words are, "or other writing in nature of a will." *Longford v. Eyre*, 1 P. W. 742.

A, having a power to dispose of land with consent of trustees, devises the lands by her will; this being without the consent of the trustees, is void. *Hutton v. Simpson*, 2 Vern. 723. Pre Ch. 439. Gilb. Eq. Rep. 115, 120.

A devises freehold lands for a charity, but the will was not executed in the presence of three witnesses; adjudged, the will being void as a will, it could not operate as an appointment within the statute of 43 Eliz. Att. Gen. v. Burnes, 2 Vern. 597. Pro. Ch. 270. S. C. Gilb. Eq. Rep. 5.

But such a will may operate as an appointment as to copyhold lands, where there is a surrender to the use of the will, they passing by the surrender and not by the will. *Id. ib.*

A devises by will to which there are no witnesses, and afterwards makes a codicil, executed in the presence of three witnesses; the will is void as to the land, and the codicil will not support it. *Id. ib.*

#### 4. By Married Women.

Husband and wife having a joint power to appoint by formal deed over wife's estate, agree in writing to sell it. Specific performance refused, as the agreement was invalid against a married woman. *Martin v. Mitchell*, 2 J. & W. 425. AGREEMENT; SPEC. PERF.

Injunction to restrain husband from preventing his wife's solicitor and friends from having access to her, she being confined by dangerous illness in his house, to enable her to execute a deed of appointment under a power in her marriage settlement, refused, it not being proved that she had given instructions for such a deed. Whether under any circumstances, such an injunction would be granted, *Quære?* *Middleton v. Middleton*, 1 J. & W. 94. INJUNCTION.

A trust term created by a marriage settlement, to raise a sum of money on the decease of the survivor of the husband and wife, in case there should be no issue of the marriage living at her death, and to be paid as the wife, at any time or times during her co-

verture, and notwithstanding the same, by any deed or writing, &c., should appoint or devise. The power cannot be exercised during widowhood, or a second marriage. *Horseman v. Abbey*, 1 Jac. & W. 321. SETTLEMENT, C. OF.

Under a bequest of stock, in trust to permit a woman to receive the dividends for life for her sole and separate use, &c., and to pay the same into her own proper hands, and that her receipt and receipts should from time to time be sufficient discharges; a sale by her of part of the dividends established. A *bond fide* sale of dividends of stock is not within the annuity act. *Browne v. Like*, 14 Ves. 302. ANNUITY ACT.

A, entitled to the interest of money for life, with power of appointment as to the principal, receives for her support a part of the principal, and appoints to her husband; the husband cannot claim his part of the principal. *Randal v. Hearle*, 2 Anst. 363.

Money vested in trustees, in trust for husband and wife successively for life, and remainder to the children, and in default thereof to such person as the wife should appoint; a deed of the wife, conveying this contingent interest, was established. *Guise, Bt. v. Small*, 1 Anst. 277. CONVEYANCE.

A woman being about to marry, enters into an agreement with the future husband, (without seal or stamp,) by which her property is settled upon the survivor for life, with power to the wife to dispose by will made after the marriage; she then immediately makes a will, by which she gives her property to the intended husband; and afterwards (on the same day,) she marries, the articles resting in agreement give the husband an equitable estate for life, but the will is revoked (not being protected by the power) by the subsequent marriage. *Hodsdon v. Lloyd*, 2 Bro. C. C. 534. WILL, WHO MAY MAKE.

A sum of money in the public funds being given by will to trustees for the separate use of a feme covert, and to be subject to her appointment after her death; the wife made an appointment of this money to her husband; and in bill filed by husband and wife against the trustees to transfer this fund, the court on examination of the wife, decreed the same accordingly. *Frederick v. Hartwell*, 1 Cox, 193.

A woman entitled to the trust of a reversion in fee of lands, reserves to herself, by articles previous to her marriage, a power of disposing of all her estate to such uses as she shall think proper. She afterwards makes an appointment in favour of her husband and children. This appointment was held good, although no conveyance of the reversion was ever executed. *Wright v. Ld. Cadogan*, 1 Bro. P. C. 486.

A woman by marriage articles reserves a power of disposing of her present or any future estate, real or personal, by deed or will. A devise is a good execution of her power, the legal estate being in trustees. Devise to first and other sons, and in default to daughters as tenants in common, and in default of such issue over, raises cross remainders between the daughters. *Wright v. Englefield*, Amb. 468. S. C. 2 Eden, 239. WILL, C. OF.

Feme covert having power to convey her estate after her death, conveys it by lease and release, to take effect after her death; she afterwards joins with her husband in levying a fine to different uses. The lease and release held to have no effect, and the fine operated. *Bramhall v. Hall*, Amb. 467. S. C. 2 Eden, 220. not S. P. FINE & RECOVERY; LEASE & RELEASE.

Appointment pursuant to a power good, though executed by will of a feme covert. *Burnet v. Mann*, 1 Ves. 156. FEME COVERT.

Bill by husband and wife, who had a power of appointment for her separate use, submitting that the subject of it should be applied in payment of his debts, by mortgage and otherwise, for which a decree passes, tantamount to an actual appointment. The heir, there-

fore, although in being at the time, and not made a party to the original suit, was not permitted to unravel the accounts taken under that decree, but only to surcharge and falsify. *Allen v. Pupworth*, 1 Ves. 163. See Observation on this case, 4 Ves. 138. n.; and Belt. Supp. 88. HEIR AT LAW; ACCOUNT, OPENING.

M married E's daughter; after some years the daughter eloped, and then E left by will 6000*l.* in trust, to dispose of the principal and interest as his daughter should by deed or will appoint. M afterwards met and took possession of his wife, when she agreed, that if M would permit her to live separate, she would pay him 1000*l.* and settle 200*l.* per annum on him for life, and articles were accordingly executed; on a bill to set aside the articles, and that M should elect to take the 200*l.* per annum; decreed, that the articles were a good execution of the power created by the will of E, and that M was not bound to elect. *Moore v. Freeman*, Bunb. 205. 3 Bro. P. C. 378.

If a wife has a power to dispose of money in the life of her husband, she may dispose of it by a writing in nature of a will, though not so provided. *Swayer v. Bleisoe*, 2 Vern. 329. S. C. 11. 244.

Feme covert may, in life of husband, dispose of money saved out of her separate maintenance. *Id.* 244.

There is a diversity between a naked power, and a power which flows from an interest, for where a bare power is given to a feme by will to sell lands, though she afterwards marries, she may sell the lands, and may sell to her husband; but where a feme, upon a settlement of her own estate, reserves a power which flows from an interest, that power ought to be executed by the feme whilst sole, and yet it is said such power ought to be taken liberally, though formerly they were taken strictly. *Marq. of Antrim v. Dk. of Bucks*, 1 Ch. Ca. 17. S. C. 3 Salk. 276. 2 Freem. 163.

Where a reversioner upon an estate for life made a settlement on herself for life, with power for her, being sole, to make leases for three lives in possession, and she and her husband in the lifetime of the tenant for life made a lease for twenty-one years, *habendum* from the date; it was held not pursuant to her power, for by the marriage, she put herself under the controul of her husband. *Id.* 1 Ch. C. 17. In this case Ld. K. took a diversity between a naked power and a power which flows from an interest.

### 5. Exclusive and Illusory Appointment.

Voluntary settlement of personal property, in trust for such one or more of his children, as the settlor shall appoint. Appointment to one child, exclusively, upon a secret understanding that that child shall reassign a part of the fund to, or in favour of a stranger. This appointment is a fraud upon the settlement, and void, not only to the extent of the sum assigned back, but in *totum*. Bill by purchaser for valuable consideration, without notice, under this appointment, dismissed as against the person entitled under the settlement in default of appointment, such person having also the legal estate in the fund which was the subject of the appointment. *Daubeny v. Cockburn*, 1 Mer. 626. VERN. & PUNCH.

Appointment of 200*l.* stock, though a very unequal proportion of the fund, held not illusory. *Butcher and Gooday v. Butcher*, 1 V. & B. 79.

The question whether an appointment is or is not illusory, must be determined upon the circumstances of each case, according to a sound discretion; the power, however large the terms, being in some degree coupled with a trust; but an equal distribution is not required, nor any reason for the inequality, unless a share is clearly unsubstantial. *Id.* 8.

Equitable jurisdiction upon illusory appointment, discretionary according to the circumstances. *Bar v. Whitbread*, 16 Ves. 15.

Execution of a power of appointment among chil-

dren and grandchildren, by giving 100*l.* to one, 2400*l.* the residue of the fund to the only other object, established under the circumstances, the former being at time of appointment an uncertificated bankrupt, and other interests being given to him and his family by the instrument creating and executing the power. *Id. ib.*

Out of a fund of 2500*l.* appointment of 33*l.* 6*s.* 8*d.* to two children, each, and the 33*l.* 6*s.* 8*d.* among the children of another child, (the power extending to their issue,) and 2400*l.* equally to two other children, the only other objects, established. *Mocatta v. Lou-sada*, 12 Ves. 123.

Appointment of 55,000*l.* to one child, 1100*l.* to another, and 500*l.* among the others, seven in number: Held not illusory. *Duke v. Sylvester*, 12 Ves. 126.

Appointment of 100*l.* *S. S.* annuities to one child, and 2400*l.* the residue, to another, those being the only objects of the power: Held not illusory. *Baz v. Whitbread*, 10 Ves. 31.

Appointment of 200*l.* out of property of 20,000*l.* Held not illusory, though very unequal. *Butcher v. Butcher*, 9 Ves. 382.

A having a power of appointment of 2000*l.* among younger children, having two sons and a daughter, his eldest son being an idiot, and the second son having obtained a part of the surplus profits of the estate during the idiot's life, A appoints 1999*l.* to the daughter and 20*s.* only to the second son. This appointment illusory; perhaps it might have been good, if the second son had had a certain provision *alias* under the time of the execution of the power. *Lysaght v. Royse*, 2 Scho. & L. 151.

Settlement upon such child or children as father should appoint: appointment excluding one, established. *Kemworthy v. Bate*, 6 Ves. 793.

Under such a power to appoint among several subjects, each must have a share, and by the rule in equity as to illusory appointments, a substantial share, unless a good reason appears, as another provision by the person executing the power, not from any other quarter. Under such a power an appointment of a fund, nearly 1900*l.* among three children the objects, 10*l.* to one, 50*l.* to another, and the remainder to the third, all having other provisions *alias* under, was set aside as illusory. Evidence that an appointment was improperly obtained, being executed by a will regularly proved, was rejected. *Kemp v. Kemp*, 5 Ves. 849. EVIDENCE.

Power to appoint to the use of such child or children, &c. an appointment to one or more, good. *Id.* 857.

Voluntary bond to pay to and among all such child or children of A, in such parts, &c. as the obligor should, by deed or will, appoint, and for want of appointment, and as to what should be unappointed, to and among all such child or children of A as might survive the obligor. Appointment by will of the whole fund to one of six children, established. *Wollen v. Tanner*, 5 Ves. 218.

An appointment by a father not illusory where he gives other provisions to the object excluded. *Long v. Long*, 5 Ves. 445. See *Spencer v. Spencer*, *id.* 368.

Appointment giving very small shares to some of the objects, set aside as illusory. *Spencer v. Spencer*, *id.* 362.

But the rule as to illusory appointments is not to be applied where a sufficient reason appears upon the face of the appointment, perhaps not between parent and child, if clearly proved. *Id.* 368. See *Long v. Long*, *id.* 445.

Trusts in marriage articles to pay certain funds, the property of the wife, to all and every her child and children, in such parts, &c. as she should by will give, &c. and for want of such gift, &c. to all and every her child and children, part and share alike, and for want of such issue, over. By her will she gave ten guineas, part of the fund, to her eldest son, declaring that he

was otherwise provided for by the will of his uncle; and the remainder she gave to all her other children, naming them, equally, with survivorship in case of the death of any during minority, and before receipt of his, her, or their shares; and in case of the death of her eldest son before he comes to the possession of his uncle's fortune, she gave her second son only ten guineas. The only provision of the eldest son was a remainder in tail after the life estate of his father, who survived his wife. The court was of opinion first, that children illegitimate, being born after elopement, and no access, clearly could not take; secondly, that a share appointed to a child who died in the life of her mother, lapsed; but the case was determined upon the third point, that under the circumstances the appointment of ten guineas was illusory, and, therefore the whole was void, and the fund was distributed among the surviving children and the representative of the deceased child; the interest vesting on the birth, liable to be divested only by appointment. *Fandersee v. Acton*, 4 Ves. 771.

Under a power to appoint to and among several persons, each of the objects must have a part, but a court of law will not enter into the amount of the share appointed. *Id.* 785.

Under a power to appoint among all children, if part is well appointed to some, leaving a share not illusory, which is afterwards appointed so as entirely to exclude one, the last appointment is void. *Wilson v. Piggott*, 2 Ves. J. 354.

Testator, under a power to appoint among children, appointed to the husband of a daughter for life, and if she survived him, to her for life, and having advanced her in marriage, recited that as a reason for giving her a small share; this is not illusory. *Bristow v. Warden*, 2 Ves. J. 336.

Gift to A and his issue, to be divided among them as he thinks fit, the issue have an interest in all events, and A has no authority but as to the proportions; if no appointment, equally. Where to be divided among issue, the proportion must not be illusory. *Hockley v. Maubey*, 1 Ves. J. 150. WILL, C. OF.

Power to appoint in shares, &c. as P should think proper, not exceeding estates tail; he appoints to two of his children, one acre for life, then to fall into the residue of the estate, which he gave to his second son for life, with remainders over. This execution of the power is illusory and bad. *Pocklington v. Rayne*, 1 Bro. C. C. 450.

Devise of all to wife, that she might give her children such fortunes as she should think proper or they deserve, there being five children, and the eldest being provided for, an appointment of a guinea to him and the rest among the other children, was held a good appointment. *Burrell v. Burrell*, Amb. 660. WILL, C. OF.

Power to appoint among children, each must have a part, not illusory nor reversionary; but a particular interest, as for life, may be given to one. Such a power will not extend to grandchildren, nor can a discretion be given to another to appoint. But though that would be void, it would not devolve on the court, which is only where the power is well created, but by accident cannot be executed by the party. *Alexander v. Alexander*, 2 Ves. 460.

Power of appointment by mother may be unequally distributed, but not so as to be illusory, unless there is a great misbehaviour. *Maddison v. Andrew*, 1 Ves. 59.

A father has a power to appoint a certain sum for the advancement of his younger children; he has several children, and devises the whole sum to one of them, reciting that the rest were otherwise provided for by their grandfather. This is not a good appointment. *Menyey v. Walker*, Forres. 72.

If a man gives his wife power to divide his estate amongst his three children, she must do it equally. *Astry v. Astry*, Prec. Chan. 256.

A man gives legacies to his children to be paid at twenty-one or marriage, and if any of them die before twenty-one or marriage, the legacy of such child to be disposed of to one or more of the children then living in such manner as his wife, whom he made executrix, should think fit. One of the children died under age and unmarried; the mother appoints the whole legacy of such child to one of the other children: a good appointment. *Thomas v. Thomas*, 2 Vern. 513.

Where an executrix has a general power to distribute a sum of money amongst children at discretion, an unreasonable or indiscreet disposition may be controlled by a court of equity. *Id. ib.*

A directs his lands shall descend to his three daughters in such shares and proportions as his wife, by deed, shall appoint. She makes a very unequal distribution; whether equity will relieve against it. *Wall v. Thurlborne*, 1 Vern. 355. WILL., C. OF.

Personal estate devised to the wife, upon trust not to dispose thereof, but if for the benefit of her children; she, by will, gives 5s. only to one child; decreed the estate to be divided equally. *Gibson v. Kinven*, 1 Vern. 66.

#### 6. When an Interest is given.

A testator makes a general devise of all his lands in nine parishes; in five of them he had only lands in fee; in three others he had only lands over which he had a power of appointment; in the other he had lands in fee, and also lands over which his power extended: all the lands pass by his will, except the lands in the latter parish, which were subject to his power. *Napier v. Napier*, 1 Sim. 28. WILL., C. OF. WHAT PASSES.

A and his wife, and B and C, having a joint power of appointing certain lands which, in default of appointment, stood limited (subject to a life interest reserved to C in part of them), to A in fee, by lease and release, being a settlement made in contemplation of the marriage of B, granted, bargained, sold, released, conveyed, directed, limited, and appointed the premises to M, to hold the same to him and his heirs, to the old uses, until the marriage, and after the marriage as to certain parts of the lands to the use of A and his wife during the life of the longest liver, to be in bar of her dower; and as to other parts to the use of A for life, and the use of C for life respectively, remainder to the use of M during the lives of A and his wife, and of C respectively, in order to preserve contingent uses, remainder to the use of B and her intended husband, during the life of the longest liver of them, remainder to the use of M, to support contingent uses; remainder to the use of M for a term of 500 years upon certain trusts, remainder to the use of the first and other sons of the marriage successively in tail, remainder to the use of the daughters in tail, remainder to the use of A and his heirs. Held that the release operated not as an appointment under the power, but as a conveyance of the interest; and therefore, that the legal fee did not vest in M. *Wynne v. Griffith*, 1 Russ. 283.

Renewal of a college lease by tenant for life, with a power of appointment in her own name and at her expence, has not the effect of an appointment in her own favour; and therefore, by the death of the appointee in the life of the tenant, there will be a resulting trust by lapse for the representative of the author of the power. *Brookman v. Hales*, 2 Ves. & B. 45. RESULTING TRUST; LEASE, RENEWAL OF.

Husband having power of appointment paramount to right of dower, in default thereof, to himself for life, remainder to his right heirs, if the power could have effect, yet a purchaser taking by a conveyance, adapted to pass the interest in the estate, as a limitation in fee, was held to take in that way, not by way of ap-

pointment, and therefore, subject to dower. *Maunderell v. Maunderell*, 7 Ves. 567. See this case further, 10 Ves. 246. VENDOR & PURCH.; DOWER.

An express estate for life, with a power to dispose by will, does not give an absolute interest, so as to preclude the necessity of executing the power. *Reid v. Shergold*, 10 Ves. 370. WILL., C. OF; ESTATE FOR LIFE; POWER.

A, having both a power and an interest, the estate being conveyed to such uses as he should appoint, and in default of appointment to him in fee, conveys by lease and release, using also words of appointment; deed operates as a conveyance of his interest, not as an execution of his power, especially if the effect of the latter construction will defeat the object. *Cox v. Chamberlain*, 4 Ves. 631.

Testator gave 1000*l.* stock to a married woman for her separate use, and whenever she should die, to be absolutely in her own power to dispose of by will or writing purporting to be her will, to any person or persons, purpose or purposes, she should think proper, but in case of failure of any such disposition or appointment to go over: this is not a power, but an absolute gift, qualified only to exclude the husband, upon the death of his wife; therefore it passed by general words in her will. *Hales v. Margerum*, 3 Ves. 299. WILL., C. OF.

Where person having particular estate, and also a power, makes a disposition containing words both of appointment and conveyance, it shall not operate as an appointment, and also as a conveyance against the intention of the party executing the instrument. *Langley v. Brown*, 2 Atk. 199.

A trust is limited to A, his heirs, and assigns, or to such as he or they may appoint: A devises these lands by a will, attested but by two witnesses; the will void, and shall not operate as an appointment. *Wingstaff v. Wagstaff*, 2 P. W. 258. WILL, EXECUTION OF.

#### 7. When void in Equity.

Devises in trust having the legal estate, with a power of leasing, in possession, until the cestuique trusts attained twenty-one, leases not conformable to the power held void in equity, and not confirmed by acceptance of rent. *Boues v. East London Water-works Comp.*, 1 Jac. 324. LEASE, CONFIRMATION OF.

Payment of a valuable consideration by a person not having the legal estate, and not being an object of the power, cannot set up an invalid appointment in favour of such purchaser. *Daubeny v. Cockburn*, 1 Mer. 638. VENDOR & PURCH.

Secus, where the power is unlimited as to its objects, and the appointment is only impeachable on the ground of its being voluntary. *Id. ib.*

Agreement by one of the objects of a power, to return part in consideration of an appointment in its favour, is a fraud in the appointee as well as in the appointor, both on the other objects of the power, and on the party who is to take in default of appointment. *Id.* 644. FRAUD.

Secus, where the appointee is not privy to the corrupt agreement. *Id. ib.*

Father, tenant for life, with a power to appoint the fee among his sons, in such shares as he pleased; by one deed, upon the coming of age of his eldest son, appoints the fee to him; by a second deed, dated two days after, the son is made to join the father in a mortgage, to secure a debt due by the father; and by a third deed, dated the next day, the son is made tenant for life of the equity of redemption, with remainder to his issue in tail male; reversion in fee to the father, and an additional charge for the younger children of the father, is created. On bill by the son

of the appointee, to be relieved from the additional charge and mortgage, held, first, that the deed so far as it charged the additional sum for younger children, was good, but the limitations void, and the excess corrected; secondly, that the mortgage was a fraud upon the power, the father deriving a benefit to himself, and declared void, the mortgagee having notice of it. *Palmer v. Wheeler*, 2 Ball & B. 18.

Equity will not relieve against a contract entered into by a child, with a parent, for an appointment from him; and a purchaser from the parent, with notice of the fraud, will be affected with it. *Id.* 30. PARENT & CHILD; NOTICE; VEND. & PURCH.

Though a party is not permitted to execute a power for his own benefit, and the objection cannot be waived by a party participating in the benefit as against other interests, the court will not act against the title upon a mere suspicion that a transaction was of that nature, appearing fair both upon the instruments and the abstract, viz. purchase under the execution of a power of appointment by a father, subject to estates for life, in him and his wife, in favour of their son, all three joining and receiving the money; the fair value which is presumed to be received according to their interests in the estate, and the purchaser not bound to see to the application. *McQueen v. Furquhar*, 11 Ves. 467.

The court will not execute a power given by the testator to trustees, to continue his charities, or to give any others they should think fit. *Cox v. Bussett*, 3 Ves. 155. CHARITY.

Power of jointuring executed in favour of a wife, but with an agreement that a wife should only receive a part as an annuity for her own benefit, and that the residue should be applied to the payment of the husband's debts; held a fraud upon the power, and the execution set aside, except so far as related to the annuity, the bill containing a submission to pay it, and only seeking relief against the other objects of the appointment. *Alegu v. Belchier*, 1 Eden, 132. FRAUD.

A, by marriage settlement, is tenant for life, remainder to trustees, to raise 4000*l.* for younger children's portions, as A should appoint, remainder to his first and other sons in tail. A appoints the 4000*l.* amongst his younger children, and particularly 2600*l.* thereof to B, his second son. The eldest son dies six years afterwards, whereby B became eldest son, and entitled to the whole estate after his father's death; and thereupon A makes a new appointment of the 2600*l.* to one of his daughters. Decreed, the last appointment to take place, the first being made to B upon a tacit or implied condition, that he should not become the eldest son. *Chadwick v. Doleman*, 2 Vern. 528.

#### 8. Partial Execution, and at what Time Power may be executed.

A power in a settlement to raise a portion for a younger child at such time as the parent should direct, he directs it to be raised when she is fourteen, and she dying, files his bill for it as her administrator; the portion shall not be raised for the father. *Hinchinbroke v. Seymour*, 1 Bro. C. C. 395. PORTION, WHEN RAISEABLE.

Where there was a joint power to husband and wife, of appointing a sum of money among children, with power, in default thereof, for the survivor to appoint; a partial execution by both of the original power, was held to prevent the execution of the secondary power by the wife who survived. *Simpson v. Paul*, 2 Eden, 34. HUSB. & WIFE.

Power to husband and wife to charge a term in lands, with sum or sums, not exceeding 200*l.*, for their daughters A and B, as the husband and wife should appoint, and in failure of their joint appoint-

ment, as the survivors should appoint, with interest from such time as the term should commence in possession, and not before. The term was not to commence in possession until after the death of the survivor. The husband and wife in execution of the power, direct the 200*l.* to be equally divided between the two daughters, six months after the decease of the father and mother; and if either of them die before payment, or the money become due, then the share of her so dying to be laid out for the benefit of her executors; one of the daughters died after the appointment, and before the time of payment: Held, a good appointment to the daughters themselves, but the appointment to executors is void; but as one of the appointees died before the time of payment, her share sinks into the estate. The joint appointment having appointed the whole, the share of the daughter who died is not subject to any further appointment. *Branch v. Nisbett*, 1 Cox, 13.

A power of appointing a fee may be executed at several times, viz. at one time to pass an estate for life, and the fee at another. *Borey v. Smith*, 1 Vern. 85. 2 Ch. Ca. 124. S. C.

#### 9. Excessive Execution of.

See POWERS, VI.

Appointment void as far as it exceeds the power, viz. to grandchildren under a power to appoint to children. *Butcher and Gooday v. Butcher*, 1 V. & B. 79.

The donee of a power cannot appoint to any persons, not the objects of the power. *Palmer v. Wheeler*, 2 Ball & B. 27.

Excess in the execution of a power, if capable of separation, will be corrected. *Id.* 28.

Marriage articles carried into execution by limiting estates in strict settlement to A and B respectively, with cross remainders between B and the issue of A, with power to A to appoint latter's estates among his children. The will of A referring to the estate, but not to the power, declared a good execution of the power to the extent of limiting estates tail to the children, the excess reformed to effectuate the general intention of the articles. *Dillon v. Dillon*, 1 Ball & B. 77. MARRIAGE ARTICLES.

Excessive appointment under power is void as to excess only; viz. to grandchildren under power to appoint to children. *Butcher v. Butcher*, 9 Ves. 382.

When a power is exceeded in the execution, in order to reject the excess, and let the appointment stand, the court must see distinctly what the person executing the power, had in view, and be satisfied that if he had rightly understood the extent of his power, he would so have executed it. *Hamilton v. Royse*, 2 Scho. & L. 315.

A settlement was made in pursuance of articles previous to the marriage, to convey to the use of the husband for life, remainder to the wife for life; remainder upon trust to convey unto and amongst all or any of the children, in such parts and proportions, &c. as the husband and wife, or the survivor, should by deed or writing, with or without power of revocation, or by will, appoint, and in default of appointment, to the first and other sons in tail male; remainder, subject to trusts that failed, to the heirs of the husband. A joint appointment by deed, subject to a proviso for revocation and re-appointment by the husband and wife, and the survivor, was held well revoked by the wife surviving; and by the same deed, a re-appointment to the daughter and two sons successively for life, with remainders in tail to the grand-children, and the ultimate remainder to the daughter in fee, was held void for the excess beyond the power, viz. the estates to the grandchildren, and the ultimate



limitation upon them to the daughter, and the principle of *cy pres* is not applicable; all beyond the life-estates of the children, therefore, shall go as in default of appointment. *Brudenel v. Elwes*, 7 Ves. 382.

An appointment exceeding the power by a limitation to objects not within the power, is void as to the excess. *Crompe v. Barrow*, 4 Ves. 681.

Father, having power to appoint among children, and purchasing the share of one, cannot by appointment entitle himself to more than the share of that child in default of appointment. *Smith v. Ld. Camel-ford*, 2 Ves. 714.

The doctrine of *cy pres* does not apply to personal estate, therefore, where, under a power to appoint personal estate to children or issue, an appointment is made to a son for life, then among all his children, if none, to him, his executors, &c., the limitation to his children, being void because not retained within the legal bounds, cannot be made good *cy pres*. *Routledge v. Dorril*, 2 Ves. J. 357.

By articles the wife's fortune and an equal sum advanced by the husband were agreed to be settled for the husband for their joint lives; and if he should die first, leaving issue by her, for her for life; after her decease, as to the capital, in such manner as he should appoint; in default of appointment to be divided equally among the issue at twenty-one without maintenance, and survivorship. After marriage in pursuance of the articles an estate purchased with the fund was settled upon the husband for the joint lives of him and his wife, remainder to trustees to preserve, &c., remainder, in case of his death first, without issue, to certain uses, remainder in case of his death first, leaving any child or children, to the wife for life, remainder to all the child or children in such shares as the husband should appoint, for want of appointment equally in tail, with cross remainder, remainder to the heirs of the husband; children only are the objects, and an appointment to a child for life, remainder to his children as he shall appoint, is an excess of power, and the doctrine of *cy pres*, by giving the child an estate tail is not applicable, but the appointment is void for the excess only, and what is ill-appointed goes as in default of appointment. *Bristow v. Warde*, 2 Ves. J. 336. SETTLEMENT, C. OF.

Under a power to devise among children, the testatrix gives to A, one of the children, for life, remainder to trustees to preserve contingent remainders, remainder to first and other sons, &c., remainder to B, another son in the same way; *quare*, whether the excess being void, the power is null, and the heir at law shall take, or the sons should take successive life estates as good under the power, or whether, to maintain the general intent, the sons shall take estates tail? *Griffith v. Harrison*, 3 Bro. C. C. 410.

A power to appoint among children does not extend to grandchildren. The appointment being bad under the power, the party taking benefit of it not obliged to make satisfaction out of the personal estate which he took under the same will. *Robinson v. Hardcastle*, 2 Bro. C. C. 344. GRANDCHILDREN.

Testator having a power of appointing lands to such of his sons, in such shares, and for such estates, and with such limitations over as he should think proper (in default of whose appointment the lands were to go to his first and other sons in tail male successively) appointed them by will to A his eldest son, for life, remainder to the first and other sons in tail male successively; remainder, subject to a charge of 1000*l.* to the testator's daughter, to B and C, his second and third sons, for their lives, as tenants in common, with several remainders in tail to their issue. Per Yelverton C. J., the charge of 1000*l.* is void, and B and C, having several other devises and bequests made to them by the same will, are not bound

to make their election on the testator's death, nor to confirm the charge, when the remainder to them vests in possession. *Stewart v. Henry*, Vern. & Scriv. 49. WILL, ELECTION.

Power may be good and bad in part, and the excess only void where the execution is complete, and the bounds between it and excess clear. *Alexander v. Alexander*, 2 Ves. 644.

Where there has been an excess in the execution of a power, it is void *quoad* the surplus, but good within the limits of the power. *Hervey v. Hervey*, 1 Atk. 569. Vide *Parry v. Brown*, Nels. 87. 2 Ves. 644. *Palmer v. Wheeler*, 2 Ball & B. 27.

Devise to A, the testator's wife, and then to be at her disposal, provided it be to any of his children, gives an estate for life with a power to dispose of the fee. And where such devise with an after-taken husband did by lease and release and fine, convey the premises to a trustee and his heir, to the use of the wife for life without impeachment of waste, remainder to her daughter by her first husband and the heirs of her body, remainder to the son by the first husband and his heirs, this adjudged a good execution of the power. *Tomlinson v. Dighton*, 1 P. W. 149. S. C. Salk. 239. 10 Mod. 31. Com. Rep. 194. WILL, C. OF. ESTATE FOR LIFE.

#### 10. Defective Execution, when supplied.

See also POWER, I. 11.

The defective execution of a power aided in favour of an eldest, against younger children, also provided for; probate held not to be conclusive proof that instruments, so far as they affect real estates, are of a testamentary character. *Hume v. Rundell*, 6 Mad. 331.

Defective execution of power by wife not supplied in favour of husband. *Moodie v. Reid*, 1 Mad. 516. HUSB. & WIFE.

Though equity will, in certain cases, aid a defective execution of a power, the want of execution cannot be supplied, even for creditors. *Holmes v. Coghill*, 12 Ves. 206.

Power of appointment among three persons, executed by a transfer of one third to one under an order on petition, stating, that the person having the power was desirous that the fund might be equally divided; that person dying without any farther execution, the court gave the two remaining thirds respectively to another of the objects, and to the administratrix of the third, who was dead, but had survived the person having the power. *Fortescue v. Gregor*, 5 Ves. 553.

Under a power for raising portions for younger children, an appointment by a charge confined to the particular event of four or more, was not extended by implication from general words in a subsequent part of the deed, providing for the case of no appointment. *Mosley v. Mosley*, 5 Ves. 249.

Where testator refers to a power, but does not legally execute it, but has other estates to which the will can apply, the defect of the execution cannot be supplied, though where he could not make the gift, but by virtue of the power, he shall be supposed to have intended to execute it, and therefore the defect shall be supplied. *Lowson v. Lowson*, 3 Bro. C. C. 272.

A court of equity will not, against the reversioner, reform a lease executed under a power, where it contains covenants not warranted. *Melwin v. Sandham*, 3 Swan. 685. LEASE, REFORMATION OF; JURISDICTION.

Where a power is reserved to be executed by deed, in the presence of three witnesses, it is by marriage settlement executed; but the deed is attested by only

two, this shall be supplied. *Wade v. Paget*, 1 Bro. C. C. 364. For the judgment vide, S. C. 1 Cox, Ch. Ca. 74.

A power to be executed by writing, in the presence of three witnesses, it is executed in consideration of marriage, in the presence of two witnesses only: this defective execution shall be supplied. *Id.* 368.

Defective execution of a power refused to be supplied in favour of a natural son against persons claiming under a subsequent valid execution of it. *Bramhall v. Hall*, 2 Eden, 220. S. C. Ambl. 467. **BASTARD.**

Defective execution of power decreed in favour of valuable consideration. *Wilkie v. Holme*, Dick. 165.

Power to make provision for children by deed, is well executed by will. *Sneed v. Sneed*, Ambl. 64. S. C. Comp. 264. cited.

A wife, in the event of her surviving her husband, and not having younger children, had a power to dispose of 4000*l.* by deed or will, executed in the presence of three witnesses; and this sum was a charge on the real estate of the husband. Before her second marriage, she, by articles executed in the presence of two witnesses only, appointed 2000*l.* out of the 4000*l.* to be for the use of her intended husband, and the remaining 2000*l.* she disposed of by will, but did not execute it in the presence of three witnesses: Held, that the articles were a good appointment of the 2000*l.* for the benefit of her second husband; for though the appointment was inaccurately and informally expressed, yet being executed for a valuable consideration, equity will supply the defect; but the will, under which the 2000*l.* was given, being a voluntary disposition, and not pursuing the power, was held a void appointment, and the 2000*l.* shall sink into the real estate. *Sergison v. Sealy*, 2 Atk. 414. S. C. 9 Mod. 370.

By a son's marriage settlement, lands were settled on father for life, with a power for him to make a jointure of such lands as he thought proper, not exceeding 600*l.* per annum; remainder to the son in tail, remainders over. The father afterwards, on his second marriage, conveys an estate of 900*l.* per annum to trustees, in trust to pay 200*l.* clear as pin-money to intended wife, and if she survive him, to pay her 300*l.* per annum for her jointure. After marriage, by a second deed, he gave her another 300*l.* per annum clear, as a further jointure. By a third deed, as further provision for the wife, he conveyed all the same lands to same trustees, to raise the further sum of 100*l.* for pin-money, and the neat sum of 600*l.* per annum as a provision for her in case she survived him, in bar of all other provisions before made; and he thereby declared that it was the intention of that deed, and of the preceding ones, to secure a jointure to his then wife, not exceeding 600*l.* The son and trustees were decreed to convey a jointure not exceeding 600*l.* per annum, subject to taxes, repairs, &c. *Hervey v. Hervey*, 1 Atk. 561.

Equity will supply the defective execution of a power, as well in the case of younger children and a provision for a wife, as in favour of purchasers or creditors; and where such provisions are intended, their being voluntary is no impediment. It has been said, that a wife or child applying for aid in the defective execution of a power, must be wholly unprovided for: but that is not the right rule, for by the invariable and proper rule, the court considers a husband or father the most competent judge what is a reasonable provision; yet where a wife has not the provision stipulated for her by her jointure, she shall be considered as wholly unprovided for, and according to the rules of equity, shall be aided in carrying a defective provision into execution. *Id.* 563. S. C. 9 Mod. 225.

Imperfect execution of power to jointure by articles

completed by words of request in a codicil. *Vernon v. Vernon*, Ambl. 3.

Equity aids a defective execution of a power, if for a valuable consideration, and this against a remainderman, or one not claiming under the power. *Cotter v. Layer*, 2 P. W. 623.

Where there is a power to declare an use by writing attested by three witnesses, and such use is declared by a writing only attested by two, if for a valuable consideration, equity will help it. *Id. ib.*

Husband has a power to make a jointure to his wife by deed; he does it by will, and she has no other provision, equity will make this good. *Tollet v. Tollet*, 2 P. W. 489.

A tenant for life, with power to grant leases for twenty-one years, or three lives, agrees to grant a lease for thirty-one years: held, that he is only bound to grant such a lease as is warranted by the power. *Byrne v. Acton*, 1 Bro. P. C. 186. **SPEC. PERF.; TENANT FOR LIFE.**

If a man by will empowers his wife to dispose of his personal estate, with the consent of the trustees, the wife, without such consent, cannot by her will devise it; and therefore the husband, as to that part, died intestate. *Symson v. Hornsby*, Prec. Chan. 452. **WILL, C. OF.**

A, tenant for life, remainder to his first and other sons in tail; remainder to B for life; remainder to his first and other sons in tail; remainder to C, with a power to B, after A's death, without issue, to make a jointure. B married in the life of A, and before marriage covenanted to make a jointure, and to execute his power when in possession. A died without issue, and B survived, but died without making a jointure. B's widow brought a bill against C, to have a jointure made, because B, surviving A, might have executed his power, and might have covenanted so to do: decreed. *Alford v. Alford*, Gilb. Eq. Rep. 167. **JOINTURE.**

Defective execution of power aided. *Gooding v. Gooding*, 1 Eq. Ab. 342.

Tenant in tail, with power to make a jointure, dies before execution, without issue; remainderman makes a jointure to his wife; administratrix of his first wife brings a bill for an account of the profits agreed to be settled: bill dismissed. *Elliot v. Hele*, 1 Vern. 406.

If a man makes a settlement of his estate on his eldest son in tail, with a power by deed or will under seal, to charge the lands with any sum not exceeding 500*l.* and he prepares a deed and gets it engrossed, by which he appoints the 500*l.* to his younger children, and dies before it is signed or sealed; yet this is a good execution of the power, the substance being performed. *Smith v. Ashton*, 1 Ch. Ca. 264. **Ca. Temp. Finch. 273. 1 Freem. 308. 3 Keb. 551. 3 Salk. 277. S. C. mentioned as a will.**

## 11. Non-Execution.

See also **POWER**, I. 10.

Powers must be expressed, not implied, and are construed strictly; though defective executions are in certain cases supplied in equity, the want of execution cannot. *Hixon v. Oliver*, 13 Ves. 114.

Decree for raising money under deed of appointment, though the only copy produced appeared not executed, upon recitals of it in two settlements as a subsisting effectual deed, and evidence from books of a deceased solicitor of charges for the preparation and execution of it. *Skipwith v. Shirley*, 11 Ves. 64. **EVIDENCE.**

Non-execution of a power is where nothing is done; defective execution is where there has been an inten-

tion to execute, and that intention sufficiently declared; but the act declaring the intention is not an execution in the form prescribed. *Shannon v. Bradstreet*, 1 Scho. & L. 63.

The court cannot execute a mere power, but will execute a trust which fails by the death of the trustee, or accident. *Brown v. Higgs*, 8 Ves. 570. JURISDICTION; TRUST.

Power, which by the will the party is required to execute as a duty, he is a trustee for the exercise of it, and has no discretion whether he will exercise it or not. The court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances, to disappoint the interest of those for whose benefit he is to execute it. *Id.* 574. *Id. ib.*

The want of execution of power cannot be supplied, though a defective execution may. *Holmes v. Coghill*, 7 Ves. 499.

Power unexecuted is not assets to pay debts. *Id. ib.* ASSETS.

Testator devised a freehold estate to his wife for her life, and then directed that she should dispose of the same amongst the testator's children by her at her decease, as she should think proper; the wife made no disposition of the estate: the children took no interest in the estate under the will. *Crossling v. Crossling*, 2 Cox, 396. WILL, C. OF, WHAT INTEREST.

Jewels, &c. to A for life, then to such grand-children as she should appoint; in default of appointment they shall go equally. *Witts v. Boddington*, 3 Bro. C. C. 95. WILL, C. OF.

Where a person has an absolute and general power of appointing a fund, as well in his lifetime as at his death, and there is no gift over, yet if no appointment be made, his administrator cannot claim the fund, and even creditors will not be entitled to the benefit of it without some step taken towards an appointment; though where any such appointment be made, the court will arrest the fund *in transitu* for the benefit of creditors. *Harrington v. Hart*, 1 Cox, 131. ASSETS.

2500*l.* is provided by settlement for the issue of the marriage, in such proportion as the husband should appoint; he dies, leaving a daughter only, and makes no appointment: she shall have the 2500*l.* *Davy v. Hooper*, 2 Vern. 665. Affirmed, 6 Bro. P. C. 51. SETTLE. C. OF.

A, by will, devises his lands to trustees to sell, and to dispose of the money as he by writing should appoint, and for want of appointment to his four nephews; and by writing appoints his trustees to pay several sums to several persons, but not near the value of lands: decreed, the surplus to the heir, and not to the nephews, as an interest resulting, and not disposed of. *City of London v. Garraway*, 2 Vern. 571. WILL, C. OF; HEIR AT LAW; RESULTING TRUST; LANDS DEVISED TO BE SOLD.

Upon settlement of lands to be sold in trust for several purposes, the residue is given to B and his heirs, reserving only 200*l.* to appointee of settlor; settlor died without appointing: the 200*l.* shall go to his heir, and not to B, or his assignees. *Anon.* 1 Com. 345. SETTLE. C. OF; HEIR; TRUST, RESULTING.

## II. WHEN THEY SURVIVE.

Power to the survivor of husband and wife to appoint among children, not well executed by a deed by both. *M'Adam v. Logan*, 3 Bro. C. C. 310.

Where feme covert conveys stock to trustees to use of intended husband and self for life, with power to dispose of part, this power survives to wife.

*Homer v. Bendloe*, 9 Mod. 335. HUSB. & WIFE; SURVIVORSHIP.

A, on his marriage, conveys his land to a trustee to the use of himself for life, remainder to his wife for life, remainder to the heirs of their two bodies, remainder to A in fee. Proviso, that in default of issue of the marriage, the trustees shall convey to such uses as the survivor should appoint. Although the husband devises the land, and dies first without issue, yet the wife has a good power of disposing of the estate by her appointment. *Bp. Oton v. Leighton*, 2 Vern. 376. MARRIAGE SETTLE. C. OF; HUSB. & WIFE.

## III. WHEN THEY TEND TO PERPETUITY.

Settlement on husband and wife for lives, remainder to sons in tail male, remainder to daughters in tail, remainder to survivor of husband or wife in fee, with power to wife if husband survived, and all the children of marriage died without issue, to charge estate with 5000*l.*: Held, that power is too remote and void. *Bristow v. Boothby*, 2 S. & S. 465. SETTLEMENT, C. OF.

Personal estate settled on marriage for the husband for life, then for the wife for life, then to and among all and every the children and grandchildren, or issue in such shares, under such restrictions, at such times and in such manner, as they or the survivor should appoint by deed or deeds, or by will, for want of appointment, to all and every the children and grandchildren, or issue living at the decease of the survivor, equally payable at twenty-one, or marriage; if but one, to that one; provided that in case of no appointment the issue of any children dead should not have a greater share than their parents would have had; issue only are within the power, but in any degree; but an appointment to any issue not living must be restrained to twenty-one years after lives in being at the creation of the power, otherwise it is void, even as to such as come *in esse* within those limits; but on marriage of a daughter, interests may be given to her children generally, and to the husband. What is ill appointed, goes as in default of appointment; but children of a living parent cannot take under the proviso. *Routledge v. Dorrit*, 2 Ves. 356. SETTLE. EXECUTION OF.

Issue will extend to any remote degree, as a description of objects of the power of A to distribute among them as he thinks fit; but they must all be in existence during his life. *Hockley v. Mawbey*, 1 Ves. J. 150. WILL, C. OF.

Power of alterations of estates tail as they were to come *in esse* into tenancies for life, held to be void. *Heath v. Heath*, 2 Eden, 330.

## IV. POWERS OF LEASING.

Power reserved upon marriage settlement to tenants for life to grant or renew leases for lives, provided that a right of re-entry is reserved upon such leases for non-payment of rent, is well executed by lease for lives, providing a re-entry in case the rent remains in arrear fifteen days, and there is no sufficient distress on premises. *Smith v. Ed. Jersey*, 3 Bligh. 290. LEASE.

Tenant for life, with power to grant leases by deed, does not execute power by a written agreement for lease. *Symons v. Symons*, 6 Mad. 207. LEASE; AGREEMENT.

Power of leasing in trustees of a charity controuled for the benefit of the charity. *Exp. Berkhamstead Free School*, 2 V. & B. 138. CHARITY.

Tenant for life, with a leasing power, enters into

an agreement by article to make a lease pursuant to the power. This agreement shall bind the remainderman. *Shannon v. Bradstreet*, 1 Scho. & L. 52. TEN. FOR LIFE & REMAINDER-MAN; COVT. WHO BOUND BY.

G, tenant for life in settlement, is thereby empowered to make leases for lives of lands in Ireland, at the best rent, without fine, and with consent of trustees to raise any sum of money. The trustees, in pursuance of powers, consent that G should, by mortgaging all or any part of lands, or in any other manner he should think fit, raise any sum of money not exceeding 5000*l.* G, being in distress, and involved in litigation, in consideration of 300*l.* and rent, grants to V, his solicitor, part of the lands in settlement upon a lease for lives. The grant and receipt, expressing that 300*l.* was raised under a power and consent as part of the 5000*l.*, were duly registered. The rent and premium, calculated at 6 per cent., were considerably short of the annual value. On appeal, held a good execution of power, but void as fraudulently obtained by V. *Ward v. Hartpole*, 3 Bligh. 470. FRAUD.

Tenant for life of estate, on which were mines opened, with power to let leases in possession for twenty-one years, reserving best rent, leases the mines, opened and unopened, for twenty-six years, without reference to the power, and before the expiration of a former lease, reserving ore as rent to him, his heirs and assigns: 1st, The former lease shall be presumed surrendered: 2nd, The lease shall bind the remainderman for twenty-one years: 3rd, Ore, is quasi rent of mines: 4th, Evidence let in to prove the lease engrossed and executed after it bore date: 5th, The rent reserved not being a gross sum for all the mines, but separate on each, the power is well executed as to the open mines, though not of mines unopened. *Campbell v. Leach*, Amb. 740.

In a settlement, a power is reserved to tenant for life to make leases of all lands anciently demised, reserving the ancient rents, and of the other lands, reserving the best improved rents. Tenant for life being ill, and not having the counterparts of the old leases, makes a general lease to his sister of all the lands, paying for the lands that had been let, the ancient and accustomed rents, and for the lands not usually let, the full and improved rents and value thereof. Lease adjudged void by the Lord Keeper and Lord C. J. Trevor: *contra*, the opinion of the Lord C. J. Holt. *Orbey v. Mohun*, 2 Vern. 531. Prec. Ch. 257. Gilb. Eq. Rep. 45. S. C. This affd. 6 Bro. P. C. 145.

Where one has power to make leases for ten years, and he makes one for twenty, it is a good lease for ten years. *Pawcay v. Bowen*, 1 Ch. Ca. 23. 3 Ch. Rep. 11.

If power be reserved to make leases by covenant without transmutation of possession, chancery will not help. *Cary*, 29.

#### V. WHAT ARE CONSTRUED USUAL POWERS.

Will directed settlement to be made of real estate on A and his first and other sons in tail, with powers of jointuring, leasing, sale, and exchange, and all other clauses, powers, and provisos, usually inserted in settlements of same kind. Held these last words did not give power to charge with portions. *Higginson v. Barnely*, 2 N. & S. 516. PORTIONS; WILL, C. OF.

A will, directing a settlement of estates, and that there should be inserted all proper power for making leases and otherwise, according to circumstances, to and for the tenants for life, to be exercised by them when qualified, and when not by the trustees, does not au-

thorise the insertion of a power of sale and exchange. *Horne v. Barton*, 1 Jac. 437. WILL, C. OF; SETTLEMENT.

Articles for a settlement on ward of court, with a power of leasing for twenty-one years, and other usual powers, &c., do not authorise the introduction of a power of granting building leases for long terms. *Pearse v. Bown*, 1 Jac. 158. SETTLEMENT, MARRIAGE ARTICLES, C. OF.

A will, directing a settlement of estates, and that there should be inserted all proper powers for making leases, and otherwise according to circumstances, for the tenants for life, to be exercised by them when qualified, and when not by the trustees, does not authorise the insertion of a power of sale and exchange to the trustees, to be exercised with the consent of the tenant for life. Whether the will authorises the introduction of a power of sale and exchange of any description? *Brewster v. Angell*, 1 Jac. & W. 625. WILL, C. OF.

#### VI. POWERS TO APPOINT TO CHILDREN.

See also POWER, I. 9.

Power to appoint amongst testator's present or future grand-children, or their respective issue, does not authorise the donee to exclude the children of a deceased grand-child, who were living at the donee's death. *Cyrilwite v. Robinson*, 2 Sim. 43.

Power in will to J, to appoint "to use of such child or children, and for such estate, and in such parts, and in such manner and form, as the said J should, by deed or will, limit or appoint, or give or devise; and in default of such appointment, to the children equally, as tenants in common." J originally appointed the trust estate to the grandchild of testator absolutely in fee; but by subsequent deed, and pursuant to an agreement made prior to the execution of the power, a term of two hundred years was created and vested in trustees, to provide for the costs of the appointee in the original suit, and the costs of the parties to that instrument in another suit to be instituted by them in the name of the appointee, and for his benefit, and to raise and pay annuities to the other objects of the power; and, subject to the term and its trusts, the estate was re-settled to the use of the appointee for life, remainder in fee to his children; and if no son should attain twenty-one, or no daughter attain that age, or marriage, then to appointee in fee. Held a good appointment. *Tucker v. Sanger*, 1 M'Clel. 439. S. C. 13 Price, 607.

A power to appoint the proportions in which definite objects are to take tacitly includes a gift to them in default of appointment. *Kennedy v. Kingston*, 2 J. & W. 434.

Devise to testator's widow for life, to be by her divided amongst such of testator's children and their issue as should be surviving at her death. The power well executed by a will, appointing a share to each of the surviving children of the testator, or, in case of their deaths, to their children respectively, and another share to the children of a deceased child. *Exp. Williams*, 1 Jac. & W. 89.

Power of appointment in a marriage settlement, held to comprehend, as its objects, all the children of the marriage, and not to be confined to such of the children only as should be living at the death of the survivor of the parents. *Hougrave v. Cartier*, Coop. 66. S. C. 3 Ves. & B. 79.

Under power to appoint amongst children, interests may be given to grandchildren, by way of settlement on their mother, with her consent and her husband's. *White v. St. Barbe*, 1 V. & B. 399.

Appointment to a deceased child, or its representatives, void. *Butcher and Gooday v. Butcher*, 1 V. & B. 91.

The old practice of executing a power of appointment after the death of one of the objects, by giving part to the survivors, and letting the rest go, as in default of appointment among all, incorrect. *Id. ib.*

A father, having a power of appointing among his children, cannot, from the execution of it, derive to himself a benefit. *Palmer v. Wheeler*, 1 Ball & B. 29.

Bequest to such of the children of A as B shall, by will, direct, and, in default of such direction, among the children, share and share alike. B's disposition, by will, in favour of the children living at her death, established against the claim of one born afterwards, under the general words. *Paul v. Compton*, 8 Ves. 375. WILL, C. OF, WHO TAKE.

Under marriage articles, 15,000l. was vested in trustees on trust, together with 5000l. covenanted by the husband to be paid, to be laid out in land, to be settled upon the husband for life, remainder to the wife for life, remainder to the use of such child and children, in such shares, for such estates, and subject to such powers, limitations, and provisions, as the husband and wife, or the survivor, should appoint; in default of appointment, to the children in tail; in default of issue, to the husband in fee. The husband and wife joined in a direction to the trustees, reciting their resolution to invest the trust fund in an estate lately purchased by the husband for 16,300l., and directing them to deliver the said stock, &c., to him, at the price they were at on the day of the purchase, which was done. The wife died. There were two daughters. The father, by will reciting the purchase, and that he had not conveyed it to the uses of the settlement, and that it was not his intention that the said purchase should be an investment of the trust fund, but that fund, with its increase, should be taken out of his personal estate, gave 10,000l. part of the trust fund, in trust to be laid out in land, to be conveyed to one daughter for life, for her separate use, remainder to her children in tail; remainder to the other daughter in fee, for whom he also appointed the residue of the fund, but revoked that by codicil, reciting a portion given on her marriage. Held, 1st, That grandchildren are not objects of the power, but the excess only would be void: 2ndly, The fund, with its increase, was vested in the purchase: 3rdly, There was no appointment of the estate, or money due on the covenant: 4thly, The remainders, in default of appointment, are vested subject to be devested by appointment, and will take effect as to what is ill appointed or unappointed: 5thly, The share of the daughter, to whom the portion was advanced on marriage, was thereby satisfied. *Smith v. Ltd. Camelford*, 2 Ves. J. 698. See this case, nom. *Pitt v. Jackson*, 2 Bro. C. C. 51. SETTLEMENT, MARRIAGE ARTICLES, C. OF.

Testator appoints to grandchildren, under a power to appoint to children a fund, to go in default of appointment, equally: the appointment being bad, the children, having legacies, must elect. *Whistler v. Webster*, 2 Ves. J. 366. WILL; ELECTION.

Power to divide a fund among all and every the children, to be vested at twenty-one; and in default, or part execution, the whole, or part unappointed, to go to all. There were two children, a son and a daughter; a partial provision was made for the son, who died unmarried, and without issue. A subsequent appointment of the whole residue to the daughter is a good execution of the power. *Boyle v. Ep. of Peterborough*, 3 Bro. P. C. 243. S. C. 1 Ves. J. 299.

Power to appoint among nephews and nieces, does not extend to great nephews, &c.; and if part be ap-

pointed, not pursuant to the power, the money so appointed lapses into, and passes under, the appointment of the residue which was properly appointed. *Falkner v. Buttler*, Ambl. 614.

By marriage settlement, 1500l. was provided for younger children, in such shares as the parents should appoint; in default of appointment, to all the children, after the death of the wife. The parents afterwards made an appointment, excluding one child: this deed vests the portions in the children born or to be born, except the one excluded. *Mayhew v. Middleditch*, 1 Bro. C. C. 162. MARRIAGE SETTLEMENT, C. OF; INTEREST VESTED.

Execution of a power of appointment to children held good, though it extended to the issue of one of them, under the special circumstances of the case. *Langston v. Blackmore*, Ambl. 289. See *Tucker v. Sanger*, 1 M'Clel. 449. S. C. 13 Price, 609. PARENT & CHILD.

A father, having a power of appointment amongst children, cannot take any benefit himself, but must appoint to a child or children, and cannot give any interest to a stranger: but if a further advantage is given to the child than he could have under the power, and the father sells part of his own interest, the court will not weigh the consideration. *Id. ib.*

A power to make a provision for younger children by deed was executed by will, and held good. *Sneed v. Sneed*, Ambl. 64. *Tyllet v. Tollet*, 2 P. W. 489. *Smith v. Ashton*, 1 Ch. Ca. 264.

Power to charge lands for portions for younger children living at the father's death: a child in ventre sa mere, is a child within the power. *Beale v. Beale*, 1 P. W. 246. INFANT IN VENTRE SA MERE.

## VII. POWER OF SALE.

Testator directs his real and personal property to be sold and divided. Held, that executors have an implied power to sell real estate. *Tylden v. Hyde*, 2 S. & S. 238. WILL, C. OF.

Where articles stipulate for a division of the partnership property at the end of the partnership, a sale is intended. *Rigden v. Pierce*, 6 Mad. 353. DEED, C. OF.

Devise to testator's wife, she paying his debts and 15l. to A B, if so much can be spared, and rest of estate to go to A B, after her death, gives her the fee and power of sale. *Dolton v. Heuven*, 6 Mad. 9. DEVISE; WILL, C. OF; EST. FER-SIMPLE.

Power of sale to be exercised with consent of three trustees, their heirs, and assigns, and the trustees or the survivor, his executors or administrators, to give give receipts. A new trustee is appointed, in the place of one who retires; another trustee dies. Whether the power can be exercised with the consent of the continuing and the new trustee: *Qu?* *Hall v. Dewes*, 1 Jac. 189.

Injunction not granted to restrain mortgagee from selling under power in mortgage deed, otherwise where there is a trustee for sale, and he proceeds precipitately and without notice to both parties. *Anon.* 6 Mad. 10. INJUNCT.; MORTGAGE;

Where estate is devised in trust for two daughters for life, with remainder in each moiety for their children at twenty-one, and a power of sale is given to trustees; the power of sale subsists, though one daughter is dead and her children have attained twenty-one. *Trouer v. Knightley*, 6 Mad. 136. TRUST.

Where tenant for life is directed to renew, with power to raise fine by mortgage, and court directs fine to be raised by sale or mortgage; if money cannot be raised on mortgage, parties cannot be compelled to insure life of *cestuique vie* for better security of mort-

gage, but must sell. *Grantley v. Garthwaite*, 6 Mad. 96. ESTATE FOR LIFE; CHARGE; INSURANCE.

Power of sale, in the event of two of testators children disapproving of the manner of managing his lands and houses, does not arise upon their notifying their opinion, that the executors are inadequate to the management. *Semble. Patton v. Randall*, 1 Jac. & W. 189.

Direction for the sale, in a given event, of an estate devised by the will, without expressing by whom it was to be sold, does not give a power of sale to the executors by implication. *Id. ib.* EXECUTOR; WILL, C. OF.

A power of sale not expressly given to any one, is not to be implied to the executors, because the devisees of the estate are minors. *Id. ib.*

Power given to trustees to sell land and divide produce amongst the *cestuique* trusts, who were infants, enables trustees alone to give effectual receipts to purchasers. *Sowarby v. Lucy*, 4 Mad. 142. TRUSTEES.

Who is to execute power of sale of real estate, is implied to be in him through whose hands the fund is to pass. *Benthum v. Wiltshire*, 4 Mad. 44. WILL, C. OF.

Power of sale given to three trustees, held not to be well executed by two surviving trustees. *Townsend v. Wilson*, 3 Mad. 261.

A testator having by his will, devised his freehold and copyhold estates in trust for his son in strict settlement, with remainder to his nephew; and having given by his first codicil, a special power of sale over a part of his estates, to be exercised at the request of his son, in favour of his nephew; and, by his second codicil, a general power of sale over "all or any part of his estates," to be exercised at the discretion of his trustees; the conveyance by the trustees must contain both the particular and the general power of sale. *Green v. Wigglesworth*, 1 Swan. 234. WILL, C. OF; CONVEYANCE.

Testator devises to A and B, (whom he appoints his executors,) upon trust, to sell for such purposes as he shall hereafter appoint, and then directs his debts to be paid by his executors. Under this devise, A and B are authorized to sell for payment of debts. *Burke v. De. Devonshire*, 3 Mer. 310.

Where at time of deposit by way of equitable mortgage, power of sale was given by agreement to mortgagee, on note being given to repay the money secured, mortgagee cannot make a valid assignment of premises in event of bankruptcy of party pledging, without notice to and concurrence of assignees of bankrupt in the conveyance. *Hawkins v. Ramshotton*, 1 Price, 138. BANKRY. ASSIGNEES; EQUITABLE MORTGAGE; TITLE.

Purchases held not a substitution for estates sold under a power in a settlement, to sell and invest the money in estates to be settled to the same uses, there being no original trust, subsequent agreement, or representation relied on. *Denton v. Davies*, 18 Ves. 499.

Leasehold estates bequeathed in trust, to pay the rents and profits to the persons for the time being entitled under the limitations of real estate devised in strict settlement, with power to trustees at any time, with consent of the persons so entitled, or if minors, at their own discretion, to sell and invest the produce in real estate to the same uses. The leasehold estates vest absolutely in the tenant in tail upon his birth, and the power is void. *Ware v. Polhill*, 11 Ves. 257. WILL, C. OF; INTEREST VESTED.

Contract by trustees under power of sale, though by subsequent events it cannot be executed under the power, shall be made good in equity by the effect of the interest acquired on the estate, bound by the con-

tract. *Mortlock v. Buller*, 10 Ves. 315. AFFID. 2 DOW, Rep. 518. TRUSTEES; CONTRACT.

Trustees to pay debts, may fairly raise by sale or mortgage, without waiting for a decree. *El. Bath v. El. Bradford*, 2 Ves. 590. TRUST TO PAY DEBTS.

Devise of "rents, profits, and produce," of W. I. stock, to be consigned to trustees and applied by them in disencumbering an estate in Scotland of debts, and also in payment of other debts, funeral expences, and legacies. Held on rehearing, that such charges could only be paid out of the annual perception of rents and profits, and that part of the former decree, which had directed a sale, was reserved. *Conyngham v. Conyngham*, 1 Ves. 522. WILL, C. OF.

A sale directed on the words "rents and profits alone," though generally contrary to testator's intent in aid of a creditor, on the ground of law, that in a will those words meant and passed the land itself; another construction however, as to legacies, upon the addition of the words "as the rents and profits, &c. should advance the money." *Baines v. Dixon*, 1 Ves. 41. WILL, C. OF.

Devise in trust to sell, and a charge to pay debts, give equally a power of sale. *Elliot v. Merriman*, 2 Atk. 43. S. C. Barn. 78. POWER, C. OF.

A proviso in the will of R, that if his personal estate, and house, and lands at W. should not be sufficient to pay his debts, then his executors to raise the the same out of the copyhold premises, enables the trustees, if the rents are not sufficient, to sell the copyhold lands to satisfy the testator's intention of paying his debts. *Buteman v. Buteman*, 1 Atk. 421. WILL, C. OF.

A devises his real and personal estate for payment of debts. The personal estate being not sufficient, the executors may sell the real estate, although no directions are given in the will as to who shall sell, and the money arising from the sale is legal assets in the hands of the executors. *Blatch v. Wilder*, 1 Atk. 420. WILL, C. OF; ASSETS LEGAL.

The words, "to be raised by rents and profits," will imply a power to sell. *Green v. Belchier*, 1 Atk. 506. *Okeken v. Okeken*, 1 Atk. 551., and notes.

Mortgagee of stock cannot sell it. *Harrison v. Franks*, 2 Eq. Ab. 725. MORTGAGE OF STOCK.

Trust of a term to raise portions out of the rents and profits, to be paid as soon as conveniently may be. By virtue of the word "profits," trustees may sell or mortgage; *scus*, it said "annual profits." *Trufford v. Ashton*, 1 P. W. 415.

Where there is a trust for raising portions out of rents and profits, the lands may be sold. *Sheldon v. Dormer*, 2 Vern. 310. TRUST TO RAISE PORTIONS.

A devises lands to B in tail, remainder to C, and gives his executors power to raise out of his estate 500*l.* for his next of kin, and desires him to see his debts paid. This gives the executor a power to sell the lands to pay his debts. *Wareham v. Brown*, 2 Vern. 154. WILL, C. OF.

Lands are settled on marriage upon condition if there should be a daughter, the persons in remainder should pay her 2000*l.* at sixteen, with power for the daughter, in case of non-payment, to distrain for the 2000*l.* and damages. Though no power to sell, yet a sale decreed for raising the portion. *Wharton v. Wharton*, 2 Vern. 1. SETTLEMENT, C. OF; PORTIONS, HOW RAISED.

A, the *cestuique* trust of lands in L., devises several legacies, "all which before mentioned legacies, not limited to a continued payment, my will is, shall be paid within a year, if my lands in N. can be sold," and gives residue, after debts and legacies paid, to defendant her executor. Held, executors had power to sell. *Elton v. Harrison*, 2 Swan. 276. EXORS.

If trustees are empowered to pay portions at fixed days out of the rents and profits of lands, and they

are inadequate, the trustees may sell the lands. *Backhouse v. Middleton*, 1 Ch. Ca. 175. TRUST.

Where trustees have a power of selling a real estate, or keeping it in land at their option, it will be subject to the same trust, as the personal estate is applied to, whether converted into money or not. *Cook v. Duckenfield*, 2 Atk. 563. ASSETS.

Whosoever takes under a power, takes from the grantor, and not from the power itself. *Id.* 565.

A man, by empowering other persons to dispose of his estate, disinherits his heir as much as by his own actual disposition. *Id.* 567. RESERVING TRUST.

Where testator says, "I will my ~~heir~~ shall sell the land," without mentioning for what purpose, he is not obliged to sell, but if he appoints his executor to sell, it is turned into personal assets, and leaves no resulting trust in the heir. S. C. *Id.*

#### VIII. POWER OF REVOCATION.

Settlement of two estates in remainder on W for life, with remainder to his sons in strict settlement, and remainder over to M with power to tenants for life in possession to charge the estates with a jointure of 400*l.*, and power to revoke the uses of the settlement as to one of the estates, and to appoint new uses. By a subsequent deed the settlor exercises the power of revocation as to the remainder to M, and in lieu thereof appoints that estate to S, and repeats several of the powers contained in the first settlement, and gave power to W and S to charge the estate with 400*l.* jointure; W, by separate deeds, executes both powers of jointure: Held, on bill by his widow for both jointures, that W had no new power to jointure under the second settlement. *Wigzell v. Smith*, 1 S. & S. 321. SETTLEMENT, C. OF.

Power given by will and codicil to sell to certain persons at a fixed price, revoked by a subsequent codicil devising the premises to trustees to be sold for the payment of debts, and subject thereto upon the limitations of the will. *Bridges v. Rier*, 1 Jac. & W. 74.

Whether power in a will to sell several estates to certain persons at a fixed price is entirely revoked by a codicil, devising one of the estates to different uses? *Quare. Id. ib.*

Deed executed according to power, containing no clause for power to revoke it, cannot be revoked, though original power gave such clause. *Worrall v. Jacob*, 3 Mer. 256.

Execution of power by will is revoked by subsequent conveyance upon a sale by the tenant for life having obtained the legal estate; and that not being an execution within the interest of the power, the estate passed under a general residuary devise against the purchaser. *Reid v. Shergold*, 10 Ves. 370. POWER, EXECUTION OF.

Testatrix gave a fund, over which she had a power to appoint, to trustees in trust for her residuary legatee after named, and gave general residue to A. By codicil she revoked the bequest of the residue to A, and gave it to A and B; A held entitled solely to fund under appointment. *Roach v. Haynes*, 6 Ves. 153. affirmed, 8 Ves. 584. WILL, C. OF.

Charge well created by settlement, though for volunteer, not revoked by general revocation of the uses under a power for the mere purpose of partition of joint estate and resettling to the same uses, the separate part to be taken on partition. *El. Uxbridge v. Bayly*, 1 Ves. J. 449. 4 Bro. C. C. 18.

A partial appointment by will under a power is revocable by a subsequent appointment by deed, though no power of revocation is reserved by the will, or the instrument which created the power. *Liste v. Lisle*, 1 Bro. C. C. 533.

A papist, having a power of revocation under a

settlement made prior to the Irish popery acts, executes that power after the acts passed: Held, that the revocation was good. *French v. Caddell*, 3 Bro. P. C. 266. PAPIST.

Power without revocation reserved, once executed, is not to be revoked and executed anew. *Ld. Teynham v. Webb*, 2 Ves. 211.

Power of revocation and to appoint new uses; express revocation must be reserved, or it is executed. *Dk. Marlborough v. Td. Godolphin*, 2 Ves. 76.

Where person had power of appointment, and at the end of the settlement it was declared that every appointment made by her by virtue of the power in the deed, might from time to time be revoked and a new appointment made. She made an appointment without reserving a power of revocation, and then executed another appointment. Lord Hardwick inclined to think both powers might be executed once, as they seemed to be distinct and separate powers. *Langleigh v. Brown*, 2 Atk. 199.

General power of revocation in preamble of deed may be abridged by special power in operating part of it. *Fitzgerald v. Fauconberg*, Fitzgib. 214. DEED, C. OF.

Where owner of estate in voluntary deed reserves power to himself, it is to be construed more favourably than power reserved to a stranger. *Id. ib.* 220.

One makes a settlement with power by deed to revoke it, and by the same deed, or any other, from time to time limit new uses; he revokes the settlement and limits new uses, but reserves no further power to himself; he cannot by virtue of the first power limit any other uses. *Hele v. Bond*, Prec. Chan. 474. SETTLEMENT, C. OF.

A proviso in a settlement if the wife survive her husband, they not having issue between them, then she may revoke the settlement; husband dies leaving a son who dies in the life of his mother, she may revoke the settlement. *Molt v. Barlen*, 2 Vern. 651. Pre. Ch. 293. S. C. SETTLEMENT, C. OF.

A person having only an authority to execute, cannot annex a power of revocation when he executes it. *Hall v. Thurboine*, 1 Vern. 355.

Mortgage in fee is a revocation *pro tanto* only of a settlement, with power of revocation. *Thorne v. Thorne*, 1 Vern. 182. MORTGAGE.

Power of new limitation when incident to power of revocation, though not expressly reserved. *Witham v. Bland*, 3 Swan. 277. CONVEYANCE.

#### IX. LIMITATIONS IN DEFAULT OF APPOINTMENT.

Under a general power of appointment among all the children by deed or will from time to time, &c., in default of appointment, equally at twenty-one, &c., the death of one above that age does not prevent an appointment to the survivors. *Butcher and Gooday v. Butcher*, 1 V. & B. 79.

Power to appoint to or among one or more younger children; in default of appointment, equally. One of two objects being removed by effect of express satisfaction by way of advancement, the other takes the whole, as in the case of death, by analogy to customs of York and London. *Folkes v. Western*, 9 Ves. 456.

Settlement of the wife's estate to such uses as the husband and wife or the survivor should appoint by deed or will with three witnesses, in default thereof, to the heirs of the husband; the wife surviving, made a disposition by her will to a charity, and therefore void: Decreed to the heir of the husband. *Att. Gen. v. Ward*, 3 Ves. 327. SETTLEMENT, C. OF.

Money settled in trust, to be paid according to the appointment of A, and in default thereof, to his legal representatives, according to the course of adminis-

tration. A, by will, in pursuance of the power, appoints to his legal representatives, according to the course of administration, and makes a residuary legatee, whom he appoints one of his executors. Upon the will, the next of kin are entitled. *Jenning v. Gallimore*, 3 Ves. 146.

4000*l.* settled on marriage in trust after the decease of the husband and wife, to pay among all and every the child and children, other than an eldest or only son, at such time and in such proportion as he or she or the survivor should appoint by deed or will, for want of appointment, among such child and children, other than, &c., equally to be divided, if but one, to that one, payable at twenty-one or marriage, or as soon after as the life interest should drop; the shares of any dying before, payable in the 4000*l.*, or so much as should not be appointed, to go to the survivors at the same time. There were four children; the marriage settlement of one recited, that she was entitled to 1000*l.*, part of this fund; one-fourth of it was appointed to another on his marriage; and to a third, 1000*l.* as her share of that portion; the fourth died above twenty-one, before his father, who survived his wife, and died without any further appointment: Held, that 3000*l.* was well appointed, and that the remainder vested in all equally, according to the direction for want of appointment. *Wilson v. Piggott*, 2 Ves. J. 351. SETTLEMENT, C. OF.

#### X. POWER OF ATTORNEY.

Power of attorney to sue in plaintiff's name need not be stated in bill, but if stated, proof will be directed of it before master in taking the accounts. *Edney v. Jewell*, 6 Mad. 165. PR. EVIDENCE; PR. BILL.

The bill of sale passes the absolute property in a ship at sea, subject only to be divested in case of the indorsement on the certificate of registry not being made within ten days after the return of the ship to port. Power of attorney to sign an indorsement on the certificate, not revoked by bankruptcy of the vendor subsequent to the execution of the power, but previous to the indorsement, being a power only to do a mere formal act, which the bankrupt himself might have been compelled to execute, notwithstanding his bankruptcy, and for a valuable consideration. Therefore, in this case, the indorsement on the certificate being made within the ten days, under a power of attorney, the grantor of which had since become bankrupt: Held a sufficient compliance with the terms of the registry act. *Dixon v. Exart*, 3 Mer. 322. S. C. Buck, 94. SHIP REGISTRY ACT; BANKRY. EFFECT OF.

Power of attorney executed abroad, and authenticated by notary, and affidavit verifying signature of notary, ordered to be acted upon by accountant-general, without certificate of chief magistrate of the place. *Id. Kinnaird v. Ly. Salloun*, 1 Mad. 227. DEEDS, ATTESTATION; NOTARY PUBLIC.

Power of attorney to a creditor to receive a debt, not accompanying any assignment of it, nor making part of any security given, but with declarations, that it was to enable the creditor to apply the money to his debt, not an appropriation; and therefore failed by the death of the debtor. *Lepard v. Vernon*, 2 Ves. & B. 51. PR. ABATEMENT BY DEATH.

Answer of defendant abroad, not being required to be put in on oath, ordered to be put in by person having power of attorney to defend suits, &c., without signature. *Bayley v. DeWalkiers*, 10 Ves. 441. PR. ANSWER, SIGNATURE.

A legacy of 100*l.* was ordered to be paid to a person having a general power of attorney from the lega-

tee, without any power authorising him to receive this legacy specifically. *Carr v. Eastabrook*, 2 Cox, 390. PAYMENT OUT OF COURT.

Service on person holding power of defendant abroad, held good. *Hales v. Sutton*, Dick. 26. *Carter v. De Brune*, id. 39.

#### XI. MERGER, EXTINGUISHMENT, & SUSPENSION.

Where a tenant for life of trust monies, with a power for appointing part for advancing his children, assigned his whole interest, &c., as security for annuity granted by him, he was held to have precluded himself from exercise of power for advancement, though the annuity was of a much less value than the fund. *Noel v. Henley*, 1 McClel. & Y. 303.

Power of appointment in grantor for life, though in favour of particular objects, is not a trust, and may be extinguished by a recovery. *Smith v. Deeth*, 5 Mad. 371. TRUST; RECOVERY.

Power of appointment does not prevent the fee vesting subject to be divested by execution of the power. Such a power is a mode which the owner of the estate reserves to himself, or gives to another, through the medium of the statute of uses of raising and passing an estate. *Maundrell v. Maundrell*, 10 Ves. 265, 266.

A general power of appointment over the whole estate may subsist in the same person who has the fee simple. *Maundrell v. Maundrell*, 10 Ves. 247, overthrowing the principle of *Cross v. Hudson*, 3 Bro. C. C. 30. See note there.

A bare naked power is not barred by any of the statutes of fines; otherwise as to an *interesse termini*. *Willis v. Shorrell*, 1 Atk. 476. Neither can a collateral or naked power be barred or extinguished by fine, forfeiture, or any other conveyance. *Albany's ca.*, 1 Co. 111. *Digge's ca.*, 1 Co. 174. *Edwards v. Slater*, Hard. 415. FINE & RECOVERY.

Where power is given to a woman to dispose of estate by will, and she marries, sensible, it is a suspension of power. *Set quare*. *Rich v. Beaumont*, 6 Bro. P. C. 152. MARRIAGE, EFFECT OF.

Tenant for ninety-nine years, if he so long live, with a power of charging the premises with sums of money, joins in suffering a recovery, and declares the uses thereof: this extinguishes the power of charging the estate. *Savile v. Blacket*, 1 P. W. 777.

#### XII. CONSTRUCTION OF POWERS IN GENERAL.

A power of sale and exchange vested in the trustees of a settlement, may be exercised by the trustees upon a sale to, or an exchange with, the tenant for life of the settled estates. Where, upon the exercise of such a power, it is declared, that the estate shall be vested in the purchaser, the purchase being made in the name of a trustee, an appointment to the trustee, in trust for the purchaser, is a valid execution of the power. *Howard v. Ducane*, 1 Turn. & R. 81. TRUSTEES.

Power to a tenant for life, lord of a manor, to enfranchise, and for that purpose to convey the freehold to the customary or copyhold tenants, authorizes a conveyance of the freehold to one who is equitably entitled, and has been erroneously admitted without a previous surrender by his trustee. *Wilson v. Allen*, 1 Jac. & W. 611. COPYHOLD, ENFRANCHISEMENT OF.

Power to charge portions not inconsistent with an estate tail. *Jervoise v. De Northumberland*, 1 Jac. & W. 575. ESTATE TAIL.

Power to exchange does not, it seems, warrant a



partition. *Att. Gen. v. Hamilton*, 1 Mad. 214. PARTITION; EXCHANGE OF ESTATES.

Power to charge a sum in gross implies power to give interest also. *Roe v. Pogson*, 2 Mad. 457. INTEREST.

Direction to trustees to cut trees in aid of testator's real and personal estate: held not a trust, but a mere power upon the whole of the will. *Gower v. Eyre*, Cooper, 156. TRUST; WILL, C. OF.

Power to appoint estates, to be purchased with money, produced by the sale of other estates, well executed by an appointment, operating directly on the original estates. *Bullock v. Hodgkiss*, 1 V. & B. 471.

Power to appoint an estate includes a power to dispose of the estate and appoint the produce. The same effect has been given in the more doubtful case of a power to charge; and a power to appoint the money, produced by an estate directed to be sold, has been considered as a power to appoint the estate itself. *Id.* 478.

Devise, subject as to part to a devise to trustees and their heirs, for debts, in aid of the personal estate, and as to part to mortgages in fee to sons and a daughter, and their respective issue male in strict settlement, &c., with power to the sons respectively, when in possession, to convey or appoint all or any part to trustees on trust by the rents and profits, to raise a rent charge as and for a jointure for any wife or wives, for each such wife's natural life only, and also to charge portions by deed and to lease for twenty-one years. Execution of the power by conveyance to trustees and their heirs on trust, by the rents and profits, to raise and pay a jointure during the wife's natural life only, and charging portions, with covenant for title, and for quiet enjoyment, by the trustees during the natural life only of the wife. As to the estate of the trustees at law, *quære*? the court of king's bench certifying, that they took an estate in fee, and the court of common pleas, that they took no estate whatsoever. *Wykham v. Wykham*, 18 Ves. 395. WILL, C. OF, WHAT ESTATE.

Power of appointment in tenant for life subject to condition of her remaining sole and unmarried, which condition was qualified by proviso, that a marriage, with consent of A B & C, should not determine that power. Condition held a condition subsequent, and becoming impossible by death of A, B, & C, marriage of tenant for life after their death without their consent did not determine the power. *Aislabe v. Rice*, 3 Mad. 256. CONDITION, SUBSEQUENT.

Power of sale not well executed by a partition. *M'Queen v. Farquhar*, 11 Ves. 467. PARTITION.

Power of exchange or partition does not include a power of sale. *Id.* 473.

A trust created to raise 36,000*l.* for the portions of three children, A, L & C, to be paid to and amongst them at such time and times, and in such share and proportion as M should appoint by deed or will, and in default of appointment, to be paid to and amongst the said A, L & C, in equal shares, on their respectively attaining twenty-one or marriage; provided, that if any of the said daughters should die under twenty-one, or unmarried, 24,000*l.* only to be raised for the surviving daughters, to be paid to and amongst them at such time or times, and in such shares as M should appoint; and if no appointment, then to be paid equally between them at twenty-one or marriage, and if two die before twenty-one and unmarried, then a like proviso for raising only 12,000*l.* L attains twenty-one, and dies. The whole 36,000*l.* to be raised; but M has no power to appoint the share of L. It goes equally between the survivors and the personal representatives of L. An appointment as to the remaining 24,000*l.* between A & C, unequally,

is good. *Vane v. Ld. Duncannon*, 2 Scho. & L. 118. SETTLE. C. OF.

Power to appoint land is well executed by a charge. *Kemworthy v. Bate*, 6 Ves. 796.

Power of appointing real estate is well executed by a devise to trustees to sell, and an appointment of money produced by the sale. *Id.* 793.

Power to charge includes power to sell. *Id.* 797.

Devise in trust to dispose of the premises unto and amongst the devisee's four children, in such manner, shares, &c. as he should, by deed or will, appoint. One dying in the life of his father before appointment, was held entitled to a fourth; the father, after that child's death, having appointed three fourths to his three surviving children respectively. *Reade v. Reade*, 5 Ves. 744. This decision, as far as it leaves one fourth to the deceased child, is questioned by Ld. Eldon. *Butcher v. Butcher*, 1 V. & B. 192. WILL, C. OF.

Appointment by father and son under a power, of money charged on an estate, that in case the son should survive, it should be applied by him in and towards payment of the debts of the father, and subject thereto, the residue, if any, should go, and be considered as part of the personal estate of the father, and in case the latter should survive, it should go and be paid by them, his executors, &c. in and towards satisfaction of his debts, with a similar provision as to the residue: the father surviving appointed in favour of another son for valuable consideration as to part; as to that the decree directed payment under the appointment. *Clinton v. Seymour*, 4 Ves. 440.

Power to appoint for the benefit of a married woman and her family, would not include the husband in general; but upon the whole will an appointment in his favour was established. *M'Leoth v. Bacon*, 5 Ves. 159.

A devised all his estates to widow for life, remainder to nephew, he paying 2000*l.* to appointee of widow, and made her executrix and residuary legatee. The estates were held under church leases, which testator renewed after will. *Qu.* if a revocation? The widow, by will, "in pursuance of power," appointed plaintiff and devised estates, "so given by her said husband's will, and all her interest, &c. therein," to trustees, for nephew, on his paying the said 2000*l.* "according to the true intent, &c. of husband's will; but not before or otherwise." Supposing the renewal of leases a revocation, the widow shall be presumed to have designedly given effect to real intent of husband. *Penrice v. Gomers*, 3 Anst. 621. WILL, C. OF; WILL, REVOC. OF; RENEWAL OF LEASES.

A power to charge a sum in gross, implies a power to give any rate of legal interest, and the rule of the court to give 4 per cent. applies only where no rate is specified by the party having powers to fix it. *Lewis v. Freke*, 2 Ves. J. 507. INTEREST.

Partition of an estate in common, a good execution of a power to sell or exchange. *Abel v. Heathcote*, 2 Ves. J. 98. S. C. 4 Bro. C. C. 278. PARTITION.

A devised to B, for life, remainder to his first and other sons in tail male, remainder over in trust to convey the premises, or any part thereof, to such child or children of testator's daughter, and her then husband, other than and except their eldest son, for the time being, and the issue male or female of such child or children (except as before excepted), for such estates, and in such shares, and subject to such limitations as she, by deed or will, should appoint; and for want of appointment by her, or for so much as shall not have been appointed by her, then as her husband should, by deed or will, appoint; and for want of such appointment, or for so much, &c. then as their eldest son for the time being shall appoint. The husband, by his will (his wife having died without appointing), appointed to his younger sons, by name in tail with

cross remainders in tail, and if all his said younger sons should die without issue, then to his daughters. He died, leaving his sons the appointees, still younger sons; afterwards one of them became the only surviving son, the rest being dead without issue, and then the trust estate vested in possession by the death of B without issue male. The daughters of the appointor claimed the estate, considering the appointment to their surviving brother as defeated, by his being, as they said, an eldest son for the time being, and so excluded by the will of A; and the other brothers, the appointees, being dead without issue. But it was decreed by Lifford C., that the appointment to him continued undisturbed; that "time being" meant the time of the appointment being made, that the appointees were as if named in the will of A, and that the daughters could only claim under the appointment of their father, who limited it to them in the event of all his sons, the appointees, dying without issue, which did not happen. *Jones v. Cope*, Vern. & Scriv. 29. WILL, C. OF, WHO TAKE.

Where lands of a specific annual value are settled in jointure, pursuant to a power, the value is to be estimated at the death of the husband. *Cs. Londonderry v. Wayne*, 2 Eden, 170. S. C. Ambl. 424.

A, by will, devised his collieries, &c. to trustees, upon trusts to dispose and convey the same in such manner as his daughter, M., whether sole or covert, should direct or appoint; and for want of such direction or appointment, to apply the money arising thereby to certain purposes in his will mentioned. He then declared, "that though his meaning was to give his said daughter the absolute disposal of the said collieries, &c., to prevent the expences and trouble that must attend the management of affairs of such a nature, under the direction of the court of chancery; he requested his said daughter to direct the money arising therefrom, to be applied in such manner as he had directed the same in default of her direction and appointment." The daughter made an appointment in favour of her husband absolutely. But this appointment was held to be void, as being contrary to the testator's intention. *El. Bute v. Stuart*, 1 Bro. P. C. 476. WILL, C. OF.

Writing in nature of a will by feme covert under a power, not a proper will, and the appointees take under the power coupled with the writing; yet it has effect of a will to three intents; the words have the same liberal construction; it is ambulatory until testator's death, whom appointee might survive, and can take only from testatrix's death. *Southby v. Stonehouse*, 2 Ves. 612. FEME COVERT.

Where given to those not capable, together with another who is capable, the latter will take the whole. Under such a power, it cannot be given free from debts of the appointee. *Alexander v. Alexander*, 2 Ves. 640. *Id.*

Power to husband to make jointure not exceeding clear yearly value of 100*l.* for every 1000*l.* portion; part of the portion is limited, the interest to the husband for life, then to increase younger children's fortune; if none, to survivor of husband or wife: this considered as received by him, as settled fairly for the family and for his benefit, and within interest of the power. "Clear" means, as at the time of making the jointure, and not during its continuance, which would make these powers fluctuating. "Clear" means free from charges usually allowed between buyer and seller, and by the course of the country borne by tenant, but subject to land-tax, and those borne by landlord. *El. Tyromel v. Dk. Anoster*, 2 Ves. 500. S. C. Ambl. 237.

Power of appointment by a father not well executed, being contrary to the intention as collected from a reasonable construction of the recital of the

deed which created the power: "and" construed "or." *Burleigh v. Pearson*, 1 Ves. 281.

Devise in trust to sell, and a charge to pay debts, give equally power of sale. *Elliot v. Merriman*, 2 Atk. 43. S. C. Barn. 78. POWER OF SALE.

A general power to raise portions for daughters may be restrained and qualified by particular proviso. *Fane v. Dk. Devonshire*, 6 Bro. P. C. 137.

Power to charge lands with sum of money, imports interest thereof also. *Ld. Kilmurry v. Geery*, 2 Salk. 538. INT. WHEN PAYABLE.

A settles land to the use of himself for life, remainder to such of his four children, and in such shares and proportions, as A by any writing shall appoint. A may not only limit the land to any of his children, but may charge the land with any rent-charge or sums of money for any of his children. *Thwaytes v. Dye*, 2 Vern. 80. SETTLEMENT, C. OF.

### XIII. TRANSFER OF POWERS BY DELEGATION OR ACT OF LAW.

Bankrupt seised for life, with a general power of appointment, with remainder, in default of appointment, to the heirs of his body, cannot be compelled by decree in equity to execute the power for his creditors: but see 6 G. 4. c. 16. s. 77. *Thorpe v. Goodall*, 17 Ves. 388. 460. S. C. 1 Rose, 270. BANKCY. CONVEYANCE BY BANKRUPT.

Mere power unexecuted in a tenant for life who becomes bankrupt, does not vest in his assignees. *Townshend v. Windham*, 2 Ves. 3. BANKCY. ASSIGNMENT, WHAT PASSES.

A power under a settlement for a husband to dispose of a reversionary interest in an estate, in such proportions as he should think fit, among the issue of the marriage, he, by will, delegates it to his wife in such shares as she pleases between his son and daughter: Held to be like a power of attorney, and not transmissible to a third person, but could be executed by the husband only. *Ingram v. Ingram*, 2 Atk. 88. ALIENATION.

### PRACTICE.

\* \* The principal titles of this subject are arranged alphabetically, and those with asterisks are merely for reference.

See also ACCOUNT, VIII. — BANKCY. VI. 11. (c). — CHARITY, IV. — GUARD. & WARD, — INFANT, II. 1. — LEGACY, VIII. 5. — LUNACY, IX. — MORTGAGE, V. 7.

#### I. ABATEMENT AND REVIVOR. See also BANKCY.

##### II. 2.—PR. APPEAL, 6.—PR. SEQUESTRATION, 3.

##### 1. Abatement.

- (a) Generally and effect of.
- (b) By death.
- (c) By bankruptcy and insolvency.
- (d) By marriage.
- (e) By infant coming of age.

##### 2. Revivor.

- (a) By and against whom.
- (b) For costs.
- (c) How revived.

\* ACCOUNTANT GENERAL, see PR. OFFICERS OF COURT, 2.

\* ADJOURNMENT OF CAUSE, see PR. CAUSE.

\* ADVANCE FROM FUND IN COURT, see PR. FUND IN COURT.

\* ADVANCING CAUSE, see PR. CAUSE.

II. ADVERTISEMENT TO APPEAR. See also PR. CREDITOR'S SUIT.

\* AFFIDAVITS, see PR. EVID. 11.

\* AMENDMENT, see BANKCY. VI. 6.; XVII.

- 5.—PR. ANSWER, 15.—PR. BILL, AMENDMENT OF.—PR. COSTS, 10. (c).
- PR. DECREE, 13.—PR. DEMURRER, 4.—PR. EVID. 29. (c).—PR. INJUNCTION, 11.—PR. MASTER, REFER. 2. (d).—PR. ORDER, 6.—PR. PLEA, 7. PR. SUBPENA, 1.

III. ANSWER. See also PR. COSTS, 10. (y).—PR. EVID. 11. (n).; 12.—PR. INJUNCTION, 2.; 4.—PR. TAKING OFF FILE.

1. General orders relating to.
2. Form of.
3. Signature of.
4. Jurat of.
5. Schedules.
6. In what time, and of the filing of.
7. Ordered in a given time to be put in.
8. Commission to take.
9. Time given to answer.
10. Effect of answer.
11. Further.
12. Supplemental.
13. Separate.
14. To amended bill.
15. Amendment of.
16. Evasive.
17. Exceptions to.
  - (a) Form and requisites.
  - (b) Effect of.
  - (c) When necessary or proper to be taken.
  - (d) In what time.
  - (e) Filing generally, and nunc pro tunc.
  - (f) Deposit on.
  - (g) Further exceptions.
  - (h) Waiver.
  - (i) Submission, or otherwise to.
  - (j) Reference on exceptions.
  - (k) Argument and hearing of.
  - (l) Allowance and overruling of.
18. Reference for scandal and impertinence.
19. Sufficiency.
20. Who bound.
21. Liberty to withdraw.
22. Priority.

IV. APPEAL. See also PR. COSTS, 10. (d).

1. Form, and to what tribunal, and steps necessary to be previously taken.
2. When and on what grounds it lies, or when barred, and when on new matter.
3. In what time.
4. Who may prosecute.
5. Evidence on.
6. Abatement and revivor of.
7. Effect of staying proceedings during.
8. Practice on generally.

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1. Effect of, and want of.
2. When substituted, and its incidents.
3. Undertaking to appear.
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\* ARGUMENT, see PR. ANSWER, 17. (k).—PR. DEMURRER, 5.—PR. PLEA, 4.

VI. ATTACHMENT. See also PR. PROCESS.

1. Effect of.
2. When and in what cases, and cause against.
3. Affidavits in support.
4. Discharge from.
5. Against prisoners.

6. Service of.

7. Entry of.

8. Return to.

9. For want of answer.

10. For costs.

11. With proclamations.

VII. ATTACHMENT AGAINST PROPERTY.

VIII. RAIL.

\* BILL, see CHARITY, IV.—PR. EVID. 13.

IX. BILL AMENDED. See also PR. INJUNCTION, 3.

X. BILL, AMENDMENT OF.

1. Generally, when necessary, when granted, and in what matters allowed.
2. Effect of, and of motion for leave to amend.
3. In what time, and order to amend in a given time.
4. When of course, or only by special application.
5. Motion to amend, necessary steps on.
6. Motion to amend without prejudice, when granted.
7. Effect of order for leave to amend.

XI. BILL, PRO CONFESSO. See also PR. DECREE, 11.—PR. EVID. 13.—STAT. C. OF, II. 8.

XII. BILL OF DISCOVERY.

XIII. BILL, DISMISSAL OF. See also PR. COSTS, 10. (h).

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\* BILL OF EXCEPTIONS, see PR. EXCEPTIONS, BILL OF.

XIV. BILL OF INTERPLEADER. See also PR. COSTS, 10. (z).—PR. EVID. 11 (f).—PR. PAYMENT INTO COURT, 3.

XV. BILL TO PERPETUATE. See also PR. EVID. 14.

XVI. BILL OF REVIEW, PROCEEDINGS AND EVIDENCE ON. See also PL. PLEADING, II. 5.—PR. COSTS, 10. (ii).

XVII. BILL OF REVIVOR.

XVIII. CAUSE, ADJOURNING, ADVANCING, CONSOLIDATING, RESTORING, RETAINING AND SPEEDING. See also PR. COSTS, 10. (i).—PR. HEARING, &c.

XIX. CAUSE, CONDUCT OF.

\* CERTIFICATE, see PR. MASTER, REFERENCE, &c.

XX. CERTIORARI.

XXI. CHARGE AND DISCHARGE.

\* CLERK IN COURT, see PR. OFFICERS OF COURT, 3.

\* CLERK OF INROLMENTS, see PR. OFFICERS OF COURT, 4.

\* COMMISSION, see PR. ANSWER, 8.

XXII. COMMISSION TO ASCERTAIN BOUNDARIES AND VALUE OF LANDS.

\* COMMISSION OF BANKRUPTCY, see BANKRUPTCY, VI.

\* COMMISSION OF LUNACY, see LUNACY, IV.

\* ——— TO EXAMINE, see PR. EVID.

28. (i).

XXIII. COMMISSION OF PARTITION.

XXIV. ——— OF REBELLION.

XXV. ——— OF REVIEW. See also titles PL. & PR. BILL OF REVIEW.

XXVI. COMMITMENT.

\* CONDUCT OF SUIT, see PR. CAUSE, CONDUCT OF.

**XXVII. CONSENT IN COURT.** See also ACQUISITION.—HUSB. & WIFE, III. 3. (d).—PR. DECREE, 10.

\* CONSOLIDATION OF CAUSES, see PR. CAUSE.

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2. What constitutes process and committal for.
3. Effect of.
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**XXIX. COPIES.** See also PR. EVID. 15.

**XXX. COSTS.** See also BANKCY. XIII. 9.; XVII. 6.—PR. ABAT. & REVIV. 2. (b).—PR. ATTACHMENT, 10.—STAT. C. OF, II. 16.—VEND. & PURCH. VIII.

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2. How lost.
  - (a) Generally.
  - (b) By fraud.
  - (c) By tender of demand.
3. Apportionment and contribution.
4. From what fund.
5. Payment and tender, when necessary, and effect of.
6. Security for.
7. Settling off.
8. When stayed by appeal.
9. Taxation.
  - (a) Generally.
  - (b) Costs of taxation of costs.
  - (c) Effect of, and of costs not being taxed, and of appeal, rehearing and revivor for.
  - (d) Where party shall pay taxed costs, or only fixed costs.
  - (e) Whether costs in cause, or extra costs.
  - (f) Allowances beyond taxed costs, and of costs, whether as between party and party, or attorney and client.
10. In cases of — on suits for — or by or to.
  - (a) Abandonment after notice to appear, &c.
  - (b) Account.
  - (c) Amendment.
  - (d) Appeal.
  - (e) Attorney-General and Crown.
  - (f) Bankrupt and insolvent.
  - (g) Bank of England.
  - (h) Bill, dismissal of.
  - (i) Cause standing over, or struck out of paper.
  - (j) Charity.
  - (k) Commissioners of bankrupt.
  - (l) Contempt.
  - (m) Creditors.
  - (n) Cross cause.
  - (o) Decree.
  - (p) Demurrer or plea allowed, submitted to, or overruled, or ordered to stand for answer.
  - (q) Discovery.
  - (r) Dower.
  - (s) Executors, trustees, committees, &c.
  - (t) Exceptions allowed or overruled.
  - (u) Heir at law.
  - (v) Husband and wife.
  - (w) Incumbrancers, mortgagors and mortgagees, equitable and legal.
  - (x) Infant, pr. uni, and guardian.
  - (y) Insufficiency of answer.
  - (z) Interpleader.
  - (aa) Irregularity of process.

(bb) Issue at law.

(cc) Lunacy.

(dd) Parties improperly joined, or served with notice, &c.

(ee) Pauper.

(ff) Perpetuating testimony and commission to examine.

(gg) Proof of debts before master.

(hh) Receiver.

(ii) Review.

(jj) Solicitor.

(kk) Specific performance and sales judicial.

(ll) Witness.

**XXXI. COURT, PRACTICE IN, AND GENERALLY.**

**XXXII. CREDITOR'S SUIT.**

**XXXIII. CROSS BILL.** See also PR. COSTS, 10. (n).

\* CURSTON, see PR. OFFICERS OF COURT, 5.

\* DE BYNE ESNP, see PR. EVID. 28. (f); 29. (b).

**XXXIV. DECREE.** See also INTEREST, PECUNIARY, VI.—PR. COSTS, 10. (o).

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4. To account.
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7. Who bound by. See further, INFANT, II. 3.
8. Obtaining generally.
9. Obtained by fraud.
10. Obtaining by consent.
11. Pro confesso, and by default. See also PR. BILL, PRO CONFESSO.
12. Service of.
13. Adding to, altering, rectifying, and varying minutes of.
14. Entry, drawing up, and enrolment of.
15. Of the suspension, prosecution of, and carrying into execution of.
16. Impeachment, discharge, and reversal of.
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\* DEDIMUS POTESIATEM, see PR. WRIT, 7.

\* DEFENDANT, see PR. PARTY, &c. 2.

**XXXV. DELIVERY UP OF DEEDS BY PARTIES AND OUT OF COURT.**

**XXXVI. DEMURRER.** See also PR. COSTS, 10. (p).—PR. EVID. 27. (d).

1. General orders.
2. Generally.
3. Time of filing, entry, and enrolment of.
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5. Argument, setting down for, and withdrawing of.
6. Allowing, effect of.
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\* DEPOSIT, see PR. SALES, JUDICIAL, 7. (b).—PR. APPEAL, I. 8.

\* DEPOSITIONS, see PR. EVID. 29.

**XXXVII. ELECTION TO SUE AT LAW OR IN EQUITY.**

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**XXXVIII. EVIDENCE.** See also BANKCY. VI. 14. (c); X. 9. (a).—MARRIAGE, II.—PR. APPEAL, 5.—TITHES, VI; X. 2.—WILL, X.

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8. Before master.
9. At law.
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11. Affidavits. See also *BANKCY.* XVI. 3. (b). (3); XVII. 4. — *PL. BILL.* 2. (i). — *PR. ATTACHMENT*, 3.
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  - (d) Form of.
  - (e) In support of injunction.
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  - (g) In support of motions.
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  - (i) Of service.
  - (j) On application for substituted service.
  - (k) On obtaining writ *ne exeat regno*.
  - (l) On commission to examine witnesses.
  - (m) When necessary.
  - (n) When read against answer.
  - (o) When received and read as evidence generally.
  - (p) Affidavits in reply.
12. Answer.
  - (a) Where answer may be read as evidence.
  - (b) What good against.
  - (c) Effect of reading.
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14. Taken on bill to perpetuate. See also *MARRIAGE*, II. — *PR. COSTS*, 10. (ff).
15. Copies.
16. Taken in other courts.
17. Decisions of other courts.
18. Evidence of one defendant read against the other.
19. Decree in former cause.
20. Taken in another cause, &c. or matter.
21. Deals, proof of, and loss of deeds.
22. Where admitted to expound deeds.
23. Hand-writing.
24. In tithe causes.
25. Will, proof of.
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  - (a) Generally, his rights, duties, and liabilities, and of subpoena to testify.
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  - (c) Examination as to credit.
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  - (e) Attesting witnesses.
28. Examination. See also *BANKCY.* VII. 2. (a) (2); VIII. 2.
  - (a) Generally.
  - (b) When and how taken.
  - (c) Examination *viva voce*.
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  - (g) *Pro interesse suo*.
  - (h) Cross-examination.
  - (i) Further or re-examination.
  - (j) Of parties to cause.
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    - (1) General orders.
    - (2) Effect of.
    - (3) When and how granted and obtained.
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    - (5) How discharged or abated.
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29. Depositions.
  - (a) Generally and general orders.
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- \* *EXAMINATION.* See *PR. EVID.* 28.
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- XL. EXCEPTIONS, BILL OF.
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  - \* *EXHIBITS.* See *PR. EVID.* 10.
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- XLII. FUND IN COURT, AND ADVANCING TO PARTY THEREOUT TO CARRY ON SUIT.
- XLIII. FURTHER DIRECTIONS.
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- \* *INFORMATION.* See *CHARITY*, IV.
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  4. Special.
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  7. Service of, and of order for.
  8. Breach of, what constitutes, and commitment for.
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  10. Dissolving, and cause against dissolving.
  11. Effect of amendment, and obtaining leave to amend without prejudice.
  12. Against proceeding at law.
    - (a) Generally.
    - (b) Against ejectment.
    - (c) To stay trial, and extending common injunction.
    - (d) To stay execution and distress.
    - (e) In other courts.
    - (f) Where money will be ordered into court on granting.
    - (g) In cases of fraud and public policy.
13. Against darkening ancient lights.
14. ——— breach of contract, covenant, and trust.

15. *Against infringement of copyright and patent.*

16. ——— *setting up legal defence and bars.*

17. ——— *nuisance.*

18. ——— *payment of money or transfer, or negotiation of security or property.*

19. *To quiet possession.*

20. *Against sailing of ship.*

21. *Against sale.*

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XLVIII. *INSPECTION OF DEEDS, &c. See also PR. PRODUCTION OF DEEDS.*

XLIX. *INSPECTION, ORDER FOR.*

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LII. *INTITULING PLEADINGS.*

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—PR. CERTIORARI.—PR. HABEAS  
CORPUS.

1. *De coronatore eligendo.*
2. *Of error.*
3. *De excommunicato capiendo.*
4. *Ne exeat regno.* See also PR. EVID.  
11. (k).
- (a) *When granted.*
- (b) *Discharge of.*
- (c) *Bond and surety.*
5. *Of supplicavit.*
6. *De ventre inspiciendo.*
7. *Of other natures, and generally.*

#### I. ABATEMENT & REVIVOR.

See also BANKRUPTCY, 11. 2.—PR. APPEAL, 6.—  
SEQUESTRATION, 3.

1. *Abatement.*
  - (a) *Generally, and effect of.*
  - (b) *By death.*
  - (c) *By Bankruptcy and insolvency.*
  - (d) *By Marriage.*
  - (e) *By Infant coming of age.*
2. *Revivor.*
  - (a) *By, and against whom.*
  - (b) *For costs.*
  - (c) *How revived.*

(a) *Generally, and effect of.*  
A bill having been filed by a number of persons, on behalf of themselves and other creditors of a banking-house, an order is obtained by A, one of the plaintiffs, to amend the bill by striking out the names of the co-partners, but no amendment is actually made; many years afterwards, the executors of A, not knowing that the record had not been amended, file a bill of revivor, as if A had been the sole plaintiff, and an order of revivor being obtained, move in the revived cause for a receiver. Such a motion is irregular, notwithstanding that the order of revivor has not been discharged. *Hughes v. Dumbell*, 1 Russ. 317.

A bill against several defendants being retained, with liberty for the plaintiff to bring an action against one of the defendants, the trial may take place during an abatement, occasioned by the death of one of the other defendants, if the decree does not direct them to attend it. *Humphreys v. Holt*, 1 Jac. 73. PR. RETAINING BILL; PR. ACTION AT LAW.

A suit by a corporation does not become defective on the death of some of the members; otherwise of a suit by the members in their individual characters. *Blackburn v. Jepson*, 3 Swan. 138. CORPORATION.

Order to dismiss for want of prosecution, after an abatement, although irregular, not to be regarded as a nullity; consequently, that order must be discharged before the plaintiff can obtain an order to revive the suit. *Boddy v. Kent*, 1 Mer. 361. PR. ORDER TO DISMISS FOR WANT OF PROSECUTION.

Separation a mensa thoro in the spiritual court, only *propter sevitiam aut adulterium*; and after reconciliation, the same cause cannot be revived. *Id. St. John v. St. John*, 11 Ves. 532.

The right of children to a provision out of the property of their mother, under decree directing a settlement by husband on her and her children, exists notwithstanding death of mother before the report. *Murray v. Elbank*, 10 Ves. 84. HUSB. & WIFE, SETTLED BY COURT; PARENT & CHILD.

Order for transfer and payment out of court, though case abated; the right being clear. *Roundell v. Turner*, 6 Ves. 250. PR. PAYMT. OUT OF COURT.

If settlement of the wife's equitable interest had

been approved and ordered by the court, it is binding notwithstanding the death of either party before it is carried into effect. *Macanley v. Philips*, 4 Ves. 19 HUSB. & WIFE, SETTLED BY COURT.

Where there is a reference to the master in a case of lunacy, he shall make his report, although the lunatic be dead. *Exp. Armstrong*, 3 Bro. C. C. 238. LUNACY; PR. REF. TO MASTER.

Not necessary to revive a perpetual injunction on death of party. *Askew v. Townsend*, Dick. 471.

After abatement, defendant having absconded, and stat. 5 G. 2. c. 25. being complied with, bill to be taken *pro confesso*. *Seagood v. Ferrard*, id. 300. Fit vid. 63.

Depositions from abroad, published, though taken during abatement. *Sinclair v. James*, id. 277.

Though a cause be abated, money may be ordered to be paid out of court, without reviving the cause, upon the consent of all the parties actually interested. *Beard v. El. Powis*, 2 Ves. 399. PR. PAYMT. OUT OF COURT.

Abatement, after answer to bill of discovery, suit cannot be revived. *Gould v. Barnes*, Dick. 133.

Depositions allowed to be read, though taken during abatement. *Thompson v. Took*, id. 115.

Sequestration as a process, abates on death of plaintiff, and revivor of suit. *Hyde v. Foster*, id. 132.

A sequestration issues as a mesne process of the court, falls with the death of the person; but if for non-performance of a decree, the death of the party does not determine it. *Hawkins v. Crook*, 2 Atk. 594. *Burdett v. Rockley*, 1 Vern. 58. PR. SEQUESTRATION.

On an appeal, the house reserved giving judgment upon the point, until an account between the parties was taken. The account is accordingly taken, but before the appeal is brought on again, one of the parties dies; the suit below is thereupon regularly revived. Held, the appeal need not be also revived. *Lake v. Mason*, 5 Bro. P. C. 281. PR. APPEAL.

Defendants enrolled decree after abatement, and held regular. *De Berks v. Sheffield*, Amb. 586. PR. ENROLMENT OF DECREE.

Man and wife sue for promise made to wife during coverture, wife dies; suit does not abate. *Thorne v. Brand*, Cary, 62.

After abatement defendant absconding, 5 Geo. 2. c. 25., must be complied with. *James v. Dore*, Dick. 63.

Though by death of cestuique trust, the suit abates as to him, yet if there be a decree against him and his trustees to convey, &c., the trustees are obliged to convey the legal title, for the death of either party makes an abatement only *quoad* himself. *Finch v. Id. Winchelsea*, 1 Eq. Ab. 2. TRUSTEES & CESTUIQUE TRUST.

The court will order money out of court to person entitled to it by decree, notwithstanding death of some of the parties. *Id. ib.* PR. PAYMT. OUT OF COURT.

If, after a decree to account, an executor or administrator does not revive within six years, this is not within the statute of limitations. *Hollingshead's case*, 1 P. W. 742. DECREE TO ACCOUNT; LIMITATIONS STAT. OF.

Decrees of this court take effect from the time they are pronounced, and the death of the parties shall not hinder the enrolment in convenient time. *Clapham v. Phillips*, Rep. T. Finch, 169. PR. DECREE, ENROLMENT OF.

A decree may be enrolled after the party's death by order. *Anon.* 2 C. C. 227. PR. DECREE.

Secus, if the party was administrator only. *Warren v. ———*, 2 C. C. 247. *Id.*

Bill to reverse a decree, for that it was signed and enrolled after the party's death, dismissed. *Yeavely Yeavely*, 3 C. R. 44. 73. *Id.*



If two joint tenants are plaintiffs, and one releases, the cause is not thereby abated. *Anon.* 2 Free. 6. But see per Lord Eldon in *Falloes v. Williamson*, 11 Ves. 305; and *Boddy v. Kent*, 1 Mer. 364. JOINT TENANCY; RELEASE.

### (b) By Death.

Husband and wife defendants to a bill praying an assignment of a term, which the wife by answer claims to hold, to preserve her title to dower; on the death of the husband, the suit may proceed without a supplemental bill, *semble*. *Mole v. Smith*, 1 Jac. 495. HUSB. & WIFE.

P. ami of feme plaintiff being dead, she was ordered to appoint new one in two months, or bill dismissed with costs out of fund in court. *Barlee v. Barlee*, 1 S. & S. 100. P. AMI.

A commission of bankruptcy cannot proceed, after the death of the party against whom it issued, if before a declaration of bankruptcy. *Exp. Isaac*, 2 Ves. & B. 29. BANKCY. COMMISS. OF.

Power of attorney to a creditor to receive debt, not accompanying any assignment of it nor taking part of any security given, but with declarations that it was to enable the creditor to apply the money to his debt, held not an appropriation, and therefore failed by the death of the debtor. *Lepard v. Vernon*, 2 Ves. & B. 51. POWER OF ATTORNEY.

Death of one of defendants, does not necessarily prevent judgment. *Davies v. Davies*, 9 Ves. 461. PR. JUDGMENT.

If a defendant in equity becomes bankrupt, the plaintiff cannot therefore dismiss his own bill without paying costs; it is no abatement. *Rutherford v. Miller*, 2 Anst. 458. DISMISSAL OF BILL; BANKCY.

An order was made that the plaintiff should set down his cause to be heard within a limited time, or that the bill should be dismissed without further order; in the mean time the suit abated by the death of a defendant: this abatement suspends the effects of the former order. *Greyson v. Oswald*, 1 Cox. 343. PR. ORDER TO SET DOWN CAUSE.

Sequestration to compel performance of a decree abated by death of plaintiff. *Wharam v. Broughton*, 1 Ves. 182. PR. SEQUESTRATION.

Also the suit abates, a further act being necessary, so that a bill of revivor must be filed: no subpoena, *scilicet*, as the decree was not signed and enrolled. *Id. ib.*

*Et. scilicet*, not abated by death of plaintiff, the right being vested; otherwise of an extent where a *liberata* is necessary; so of a sequestration, because a further act is necessary. *Id. ib.*

Plaintiff gave feme covert a promissory note, and the husband dying before answer to a bill of discovery of the consideration: held, that suit was abated. *Lightbourn v. Holyday*, 2 Eq. Ab. 1. HUSB. & WIFE.

Though by 8 Will. 3. a suit shall not abate by the death of one defendant; yet it must be taken with this restriction, that the subject-matter of the bill is not hurt thereby. *Brown v. Higden*, 1 Ark. 291.

A custody of a lunatic's estate granted to baron and feme (the feme being next of kin) determines on her death. *Exp. Lym*, Forres. 143. LUNATIC, COMMITTEE OF; HUSB. & WIFE.

Bill for a legacy against baron and feme who was executrix of testator, defendants answer and witnesses are examined and publication passed; husband dies; no abatement, and the wife shall be bound by the answer and depositions; but it might be otherwise if the wife's inheritance was in question. *Shelbury v. Briggs*, 2 Vern. 249. *See quere*, see *Anon.* id. 197. PR. EVIDENCE; HUSB. & WIFE.

In a bill of interpleader, a trial of law is directed between the defendants; the suit, if thereby ended as

to the plaintiff, so that if the plaintiff dies, defendant may proceed without reviving the cause. *Anon.* 1 Vern. 351. PR. INTERPLEADER.

A sequestration which issues as mesne process determines by the death of the party, otherwise if it issues after a decree, though for a personal duty. *Burdett v. Rockly*, 1 Vern. 58. PR. SEQUESTRATION.

Effect of a sequestration binds from the time of awarding the commission, and not only from the time of executing it. *Id. ib.*

Bill against husband and wife abates by death of former. *Anon.* 3 Salk. 84. HUSB. & WIFE.

If the bill be brought by husband and wife for a demand in her right, and the husband dies, it is in the nature of a chose in action and survives, and the cause does not abate. *Perry v. Juton*, 3 C. R. 40. HUSB. & WIFE.

Where joint tenants file a bill, and one dies, his interest survives to the other, and therefore there is no abatement. *See quere* as to tenants in common. 1 Eq. Ab. 1. *Wright v. Dorset*, 3 C. R. 66. JOINT TENANCY.

Bill by husband and wife for promise made to both; since bill filed wife died: it is not necessary to revive. *Thorne v. Brend*, Cary, 89.

### (c) By Bankruptcy or Insolvency.

The devisee having taken the benefit of an insolvent act, and made the assignee a party to the suit, who, by his answer, disclaimed all knowledge of the assignment, and refused to undertake the trust for the creditors, he cannot be compelled to act, and the suit remains imperfect until another assignee is appointed and made a party: a decree made in such a state of the cause is erroneous. *Rylands v. Latouche*, 2 Bli. 567. RENOUNCEMENT OF TRUST; INSOLVENCY, ASSIGNEE IN.

Plaintiff becoming bankrupt, a special motion must be made and notice served on assignees that they file supplemental bill; in nature of revivor within given time, or bill may stand dismissed. *Porter v. Cox*, 5 Mad. 80. BANKRUPTCY, EFFECT OF.

On plaintiff's bankruptcy, defendant may move that assignees file supplemental bill in given time, or that bill stand dismissed. *Wheeler v. Malins*, 4 Mad. 171. BANKCY. EFFECT OF, PR. MOTION TO DISMISS.

By the bankruptcy of the plaintiff the suit becomes defective if not abated by analogy to law, the assignees ordered to be made parties in a limited time, or the bill to be dismissed; whether with costs? *Randall v. Mumford*, 18 Ves. 424. S. C. 1 Rose, B. C. 196. BANKCY.

Upon the bankruptcy of the plaintiff in an injunction bill, the assignees to be made parties, or the injunction dissolved. *Id. ib.*

Practice of the court of exchequer holding the bankruptcy of the plaintiff no abatement, and therefore dismissing the bill with costs for want of prosecution. *Id.* 426. BANKCY.; PR. IN EXCHEQUER.

By the insolvency of the plaintiff pending an account, the suit is abated. *Williams v. Kinder*, 4 Ves. 389. INSOLVENCY.

Bankruptcy of the plaintiff does not abate a suit in equity, and the bill may therefore be dismissed with costs for want of prosecution. *Davidson v. Butler*, 2 Anst. 460. BANKCY.; DISMISSAL OF BILL.

A plaintiff having become bankrupt, and his assignees not having the consent of the creditors to proceed in the cause in due time, the defendants obtained an order to dismiss the bill for want of prosecution. Order discharged under the circumstances upon the terms of the assignees filing a bill of revivor within a week (whether bankruptcy is an absolute abatement of the suit, *quere*?) *Lingard v. Wigg*, 3 Bro. C. C. 435. PR. DISMISSAL OF BILL; BANKCY.

(d) *By Marriage.*

Upon the marriage of female plaintiff, revivor alone will not do, where the interests of third person, viz. trustees and the issue must be brought forward, making a supplemental bill necessary. But a motion to stay an attachment for want of answer was refused, being made with consent of the husband, in the face of his covenant, to permit the suit to be revived and prosecuted by the trustees in his name, for the benefit of the family, *Mereweather v. Mellish*, 13 Ves. 161.

Abatement by marriage of feme plaintiff to bill of discovery after answer: Held that defendant cannot have his costs. *Dodson v. Jude*, 10 Ves. 31. PR. COSTS; PR. BILL OF DISCOVERY.

Infant plaintiff a ward of court having married, proceedings stayed till husband shall appear. *Bruinell v. McPherson*, 7 Ves. 237. AWARD OF COURT.

Feme sole brings bill, and pending the suit marries, and baron and feme bring bill of revivor and obtain decree with costs. They shall have costs for the whole suit, except the bill of revivor. *Durbaine v. Knight*, 1 Vern. 318. PR. COSTS.

Administrator *durante minoritate* obtains a decree to account, the infant marries, and a new administration during her minority is granted to the husband. *Coke v. Hodges*, 1 Vern. 25. ADMOR. DUR. MIN.; PR. DECREE TO ACCOUNT.

Marriage of feme plaintiff abates effect of subpoena. *Hastings v. Jugges*, Cary, 36.

Plaintiff marries before answer and no advantage taken, therefore no bill of revivor necessary. *Fairefield v. Greenfield*, Cary, 52.

Where two defendants marry together, no cause of revivor. *Jackson v. Smith*, Id. 57.

Feme sole sueth out subpoena, and same day is married; defendant dismissed with costs. *Peirs v. Cause*, id. 98.

Feme marries pending suit, no ground to reverse decree. *Cranbourne v. Dalmahey*, Dick. 8.

Marriage after decree suit revived by *sci. fa.* *Sayer v. Sauer*, id. 42.

Bill abated by marriage of plaintiff, no revivor till after cross bill filed, loses priority. *Smart v. Floyer*, *et c. contra*, id. 260.

Where the testator made his widow executrix jointly with J S, but on condition she should not marry, and pending a suit by them as executors general, the widow married: Held by Bridgman, C. J. that the marriage abated the suit. *Hampden v. Brewer*, 1 C. C. 77. S. C. Nels. 108. But see *Miff*. 45. CONDITION, BREACH OF.

Widow party to suit, had judicial order and commission to make proofs, and then married: Held not necessary to revive. *Windham's Case*, 1oth. 130. 174.

No bill of revivor after marriage. *Vane v. Dowell*, *Dale v. Dale*, id. 20.

Demurrer to second bill of revivor overruled. *St. John v. Thornburgh*, id. 75.

Bill to revive bill of revivor lies. *Att. Gen. v. Burkham*, Hard. Exch. 201.

Feme sole sues out a commission to examine witnesses; before they are examined she marries. Their depositions ordered to stand. *Winter v. Daniele*, 1oth. 99. PR. COMMISSION TO EXAMINE; PR. EVIDENCE.

(e) *By Infant coming of Age.*

Bill by administrator *durante minoritate* abates by infant coming of age, therefore supplemental bill is necessary. *Stubbs v. Leigh*, 1 Cox, 133.

By the infant's coming of age, administration *durante minoritate* ceases, and suit by such administrator is thereby determined for that the infant cannot

go on therewith, but must begin anew, unless a decree to account were had, in which case the infant on a bill brought for that purpose, may be allowed to go on therewith. *Jones v. Bassett*, Prec. Chan. 174. ADMOR. DUR. MIN. ETATE.

An infant suing by prochein ami comes of age, afterward publication passed, and the cause came on to be heard. It was objected that the suit was abated, but the court overruled the objection and proceeded to hear the cause, and in such cases the course is to proceed to hearing without any change in the proceedings. Cur. Can. 464.

Infants coming of age do not abate bill brought by administrator *durante minoritate*. Cary, 22.

2. *Revivor.*

(a) *By and against whom.*

(b) *For costs.*

(c) *How revived.*

(a) *By and against whom.*

Upon a bill filed before the bankruptcy of the plaintiff, supplemental bill may be filed by the assignees, without the consent of creditors. *Beun v. Lewis*, 2 G. & J. 245. BANKCY. ASSIGNEES, POWER OF.

It may be necessary to revive a suit against the personal representative of a deceased defendant, who has himself disclaimed, and against whom the plaintiff waives all relief. *Glassington v. Thwaites*, 2 Russ. 458.

Where one of plaintiffs in creditor's suit dies after decree, his personal representative has a right to revive. *Burney v. Morgan*, 1 S. & S. 359. PR. CREDITOR'S SUIT.

Where one plaintiff dies before answer, the suit is abated, and the defendant cannot move that supplemental bill be filed within a limited time. *Adamson v. Hull*, 1 S. & S. 249. S. C. 1 T. & R. 258. PR. ANSWER.

Suit not revived against the administrator of a party named who did not appear, nor was served with a subpoena, nor can the plaintiff have the benefit of former proceedings against such an administrator. *Ashee v. Shipley*, 6 Mad. 296. EXORS. & ADMORS.

On the death of a defendant against whom the bill seeks to set aside a contract entered into by him for the sale of his wife's estate, it is regular to revive against his personal representative without making wife a party. *Humphreys v. Hollis*, 1 Jac. 73. HUSB. & WIFE; PR. PARTY.

If creditor file bill on behalf of himself and other creditors, and obtain decree and dies, another creditor may obtain order to file supplemental bill, if representatives of first plaintiff do not revive within a limited time. *Dixon v. Wyatt*, 4 Mad. 392. PR. CREDITOR'S SUIT.

Prochain ami plaintiff, dying after decree, reference to master to appoint another directed, on motion of defendant. *Bracey v. Sandford*, 3 Mad. 468. PROCHAIN AMI.

Defendant cannot revive, except after a decree to account, or where the defendant has some interest in the further prosecution of the suit: not, therefore, where his only object was to dissolve an injunction and proceed at law. *Horwood v. Schmiedel*, 12 Ves. 311. PR. PARTY DEFENDANT.

After decree suit may be revived by defendant, or by his representative, if dead. *Williams v. Cooke*, 10 Ves. 406. PARTY DEFENDANT; PR. DECREE.

Tenant in tail claiming upon death of former tenant in tail without issue, not through or under him, but by a new limitation in remainder is entitled to continue suit of former tenant in tail, and to benefit of proceedings by supplemental bill. *Lloyd v. Jones*,

9 Ves. 37. TEN. & TAIL; PL. SUPPLEMENTAL BILL.

Where injunction abates by death of defendant, defendant's representatives should move that plaintiff revive in a reasonable time, or injunction be dissolved. *Stuart v. Ancell*, 1 Cox, 411. PR. INJUNCT.

Bill by husband and wife, on death of husband, wife is not bound to prosecute. *Bredon v. Vaughan*, Dick. 566.

A mortgagor brings a bill to redeem, obtains a decree for an account, &c. in the usual manner, and the account is accordingly taken by the master. Before any further proceedings, the plaintiff dies, and his infant son and heir revives, and carries on the suit. Held that he is bound by the account already taken, but he shall be at liberty to surcharge and falsify it if he can. *Badham v. Odell*, 4 Bro. P. C. 349. ACCOUNT; HEIR.

A defendant cannot revive, but in one instance, and that is after a decree to account, because in that case he is not considered as an actor, for till the account is taken it is not known on which side the balance lies. *Anon.* 3 Atk. 691. PR. PARTY DEFENDANT.

Where new assignees in bankruptcy are appointed they can only revive by supplemental bill. *Anon.* 1 Atk. 88. BANKCY. ASSIGNEES.

Assignee of interest cannot file bill of revivor. *Harrison v. Rutley*, 2 Com. 589. ASSIGNOR & ASSIGNEE.

Where the testator had pleaded to a bill, and died before the plea was argued, the executor may plead *de novo*, for the first plea cannot be now argued. *Micklethwaite v. Culverly*, Forbes. 3. But if executor has assets, he will be bound. *Id. ib.* EXOR.; PL. PLA.

Where a suit abates by death of plaintiff, a person claiming by provision or *per formam doni*, and not as heir or representative of deceased, plaintiff cannot revive, but must bring his original bill, or commence at law. *Osborne v. Fisher*, 6 Bro. P. C. 20.

Decree made, defendant dies; suit must be revived and decree then drawn up *nunc pro tunc*. *Bertie v. Id. Falkland*, Dick. 25.

Upon a bill in nature of bill of revivor against devisee, the devisee cannot dispute the justice or validity of decree. *Minshall v. Id. Mohun*, 2 Vern. 672. Affirmed 6 Bro. P. C. 32. DEVISEE.

A devisee may bring original bill in nature of bill of revivor, and shall have the same advantage of a decree as an heir or executor, and the defendant is not at liberty to make a new defence. *Clare v. Wardell*, 2 Vern. 548. *Id.*

After a decree to account and abatement of the suit by the defendant's death, his representative may revive. *Kent v. Kent*, Prec. Chan. 197. PR. DECREE FOR ACCOUNT.

Mortgagor brings a bill to redeem, an account is decreed, and a report is made, and divers proceedings are had in the cause, and plaintiff is ordered to pay costs and deliver possession; the defendant, the mortgagee, dies; his executor can revive this suit. *Ly. Stowell v. Cole*, 2 Vern. 296. MORTGOR. & MORTGORE.

Administrator obtains a decree and dies; the administrator *de bonis non* may revive this decree within the equity of stat. 30. Car. 2. c. 6. *Owen v. Curzon*, 2 Vern. 237. ADMIN. DE BONIS NON.

A man marries an administratrix; plaintiff obtains decree against him and his wife for 1500*l.*; she dies; plaintiff cannot proceed against the husband, without reviving against the administrator of the wife. *Jackson v. Rawlings*, 2 Vern. 195. HUSB. & WIFE; ADMIN.

Where a mutual account is decreed, the defendant, in case of abatement, may revive, or on his death,

his representatives. *Stowell v. Cole*, 2 Vern. 219. *Kent v. Kent*, Prec. Ch. 197. DECREE TO ACCOUNT.

A decree and sequestration for a personal duty against one who dies; this shall not be revived against his heir, or real estate, though it were for money payable on the behalf of a charity. *University College v. Fosterest*, 2 C. R. 244. 1 Vern. 166. HEIR AT LAW; PR. SEQUESTRATION.

If a decree be signed and enrolled, an assignee may revive by *scire facias*. *Dunne v. Allen*, 1 Vern. 283.

Purchaser or assignee who comes not in in privity, cannot revive either by *scire facias* or by bill of revivor, but may bring an original bill to carry former decree into execution. *Id.* 426. ASSIGNEE; PRIVACY OR TITLE.

A decree for confirming an agreement between a lord and his tenants, for settling heriots and stinting common, revived by bill brought by purchaser, who did not come into possession and confirm, though lord and tenants were only tenants for life. *Id. ib.* 427.

In case of abatement it is not necessary to revive against a defendant who has not answered. *Orburgh v. Fincham*, 1 Vern. 308.

Plaintiff may revive when defendant's time for answering is out. *Wakely v. Bathes*, Dick. 13.

If baron and feme have a decree for money in right of the wife, and the husband dies, she shall have the benefit of the decree. *Nanney v. Martin*, 1 Ch. Ca. 27. 2 Freeman. 72. S. C. HUSB. & WIFE.

Where divers are plaintiffs, and the bill, after hearing, abates, some of them without the rest may revive the cause. *Eaton v. Turner*, 2 C. C. 80.

After answer to a bill for discovery, if the suit abates by the death of defendant, the plaintiff may revive for further discovery. *Gould v. Barnes*, Beame on Costs, 199.

A devisee cannot bring a bill of revivor, not being in representation to the devisor, but in nature of a purchaser. *Buckhouse v. Middleton*, 3 C. R. 30. 1 C. C. 174. S. C. *Anon.* 2 Freeman. 132. Nor a purchaser, *id. ib.*, but they may in nature of revivor. *Clare v. Wardell*, 2 Vern. 543.

Where bill to revive suit of forty years back, not allowed. *Price v. Morgan*, 2 Ch. Ca. 215.

Testator died after publication; executor not permitted to file new bill to make further proofs, but was held to bill of revivor. *Ferney v. Laune*, Toth. 174.

Where two defendants marry together, no revivor is necessary. *Jackson v. Smith*, Cary. 59.

Husband and wife parties to bill; husband dies and revivor by wife held good. *Parrott v. Randall*, *id.* 100.

Assignee of lease, subject of suit, cannot revive. *Cheestrot v. Haslewood*, Choice Ca. Ch. 147. S. C. *Haslewood v. Reynold*, Toth. 174. Et vide *Dunn v. Allen*, 1 Vern. 424.

#### (b) For Costs.

The general rule being, that there shall be no revivor for costs alone, yet where the costs have been taxed previous to the abatement, it seems there is a right to revive merely for the purpose of having them paid; and where the abatement has happened by the death of the party in whose favour the costs were awarded, it is the settled practice of the court that his representative may revive for such purpose. *Louten v. Mayor, &c. of Colchester*, 2 Mer. 113.

A cause is not out of court for this purpose, in consequence of the bill being dismissed. Enrolment of the decree not necessary to entitle the representative of a party to revive for costs; revivor for costs decreed out of a particular fund, is another exception to the general rule. *Id. ib.* DECREE, ENROLMENT OF.

No revivor for costs alone, unless they are to be paid out of estate. *Jenour v. Jenour*, 10 Ves. 572.

Revivor for costs only on the death of the plaintiff entitled to them, though before the report, and they were not to come out of a particular fund. *Morgan v. Scudamore*, 3 Ves. 195.

Though, generally speaking, costs die with the party if they have not been taxed, several exceptions are allowed to it, and revivor may be for costs alone, under particular circumstances, as where a duty is decreed, or where out of a particular fund, though nothing more to be done. *Kemp v. Mackrell*, 2 Ves. 579.

Where, at the hearing of an original and cross cause, the cross bill was dismissed with costs, and an account directed in the original suit, and the plaintiff died before the account was taken, the court held it a decree executory, and therefore that the representative of the plaintiff was entitled to revive for the costs of the cross cause. S. C. 3 Atk. 812. 2 Ves. 580.

And where a duty is also decreed, or where the costs are directed out of a particular fund, though nothing in the decree remains to be done, the case is held to be an exception to the rule. *Id. ib.*

Revivor is allowed for costs taxed; costs die with the party, unless taxed, and even where taxed in the lifetime of such party, and the person to pay them is in prison; he will be discharged unless there be a revivor within a reasonable time: this in like manner as in a case of sequestration. *White v. Hayward*, 2 Ves. 461.

Though the strict rule be not to allow revivor merely for costs which have not been taxed, the court leans against enforcing it if there be any thing in the decree yet remaining to be executed. *Johnson v. Peck*, 2 Ves. 465.

The court inclines against the rule of not reviving for costs untaxed, and therefore will not enforce it if the decree remains in any part unexecuted, and if the decree is against an executor for a sum with costs out of assets, and the executor pays the sum, but not the costs, and dies, it is held a decree executory, and the plaintiff entitled to revive. *Id.* and S. C. *Johnson v. Leake*, 3 Atk. 773.

After verdict on issue directed, leases decreed to be delivered up to the plaintiff; after the master had settled the amount of the costs, but before report, the plaintiff died. On demurrer to so much of the bill by his devisees as prayed revivor, the court inclined to hold the rule not to revive for costs only, not applicable where the party to receive them dies also; that the taxation would relate to the time when the amount was settled, so as to take it out of the rule; but the demurrer was overruled, as it did not appear on the bill that the decree had been executed by delivering up the leases. *Morgan v. Scudamore*, 2 Ves. J. 313.

Where the party to pay costs dies, and they are not taxed, no revivor for them only, because a personal demand. *Id. ib.* 315.

A representative of a person who had obtained an order to tax a bill, can revive it only on an undertaking to pay. *Murphy v. Bulderston*, 2 Atk. 114. PR. ORDER TO TAX, REVIVAL OF; EXORS. & ADMORS.

Baron and feme brings a bill to redeem a mortgage, defendants plead to the bill, and the plea overruled, and costs given to the plaintiffs, which by the course of the court, are 5*l.* Baron dies; the feme by survivorship shall have the costs. *Copple v. —*, 2 P. W. 486. HUSB. & WIFE; PR. TAXED COSTS; SURVIVORSHIP.

Bond given to a baron and feme during coverture, baron dies; the bond will survive to the wife, *id.* 497. *Id.*

Suit cannot be revived for costs only, though taxed,

unless decree is enrolled. *Gleham v. Statwell*, Dick. 14. But see 2 Mer. 113. DECREE, ENROLLMENT OF.

### (c) How revived.

Bill of revivor having been filed, but no order to revive obtained, court ordered plaintiff to revive within ten days, or original and revived bill to be dismissed. *Bolton v. Bolton*, 2 S. & S. 371. PR. ORDER TO REVIVE.

Where a feme plaintiff marries, and the husband dies before revivor, a bill of revivor is unnecessary, but the subsequent proceedings ought to be in the name, and description acquired by the marriage. *Godkin v. El. Ferrers*, Mitf. 47. HUSB. & WIFE.

Where sole relator dies, application for new one must be made by the attorney general. *Att. Gen. v. Plumptree*, 5 Mad. 452. RELATOR.

Where husband and wife are defendants, and by the death of the husband a new interest arises to the wife, the suit becomes defective, a supplemental bill is necessary, and she is not bound by the answer put in during the coverture. *Neale v. Smith*, 1 Jac. & W. 665. See 1 Jac. 490. HUSB. & WIFE; SUPPL. BILL.

On abatement by bankruptcy of defendant, an executor, after decree to account, supplemental bill in nature of revivor is necessary. *Russell v. Sharp*, 1 V. & B. 500. EXOR.; PR. SUPPL. BILL; PR. DECREE TO ACCOUNT.

Where a party is avoiding service, and the clerk in court is dead, the proper course is to move first, that service of a subpoena to name clerk in court, on the solicitor, may be good service; and if none is named, then that service on the solicitor may be good service. *Franklyn v. Colhoun*, 12 Ves. 2. PR. SUBPOENA SERVICE SUBSTITUTED; PR. OFFICERS OF COURT, CLERK IN COURT.

When an appeal is abated in the House of Lords, the order to revive is obtained of course, and there is no fresh summons. *Byne v. Potter*, 5 Ves. 305. PR. APPEAL IN HOUSE OF LORDS.

The defendant dying after service of the subpoena to hear judgment, whether upon a bill of revivor, a new subpoena to hear judgment is necessary, *quere?* *Id. ib.* PR. SUBPOENA TO HEAR JUDGMENT; PR. BILL OF REVIVOR.

Where a defendant dies pending an injunction against him to restrain proceedings in an ejectment, the heir at law may move, that plaintiff in equity may revive within a week, or the injunction be dissolved. *Hill v. Hoare*, 2 Cox, 50. HEIR AT LAW; INJUNCTION.

Although a defendant has appeared and answered the original bill, if he cannot be found to be served with a subpoena to answer a bill of revivor, the plaintiff must proceed under 5 G. 2. c. 25. to have the bill taken *pro confesso*. *Henderson v. Meggs*, 2 Bro. C. C. 127. PR. BILL, PRO CONFESSO; STAT. C. OF; PR. SERVICE OF SUBPOENA.

Not necessary to revive a perpetual injunction on death of party. *Askew v. Townsend*, Dick. 471.

Service of subpoena to revive, on defendant's clerk in court, in original cause refused. *Brewin v. Lee*, Dick. 545. *Id.* *Lee v. Warner*, Dick. 546.

Stat. 5 G. 2. c. 25. extends to bill of revivor. *Att. Gen. v. Smith*, *id.* 135.

Bill abated by marriage of plaintiff, no revivor till after cross bill, filed loses priority. *Smart v. Floyer*, *id.* 260.

The plaintiff, on the death of the defendant, is not obliged to bring a bill of revivor, but may file a new bill. *Anon.* 3 Atk. 486.

If the party's clerk in court be dead, no process can be taken out against the party, until he has ap-

pointed a new clerk in court, and a subpoena *ad faciend. attorn.* must be taken out for that purpose. *Ratcliff v. Roper*, 1 P. W. 420. PR. CLK. IN COURT.

Part of the matters being omitted in drawing up the decree, and after the decree signed and enrolled, the defendant dies, a bill of revivor lies to revive the matters omitted. *Williams v. Arthur*, 1 C. C. 37. 2 Free. 177. PR. DECREE.

After decree signed and enrolled, and several proceedings had respecting costs, the suit abated by death of the plaintiff; held, a bill of revivor was the proper mode of reviving the decree. *Croster v. Wisiter*, 2 C. R. 67. 1b.

Where a suit abates, plaintiff may bring an original bill, or bill of revivor at his election. *Spencer v. Wray*, 1 Vern. 463.

ACCOUNTANT GENERAL. See PR. OFFICERS OF COURT, 2.

ADJOURNMENT OF CAUSE. See PR. CAUSE.

ADVANCE OUT OF FUND IN COURT. See PR. FUND IN COURT.

ADVANCING CAUSE. See PR. CAUSE.

## II. ADVERTISEMENT TO APPEAR.

See also PR. CREDITOR'S SUIT.

Legatees are not precluded from claim by non-appearance pursuant to advertisement to come in under decree, or to be excluded from benefits of it. *Anon.* 9 Pri. 210. LEGATEES; PR. DECREE.

AFFIDAVITS. See BANKCY. XVI. 3. (b). (3).; XVII. 4.—PR. EVID. 11.

AMENDMENT. See BANKCY. VI. 6.; XVII. 5.—PR. ANSWER, 15.—PR. BILL, AMENDMENT OF.—PR. COSTS, 10. (c). PR. DECREE, 13.—PR. DEMURRER, 4.—PR. EVID. 29. (c).—PR. INJUNC. 11.—PR. MASTER, REFER. 2. (d).—PR. ORDER, 6.—PR. PLAFA, 7.—PR. SUBPOENA, 1.

## III. ANSWER.

See also PR. COSTS, 10. (y).—PR. EVID. 11. (n).; 12.—PR. TAKING PLEADINGS OFF FILE.—PR. INJUNC. 2; 4.

1. General orders relating to.
2. Form of.
3. Signature of.
4. Jurat of.
5. Schedules.
6. In what time, and of the filing of.
7. Ordered in a given time to be put in.
8. Commission to take.
9. Time given to answer.
10. Effect of answer.
11. Further.
12. Supplemental.
13. Separate.

14. To amended bill.

15. Amendment.

16. Evasive.

17. Exceptions to.

(a) Form and requisites.

(b) Effect of.

(c) When necessary or proper to be taken.

(d) In what time.

(e) Filing generally, and *nunc pro tunc*.

(f) Deposit on.

(g) Further exceptions.

(h) Waiver.

(i) Submission, or otherwise to.

(j) Reference on exceptions.

(k) Argument and hearing of.

(l) Allowance and overruling of.

18. Reference for scandal and impertinence. See also PR. MASTER, 1. (d).

19. Sufficiency. See also PR. MASTER, 1. (d).

20. Who bound.

21. Liberty to withdraw.

22. Priority.

### 1. General orders relating to.

Reference of answer as insufficient, not granted without particulars pointed out. *Beame's Ord.* 24.

When confessing a trust, the course to be pursued concerning. *Id.* 24.

When immoderately long, party and counsel to be fined. *Id.* 25. 70.

To be signed by counsel. *Id.* 25. 70. 165.

To be suppressed if scandalous or impertinent. *Id.* 25.

When insufficient, for first answer defendant to pay costs. *Id.* 28.

For second, when insufficient on same points, double costs. *Id.* 28.

So for third, treble costs. *Id.* 28.

So for fourth, quadruple costs, and defendant to be committed and examined on interrogatories. *Id.* 28. 183.

If certified, sufficient, plaintiff is to pay costs. *Id.* 28. 182.

Cannot be excepted to as insufficient after replication. *Id.* 28.

Must be direct to matter charged as defendant's own acts, if laid as done within seven years before. *Id.* 28. 179.

Unless on exception taken, the court dispenses with so positive an answer. *Id.* 179.

How defendant must traverse a fact. *Id.* 29. 179.

Answer admitted true in all points when hearing prayed on bill and answer. *Id.* 29. 180.

To be read at hearing where no counsel appears for defendant, and process served. *Id.* 29. 198.

Report on reference of answer, as insufficient, to be procured and filed within a month, or reference void. *Id.* 53.

Answer not to be stuffed with repetitions of deeds *in hac verba*. *Id.* 69. 166.

Only to contain the effect and substance, &c. in brief terms, avoiding useless traverses, tautologies, &c. *Id.* 70. 166.

If, on answer, there is sufficient for a decree, cause to be set down on bill and answer. *Id.* 78. 180.

Answer not to be copied until filed and hand of six clerk put to it. *Id.* 110. 123. 187.

Taken by commissioner not to be opened or copied until returned to six clerk. *Id.* 111. 191.

To be filed with six clerk. *Id.* 123. 135. 140. 168. 231.

Not to be impertinent or scandalous. *Id.* 25. 266.

Is not of record until filed with six clerk. *Id.* 168.

No commission to take an answer to issue, party

being in contempt, without motion and affidavits. *Id.* 178.

No second commission to answer, but on special order or plaintiff assenting. *Id.* 178. 183.

If, on exceptions to answer, defendant do not within eight days amend or put in a second insufficient answer, plaintiff may refer. *Id.* 182.

And for second insufficient answer defendant to pay costs. *Id.* 182. 183.

The course if answer is filed in vacation. *Id.* 182.

If answer reported good, plaintiff is to pay costs. *Id.* 182.

Costs on different answers reported insufficient. *Id.* 182. 183.

After fourth answer reported insufficient, defendant to pay 5*l.* costs, and be examined on interrogatories and committed, &c. *Id.* 183.

If answer certified insufficient, plaintiff may immediately proceed for his costs and better answer. *Id.* 210.

Answer to be filed, and not copied until filed. *Id.* 110. 123. 240.

As to answer of a quaker. *Id.* 248. 249.

A answer ought to be full. *Id.* 250.

Where defendant is to make further answer, not necessary to serve him with subpoena. *Id.* 250.

A rule sufficient, or copy of order. *Id.* 250. 251.

If defendant then puts in insufficient answer, process of contempt to issue. *Id.* 251.

Or plaintiff to resort to proper process, &c. *Id.* 251. As to the costs of these proceedings. *Id.* 251.

After third answer reported insufficient, defendant shall be examined on interrogatories, and stand committed, pay 4*l.*, and such further costs as court directs. *Id.* 318.

To be a part of all orders, giving time to answer that party consent that a serjeant at arms shall go against him, &c. in case of non-compliance. *Id.* 324.

All answers to be signed by the defendants in the presence of the master or the commissioners. *Id.* 452.

On a third application for time to answer, defendant to enter appearance with register in four days, consenting that a serjeant at arms shall go against him if he put not in his answer by time granted. *Id.* 455. So on second application for time to answer amended bill, or after exceptions allowed. *Id.* 455. But this not to preclude special application. *Id.* 456.

## 2. Form of.

Answer ordered off the file, it purporting to be an answer to the bill of five complainants when there were six. *Cope v. Parry*, 1 Mad. 83. *PR. INTITUTING PLEADINGS.*

Joint and several answer, including in title persons who declined joining in suit, ordered to be received as answer of those who swore without striking out names of the others. *Done v. Read*, 2 V. & B. 310. *PL. PARTIES.*

Where a foreigner puts in an answer in his own language, a sworn translation must be filed with it. *Simmonds v. Cs. Du Barré*, 3 Brown, C. C. 265. *FOREIGNER.*

## 3. Signature of.

All answers to be signed by defendant in presence of master or commissioners. *Beame's Ord.* p. 452, and by counsel. *Id.* 25. 70. 165.

Where an answer is contained in more than one skin of parchment, every skin must be signed by the defendant, and therefore where in a country cause an answer was comprised in two skins, and the last only was signed, the court directed that an officer should

take the answer into the country, and procure the signature of the defendant to the other skin, unless the defendant should previously come to town and sign it. *Jacobs v. Badger*, 1 Y. & J. 166.

Answer on two skins must be signed on both, and where answer was attended also with other irregularities, ordered to be taken off file with liberty to put on another, first to be impounded to guard against perjury. *Bailey v. Forbes*, 1 M'Clel. & Y. 462.

If one only of several skins of answer be signed by defendant, it will be ordered off the file to be resworn, and signed. But where it appeared probable from the motion (for shewing cause against an order nisi for dissolving an injunction obtained for want of answer) being delayed till the last day, that the object of the application was to protract the injunction, the court permitted the answer to be filed, resigned, and resworn on the following day *tunc pronunc*, to save the order nisi, and prevent the delay. Costs of the motion were also refused. *Carver v. Bonsanquet*, 13 Price, 604. S.C. 1 M'Clel. 456.

If a bill and cross bill be filed, the plaintiff in the original bill has a right to the first answer, and may move to stay proceedings in the cross cause till the original bill is answered, though the plaintiff in the cross bill may be in a situation to enforce an answer first. The right of the plaintiff in the original bill to make the motion, was held not to have been waived, by his having taken out the common orders for time to answer the cross bill. *Harris v. Harris*, 1 Turn. & R. 165. *PR. CROSS BILL; WAIVER; PR. ORDER FOR TIME TO ANSWER.*

Guardian of infant defendant being a co-defendant, need only sign the joint answer once. *Anon.* 2 J. & W. 553. *GUARDIAN; INFANT.*

Plaintiff in original bill amending after cross bill filed, loses his right to receive an answer to original bill before he answers the cross bill. But in order to stay proceedings on original bill until cross bill is answered, defendant in original bill must obtain an order to stay proceedings. *Noel v. King*, 2 Mad. 392. *PR. CROSS BILL; PR. STAYING PROCEEDINGS.*

Defendant only signing first skin of answer, before filing, allowed to sign the rest on the file, and time allowed him to come to town for that purpose. *Clarke v. Mansfield*, 3 Price, 605.

The signature of counsel is necessary to an answer. The constant and undisturbed practice of the court is binding, as the law of the court, without positive order. The old practice on country commissions equivalent to a signature by counsel. *Brown v. Bruce*, 2 Mer. 1. *PR. SIGN BY COUNSEL.*

Order on plaintiff's motion, that defendant shall be at liberty to put in his answer without oath or signature, of course, if defendant is in this country; if abroad, his consent required. *Codner v. Hersey*, 18 Ves. 463. *PR. ORDER.*

Answer of a mere trustee, without interest in a state of incapacity, not to be taken without oath and signature. The proper course is to have a guardian appointed. *Wilcox v. Grace*, 14 Ves. 172. *LUNATIC TRUSTEE.*

Order made to take the answer of defendants, they being out of the jurisdiction, without oath and signature. *Harding v. Harding*, 12 Ves. 159.

Answer of defendant abroad (not being one required to be put in on oath) ordered to be put in by person having power of attorney to defend suits, &c. without signature. *Bayley v. De Walkiers*, 10 Ves. 441. *POWER OF ATTORNEY.*

Under special circumstances and by consent, six clerk was directed to receive the answer to bill of foreclosure, though not signed by defendant. — *v. Lake*, 6 Ves. 171. a. S. P. — *v. Gwillim*, *id.* 285.

Where counsel's name to answer was forged, the court will not order it off file to prejudice of innocent plaintiff. *Bull v. Griffin*, 2 Anst. 563. SIGNATURE OF COUNSEL.

#### 4. Jurat of.

By order of the House of Lords, Dec. 3, 1640, the nobility of this kingdom, and Lords of the Upper House of Parliament, and the widows and dowagers of the temporal lords shall answer as defendants upon protestation of honour only, and such order shall extend to all answers and examinations upon interrogatories. Beame's Ord. Ch. 105. ~~FEELS~~.

Exceptions cannot be taken to answer put in without oath. *Hiles v. El. Bute*, 2 Fowl. Exch. Pr. 11.

Answer taken off the file for irregularity on the grounds (inter alia) that in jurat as to one defendant, a mistake had been made in the year 1817 being written for 1827, and that the answer had been affirmed by another of the defendants who was a quaker, under a commission issued to take the answer of that defendant upon his corporal oath. *Parke v. Christey*, 1 Y. & J. 533. ~~PH. TAKING PLEADINGS OFF FILE.~~

Answer of two defendants sworn only by one, ordered to be taken off the file. *Cooke v. Westall*, 1 Mad. 265.

Answer without oath or attestation of honour, regarded for the purposes of civil justice as if with that sanction. *Curling v. Townshend*, 19 Ves. 628.

Answer taken by commission abroad, ordered to be filed, without the usual oath of the messenger under the circumstances, that it had been opened by the defendant's solicitor, and afterwards read in the presence of the plaintiff, upon affidavits of the messenger, &c. identifying it, and accounting for its being opened, as the effect of accident, the farther irregularity being cured by the consent. *Car v. Newman*, 2 V. & B. 168.

An amendment in the title of an answer being necessary, viz. instead of "the farther answer to the original amended bill," entitling it "the farther answer to the original bill, and the answer to the amended bill," the answer so amended, must in the case of a peer, be again attested upon honour, as in the case of a common defendant it must be re-sworn. *Peacock v. Dr. Redford*, 1 V. & B. 186. ~~PH. AMENDMENT OF ANSWER; PEER.~~

If one puts in his answer as being a quaker, the court will not enquire whether he is such. *Marsh v. Robinson*, 2 Anst. 479. AFFIRMATION OF QUAKER.

An answer prepared for five, cannot be sworn to as the answer of three of them only. *Harris v. James*, 3 Bro. C. C. 399.

The court allowed a quaker to put in his answer without oath or affirmation, where the bill appeared frivolous. *Wood v. Story*, 1 P. W. 781. QUAKER.

A bill against a corporation to discover writings. The defendants answer under the common seal, and so being not sworn will answer nothing in their own prejudice. Ordered that the clerk of the company, and such principal members as the plaintiff shall think fit, answer on oath, and that a master settle the oath. *Anon.* 1 Vern. 117. CORPORATION.

Court has directed defendant to answer without oath, for purpose of entitling plaintiff to commission to examine abroad, even though injunction had been decreed against defendant till plaintiffs right had been tried and ascertained at law. *E. I. Comp. v. Sandys*, 1 Vern. 127. 130. Vide *Anon.* 1 P. W. 523.

In what cases a peer shall answer on oath. *Meers v. Ld. Stourton*, 2 Salk. 512. ~~PEER.~~

Answer and plea returned as an answer only, rejected, the plea not being upon oath, but without

costs, because the commissioner's fault and not the defendant's. *Jefferson v. Dawson*, 2 C. C. 208.

Members of a corporation charged as private persons, answer upon oath. *Warr v. Comp. of Felt-Makers*, Toth. 7.

Bishop to answer upon oath. *Mayor of Sarum v. Epis. Sarum*, Toth. 12.

A bill being preferred against a quaker for tithes, who refused to answer upon oath, the defendant was brought to the bar, and having been brought three times before, the bill was taken *pro confesso*, and it was referred to a master to examine what was due, and not to be armed with a commission for that purpose. *Anon.* 2 C. C. 237. 2 Free. 27. ~~PR. BILL PRO CONFESSO; QUAKER.~~

#### 5. Schedules.

Rule that there must be schedule before court will order production of deeds and papers, applies only in cases of discovery. *Anon.* 6 Mad. 97. ~~PL. DISCOVERY; PR. PRODUCTION OF DEEDS, &c.~~

Where in schedule to answer material error was discovered only on taking account before master. On petition and affidavit, supplemental schedules were allowed to be put in. *French v. Myles*, 4 Mad. 404.

Motion for payment of money into court, not admitted to be due, even upon the examination of the defendant, but appearing due by his schedule, according to the plaintiff's calculation, refused. For such a purpose the result of the schedule, ascertaining the sum due, must clearly appear verified by affidavit. *Quarrell v. Beckford*, 14 Ves. 177. ~~PR. PAYMENT INTO COURT.~~

#### 6. In what Time.

Defendant in country cause to answer, &c. in eight days, or obtain time. Gen. Order, Exch. June 30, 1828. 2 Y. & J. 492.

Defendant in country causes must put in his answer within eight days after appearance, or obtain the usual orders for time. 3d Gen. Order, 3d April, 1828.

Every defendant to put in his answer within eight days after appearance and bill filed, if the bill shall be filed in term, or within two days after, in case he does not desire a commission, which is to be entered under his appearance, and to be returnable the beginning of the following term; and no defendant living within twenty miles to have a commission without special order. Ord. Exch. 1685, Kirkby's Ed. 5.

Commission to examine in West Indies, on bill filed for discovery in aid of action at law brought by plaintiff, and for commission, (not praying relief,) ordered on motion, although defendant's answer had not come in, time having however expired. *Hebberson v. Cambridge*, 13 Price, 796. ~~PR. MOTION; PR. COMMISSION TO EXAMINE ABROAD.~~

Where defendant enters appearance gratis, time within which he must answer or sue out commission, is calculated from such his actual appearance. *Webster v. Threlfull*, 1 S. & S. 135. ~~PR. APPEARANCE GRATIS.~~

To prevent attachment, or injunction, or motion to extend common injunction, to stay trial answer must at latest be filed the evening before seal-day. *Whitehouse v. Hickman*, 1 S. & S. 102. ~~PR. FILING PLEADINGS.~~

Answer filed on seal-day is too late to prevent motion to extend common injunction, although motion on account of press of business was not made until following day. *Id. ib.*

Neither will mistake in office hours tend to excuse the delay. *Ibbotson v. Booth*, id. 103.

Plea and answer cannot be filed until demurrer actually taken off file after order for that purpose. *Cust.*

v. *Boole*, 1 S. & S. 218. PR. PLEA; PR. FILING PLEADINGS, &c.; PR. DEMURRER; PR. ORDER TO TAKE DEMURRER OFF FILE.

Where defendant is not bound to appear before particular day, but prior thereto does appear gratis, the time for answering, &c. is calculated from the actual appearance. *Hanworth v. Wallater*, 5 Mad. 422. PR. APPEARANCE GRATIS.

The further answer of a defendant, being sworn at the house of a master, and filed in the six clerks' office, on the evening of the day on which the master had reported a former answer insufficient; an order obtained at the sitting of the court on the next morning for an injunction, is irregular. *Secus*, if the answer had not been filed on the day, on which it was sworn. *Duckworth v. Boulcott*, 3 Swan. 266. PR. INJUNCTION.

Motion to discharge an order for an injunction, and to set aside an attachment on which the injunction had issued, refused: the answer having been sworn on the evening before, but not filed until after the injunction issued. *Bruce v. Webb*, 2 Mer. 474. PR. INJUNCTION, DISSOLUTION OF.

Where a bill of review was irregular, as containing new matter, and yet filed without leave, but the defendant had inadvertently obtained an order for time, the court gave him leave to withdraw it. *Vide Houghton v. West*, 2 Bro. P. C. 93.

In *Tonkin v. Lethbridge*, 9 Ves. 178, where an answer evidently evasive was put in for the purpose of gaining time, the Ld. Chancellor said, that where further time is necessary, it is more proper to apply by affidavit. He had acted upon that ground as to Ld. Rosslyn's order. The usual time of six weeks is only for general cases. In some it is too much, and though the court would not encourage such applications, it must be understood to bend to circumstances. See *Smith v. Serle*, 14 Ves. 415, as to taking an answer, clearly evasive, off the file.

A defendant in all cases, by the course of the court, has eight days, exclusive of the day of appearance to answer plaintiff's bill. *Hinde*, 225.

If a man whose residence is in the country, be found in town, and there served with a subpoena, he is only entitled to eight days time to answer, and not to a dedimus to answer in the country, because the time for answering depends on the place where the subpoena was served. *Coningsby v. Price*, Gilb. For. Rom. 43.

#### 7. Ordered in a given time to be put in.

If the attorney-general do not put in his answer to a bill filed against him within a reasonable time, the court will order that unless the answer be put in by a short day the bill be set down to be taken *pro confesso*. *Peto v. Att. Gen.* 1 Y. & J. 509. ATTORNEY-GENERAL; PR. TAKING BILL PRO CONFESSO.

A solicitor who had prevailed on a party to file a bill against others, and himself acting as the plaintiff's solicitor in the suit, and did not put in his answer; ordered to file his answer in a given time, on motion, upon notice. *Jennaway v. Middleton*, 9 Price, 666.

Order made that defendant should within four days answer interrogatories, or in default a sergeant at arms to go. Insufficient answer put in; sergeant ordered to take him. *Weston v. Jay*, 1 Mad. 527. ANSWER, INSUFFICIENCY; PR. PROCESS.

Solicitor who had instituted suit as plaintiff's solicitor, but was afterwards made defendant, after several years, not having put in an answer, ordered to answer within a week. *Mootham v. Hale*, 3 Y. & B. 92. SOLICITOR.

A copyholder in fee, by will charged his lands with his debts, the land being in England, and the heir an infant in Scotland, the creditors bring a bill to have

their debts paid out of the copyhold premises; whereupon the heir appears, and there is an attachment for want of an answer, but the heir being an infant, the next step is to bring up the body, the heir being in Scotland, and out of the reach of the process of court. The plaintiff cannot bring up the body, the infant shall answer by a certain time, or shew cause why a receiver should not be appointed. *Leg v. Turnbull*, 2 P. W. 409. JURISDICTION; INFANT.

#### 8. Commission to take.

By 55 Geo. 3. c. 157. the Ld. Ch. and court of exchequer in Ireland is authorised to appoint extra commissioners for taking answers of defendants in suits in the courts of equity in Ireland, residing in Great Britain; and by Order of 20th May, 1816, for carrying such act into effect, when any answer is in future to be taken in Great Britain, it shall be taken by the extra commissioners of the district wherein such defendant resides, and that fourteen day's notice shall be given to plaintiff's clerk in court and solicitor, of the name and residence of such extra commissioner, and time and place of tendering such answer.

As well on new commissions to take answers and pleas in the country, as before the masters in chancery, the commissioners shall see the defendants sign their answers and pleas in future. General Order, April 27, 1748, 2 Atk. 289.

In all joint commissions to take answers, &c. the name of the commissioners agreed on shall be entered in a book for that purpose, to be kept by the six clerk who has the carriage of the commission, and subscribed unto by each six clerk in the cause, or in their absence, by their deputy or deputies, whereby no alteration may be had of the commissioners' names agreed on, but by order; and the under clerk not to presume to agree on the commissioners' names in any other manner. Ld. Manchester's Ord. 1646. Beame's Ord. 107.

No answer taken by commission to be opened or copied till it be returned to the six clerk, out of whose office the commission issued, or, in his absence, to his deputy, and until publication be passed in the cause. Ld. Manchester's Ord. 1646. Beame's Ord. 111. Nor any answer taken by commission to be opened by any of the under clerks, before they be delivered to the six clerk in the cause, or his deputy. Ld. Clarendon's Ord. 1661. Beame's Ord. 191.

After a contempt duly prosecuted to an attachment with proclamations returned, no commission to answer shall issue, but on motion, and affidavit of the party's inability to travel, or other good matter, to satisfy the court touching that delay. Ld. Clarendon's Ord. 1661. Beame's Ord. 178. And see the references in the editor's note.

Yet where defendant was in contempt for non-appearance, and took out a commission to answer, the court would not quash it, nor force him to appear, but said if the commission had not been gone, but was about to go, the court would have stayed it until pearance. *Anon.* Wy. Pr. Reg. 114.

After a commission once obtained to answer, no second commission shall be granted without special order of court, upon good reason shewn, or plaintiff's own assent. Ld. Clarendon's Ord. 1661. Beame's Ord. 178.

So, after an answer reported insufficient, no new commission shall be awarded for taking a second answer unless it be by order, on affidavit made of the party's inability to travel, or other good matter shewn, and first paying the costs of the insufficient answer. *Ibid.* Beame's Ord. 183.

All answers coming in after the setting down of causes, are to be taken as answers of the succeeding



term. Ord. Exch. (15). Kirkby's Ord. Exch. 10. 1 Fowl. Ex. Pr. 428.

No commission whereby any answer is returned, shall, after the return, be broken open, but in the presence of the six clerk to whom it properly belongs, or his deputy; or, in his or their absence, by some other of the six clerks, not towards the cause. Sir O. Bridgman's Ord. 1668. Beame's Ord. Ch. 230.

No defendant living within fifteen miles of London, to have a commission but by special order of court: and all defendants living within fifty miles of London, appearing on process returnable on the first return of Easter or Michaelmas terms, desiring a commission to answer, are to return such commission by the end of the same term. Ord. Exch. (7.) 1688. Kirkby's Ord. Exch. 5. 1 Fowl. 412. Defendant may obtain this commission, though he lives within twenty miles, on an affidavit of illness and inability to travel. *Jordan v. Lefevre*, Exch. Newl. Pr. 125.

Notice of executing a commission being given, plaintiff's commissioners attended at the place and day from nine till twelve, and from one till three, but defendant's commissioners did not come; the answer, however, was sworn the same day. Plaintiff moved that it should be suppressed. The court said, his commissioners should have staid till six o'clock. *Anon. Wy. Pr. Reg.* 116.

No answer taken by commission to be filed, or any copy thereof taken, before a fiat, fairly engrossed on parchment, shall be fixed thereto, to warrant such commission. Ord. Exch. 13th Nov. 1731. Kirkby's Ord. Exch. 32.

Defendant's solicitor may be commissioner to take his answer. *Bird v. Branker*, 2 S. & S. 186. SOLICITOR & CLIENT.

Party in contempt, obtaining an order for commission to take "plea, answer or demurrer," may put in a plea. *Barber v. Crueshaw*, 6 Mad. 284. PLEA; CONTEMPT.

Infant defendants being out of the kingdom, a guardian *ad litem* was appointed by commission to put in their answer. Supplemental bill was filed, to which same infants were defendants and still abroad. Ordered on motion, that same guardians might put in their answer to supplemental bill. *Lushington v. Sewell*, 6 Mad. 28. INFANT; PR. GUARDIAN AD LITEM.

Where answer is to be taken by commission, in which plaintiff joins, plaintiff is entitled to six days' notice of time and place of taking the answer to be given to the commissioner named by him, and such notice should be a six days' notice, and be signed by two of the other commissioners. *Pound v. Wildgoose*, 8 Price, 102. NOTICE.

And where an answer was taken at the office of defendant's solicitor on the 22d, pursuant to notice given by such solicitor on the 17th, the answer was ordered to be taken off the file for irregularity, but without costs. S. C.

When commission issues to take answer of a foreigner, a power to take it through an interpreter when necessary, is virtually implied; and if the commissioners certify that the defendant was duly sworn to such answers in presence of commissioners, and it appear by affidavit of one of commissioners, that the interpreter was duly sworn, and that he believes, the defendant understood the contents of the answer, it is sufficiently verified. *Longman v. Noras*, 6 Price, 108. INTERPRETER.

Defendant, in contempt for want of answer, may, without consent, move for commission to take same. *Mainwaring v. Wilding*, 3 Mad. 41. PR. CONTEMPT.

A joint and several answer was taken by commission, and in the title of it, the names of two persons appeared, who declined joining therein, and put in a joint answer with other defendants. The V. C. ordered it to be received as the answer of those who swore it,

without striking out the names of the others. *Dons v. Read*, 2 Ves. & B. 310. But in *Cooke v. Westall*, 1 Mad. 265, an answer, purporting to be the answer of two, though sworn only by one, was ordered to be taken off the file. Et vide *Hope v. Parry*, ib. 83.

An infant defendant abroad cannot have a guardian assigned to put in his answer on motion, but a commission must go. *Tappen v. Norman*, 11 Ves. 563. INFANT; PR. GUARDIAN, ASSIGNING OF.

Defendant may obtain a commission, though he lives within twenty miles of London, on a proper affidavit that he is ill, and unable to travel to London. *Att. Gen. v. Bennett*, *Anderson v. Camden*, Newl. Pr. 125. *Jordan v. Lefevre*, in Exch. 1b.

The old rule of court, before the stat. 4 & 5 Ann. for amendment of the law, was to send to the commissioners the tenor of the bill, and they examined defendant in taking his answer by this tenor, in the same manner as if they had been examining him on interrogatories; but by degrees the inserting the tenor of the bill was done so loosely, that it did not answer the end, and therefore the act abolished the practice. As this is now omitted, the party, as well as the commissioners should sign an answer taken in the country; but it need not be signed by counsel. *Barley v. Pearson*, 3 Atk. 440.

A commission to take an answer of a person resident in a foreign country at war with us, must be executed in that very country; a commission directed to examine witnesses is executed at the nearest neutral port. — *v. Romney*, Ambli. 62. PR. COMMISSION TO EXAMINE ABROAD.

Where a defendant was deaf, and incapable of giving instructions for his answer, the court, on motion, ordered a commission to issue for taking the answer in the old way, with the bill annexed, for the commissioners themselves to endeavour to take the answer. *Gregory v. Waver*, 2 Mad. Prin. 278.

As to the form of the jurat of answer of a heathen or disbeliever, see *Runkissen v. Barker*, 1 Atk. 19.

An answer of two defendants, on motion, suppressed for irregularity, because it was underwrit "jurat" and not "jurati" or "ambo jurati." *Anon. Mos.* 238.

By the constant rules of the court, a *dedimus* to take an answer is returnable the first return of the next term; but by the practice, as allowed by the M. R., it is not returned till the second return of Hilary and Trinity terms, because the vacations between Michaelmas and Hilary, and between Easter and Trinity, are so short. *Anon. Mos.* 176. See Newl. Pr. 125.

Defendant cannot plead after proclamations returned, nor can plea be taken upon a general commission to take the answer only. *Lloyd v. Gunter*, 1 Vern. 275. See 1 Sim. & S. 226. PR. PLEA; PR. PROCLAMATION.

Answer returned and the indorsement of *executio istius brevis* omitted, supplied by other words in return. *Penn v. Chelle*, 1 Vern. 41.

If commissioners to take answer fail in duty, party wronged thereby must make affidavit thereof, and then take out attachment. Cary, 30.

If commissioner refuse to join in commission, attachment issued for not returning the commission, will be discharged on payment of costs, and a new commission granted. *Marshall v. Harwood*, id. 113.

Commission to take answer, granted on return of a *languedus* in prison. *Thomas v. Hoell*, id. 36.

Plaintiff, one of commissioners, to take answer; defendant in contempt, but discharged, and new commission granted. *Marshall v. Harwood*, id. 79.

Commission to take answer upon certificate of oath before mayor of L. of impotency. *Wotton v. Lewescombe*, id. 83. *Dodderidge v. Lasty and Vivan v. Napper*, id. 84.

Commission for answer; defendant being seventy years of age. *Hill v. Worlen*, Cary, 108.

Defendant taking commission to answer, cannot demur. *Stukly v. Lutterell*, id. 53. *Pain v. Carew*, id. 100.

#### 9. Time given to Answer.

Where defendants having stood out all process of contempt for want of an answer, at the return of the commission of rebellion, entered an appearance, with a clerk in court, paid the costs of contempt, and obtained the usual order for time to answer; on an application for an attachment against the defendants for not putting in their answers, the court held, that according to the established practice of the court, the defendants were entitled, on paying the costs of contempt, to appear and take the usual orders for time, in the same manner as if they had not been in contempt, but expressed its disapprobation of the practice. *Hill v. Muckay*, 2 Y. & J. 472. But see "New Orders," pl. 24.

Where a defendant, after notice of the plaintiff's intention to issue an attachment, unless an order for time is obtained, procures the order, but is unable on account of the press of business to get it drawn up, and omits to give the defendant notice of the order, until an attachment is sealed, he cannot set aside the attachment. *Kirkpatrick v. Meers*, 2 Sim. 16. *PR. ATTACHMENT.*

An order for time to answer, unless drawn up and served, will not stop an attachment. *Gayler v. Fitzjohn*, 1 Sim. 386. *Id.*

A plaintiff is entitled to move for a commission to examine witnesses abroad, as soon as the defendant has obtained an order for time, though he has neither filed his answer, nor is in contempt. *Mendicabul v. Machado*, 2 Russ. 540. *PR. MOTION FOR COMMISSION ABROAD.*

Though injunction not applied for on original bill, yet if bill is amended, injunction will be granted as of course, on defendant taking time to answer amended bill. *Statham v. Hughes*, 2 S. & S. 382. *INJUNCTION; BILL, AMEND. OF.*

Where a demurrer is overruled, the defendant, at the time of its being overruled, may move for time to answer. *Trim v. Baker*, 1 Turn. & R. 254. *PR. DEMURRER.*

After a plea overruled, an order for time to answer, obtained as of course, is irregular. *Ferrand v. Pelham*, id. 404. *PR. PLEA.*

Husband and wife being defendants; wife, after obtaining order to answer separately, is entitled to all the orders for time to answer, and is not bound by any previous order obtained by husband for that purpose on behalf of himself and her. *Jackson v. Haworth*, 1 S. & S. 161. *HUSB. & WIFE.*

After demurrer overruled, time to answer merely, can only be obtained on special application. *Trim v. Baker*, 1 S. & S. 469; and see note, id. 470. *S. C.* 1 T. & R. 253. *PR. DEMURRER; PR. MOTION OF COURSE.*

If a bill and cross-bill be filed, the plaintiff in the original bill has a right to the first answer, and may move to stay proceedings in the cross cause till the original bill is answered, though the plaintiff in the cross-bill may be in a situation to enforce an answer first. The right of the plaintiff in the original bill to make the motion, was held not to have been waived, by his having taken out the common orders for time to answer the cross-bill. *Harris v. Harris*, 1 Turn. & R. 165. *PR. CROSS-BILL; PR. ANSWER; WAIVER.*

Defendant being in contempt for want of answer, puts in one, and obtains order for discharge, upon payment or tender of costs of contempt. Costs tendered,

but not accepted. Answer was excepted to and referred, and after warrants to proceed before master, defendant submitted to exceptions. Plaintiff did not proceed immediately upon former contempt, but waited for answer and exceptions. Held, defendant entitled to order for time to answer exceptions. *Cox v. Champneys*, 6 Mad. 262. *PR. CONTEMPT; WAIVER; PR. EXCEPTIONS.*

Court will not grant a defendant, in a suit for tithes, who has filed a cross-bill against plaintiff for discovery, time to answer the original bill, until after the answer to the cross-bill is put in; defendant should amend the answer, if necessary. *Dolben v. Whittington*, 11 Price, 28. *CROSS-BILL.*

A general demurrer, for want of equity, to bill for discovery in aid of action, interrogating as to certain facts, is overruled by defendant's answering as to any material fact, though it was done in compliance with rule, on granting time to answer, &c., not demurring alone. On a special application, however, made before filing or arguing demurrer, leave will be given so as to relax this rule. *Sherwood v. Clark*, 9 Price, 259. *PR. DEMURRER OVERRULED BY ANSWER; PR. ANSWER.*

After an order, that the defendants should have a fortnight's time to answer, after the plaintiff had produced an instrument stated in the bill, fifteen months having elapsed without production, the plaintiff was ordered to produce the instrument on or before a day named, and production not being made, the bill was dismissed with costs. *Princess of Wales v. El. Liverpool*, 3 Swan. 567. *PR. PRODUCTION OF DEEDS.*

After motion for a month's time to answer the original bill, after cross-bill is answered, and the month expires, a motion cannot be made as of course for further time to answer the original bill. *Noel v. King*, 3 Mad. 183. *PR. CROSS-BILL.*

Copy of petition for third order for time to answer, ought to be served on plaintiff, or else it is invalid. *Newcombe v. Rowlings*, 3 Mad. 246. *PR. PETITION, SERVICE OF.*

Subpoena served on defendant at home in London, but he resided in the country; attachment issued and he appeared. Held, appearance waived irregularly, and that it made it a town cause; order obtained for six weeks' time to answer was therefore discharged with costs, as being irregular. *Bound v. Wells*, 3 Mad. 434. *PR. TOWN CAUSE; WAIVER; PR. APPEARANCE; PR. PROCESSES, IRREGULARITY OF.*

In a bill against executors, the plaintiff having stated two promissory notes of the same date, one for 15,000*l.* sterling the other for 15,000*l.* French *louis*, given by the testator for securing a sum of 15,000*l.*; on an affidavit by one of his executors, that he had inspected the first note, and observed on the face of it, circumstances tending to impeach its authenticity; that he was informed and believed, that the second note had been produced by the plaintiff for payment in a foreign country; and that he was advised and believed that it was necessary, in order that his answer might fully meet the case, that he should before answer, have inspection of the second note; it was ordered, that the defendants should not be compelled to answer, till a fortnight after production of the second note. *Princess of Wales v. El. Liverpool*, 1 Swan. 114. *PR. INSPECTION OF DEEDS, &c.*

A demurrer and answer filed by a defendant, attached for want of an answer, after orders for time to plead, answer, or demur, not demurring alone; ordered to be taken off the file. *Curzon v. De la Zouch*, 1 Swan. 185. *PR. ATTACHMENT; PR. DEMURRER; PR. TAKING PLEADINGS OFF FILE.*

Where the plaintiff, by an amended bill required the defendant to answer as to certain facts, upon the inspection of papers, stated to be left by the plaintiff in the hands of his clerk in court, the defendant, hav-

ing obtained one order for time, was allowed, on affidavit that the papers were not left for inspection till some time after that order obtained, as much time in addition, without prejudice to the usual order on a second application, after that additional time has expired. *Furnsworth v. Yemans*, 2 Mer. 142.

Defendant to an injunction bill, having suffered the injunction to go against him, upon a *dedimus*, the time for answering being expired, although not under an order for time, nor in contempt, *q.v.* whether he may demur alone? and it seems that he cannot be allowed to do so. *Edmonds v. Savery*, 3 Mer. 304. PR. DEMURRER.

After time obtained to answer only, a motion will not be granted for leave to demur, unless under special circumstances, such as surprise. *Bruce v. Allan*, 1 Mad. 556. DEMURRER.

Motion for time to answer on same day attachment is sealed; attachment has precedence; so of answer put in on same day. *Stephens v. Neale*, 1 Mad. 550. PR. ATTACHMENT.

After order for time to answer, a demurrer may be taken off the file. *Dyson v. Benson*, Coop. 116. PR. DEMURRER.

Time allowed defendant to answer amended bill is eight days, or he must, within that time, apply for time to answer. But on special application to be allowed to answer amended bill, even after plaintiff has replied, and called on defendant to join in commission, court will grant it, on condition of answering and joining commission immediately. *Church v. Legent*, 2 Price, 45. AMENDED BILL.

After a demurrer overruled, time to answer can be obtained only on a special application. *Jones v. Szaby*, 1 Swan. 194. (n.) *Contra*; where held after demurrer overruled, order is of course for month to plead or answer. *Gryllith v. Wood*, 1 V. & B. 541. PR. DEMURRER.

Mere denial of combination not a compliance with the terms of the order for time to answer, &c., not demurring alone. *Wetherhead v. Blackburn*, 2 V. & B. 123.

Illness an exception to the rule that an application for time on special grounds must be made in the first instance before the usual orders obtained. — *v. Riddle*, 19 Ves. 112.

Construction of the general order, (23d January, 1794.) Defendant, after exceptions allowed, not having previously come under terms, is entitled, of course, to one order for time; the general order not attaching before the second application for time to answer an amended bill, or after exceptions allowed. *Wills v. Powell*, 17 Ves. 113. GENERAL ORDER, C. OF.

Plea filed under an order for time to answer, regular. *De Minck v. Udney*, 16 Ves. 355. PL. PLEA.

Special order, under circumstances, for time to answer, without first obtaining the usual order. *Norris v. Kennedy*, 12 Ves. 66.

Defendant, having applied and obtained an order for time to answer, cannot put in an answer and demurrer, without a special case. As the demurrer being coupled with answer could not be taken off the file, it was moved to expunge or overrule it. *Taylor v. Milner*, 10 Ves. 444. PR. DEMURRER; PR. TAKING PLEADINGS OFF FILE.

Admission of single fact, besides denial of combination, is a compliance with the terms not to demur alone. *Baker v. Mellish*, 11 Ves. 73. PR. DEMURRER.

Plaintiff amended his bill, praying costs: the amended bill is not within the general order, 23d June, 1794, and defendant therefore is entitled to the same time as upon an original bill. *Spencer v. Bryant*, 9 Ves. 231. PR. AMENDED BILL; PR. TIME TO ANSWER.

Defendant, after an order for time, cannot have security for costs from plaintiff living out of jurisdiction. *Anon.* 10 Ves. 287. PR. SECURITY FOR COSTS.

Where more than usual time for answering is necessary, the proper course is to apply on affidavit, not to put in a short evasive answer for purpose of gaining time. *Tonkin v. Lethbridge*, 9 Ves. 178.

Defendant, submitting to exceptions, is not entitled to further time under the general order, 23d January, 1794, having previously had three orders for time, consenting to a sergeant at arms, as required by that order. *Portier v. De la Cour*, 8 Ves. 601. GENERAL ORDER, C. OF.

A mere denial of combination, by answer, does not satisfy the undertaking not to demur alone. *Lansdown v. Elderton*, 8 Ves. 526. PL. ANSWER.

Construction of the general order, 23d January, 1794, in the case of a peer defendant, that in the cases specified, upon application for time to answer, the defendant enter his appearance, and undertake, that if the answer is not put in, a sequestration, i. e., a sequestration absolute. *Gregor v. Ld. Arundel*, 8 Ves. 87. GENERAL ORDER, C. OF; PEER; PR. SEQUESTRATION.

Demurrer and answer, after a peremptory order for three weeks further time to answer, following an order for a month to plead answer or demur, not demurring alone, ordered to be taken off the file. *Mann v. King*, 18 Ves. 297. PL. DEMURRER.

After two insufficient answers, defendant is not entitled to six weeks' time to answer. *Gregor v. Ld. Arundel*, 6 Ves. 144. PR. ANSWER INSUFFICIENT.

After an order for time to answer, the bill may be referred for scandal, but not for impertinence. *Anon.* 5 Ves. 656. PR. REFERENCE FOR SCANDAL; PR. REFERENCE OF IMPERTINENCE.

The court refused to vacate the enrolment of a decree dismissing the bill with costs, by default; and afterwards, upon a new bill for the same purpose, granted a motion for time to answer until a month after payment of the costs of the other cause, adopting the practice at law. *Pickett v. Loggan*, 5 Ves. 702. PR. VACATING ENROLMENT OF DECREE; COSTS.

After exceptions are allowed, defendant has eight days to answer, and then may have an order for three weeks, to commence from end of eight days. *Coran v. Philips*, 3 Anst. 937. PR. EXCEPTIONS TO ANSWER.

Where the bill is amended after answer, by adding a defendant, the original defendant cannot answer the amended bill, nor have any order for time to answer. *Gill v. Matthews*, 3 Anst. 879. PR. AMENDED BILL; PR. ANSWER.

Demurrer allowed in the exchequer, upon argument, with 30s. costs. In another suit in chancery between the same parties, and to the same effect, it was ordered, on motion, that the defendant should have time to answer till payment of those costs, but without prejudice to an application to dismiss the bill. *Holbrooke v. Cracroft*, 5 Ves. 706. COSTS.

General order, that on a third application for time to answer, the defendant shall submit to a sergeant at arms, if he does not answer within the time, and also that he shall submit to the same terms, on a second application for time to answer an amended bill, or after exceptions allowed. Order of Court, 23d January, 4 Bro. C. C. 544. Vide etiam Beame's Ord. Ch. 455.

Upon time granted to answer only, a demurrer, though only to part, and answer to the rest, shall not be put in. *Kenrick v. Clayton*, 2 Bro. C. C. 214. S. C. Dick. 685.

Putting in a plea is a sufficient compliance with orders for time to answer. *Roberts v. Hartley*, 1 Bro. C. C. 66. S. C. 2 Dick. 554. PL. PLEA.

Defendant cannot demur, after obtaining time to answer only. *Penn v. Id. Baltimore*, Dick. 273.

Plea put in after time to answer obtained, discharged. *Newton v. Dent*, Dick. 234.

Where injunction was issued irregularly, held defendant had not waived objection to the irregularity, by asking for time to answer. *Tratens v. Stafford*, 2 Ves. 19. PR. INJUNC.; PR. IRREGULARITY, WAIVER OF.

On time given to answer, the defendant may put in a plea, for that is an answer, and on oath, but he cannot put in demurrer. *Anon.* 2 P. W. 464, and see notes there. PR. PLEA.

The court condemned the practice of allowing as much time of course after an insufficient answer, as on the original answer; also as to the costs of attachments, a proposed remedy by order. *Anon.* 2 Ves. J. 270. S. C. nom. *Gordon v. Pitt*, 4 Bro. C. C. 406. PR. ANSWER, INSUFFICIENCY OF.

Defendant has leave to plead answer and demur, but not to demur alone. The defendant demurs, and answers only by denying combination, or some such trifling matter. Demurrer set aside. *Stephenson v. Gardiner*, 2 P. W. 286.

A and B jointly confess a judgment to C for 400*l.*, and afterwards file a bill against him to set it aside as unfairly obtained, and for an injunction in the mean time, C having got an order for time: the injunction issued, of course; but, on putting in his answer, he moved to dissolve the injunction, and, being told it was dissolved, he took B in execution upon the judgment: but being afterwards informed that the plaintiff, by filing exceptions to his answer, had continued the injunction, he immediately discharged B out of custody. The judgment being joint, it was insisted that the discharge of one from the execution operated at law as a discharge of both; and therefore A and B brought an *audita querela* in B. R. to be relieved against the judgment, on the ground of such discharge; but, on a bill filed by C, the court decreed him the whole 400*l.*, with his costs, both at law and in equity, and ordered a perpetual injunction to stay all proceedings on the *audita querela*. *Clerke v. Moore*, 4 Bro. P. C. 723. JUDGMENT; DEBTOR & CRED. DISCHARGE; PR. INJUNC. PERPETUAL; PR. INJUNC.

The defendant obtained an order to refer the bill for impetunence, after he had twice prayed time to answer: the chancellor ordered that he should procure a report within four days, or the order be discharged. *Anon.* Mos. 71. PR. REFERENCE FOR IMPETUNENCE.

The defendant having made oath that he could not answer without sight of writings in the country, and then putting in a demurrer, an attachment was awarded against him. *Farmer v. Fox, Toth*, 15. Cary, 158.

A defendant is entitled, as of course, to three orders for time to answer. *Prac. Reg.* 15.

#### 10. Effect of Answer being put in, and of the want of, generally.

Contempt for want of answer may, after answer is filed, be discharged by waiver on part of plaintiff. *Huskins v. Lloyd*, 1 S. & S. 393. WAIVER; PR. CONTEMPT.

Where one plaintiff dies before answer, suit is abated, and defendant cannot move that supplemental bill be filed within limited time. *Adamson v. Hull*, 1 S. & S. 249. S. C. 1 T. & R. 258. PR. ABATEMENT AND REVIVOR.

Attachment for want of answer to amended bill cannot issue till amendments have been entered in six clerk's book, and there is no difference between the amendments of a bill which has been answered,

and those of a bill which has not. *Adamson v. Blackstock*, 1 S. & S. 118. PR. ATTACHMENT; PR. BILL, AMENDMENT.

Purchaser taking possession without consent or privity of vendor, ordered on motion before answer, to pay purchase money into court. *Blackburn v. Stace*, 6 Mad. 69. VENDOR & PURCH.; PAYMENT INTO COURT.

Injunction to restrain trial on affidavit, that plaintiff cannot safely defend the action without discovery, and that it will give a good and effectual defence, not discharged upon the answer of one defendant only. *White v. Steinwuchs*, 19 Ves. 83. PR. INJUNC., AFFIDAVIT IN SUPPORT OF; PR. INJUNC., DISSOLUTION OF.

Motion by defendants to a bill for partnership account, for a production of the accounts before answer, refused. *Pickering v. Rigby*, 18 Ves. 484. PR. PRODUCTION OF DEEDS, &c.; PARTNERSHIP.

Defendant in Newgate, under a criminal sentence, having been brought up by habeas corpus, for not putting in his answer, and remanded to Newgate; as to the further proceeding, *quare*? *Lloyd v. Passingham*, 15 Ves. 179. HABEAS CORPUS; PRISONER FOR CRIME.

Though generally a party cannot be heard until he has cleared his contempt, a step taken by the other party waives the contempt for all purposes, except the right to costs in the cause, not to be obtained by process of contempt; acceptance of the answer, therefore, a waiver of the contempt, for the purpose of enabling the defendant to dismiss the bill for want of prosecution. *Anon.* 15 Ves. 174. PR. CONTEMPT, WAIVER OF; PR. BILL, DISMISSAL OF.

Amendment permitted, after answer without prejudice, to exceptions, by praying injunction upon a *decuratit*, and a purpose of collusive sale by the executrix, a person of no property, to the trustee: the amendment confined to the prayer. *Jacob v. Hall*, 12 Ves. 458. PR. BILL, AMENDMENT AFTER ANSWER.

Injunction *nisi* not dissolved by putting in answer unless costs of contempt be paid. *Hall v. Darney*, Dick. 289.

Plaintiff is not bound to make his election till defendant has answered. *Tillotson v. Ganson*, 1 Vern. 103. ELECTION.

Plaintiff may revive when time for answering is out. *Wakelinn v. Wathill*, Dick. 13.

Plaintiff's witnesses being old, examined before defendant's answer put in. *Bagnold v. Green, Cary*, 48. Dick. 2.

No witness examined before answer generally. *Salisbury v. Hinde, Cary*, 93.

Attachment issued against the wife alone, and not the husband, for that she would not answer the bill. *Keies v. Macher, Toth*, 15. HUSB. & WIFE; PR. ATTACHMENT.

#### 11. Further.

If master find answer insufficient, he must fix time for putting in further answer. 8 Gen. Ord. 3 April, 1828.

Leave given to convert a bill of discovery into a bill for relief; where after answer a bill for discovery and for a commission is allowed to be converted into a bill for relief, the defendant is entitled to have leave to put in such an answer to the amended bill as he might have filed if there had been no answer to the bill of discovery. *Lousada v. Templer*, 2 Russ. 561. PR. DISCOVERY, BILL OF, AMENDMENT OF.

In an injunction cause, a defendant to whose answer exceptions have been allowed, is entitled to file a further answer, after notice to his solicitor, that the plaintiff has presented a petition for an order to be at

liberty to amend, and that the defendant may answer amendments and exceptions together, provided the further answer be filed before the order is actually served. *Leyburn v. Leyburn*, 2 Russ. 577.

Defendant may file further answer before master has signed his report of insufficiency of first answer. *Wynne v. Jackson*, 2 S. & S. 226. MASTER'S REPORT.

New exceptions cannot be taken to the further answer of the original bill, but if that answer be considered insufficient, it must be referred back to master upon old exceptions. *Williams v. Davis*, 1 S. & S. 426. PR. ANSWER, EXCEPTIONS TO.

Further explanatory answers by leave of the court, allowed. *Robinson v. Scotney*, 19 Ves. 584.

Pending exceptions to answer a further answer cannot be filed in this court until those exceptions are argued and disposed of. Tender of further answer is submission to exceptions, and injunction may be moved for thereupon, as of course. *Edwards v. Johnson*, 1 Price, 203. PR. EXCEPTIONS TO ANSWER; PR. INJUNCT.

Explanation by a second answer does not take away the opportunity of indicting upon the former answer. *Edwards v. McLeay*, 2 V. & B. 258. INDICTMENT.

Second answer may be put in pending exceptions to the first. *Knox v. Symmonds*, 1 Ves. J. 87. PR. EXCEPTIONS TO ANSWER.

Second answer may be filed at any time before the order to amend, &c. even the moment exceptions are taken. *Id.* 88.

Order for amendment without costs, requiring no further answer: the amendment was by inserting prayer for injunction. Held defendant might answer further, gratis. *Saory v. Dyer*, Anbl. 70. PR. COSTS; PR. BILL, AMENDMENT.

A plea or demurrer, accompanied by an answer to any part of the bill, even a denial of combination merely, if the plea or demurrer be overruled, the plaintiff must except to the answer as insufficient, and defendant need not put in any further answer until the plaintiff has taken exceptions. *Coles v. Turner*, Bun. 123. PR. EXCEPTIONS TO ANSWER.

### 12. Supplemental.

Leave given after replication to file a supplemental answer to a bill of dower, in order to state a fine and non-claim, which had been omitted through ignorance in the original answer. *Jackson v. Parish*, 1 Sim. 505.

Where a defendant by his answer alleged certain moduses, to be payable in lieu of tithes, but did not state any time at which the moduses were payable, the court permitted the defendant to file a supplemental answer for that purpose, on the terms of paying the costs, and did not require an affidavit from the defendant explaining the omission, holding that the moduses as pleaded were void. *Scott v. Carter*, 1 V. & J. 452.

Further supplemental answer may be used to correct or explain an obvious mistake or ambiguity in original answer, but not with a view merely to strengthen defendant's case. *Kidworth v. Dilworth*, 5 Price, 564.

Supplemental answer substituted lately for liberty to amend an answer; permitted with great caution; only on some ground of justice, as fraud; not on negligence, unless the party was led into it, requiring a precise statement of what is to be put on the record. *Curling v. Townshend*, 19 Ves. 628.

Supplemental answer permitted to correct mistake; but held strictly to mistake, clearly sworn to, and probable in itself. The solicitor who put in the former answer being dead, whose letter admitting the fact contrary to that answer, would not be evidence in a prosecution for perjury against the defendant, which ought not to be influenced by the admission or refusal

of the application. *Strange v. Collins*, 2 V. & B. 163. EVIDENCE; MISTAKE; PR. ANSWER, AMENDMENT OF.

Liberty to file a supplemental answer relative to a fact on defendant's affidavit, that at the time of filing the answer he had no recollection of the fact, and had since discovered it. Additional answer admitted with difficulty, if prejudicial to the plaintiff; easily, if for his benefit; subject, if no such objection, to the propriety of a prosecution for perjury. Permission to file a supplemental answer, or the refusal of it, to have no influence on a prosecution for perjury. *Edwards v. McLeay*, 2 V. & B. 256.

Liberty by supplemental answer to correct a fact, by stating that the possession was taken under the contract of part of the premises only, not of the whole, as stated in the answer, the defendant being previously in possession as tenant of the other part, and swearing that the mis-statement was merely from not conceiving it material, refused without an affidavit, that he meant by the original answer to swear to the fact as it really was. *Livesey v. Wilson*, 1 V. & B. 149.

The instances of permitting and refusing amendment by supplemental answer, are collected in note (a). *Id.* 150.

Practice formerly was, to permit the amendment of an answer in cases of mistake; now a supplemental answer is put in. The affidavit must state, that defendant when he put in his answer did not know the circumstances upon which he applies, or any other circumstances on which he ought to have stated fact otherwise. *Wills v. Wood*, 10 Ves. 401. PR. AMENDMENT OF ANSWER; PR. AFFIDAVIT.

Upon discovery of new matter in an account, the court will permit a supplemental answer after application. *Muggridge v. Hodgson*, 2 Anst. 443.

Court will not allow amendment of answer in any case, nor a supplemental answer, unless on new matter or a sufficient reason appearing for not inserting it in original. *Tennant v. Wilmore*, 2 Anst. 362.

A defendant having become better apprized of any matters after putting in his answer, cannot controvert or question his own admissions, &c. on the subject by a cross bill. His proper course is to put the further facts on the record by way of supplemental answer. *Berkley v. Ryder*, 2 Ves. 533.

### 13. Separate.

Reference directed to ascertain if separate answers all to same effect, by defendants having same interests was vexatious. *VanSandau v. Moore*, 2 S. & S. 509. VEXATION.

A bill being filed by a shareholder in a joint stock company against the directors and other shareholders, in order to have the partnership dissolved, and the proper accounts taken, fourteen of the directors, who all appeared by the solicitor of the company, having filed fourteen separate answers with long schedules to each, all of which answers and schedules were nearly verbatim the same: held, that in that stage of the cause, no inquiry could be directed into the necessity or expediency of filing those separate answers, with a view to the defence of the suit; the plaintiff in such a suit, notwithstanding the adoption of such a mode of defence, will not be permitted to dismiss his bill without costs on his application, nor will any reference be directed to the master, with a view to modify the costs which the plaintiff shall pay. S. C. 1 Russ. 441. PR. INQUIRY; PR. COSTS.

The court cannot require several defendants to join in their defence. *Id. ib.*

Husband and wife being defendants, wife after obtaining order to answer separately, is entitled to all orders for time to answer, and is not bound by any previous order obtained by husband for that purpose on behalf of himself and her. *Jackson v. Haworth*,

1 S. & S. 161. **HUSB. & WIFE; PR. TIME TO ANSWER.**

Husband and wife defendants, husband without order for wife to answer separate, puts in separate answer, stating wife did not live with him, and he had no influence over her; he being taken up on attachment for want of wife's answer, ordered to be discharged, and wife to answer separate, and indemnify husband his costs. *Gary v. Whittingham*, 1 S. & S. 163. **HUSB. & WIFE; PR. INDEMNITY; PR. COSTS.**

Husband and wife defendants, husband abroad, plaintiff may obtain order for wife to answer separate. *Id. ib.*

Bill against husband and wife in respect of wife's executorship; husband bankrupt, and abroad, attachment issued against him for want of answer; wife must be ruled upon notice to answer separately before attachment can issue against her. *Bunyan v. Mortimer*, 6 Mad. 278. **PR. ATTACHMENT; HUSB. & WIFE.**

Husband and wife being defendants in a suit and living separate, husband was allowed, on affidavit of separation, and that he had no controul or influence over her, to put in separate answer and order was made that he should not be liable to process for her neglect to answer. *Barry v. Cane*, 3 Mad. 472. **Id.**

Order upon a married woman to put in an answer to a bill by her husband. *Ainslie v. Medlicott*, 13 Ves. 266. **Id.**

After a joint answer by husband and wife, and amendment of bill, the husband going abroad, the wife being a material party, cannot be brought into contempt without an order to answer separately. *Tarleton v. Duer*, 10 Ves. 442. **HUSB. & WIFE; PR. CONTEMPT.**

Motion by plaintiff for a separate answer by a feme covert, because her husband was a prisoner in the king's bench, refused. *Anon.* 2 Ves. J. 332. **HUSB. & WIFE.**

Under circumstances leave given to husband to answer separate from wife. *Chambers v. Bull*, 1 Anst. 269. **Id.**

Leave given to wife to answer separate, without prejudice as to validity of marriage. *Wyburn v. Blount*, Dick. 155.

Husband being abroad, a wife having appeared and obtained an order to answer separately, whereby she fixed herself from process of contempt, will not be allowed to have her own acts set aside. *Travers v. Butkeley*, 1 Ves. 384. **S. C. 1 Dick. 138. HUSB. & WIFE.**

A husband bringing a bill against wife, this is admitting her to be a feme sole, and she must put in her answer as such, and no order is necessary. *Exp. Strangeways*, 3 Atk. 478. **Id.**

A feme covert is liable to be arrested by the serjeant at arms for not putting in a separate answer pursuant to an order obtained at her own request. *Poncel v. Prentice*, Ridgw. 258. **FEME COVERT; SERJEANT ARMS.**

Wife may apply to answer separate from husband. *Exp. Haskin*, 2 Atk. 50. **HUSB. & WIFE.**

Regularly the answer of a feme covert, if separate, ought to have an order to warrant it; but if feme covert's separate answer be put in without an order, and the same be a fair honest answer and deliberately put in with the consent of the husband, and the plaintiff accepts it, and replies, the court will not, at the motion of the wife or of her executors, set it aside. *Chandos v. Talbot*, 2 P. W. 371. **FEME COVERT.**

Where husband will answer to prejudice of his wife who is executrix, leave on motion will be given to answer separate. *Anon.* 2 Eq. Ab. 66. **HUSB. & WIFE.**

Feme covert, whose husband is in the galleys, or-

dered to answer alone. *Castleton v. Fitzwilliam*, Cary, 100.

Where a feme covert lived apart from her husband, and the court thought the husband not chargeable for the matter in question, she was ordered to answer separately. *Plomer v. Plomer*, 1 C. R. 68. **HUSB. & WIFE.**

#### 14. To Amended Bill.

Exceptions to an answer having been allowed, plaintiff obtained an order to amend, and for defendant to answer the exceptions and amendments at the same time; defendant put in an answer to the amended bill only: the plaintiff then issued an attachment: held, that it was irregular, and that plaintiff ought to have moved to take the second answer off the file. *De Tastet v. Lopez*, 1 Sim. 11. **PR. MOTION TO TAKE PLEADINGS OFF FILE; PR. ATTACHMENT.**

Where plaintiff takes no exceptions to answer to original bill, he cannot to answer to amended bill, on a principle which would have equally applied to original bill. *Owen v. Leighton*, 2 S. & S. 234. **PR. EXCEPTIONS.**

Injunction of course for want of answer to an amended bill, an answer having been put in to the original bill, and no injunction obtained upon that. *Netherpe v. Law*, 13 Ves. 323. **PR. INJUNCTION FOR WANT OF ANSWER; PR. AMENDED BILL.**

Where the bill is amended after answer, if the amended bill is not answered, the plaintiff is entitled to decree that the bill be taken *pro confesso*, generally. *Jopling v. Stuart*, 4 Ves. 619. **PR. BILL PRO CONFESSO; AMENDED BILL.**

Where the bill is amended after answer, by adding a defendant, the original defendant cannot answer the amended bill, nor have any order for time to answer. *Gill v. Matthews*, 3 Anst. 879. **AMENDED BILL; TIME TO ANSWER.**

#### 15. Amendment.

Motion by defendant to take answer defective in title off file, and amend and re-swear it, allowed. *White v. Godbold*, 1 Mad. 269.

Defendant cannot take answer off the file to correct a mistake, but must file a supplemental answer. *Taylor v. Oler*, 3 Pucc. 83.

Signature of counsel to answer not appearing on record, defendant must apply for leave to amend. *Harrison v. Delmont*, 1 Price, 163. **PR. SIGNATURE OF COUNSEL.**

Supplemental answer permitted to correct mistake, but held strictly to mistake clearly sworn to and probable in itself, the solicitor who put in the former answer being dead, whose letter admitting the fact contrary to that answer would not be evidence in a prosecution for perjury against the defendant, which ought not to be influenced by the admission or refusal of the application. *Strange v. Collins*, 2 V. & B. 163. **EVID. ; MISTAKE ; PR. SUPPLEMENTAL ANSWER.**

Leave to amend an answer refused. *Edwards v. M'Leau*, 2 V. & B. 266.

An amendment in the title of an answer being necessary, viz. instead of "the farther answer to the original amended bill," entitling it "the farther answer to the original bill, and the answer to the amended bill," the answer so amended, must in the case of a peer be again attested upon honour; as in the case of a common defendant it must be re-sworn. *Peacock v. Dk. Bedford*, 1 V. & B. 186. **PR. ANSWER, JURAT OF; PEER.**

An infant defendant may before he attains twenty-

one, amend his answer and go into a new defence. *Savage v. Carroll*, 1 Ball & B. 548. INFANT.

Answer will not be allowed to be taken off file for purpose of amending any clerical error, a supplemental answer must be filed. *Ridley v. Obee*, Wightw. 32.

Where in answer there is a mere mistake in a name, it may be taken off file and re-sworn. *Griffiths v. Wood*, 11 Ves. 63.

The practice formerly was to permit the amendment of an answer in case of mistake; now a supplemental answer is put in. The affidavit must state that defendant when he put in his answer, did not know the circumstances upon which he applies, or any other circumstance on which he ought to have stated the fact otherwise. *Wells v. Wood*, 10 Ves. 401. PR. SUPPLEMENTAL ANSWER; PR. AFFIDAVIT.

Answer not allowed to be taken off the file upon mistake, but a supplemental answer permitted. *Dolder v. Bank of England*, 10 Ves. 285.

In a case of mistake in an answer it was not allowed to be taken off the file, but an additional answer giving the explanation was permitted. *Jennings v. Merton Col.* 8 Ves. 79.

Amendment of answer not permitted even by striking out matter. *Harris v. Daubeny*, 3 Anst. 717.

In the exchequer, on exceptions to answer, if defendant intends to submit to exceptions, he must give notice thereof to the other party, before he can file his amended answer. In chancery it is otherwise. *Anon.* 1 Anst. 86. PR. EXCEPTIONS TO ANSWER.

An answer shall not be amended after an indictment for perjury preferred or threatened in order to avoid the indictment. *Fernsy v. Macnamara*, 1 Bro. C. C. 419.

Liberty given to amend answer by striking out admissions of plaintiff's pedigree after publication. *Kingscote v. Bainsby*, Dick. 485.

A defendant after having put in his answer discovers a new title, and on petition, the answer ordered to be taken off the file, and the new matter added. But by the present practice a defendant is not allowed to amend his answer, but on a proper case made out is permitted to file a supplemental answer. *Patterson v. Slaughter*, Ambl. 292.

Answer not permitted to be amended by striking out the admission of a fact, but otherwise of a matter of law. *Pearce v. Grose*, Ambl. 65. 3 Atk. 532.

Defendant having mistaken facts at time of putting in answer, cannot contravene his own admissions by a cross bill, but he must move to amend answer. *Barkley v. Ryder*, 2 Ves. 532.

Leave given to amend mistake in date of caption. *Sherrat v. Trussler*, 1 Fowl. Exch. 440. But not place of caption. *Janner v. Ashley*, id. ib. Leave to rectify mistake in title. *Woodyer v. Crumpler*, id. 441. *Lloyd v. Hutton*, id. and in names of party. *Keane v. Stanly*, id. ib. And to add name of party omitted in title. *Wright v. Campbell*, id. So to annex schedules therein referred to, and to reswear same. *Bryan v. Truman*, id. And to amend fact in answer. *Scott v. Allgood*, id. 438. *Reeve v. Miller*, id. 439.

The defendant's prayer to amend her answer by adding a new fact granted on the particular circumstances of the case. *Wharton v. Wharton*, 2 Atk. 294.

Where a defendant has mistaken a fact or a date, the court will give him leave to amend his answer. S. C. *Id.*

An answer amended after hearing a decree on affidavit of the solicitor and his clerk, that the mistake was in engrossing the answer from the draft and the draft produced. *Gainsborough v. Gifford*, 2 P. W. 427.

Liberty given to amend answer so as to explain admission of assets. *Dagly v. Crump*, Dick. 35.

On a bill brought by the next of kin of the testator against the executor for an account of the surplus, the executor answered and waived the benefit of the surplus by mistake of the law on that point, and though he afterwards proved it to have been the testator's intent that he should have the surplus, yet court refused to amend his answer. *Raetius v. Powell*, 1 P. W. 300. MISTAKE.

Defendant by answer consented that an award made by her father might be confirmed, prayed she might amend her answer, she having made oath that she never read the award, and that her answer was prepared by her father, who had wronged her in the award. Motion refused. *Harcourt v. Sherrard*, 2 Vern. 404. FRAUD.

The court permitted a defendant to amend her answer before replication, upon affidavit that the matter mistaken was added in the margin of the draft after she had perused it. *Chute v. Ly. Dacres*, 1 C. C. 29. 2 Freem. 173. See *Ward v. Colmer*, Toth. 9.

### 16. Evasive.

An answer, however evasive, will not be ordered to be taken off the file after the plaintiff has excepted to it. *Glassington v. Thwaites*, 2 Russ. 458. PR. TAKING PLEADINGS OFF FILE; WAIVER.

An answer merely evasive, to be considered as no answer, and taken off the file. *Smith v. Searle*, 14 Ves. 415. See 10 P. M. 117.

Where more than usual time for answering is requisite, defendant should apply for time by affidavit, and not put in an evasive answer. *Tompkin v. Lethbridge*, 9 Ves. 178. TIME TO ANSWER.

### 17. Exceptions to.

- (a) Form and requisites.
- (b) Effect of.
- (c) When they lie, or should be taken.
- (d) In what time to be taken.
- (e) Filing generally, and *nunc pro tunc*.
- (f) Deposit on.
- (g) Further exceptions.
- (h) Waiver of.
- (i) Submission, *et c.* contra, effect of.
- (j) Reference on.
- (k) Argument, and hearing of.
- (l) Allowance or overruling of, effect of.

#### (a) Form and requisites.

No reference of answer as insufficient, without showing particular defects, and not on surmise of general insufficiency. *Beames' Ord.* 24.

Exceptions must be set down in writing, and delivered to counsel or attorney. *Id.* 78. 181.

Exceptions to an answer must be signed by counsel. *Yates v. Hardy*, 1 Jac. 223. PR. SIGNATURE OF COUNSEL.

Exceptions not signed by counsel, taken off the file, though the defendant had taken an office copy of them, and the plaintiff had obtained an order of reference. *Id.* PR. SIGNATURE OF COUNSEL; WAIVER.

#### (b) Effect of.

Defendant allowed a certain time to amend, &c. *Beames' Ord.* 78. 181.

Order to dissolve injunction *nisi*, obtained after exceptions to answer filed, is irregular. *Williams v. Davis*, 1 S. & S. 262. PR. INJUNC.

After undertaking to show cause on the merits, against dissolving an injunction, exceptions cannot be shown for cause. *Harcourt v. Ramsbottom*, 3 Swan. 362. PR. INJUNC. DISSOLVING CAUSE AGAINST.

If answer put in and excepted to, defendant can-

not move on answer that plaintiff elect law or equity. *Brown v. Poynts*, 3 Mad. 24. PR. ELECTION, LAW OR EQUITY.

The defendant having put in his answer to the amended bill, which answer was excepted to, motion to dissolve the injunction absolutely in the first instance, refused, the court being unable to judge, except upon reference to the master, whether the answer is a sufficient answer. *Tipan v. Mortlock*, 2 Mer. 476. PR. INJUNC. DISSOLUTION OF.

Pending exceptions to answer, a further answer cannot be filed in this court, until those exceptions are argued and disposed of: tender of further answer is a submission to exceptions, and injunction may be moved for, as of course. *Edwards v. Johnson*, 1 Pri. 203. PR. FURTHER ANSWER; PR. INJUNC.

Injunction against verdict in a joint action dissolved as to defendants who answered, but not as to others, pending exceptions to their answers. *Josephs v. Doubleday*, 1 V. & B. 497. INJUNC. DISSOLVING.

The effect of taking exceptions pending a demurrer to discovery, is to admit the demurrer. Plaintiff permitted to withdraw the exceptions paying the costs, without prejudice. *Boyd v. Mills*, 13 Ves. 85. PR. DEMURRER.

In an injunction cause, where exceptions are taken to the answer, it is irregular to obtain an order to amend bill until the exceptions are disposed of. *Dixon v. Redmond*, 2 Scho. & L. 515. PR. INJUNC.; PR. BILL, AMENDMENT.

Injunction obtained for want of answer on exceptions to subsequent answer being overruled, defendant cannot, in Exchequer, as of course, move to dissolve injunction; secus, in chancery. — *v. Dubarry*, 1 Anst. 255. INJUNC. DISSOLVING.

Second answer may be put in pending exceptions to the first. *Knox v. Symmonds*, 1 Ves. J. 87. PR. ANSWER.

Bill for relief and discovery; answer to relief: plea to discovery; argument of plea necessary before exceptions taken to answer. *Pigot v. Storr*, Dick. 496. Id. *Siluey v. Perry*, Dick. 602.

Bill taken *pro confesso* upon sequestration, for want of better answer first having on exceptions to part been reported insufficient. *Turner v. Turner*, id. 316.

Answer reported insufficient, plaintiff obtained order to amend, and that defendant may answer amendments and exceptions at same time; defendant may answer exceptions alone if put in before order is served. *Bethuen v. Bateman*, Dick. 296.

Where exceptions are shown for cause against dissolving an injunction, and the answer is reported sufficient, the injunction cannot be revived on the merits disclosed by that answer. *Peyto v. Hudson*, 3 Swan. 363. PR. INJUNCTION REVIVING.

On enlargement of the time for showing cause against dissolving an injunction, the plaintiff cannot show exceptions for cause. *Pineiro v. Porter*, 3 Swan. 362. PR. ENLARGEMENT OF TIME TO SHew CAUSE; INJUNC. DISSOLVING, CAUSE AGAINST.

(c) When necessary or proper to be taken.

Bill against assignees of a bankrupt for an account and injunction to restrain proceedings at law. One of the assignees put in a separate answer, stating that his name had been used in the action at law without his knowledge or authority; that he had not acted as assignee except in some trifling particulars not connected with the matter in the bill mentioned, and that he was wholly ignorant of the matter set forth in the bill. Exceptions to the answer, because the defendant had not answered each interrogatory, overruled with costs. *Jones v. Wiggins*, 2 Y. & J. 385. PR. ANSWER.

Exceptions to an answer filed after the bill has been amended, will not be taken off the file if no answer is required to the amendments. *Miller v. Wheatley*, 1 Sim. 296. PR. AMENDMENT OF BILL.

Leave given to require by exceptions to an answer to an amended bill, an answer to statements contained in the original bill and not answered in the answer to the original bill, though no exceptions had been taken to that answer. *Glassington v. Thwaites*, 2 Russ. 458.

Bill for account answered, and bill amended by unimportant facts. Answer to amended bill stating circumstances more explicitly as to facts of original bill, cannot be excepted to without special application for leave to file exceptions. *Ireing v. Piana*, 1 McClel. & Y. 563.

It is a general rule that after an order to amend, the right to except to answer to original bill is waived. S. C. *id.*

Where plaintiff takes no exceptions to answer to original bill, he cannot to answer to amended bill, on a principle which would equally have applied to original bill. *Orey v. Leighton*, 2 S. & S. 234. PR. ANSWER TO AMENDED BILL.

General answer of Attorney-general to bill by opposite party for discovery in aid of his defence in an information at law, cannot be excepted to. *Darison v. Att. Gen.* cited in *Att. Gen. v. Lambert*, 5 Pri. 398. note. PR. ANSWER; ATT. GEN.

Exceptions to answer are only material when it omits to answer any matter in bill which is material and of importance to plaintiff's case. *Hirst v. Peirse*, 4 Pri. 339.

Bill by a testamentary guardian and husband against the trustee of the property to be allowed maintenance for minors; exceptions taken to the answer for scandal and impertinence, in stating that the husband of the guardian was not a fit person to have the management of the minors, "being a man of small fortune, increasing family, and also a settler," allowed. *Corbet v. Tottenham*, 1 Ball & B. 59. GUARDIAN; PR. ANSWER; IMPERTINENCE.

No exception can be taken to an infant's answer; in that case, therefore, cause against dissolving an injunction must be upon the merits according to the answer, and though it was manifestly insufficient, the injunction was dissolved. *Lucas v. Lucas*, 13 Ves. 274. S. P. *Copland v. Wheeler*, 4 Bro. C. C. 266. INFANT; PR. INJUNCTION, DISSOLVING.

Amendment of bill, merely adding a defendant requiring no further answer, does not prevent the plaintiff from excepting to answer. *Taylor v. Wrench*, 9 Ves. 315. PR. AMENDMENT OF BILL.

It is no answer on exceptions that the defendant is a mere witness, and ought not to have been made a party for having submitted to answer, he must answer fully. *Cookson v. Ellison*, 2 Bro. C. C. 252. PL. PARTY; WITNESS; WAIVER.

If defendant's answer separately, exceptions must be taken to each. *Sydolph v. Monkton*, Dick. 609.

No exception can be taken to an answer whilst a plea is depending, for that must first be removed out of the way. *Baker v. Pritchard*, 2 Atk. 390. LIT. PENDENS.

If a demurrer be to part of the plaintiff's bill, and an insufficient answer to the residue, yet the plaintiff cannot except until the demurrer is argued. *London Assur. Comp. v. E. I. Comp.* 3 P. W. 326. PR. DEMURRER.

If a plea or demurrer be overruled, the defendant must answer the whole bill, and the ordinary process of contempt issues to compel an answer as in other cases; but if an answer was filed with the plea or demurrer, the defendant, upon his plea or demurrer being overruled, need not put in another answer till the plaintiff has taken exceptions. *Cotes v. Turner*,



**PR. OVERRULING PLEA; PR. DEMURRER, OVERRULING.**

A plea or demurrer accompanied by an answer to any part of the bill, even a denial of combination merely, if the plea or demurrer be overruled, the plaintiff must except to the answer as insufficient, and defendant need not put in any further answer until the plaintiff has taken exceptions. *Id.* **PR. FURTHER ANSWER.**

Exceptions cannot be taken to an infant's answer because he is not bound by it, but may amend it when he comes of age. *Studrick v. Pargiter*, Bun. 338. **INFANT.**

If a plea is to stand for an answer with liberty to except, the plaintiff may except to the rest of the answer. *Coke v. Wilcocks*, Mos. 73. **PR. PLEA ORDERED TO STAND FOR ANSWER.**

Where a defendant pleads to part and answers to the residue of the bill, the plaintiff cannot except to the answer till the plea is argued, or an order obtained that it shall stand for an answer, with liberty to except. *Darnell v. Reyny*, 1 Vern. 344. **PR. PLEA.**

(d) *In what time.*

In all cases plaintiff allowed two months to deliver exceptions to answer. 4th Gen. Order, 3rd April, 1828. See Beame's Ord. 254, 258. 2 Fowl. Exch. 2. 3.

Exceptions to answer not submitted to plaintiff at end of eight days, may refer the answer, and must do it within the then next six days. 5th Gen. Order, 3rd April, 1828. **PR. REFERENCE OF ANSWER.**

Plaintiff in a bill for discovery only, is not entitled as of course to two terms to except to the answer filed in the vacation. *Hewart v. Semple*, 5 Ves. 86. But see *Baring v. Princes*, 1 Mad. 526. **PR. BILL OF DISCOVERY.**

Bill for relief and discovery; answer to relief; plea to discovery; argument of plea not necessary before exceptions taken to answer. *Pigot v. Stace*, Dick. 496. *Sidau v. Perry*, Dick. 602.

Answer reported insufficient; plaintiff obtained order to amend, and that defendant may answer amendment and exceptions at same time, defendant may answer exceptions alone if put in before the order is served. *Bethuen v. Bateman*, id. 296.

If in Michaelmas term an answer comes in, and the plaintiff does not take exceptions within eight days of Hilary term after, yet, on applying to the court, he is entitled to take exceptions, provided he does it within two terms, the term in which he moves being inclusive. *Anon.* 3 Atk. 19.

(e) *Filing generally, and nunc pro tunc.*

After order to elect law or equity, plaintiff cannot move on motion of course, for leave to file exceptions *nunc pro tunc*, but ought to make special application for that purpose, and for an order to suspend election till exceptions are answered. *Cunpland v. Bradock*, 5 Mad. 14. See *Noel v. Ward*, 1 Mad. 339. **ELECTION.**

Exceptions *nunc pro tunc*, may be filed to answer to bill of discovery. *Baring v. Princes*, 1 Mad. 526. **BILL OF DISCOVERY; NUNC PRO TUNC.**

Motion of course, to file exceptions *nunc pro tunc*, within two terms, and the following vacation, from the date of the master's report of impertinence. *Dyer v. Dyer*, 1 Mer. 1. **PR. MOTION OF COURSE.**

Exceptions filed which may be *nunc pro tunc* of course, upon application within two terms after answer, and afterwards upon special cause, will sustain an injunction. *Gooding v. Woodhams*, 14 Ves. 536. **PR. DISSOLVING INJUNCTION.**

Time allowed for filing exceptions *nunc pro tunc*, is two terms, and the following vacation. *Thomas v.*  
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*Jewellyn*, 6 Ves. 823. See *Thoburn v. Barrett*, 2 Fowl. 35.

Where in the vacation a plea is ordered to stand for an answer, with liberty to except, the exceptions strictly ought to be filed within eight days of the ensuing term, but an order to file them *nunc pro tunc* is seldom refused if applied for before the second term expires. *Diggs v. Colebrook*, Barn. 52.

(f) *Deposit on.*

Deposit on filing exceptions. Beame's Ord. 320.

Where several exceptions are taken to answer, and master reports answer sufficient, and one general exception is taken to his report, and some of exceptions to answer are allowed, some not, and others waived, court in its discretion may order deposit to be divided. *Dawson v. Bush*, 2 Mad. 184. See 12 Ves. 166.

(g) *Further Exceptions.*

New exception cannot be taken to further answer of the original bill, but if that answer be considered insufficient, it must be referred back to master upon the old exceptions. *Williams v. Davis*, 1 S. & S. 426. **PR. ANSWER FURTHER.**

Plaintiff having obtained the usual order to amend, and that the defendant shall answer amendments and exception together, cannot take a new exception, as to any thing in the original bill, but must go before the master upon the old exceptions as they apply to the original bill, and upon new exceptions as to the new matter introduced by the amendments, which, however, the master may consider with reference to such parts of the original bill as apply to them. *Partridge v. Haycraft*, 11 Ves. 570. **PR. ORDER TO AMEND.**

After answer upon exceptions plaintiff cannot add to his exceptions, but may refer the answer back upon them. *Id.* 575.

(h) *Waiver.*

Where motion would have the effect of waiving exceptions to answer, court will not qualify their order by making it without prejudice to exceptions being taken. *Phillips v. Stephenson*, 11 Pri. 733. **WAIVER; PR. MOTION.**

Plaintiff moving as of course, to amend bill after exceptions to answer, waives them; he must move specially for leave without prejudice. *De la Torre v. Bernaldes*, 4 Mad. 396. **WAIVER; PR. AMENDMENT.**

(i) *Submission or otherwise to.*

Exceptions to answer not submitted to plaintiff at end of eight days, may refer the answer and must do it within the then next six days. 5th Gen. Ord. 3d April 1828.

Where a great number of exceptions were taken to an answer, and shortly before the argument the defendant submitted to answer them, in consequence of which it was urged that the answer was clearly evasive, and that the ordinary costs were greatly inadequate, yet the court refused to give extra costs, but reserved the consideration of them until the hearing of the cause. *Attwood v. Small*, 2 Y. & J. 72. **PR. COSTS.**

Exceptions to answer containing in substance, but not verbatim, the interrogatories not answered, will be overruled. But if defendant has submitted to answer, and his farther answer is referred back, he is too late to object to the form of the exception. *Hodgson v. Butterfield*, 2 S. & S. 236. **WAIVER.**

Defendant being in contempt for want of answer, puts in one and obtains order for discharge on payment or tender of costs of contempt; costs tendered

but not accepted. Answer excepted to and referred, and after warrants to proceed before master taken out, defendant submits to exceptions. Plaintiff did not proceed immediately on former contempt, but waits for answer to exceptions: Held defendant entitled to order for time to answer exceptions. *Cox v. Champneys*, 6 Mad. 262. WAIVER; PR. CONTEMPT; PR. TIME TO ANSWER EXCEPTIONS.

When plaintiff has obtained order to amend, the defendant having submitted to exceptions, court will order plaintiff as of course, to amend within a given time or discharge former order. *Benedict v. Thackeray*, 5 Price Exch. 592. PR. AMENDMENT.

After motion to amend the bill, and that amendments and exceptions shall be answered together, if the exceptions are answered before the order is drawn up, it is regular. *Partridge v. Huercraft*, 11 Ves. 578. PR. ORDER TO AMEND AND ANSWER EXCEPTIONS.

In the exchequer on exceptions to answer, if defendant intends to submit to exceptions he must give notice thereof to the other party before he can file his amended answer. In chancery it is otherwise. *Anon.* 1 Anst. 86. PR. AMENDED ANSWER.

As to the practice of giving time to put in a further answer, after a submission to answer exceptions. *Hineley v. Tomkinson*, 1 Cox, 177. PR. TIME TO ANSWER.

#### (J) Reference on exceptions.

Plaintiff must refer a second or third answer within a fortnight. 6th Gen. Order, 3d April, 1828.

Second or third answer referred on old exceptions, those which require answer must be stated. 7th Gen. Order, 3d April, 1828.

If defendant neglect to amend, &c. and on reference answer be found insufficient, he is to pay costs. *Beames' Orders*, 79.

If he do not amend within eight days, or put in a second insufficient answer, plaintiff may refer. *Id.* 182.

And for second insufficient answer, defendant to pay costs. *Id.*

The course, if answer is filed in vacation. *Id.*

If answer reported good, plaintiff to pay costs. *Id.*

As to different answers, certificate insufficient. *Id.* 182, 163, 318.

It is irregular to obtain one order of reference only, where more than one answer is excepted to. *Allison v. Moorsom*, 2 S. & S. 478.

Where plaintiff before answer obtains injunction, and when answer is put in, excepts to the same, he cannot move to refer exceptions *instantly*. *Chandler v. Partington*, 1 Mad. 102.

After a reference to the master of exceptions to an answer, and order for leave to amend, and that the defendant might answer the exceptions and amendments at the same time, obtained before the report, on the allegation that the master had allowed some of the exceptions, discharged with costs. *Job v. Baker*, 2 Swan. 255. PR. BILL, LEAVE TO AMEND.

Motion on answer, to dissolve injunction nisi, plaintiff shewing exceptions for cause, must procure the report in four days, but the time is extended by courtesy. *Bishop v. Birch*, 2 Ves. & B. 42. PR. DISSOLVING INJUNCTION NISI.

If bill be for discovery of matters penal at common law, or by statute, the defendant need not demur or plead, but it will be admitted on exceptions; but when the time for suing a penalty expires between the first and second answers, and exception is taken to the second answer for not discovering, the exceptions shall be allowed, and the party is bound to discover. *s. v. Farrington*, 3 Bro. C. C. 38. S. C.

2 Cox, 202. STAT. OF LIMIT.; FORFEITURE; DISCOVERY.

Exceptions to answer; the answer reported to be sufficient; plaintiff amends, upon answer coming in; seventy exceptions taken; motion that these exceptions be referred to the same master with the former set, granted. *Pratt v. Tessier*, 1 Bro. C. C. 39.

Exceptions to joint answer of defendants, A and B. A died, exceptions referred to B's answer only. *Herbert v. Pusey*, Dick. 265.

#### (k) Argument, and hearing of.

Where exceptions are taken to the answer to the original bill, and exceptions are also taken to the answer to the amended bill, a separate rule for the argument of each set of exceptions must be given, and it is irregular to set them down for argument under one rule. *Eastwood v. Dobree*, 1 Y. & J. 508.

In chancery, exceptions to answer are always argued and determined before the master. In the exchequer, they are argued and determined by the court itself. *John v. Dacie*, 13 Price, 632. PR. IN EXCH.

Exceptions standing in paper for argument, can only be heard at the sitting of the court. *Memorandum*, 5 Price, 607. PR. HEARING IN EXCHEQUER.

See the orders in Kerby Ord. 35, 38, 39. O'Keefe Ord. 63, 69. 2 Fowl. 4, 5, 7, & 2 Mad. Chan. 349.

The court will not grant an order to prove exhibits at the hearing of exceptions, because you can offer nothing at the hearing that was not before the master. *Anon.* 1 Mos. 191. PR. EXHIBITS.

Three defendants put in a joint and several answer, which is reported insufficient; two of them submit to the exceptions; this will not prevent the other bringing them on to be argued. *Prac. Reg.* 204.

#### (l) Allowance, and overruling of.

Taxed costs allowed on overruling frivolous exceptions to an answer to a bill for discovery, instead of 40s. the ordinary costs. *Jones v. Steele*, 1 McClel. & Y. 274. PR. COSTS.

The test of the materiality of exceptions, is to ascertain if the answer excepted to should admit or deny the interrogatory, whether it would assist the plaintiff's equity, or advance his claim to the relief sought by his bill. *Batty v. Kendrick*, 13 Price, 291.

Court refused to allow defendant costs, in case where only four out of thirty-five exceptions taken were allowed, five only having been argued, and one of them overruled. *Daniel v. Bishop*, 13 Price, 15. PR. COSTS.

The course of the court as to costs, is to allow 40s. on overruling exceptions, and 60s. on allowing. S. C. *Id. ib.*

Where one of several exceptions had been argued and allowed, and being held material, an injunction had been granted thereon, and the plaintiffs did not afterwards set down the others for argument, they were, on motion without notice, overruled. *Jackson v. Strong*, 13 Price, 309, note.

When some exceptions to answer are allowed and some disallowed, master should point out by report, which are and are not allowed. *Agur v. Gurney*, 2 Mad. 389. MASTER'S REPORT.

Amendment of bill, after exceptions to answer, allowed, does not prejudice injunction previously obtained. *Adney v. Flood*, 1 Mad. 449. BILL, AMENDMENT; INJUNCTION.

Upon exceptions taken to an answer for insufficiency, the master may look to the materiality of them, and overrule immaterial exceptions. *Agar v. Regent's Canal Comp.*, Cooper, 212.

Injunction not revived pending a rehearing of order, allowing exceptions to report of insufficiency of answer. *Scott v. Mackintosh*, 1 V. & B. 503. PR. INJUNCTION, REVIVAL OF; PR. REHEARING.

After exceptions are allowed, the defendant has eight days to answer, and then may have an order for three weeks, to commence from end of ten days. *Cowan v. Phillips*, 3 Anst. 937. PR. TIME TO ANSWER.

If answer reported sufficient, and on exceptions held insufficient, defendant is not to pay the 40s. costs for insufficient answer. *Knightly v. Deacon*, Dick. 82.

Where, on exceptions to an answer, the court is equally divided, they are over-ruled of course. *Hamilton v. Fleetwood*, Bunb. 47.

#### 18. Reference for scandal and impertinence.

See also PR. MASTER, 1. (d).

Ordered, that in future all references of answers of defendants for insufficiency, or for scandal and impertinence, or for impertinence made in the same cause, be made to the same master. And farther, that where answers of defendants have been referred for scandal and impertinence, or for impertinence, and the court shall afterwards refer the same for insufficiency, the latter reference be made to the same master as the former reference. Gen. Order, 10th March, 1818.

Where reference of answer for impertinence is shewn as cause against dissolving injunction, and report is to be obtained in four days, which is not done, injunction is dissolved, and report being afterwards obtained, will not be cause to revive it, as in case of insufficiency. *Dancy v. Brown*, 4 Mad. 238. PR. INJUNCTION, DISSOLVING, CAUSE AGAINST.

Plaintiff a pauper: costs of impertinence expunged from the answer, ordered to be taxed, as *dies* costs to be paid into court. *Rattray v. George*, 16 Ves. 232. PR. COSTS; PR. PAUPER CAUSE.

A reference of the answer for impertinence, is good cause against dissolving an injunction. *Fisher v. Bayley*, 12 Ves. 18. PR. INJUNCTION, DISSOLUTION OF.

Answer referred for scandal, on motion of co-defendant. *Coffin v. Cooper*, 6 Ves. 514.

A stranger to record may refer for scandal. *Id. ib. Sed qv.* 4 Mad. 252.

Reference of answer for scandal or impertinence, is not cause for continuing injunction. *Milner v. Golding*, Dick. 672.

On an answer being reported scandalous or impertinent, if the plaintiff except to the report, he must shew specially wherein it is scandalous or impertinent. *Cruken v. Wright*, 2 P. W. 181. PR. EXCEPTIONS TO REPORT.

#### 19. Sufficiency.

See also PR. MASTER, 1. (d).

Answer found sufficient, shall be so from date of report. If defendant submit to answer without report, it shall be insufficient from date of submission. 9th Gen. Order, 3rd April, 1828.

Master, on deciding on sufficiency of an answer, may look at the materiality of the question. 74th Gen. Order, 3rd April, 1828.

Ordered, that in future all references of answers of defendants for insufficiency, or for scandal and impertinence, or for impertinence made in the same cause, be made to the same master. And farther, that where answers of defendants have been referred for scandal or impertinence, or for impertinence, and the court shall afterwards refer the same for insufficiency, the latter reference be made to the same master as the former reference. Gen. Order, 10th March, 1818.

After a fourth answer reported insufficient, it is a

motion, of course, that the defendant shall be examined upon interrogatories, and stadd committed. The interrogatories are to be settled by the master, and must go directly to the points to which the exceptions are sustained. The defendant, instead of putting in a written examination to the interrogatories, is to be examined personally upon them by the master. *Farquharson v. Balfour*, 1 Turn. & R. 184. PR. EXAMINATION OF DEFENDANT ON INTERROGATORIES.

Mode of conducting the personal examination of a defendant upon interrogatories after a fourth insufficient answer. *Id.* 200.

Sufficiency of a fourth answer to be decided upon, not by looking at the fourth answer only, but by looking at it connected and taken with the three preceding answers. *Id.* 189.

Insufficient answer, no answer. *Edwards v. M'Leay*, 2 V. & B. 258.

No reference for insufficiency, until reference for impertinence is determined. *Lacy v. Hornby*, *id.* 293.

An injunction against proceeding at law is gone by the master's report, that the answer is sufficient, and is not sustained by exceptions. The order extending it to stay trial, which in the court of chancery is a distinct order, falls also as a part of the original injunction, without a motion to dissolve. *Bishton v. Birch*, 2 V. & B. 40. INJUNC. AGAINST PROCEEDINGS AT LAW.

Defendant having put in three insufficient answers, in custody for want of fourth, entitled to discharge on filing of fourth answer. *Balfour v. Farquharson*, 1 S. & S. 72. Affil. 1 Turn. & R. 184. See also *Bayly v. Bayly*, 11 Ves. 151. PR. CONTEMPT, DISCHARGE.

On a motion to dissolve a special injunction staying the trial of an action till further order, the master, on a reference for impertinence, having reported the answer impertinent in a small part only, and the plaintiffs having excepted to the report, and insisting on their right, after the question of impertinence was decided, to except to the answer for insufficiency, the lord chancellor examined the bill and answer, and dissolved the injunction, so far as it extended to stay trial. *Tophael v. Birdwood*, 1 Swan. 228.

Defendant, after two orders for time, having filed answer which was found in part illegible, a motion to take it off file, resisted on affidavit that it was legible when sworn, was refused. *Att. Gen. v. Mayor of Fowey*, 3 Swan. 184. PR. TAKING PLEA OFF FILE.

The general rule as to costs of insufficient answers. *Const v. Ebers*, 1 Mad. 530. PR. COSTS.

Order made, that defendant should, within four days, answer interrogatories, or in default, a serjeant at arms to go. Insufficient answer put in, serjeant at arms ordered to take him. *Weston v. Jay*, 1 Mad. 527. PR. INTERROGATORIES, ANSWER TO; PR. PROCESS.

The right to process under an undertaking for a serjeant at arms, &c. immediately on exceptions to the report of an insufficient answer disallowed, waived by plaintiffs taking out a subpoena for a better answer, and excepting to the report entitling defendant to eight days after the exceptions are disposed of. *Algar v. Regents Canal Comp.*, 19 Ves. 379. S. C. Coop. 221. WAIVER; PR. PROCESS; SERJ. AT ARMS; PR. EXCEPTIONS TO REPORT.

Defendant, in contempt, putting in answer, to which exceptions were allowed. Plaintiff not accepting costs, may go on with old process. But if in custody, old process is discharged pending reference by tender of costs. *Boehm v. De Tastet*, 1 V. & B. 324. PR. PROCESS; PR. COSTS; WAIVER.

An answer filed is a sufficient objection to a motion to extend an injunction to stay trial; but, as the defendant submitted to exceptions, the order was made: an insufficient answer being no answer. *Rishton v. H. 1 V. & B. 366.* PR. INJUNC. TO STAY PROCS. REL. ENDING TO STAY TRIAL.

After answer reported insufficient, plaintiff may proceed upon his old process of contempt without a new order, if he has not accepted costs. *Coutson v. Wharm, id. 331.* PR. PROCESS; PR. COSTS; WAIVER.

Defendant taken upon the process for want of an answer, on putting in an answer is entitled to be discharged without waiting for the report that it is sufficient. *Hawes v. Taylor, 16 Ves. 418.* PR. DISCHARGE FROM CONTMPT FOR WANT OF ANSWER.

After two insufficient answers defendant is not entitled to six weeks time to answer. *Gregor v. Id. Arnold, 6 Ves. 144.* PR. TIME TO ANSWER.

An insufficient answer does not entitle defendants to be discharged from process of contempt. *Wallop v. Brown, 4 Bro. C. C. 213.* PR. DISCHARGE FROM CONTMPT.

The court condemned the practice of allowing as much time of course after an insufficient answer as on the original answer; also as to the costs of attachments proposed a remedy by order. *Anon. 2 Ves. J. 270.* S. C. nom. *Gordon v. Pitt, 4 Bro. C. C. 466.* PR. TIME TO ANSWER.

Order for a messenger for want of an answer. Defendant put in an answer which was reported insufficient. This being as no answer, the messenger was to proceed to execute the former order. *E. I. Comp. v. Daerres, 1 Cox, 343.* PR. MESSENGER.

Defendants answer reported insufficient, and order served on him to amend bill, and answer amendments and exceptions at same time: till this done, defendant cannot dissolve injunction obtained on original bill. *Magne v. Hechin, Dick. 255.*

Insufficient answer no answer. *Turner v. Turner, id. 316.*

Bill taken *pro confesso* on sequestration for want of a better answer, first having, on exceptions to part, been reported insufficient. *Id. ib.*

Also where defendant in contempt for want of answer puts in insufficient answer, plaintiff may go on with process where he left off. *Broughd v. Childerster, id. 379.*

Putting in answer is good cause against sequestration nisi against purchaser; but if answer insufficient, plaintiff must move again for sequestration nisi. *Rasleigh v. Butler, id. 152.*

Defendant, in custody for want of further answer putting it in, will be discharged on paying the costs of the contempt. If that answer, or any further one, proves to be insufficient, the plaintiff may resume the process where it left off. *Child v. Brabson, 2 Ves. 119.* S. P. *Anon. 1 Ch. Ca. 238.* *Id. Abergavenny v. Ly. Abergavenny, Kel. 5.* PR. DISCHARGE FROM CONTMPT.

If answer reported sufficient, and on exceptions held insufficient, defendant is not to pay the 40s. costs of an insufficient answer. *Knightly v. Deacon, Dick. 82.*

One defendant's answer is reported insufficient, and the master's report on exceptions confirmed; afterwards the other defendant put in the like answer. The court, for avoiding delay, will judge of the insufficiency of the answer without sending it to a master. *West v. Id. Delaware, 1 Vern. 74.* 2 Vent. 357. S. C.

Exceptions for insufficiency having been allowed to two answers, the plaintiff amended; defendant answered the amendments, to which answer exceptions were taken and allowed. The defendant shall pay costs as for a third insufficient answer. *Harman v. Lupton, Bun. 203.* PR. COSTS.

## 20. Who bound.

Infant's answer cannot be read against him, nor accepted to, and may be amended when he comes of age. *Savage v. Curroll, 1 Ball & B. 553.* INFANT.

But Ld. Hardwicke doubted whether an infant can, before he comes of age, put in a new answer, so as to rehear the cause over again; for if there should be a decree against him on the second hearing, he may, with as much reason, put in a third answer, which would occasion infinite vexation. *Bennet v. Lee, 2 Atk. 487.* INFANT.

Purchase to the use of baron and feme and their heirs; they join in a mortgage to the vendor to secure part of the purchase money; upon a bill to foreclose they answer jointly: the husband dies, and the wife insists on the want of a fine: held, the joint answer is equal to a fine, and mortgage good. *Anon. Mos. 248.* HUSB. & WIFE.

After a decree nisi against an infant, on such infant's coming of age, and before the decree made absolute, he may put in a new answer. *Fountain v. Cairne, 1 P. W. 504.* INFANT.

The defendant, by answer, accuses himself and his co-defendants, and is believed against himself, but not against his fellow. *Michel v. Webb, Toth, 10. PR. EVIDENCE, ANSWER.*

It is a motion of course for the defendant, after he comes of age, to be at liberty to put in a new answer, or amend his answer put in whilst he was an infant, if he has a day by the decree to shew cause after he comes of age. *Anon. Mos. 66.* But see *Bennet v. Lee, 2 Atk. 487.* INFANT; PR. DEMUR. PAROL.

## 21. Liberty to withdraw.

An infant defendant, before he comes of age, may apply to put in a better answer, where it is probable he may not be able to command the same evidence when he is of age. *Bennet v. Lee, 2 Atk. 532.* INFANT.

Defendant, not before conscious of his right, allowed to re-file new answer. *Alpha v. Payman, Dick. 33.*

The attorney-general may have liberty to withdraw his general answer, and put in another, insisting on the particular right of the crown. *Errington v. Att. Gen. Bun. 303.* ATT. GEN.

## 22. Priority.

Bill abated by marriage of plaintiff, no revivor till after cross bill filed, loses priority. *Smart v. Floyer, Dick. 260.*

Original bill must be answered first; but if, after cross bill filed, plaintiff materially amends, he loses his priority. *Long v. Burton, Dick. 82.*

The original bill is to be first answered; but if the plaintiff, after his cross bill filed, amend his bill, he loses his priority. *Steward v. Roe, 2 P. W. 435.* PR. CROSS BILL.

First bill to be answered before the cross bill: A brings his bill against B and C, who put in insufficient answers, and prefer their cross bill against A. B becomes a bankrupt; his assignees bring their bill, in nature of a bill of revivor, against A. They shall not go on till C has answered A's bill. *Child v. Frederick, 1 P. W. 266.* Id.

## IV. APPEAL.

See also PR. COSTS, 10 (d).

1. Form, and to what tribunal, and steps necessary to be previously taken.

2. When and on what grounds it lies, or when barred, and when on new matter.
3. In what time.
4. Who may prosecute.
5. Evidence on.
6. Abatement and Revivor of.
7. Effect of, and staying proceedings during.
8. Practice on generally.

1. Form, and to what tribunal, and steps necessary to be previously taken.

An appeal from the rolls, or the vice chancellor to the lord chancellor, is only a rehearing. *Williams v. Gorchild*, 2 Russ. 91.

No appeal lies to court of chancery from decisions either of the privy council or the commissioners under the acts and conventions for indemnifying British subjects from the confiscation of their property by the French revolutionary government. *Hill v. Reardon*, 2 S. & S. 431. JURISDICTION.

No appeal from a sentence of the delegates to the lords in parliament. *Kennedy v. El. Cassils*, 2 Swin. 326. COURT OF DELEGATES.

No appeal from the lord chancellor in bankruptcy. *Exp. Bryant*, 1 V. & B. 211. S. C. 2 Rose, 1. BANKRU.

On appeal from decree at the rolls, it was to be affirmed there upon a rehearing. *Brown v. Higgs*, 8 Ves. 561.

Appeal to the chancellor of the duchy of Lancaster from a decree of the vice chancellor, dismissing the bill, affirmed by him on a rehearing, on the petition of the plaintiff. *Omerod v. Hardman*, 5 Ves. 722. DUCHY OF LANCASTER.

The appeal in lunacy is to the king in council. *Oranien v. Id. Compton*, 2 Ves. J. 72. LUNACY.

No appeal to the house of lords lies against an order in lunacy. *Rochfort v. El. Elg*, 1 Bro. P. C. 450. *Id.*

An appeal will not lie from the rolls to the house of lords until the decree is signed and enrolled. *Corneghan v. Conyngham*, AmbL. 91. S. C. Dick. 145. ROLLS COURT; PR. DECREE, ENROLMENT OF.

No appeal lies to the lords from a sentence in the ecclesiastical court affirmed by the delegates, pronouncing a testator to be *compos mentis*, who, after the sentence upon an issue at law, was found *non compos*. *Baker v. Hart*, 3 Atk. 546.

No appeal lies from an order of a court of equity to shew cause, before such order be made absolute. *Nagle v. Foote*, 1 Bro. P. C. 439.

An appeal lies not from the court of exchequer to the house of lords in Ireland, complaining of an order made in that court twelve years before, nor after five years (unless disability be shewn), by the 95th standing order of that house. *Hearne v. Briscoe*, 1 Ridgw. P. C. 359.

No appeal lies to house of lords against decree before signed by the chancellor. *Barlow v. Bateman*, 2 Bro. P. C. 275. SIGNATURE OF DECREE.

No appeal lies from a decision of the lord chancellor touching idiots or lunatics, except to the king in council. *Sheldon v. Aland*, 3 P. W. 108. note. LUNACY.

An appeal from decrees made in the plantations lies only to the king in council. *Fryer v. Bernard*, 2 P. W. 262. PLANTATIONS.

Appeal lies to the lords from the lords of sessions in Scotland in a matter of ecclesiastical cognizance, though there was an appeal from the presbytery to the provincial synod. *Greenshields v. Provost of Edinburgh*, Colles' P. C. 427.

No appeal lies to the house of lords from a sentence in the delegates, nor from a decree on the stat. of charitable uses. *Saul v. Wilson*, 2 Vern. 118.

An appeal will not lie in chancery from a decree in a county palatine. *Portington v. Tarbock*, 1 Vern. 177. and S. P. *Jennet v. Bishop*, id. 184. COUNTY PALATINE.

2. When and on what grounds it lies, or when barred, and when on new matter.

Decree having been made upon bill in equity by a lay inpropriator for an account of tithes, the defendant in the suit appeals against so much of the decree as relates to part of the lands made subject to the account. The decree is reversed upon the ground that the plaintiff in the suit has not proved his title; whereupon defendant in suit presents a new appeal against the remainder of the decree: held, that a second appeal in such suit cannot be maintained; whether such appeal would be entertained in a suit where the title is in issue, *quære*? *Norbury v. Meade*, 3 Bl. 261.

A party having appealed against one part of a decree in a suit where the title is not in issue, thereby virtually submits to the rest of it, and cannot afterwards present a new appeal against other part of same decree; when such appeal is presented, the party seized with it ought not to answer, but to present a counter petition to have it dismissed. If he treats it as an effective appeal by answering and suffering it to proceed before he presents a counter petition, he will not be entitled to costs. *Id.* PR. COSTS.

Both parties ordered to be examined upon the trial of an issue directed upon a motion for an injunction supported by the plaintiff's affidavit, and opposed upon the affidavit of the defendant contradicting it; an order directing an issue not to be appealed from after the trial has taken place, *scilicet*. *De Tistel v. Bordower*, 1 Jac. 516. PR. EXAMIN. OF PARTIES TO SUIT; PR. ISSUE AT LAW.

Appeal not barred by consent to an order under the decree; but that order ought to be inserted in the petition of appeal. *Wood v. Griffith*, 19 Ves. 550.

Though no appeal is allowed on matters of costs only, they may be considered in an appeal on other grounds. *Fitzgibbon v. Scandau*, 1 Dow. 270. COSTS.

An erroneous result in point of law drawn by the court from facts apparent on the record, is the proper subject of review, for error apparent on the decree. A fact misunderstood by the court, and not introduced into the decree, may be ground for an appeal, but not for a bill of review. *O'Brien v. Connor*, 2 Ball & B. 154. REVIEW, BILL OF.

When a motion for a new trial has been refused at the Rolls, upon an issue directed by the M. R., the L. C. will not, by way of appeal, entertain a similar application. *Bonile v. Rothwell*, 2 B. & B. 56. PR. MOTION FOR NEW TRIAL.

Motion to open the enrolment of a decree, and to stay proceedings under it to give an opportunity of appeal refused, the decree being made upon the merits at law; a judgment by default is vacated on motion, not a judgment on the merits. *Charman v. Charman*, 16 Ves. 115. PR. DECREE, ENROLMENT OF; PR. STAYING PROCEEDINGS.

Distinction, where costs are disposed of as a subject of relief; an appeal not open to the objection upon an appeal for costs only. *Taylor v. Popham*, 15 Ves. 72. PR. COSTS.

It is not a ground for appeal that an account was not directed, which was not prayed by the bill, nor asked for at the hearing below. *Chumley v. Dimsany*, 2 Scho. & Lef. 712.

No point ought to be insisted upon on appeal that was not mentioned in the court below. S. C. *Id. ib.*

Where question arises on interest in a trust fund, separated from general residue, the costs must come out of the particular fund, and having been given by

decree as specifically prayed by the bill out of the general personal estate, the decree, although affirmed in other respects, was corrected in that particular, being considered as relief prayed, and therefore not within the rule against appeal for costs only. *Jenour v. Jenour*, 10 Ves. 562. COSTS; TRUST.

An appeal lies at the suit of tenant in tail in remainder, against a decree affecting his rights, had against a prior tenant in tail; and such remainderman may file a supplemental bill to make himself party in the former suit, for the purpose of appealing. *Giffard v. Hort*, 1 Scho. & L. 386. TENANT IN TAIL. & REM.-MAN.

An order for a cause to stand over, with liberty for the plaintiff to amend his bill by adding parties is, in its nature, an order by consent, and therefore cannot be appealed from. *Beresford v. Adair*, 2 Cox, 156. PR. ORDER BY CONSENT.

There shall not be an appeal or rehearing for costs only. *Newton v. Bennet*, 1 Bro. C. C. 140. S. C. 2 Dick. 594. PR. COSTS; PR. REHEARING.

It is a known and established rule, that an appeal does not lie against an order made by the consent of parties. *Toder v. Sansam*, 1 Bro. P. C. 468. PR. ORDER BY CONSENT.

A decree made by consent cannot be appealed from. *Bradish v. Gee*, Ambl. 229. S. C. 1 Ken. 73. PR. DECREE BY CONSENT.

But judgment in a cause heard by consent, reversed on appeal. *Butterfield v. Butterfield*, 1 Ves. 133. PR. DECREE BY CONSENT.

Where party to suit sells and conveys all his right, &c. under decree to another for valuable consideration, such sale, &c. is an absolute bar to appeal by him from that decree. *Cusack v. Gilbert*, 5 Bro. P. C. 471. PR. APPEAL, WHO MAY.

An appeal on re-hearing, for costs only, allowed under particular circumstances. *Couper v. Scott*, 1 Eden, 17. S. C. 1 Bro. C. C. 141. PR. COSTS.

On an appeal to the lords, no new matter can be gone into; but only what was insisted on and proved at the hearing. *Cunningham v. Cunningham*, Ambl. 90. S. C. Dick. 145.

Where tenant by *elegit* has received rents and profits beyond the debt, though he shall account to the debtor, yet he shall not pay costs. In such case appeal may be for the costs only, where defendant decreed to pay them. *Owen v. Griffith*, Ambl. 520. S. C. 1 Ves. 249. *ELIGIT*; ACCOUNT; PR. COSTS.

Where bill is filed to set aside a conveyance for fraud, imposition, and want of consideration, and for other relief, and the court dismisses the bill so far as relates to the conveyance, but gives plaintiff liberty to proceed at law as to the other matters, and in the meantime retains the bill as to those matters: if the plaintiff neglects to proceed at law, within a reasonable time, and suffers his bill to be absolutely dismissed from such neglect, he cannot afterwards complain of decree by way of appeal. *Rotherham v. Brown*, 8 Bro. P. C. 297. PR. DECREE; LACHES.

On appeal, new matter must be brought; but in review the parties, must proceed *ex eisdem* acts, unless there be a clause to receive new matter. *Popping's case*, 2 Eq. Ab. 82. (n.) to pl. 4. Sel. Ch. Ca. 48.

Such defects in a decree as the court will rectify upon motion, are not sufficient grounds for an appeal. *Bunbury v. Bolton*, 1 Bro. P. C. 434. PR. DECREE.

No words in a grant from the crown can deprive the subject of his right to appeal, much less if the grant be silent in that particular. *Christian v. Corren*, 1 P. W. 329.

An appeal lies from a decree in the Isle of Man to the king in court. *d. ib.*

Upon an appeal from the rolls, or to the house

of lords, no new matter to be insisted upon. *Thompson v. Waller*, Prec. Chan. 295.

A person, feeling himself injured by a general order of a court not made in any cause, (as for the filing an ancient record, many years mislaid), may appeal to the lords, and the persons at whose instance the order was made, cannot decline the lords' jurisdiction, by alleging that it is original and not appellate, or that many not before the house are interested in the record. *Ld. Wharton v. Squire*, Colles' P. C. 276. GEN. ORD.

An appeal brought, suggesting that decree was said to be made by consent when it was not, was dismissed. *Downing v. Cage*, 1 Eq. Ab. 165. PR. DECREE BY CONSENT.

No appeal where the matters complained of have been once settled by the lords. *Bumpfield v. Popham*, Colles' P. C. 2.

Nor can any person, not a party in the original cause, be suffered to interplead by a petition of appeal. *Handcock v. Shuen*, id. 12.

### 3. In what time.

See the standing orders of H. of L. collected. Bridg. Prac. Dig. 48.

The general order, 1725, limiting the time of appeal to one month, cannot prevail against the practice contrary to it. *Wood v. Griffith*, 19 Ves. 550. GENERAL ORDER.

Upon an application for a commission of delegates, the chancellor will not decide whether the appeal be in time, but will leave the question to the court of delegates. If it were quite plain that no appeal lay, a commission should not be granted; serus, if that question doubtful; semble. *Heed v. Harris*, 2 Scho. & L. 563.

By an order of the house of lords, of the 24th of March, 1725, the time for receiving appeals is limited to five years from the signing and enrolling of the decree; and therefore, upon an appeal brought from two decrees, of the 15th of July, 1728, and the 5th of February, 1731, which were enrolled in March, 1764, the house declared that the appeal ought not to have been received, and accordingly it was dismissed. In making this order, the house is said to have considered the enrolment of any decree pronounced by the court of chancery, as being, by legal relation, the act of the same day on which the decree was pronounced. *Smythe v. Clay*, 1 Bro. P. C. 453.

All appeals from chancery to the lords must be made within five years from the signing and enrolment of the decree. *Hill v. White*, Mos. 30.

Upon an appeal from a sentence of the admiralty of the Cinque Ports, the lord warden granted a commission of delegates; and, upon a demurrer to a bill for that the plaintiff did not set forth that the lord warden had authority to grant such commission, the court made no order as to that matter, but could not relieve the plaintiff, because the appeal was not made till fifteen days after the sentence. *Denew v. Stock*, Rep. Temp. Finch. 437.

### 4. Who may prosecute.

A suit having been instituted by a deviser, and revived by a party as devisee, whose supposed right is displaced by the discovery of a later will, the cause cannot be continued for the benefit of the effective devisee, by agreement between that devisee and the plaintiff in the suit, so as to enable the devisee under the second will (not being a party to the suit) to appeal against a decree; and an appeal cause cannot be heard before the court of appeal, until he is made a party in the suit below. In such a case, where the suit had been originally instituted by the deviser, and upon his death revived by the party claiming under

the first will, semble, that the proper course to be adopted by the devisee under the second, is not (as in this case) to file a supplemental bill, praying to have the benefit of the proceedings in the revived suit, but to revive, *de novo*, the suit as abated on the death of the devisor. *Rylands v. Latouche*, 2 Bligh, 566. DEVISEE; PR. DECREE; PL. PARTY.

The case is different where a decree is defective only because incidental parties are not before the court; as in the case of an assignment, in trust for payment of debts, reserving the surplus, if the assignee obtains a decree, and afterwards it appears that he had assigned his interest before the decree, his assignees may, by supplemental bill, have the benefit of that decree. *Binks v. Binks*, 2 Bl. 593. DEVISEE; PR. DECREE; PL. PARTY.

Where party to suit sells and conveys all his right, &c., under decree, to another for valuable consideration, such sale, &c., is an absolute bar to appeal by him from that decree. *Cusack v. Gilbert*, 5 Bro. P. C. 471. CONVEYANCE.

Under what circumstances an appeal may be brought from an old decree, by a person who was neither party or privy to the suit in which the decree was made. No appeal lies to the house of lords in Ireland, from the judgment or decree of any court in that kingdom. The statute of 6 Geo. 1. c. 5. did not introduce any new law, but is only declarative of what the law was before: but this act is now repealed by the statute 22 Geo. 3. c. 53. *Vernon v. Vernon*, 1 Bro. P. C. 440. STRANGER TO DECREE.

An agent being prosecuted for contempt in disobeying an order of which he had no notice, may join in an appeal from that order, though not party to cause in which the order was made. *Stone v. Burne*, 5 Bro. P. C. 213. PL. PARTY.

##### 5. Evidence on.

On appeal and re-hearing, additional evidence permitted in some instances: if the rule is so, it must be subject to costs. *White v. Fussell*, 1 V. & B. 153. PR. EVID. FURTHER; PR. RE-HEARING.

On the hearing of all appeals, this principle universally prevails, that no evidence can be received which was not laid before the court below; nor can any evidence, which was received below, be objected to above, unless the admission of improper evidence be among the points of the appeal. *Eden v. El. Rute*, 1 Bro. P. C. 465.

Where it does not appear by the register's minutes that any evidence was read at the hearing of the cause, the court ought not, upon a subsequent application, make an order that the evidence should be entered as read. *Id. ib.*

On an appeal from the rolls, the appellant may be let into new evidence, which was not read there, provided he will give up his deposit. *Hedges v. Cardonnel*, 2 Atk. 408. DEPOSIT.

On an appeal from the rolls to chancellor, the cause is open, and the party is at liberty to read new proof, and offer what he can against the decree. *Wright v. Pilling*, Prec. Chan. 496.

No evidence can be given, on hearing of appeal in house of lords, which was not read or insisted on in court below. *Braesh v. Moore*, 3 Bro. P. C. 546.

No proofs to be read in the house of lords which were not made use of in chancery. *Button v. Price*, Prec. Chan. 212.

##### 6. Abatement and Revivor of.

A suit having been instituted by a devisor, and revived by a party as devisee, whose supposed right is displaced by the discovery of a later will, the cause cannot be continued for the benefit of the effective

devisee, by agreement between the devisee and the plaintiff in the suit, so as to enable the devisee under the second will (not being a party to the suit) to appeal against the decree; and an appeal cause cannot be heard before the court of appeal, until he is made a party in the suit below. In such a case, where the suit had been originally instituted by the devisee, and upon his death revived by the party claiming under the first will, semble, that the proper course to be adopted by the devisee under the second, is not (as in this case) to file a supplemental bill, praying to have the benefit of the proceedings in the revived suit, but to revive, *de novo*, the suit as abated on the death of the devisor. *Rylands v. Latouche*, 2 Bligh, 566. DEVISEE; PR. DECREE; PL. PARTY.

The case is different where a decree is defective only because incidental parties are not before the court; as in the case of an assignment in trust for payment of debts, reserving the surplus, if the assignee obtains a decree, and afterwards it appears that he had assigned his interest before the decree, his assignees may, by supplemental bill, have the benefit of that decree. *Binks v. Binks*, 2 Bl. 593. *Id.*

When an appeal is abated in the house of lords, the order to revive is obtained of course, and there is no fresh summons. *Byne v. Potter*, 5 Ves. 305.

On an appeal, the house reserved giving judgment upon the point, until an account was taken between the parties. The account is accordingly taken; but, before the appeal is brought on again, one of the parties dies. The suit below is thereupon regularly revived. This is sufficient, and the appeal need not be revived. *Luke v. Mason*, 5 Bro. P. C. 281.

##### 7. Effect of, and staying Proceedings during.

Upon appeal against a decree after the case printed, and an appendix of the evidence, as entered in the registrar's notes of proofs on the hearing, it is irregular to proceed by order upon motion in the court below, to expunge any part of such evidence as entered by mistake, but the course is to apply to the house by petition for leave to proceed in the court below to rectify it. *Lopdell v. Creagh*, 1 Bl. N. S. 225. PR. EVIDENCE; MISTAKE.

The taking of an account will not be stayed pending an appeal. *Nerot v. Burnand*, 2 Russ. 56. ACCT.

Pending an appeal, the court will sometimes stay the sale of property which the decree has directed to be sold, but if the property consists of personal chattels remaining in the possession of the appellant, he must give ample security for their value. *Id. ib.* PR. INJUNCTION TO STAY SALE. SECURITY.

Motion to stay all proceedings under decree till after decision of appeal to house of lords, unsupported by affidavit, and before signature of counsel obtained, refused with costs. *Edwards v. Morgan*, 1 M'Clel. & Y. 258. MOTION TO STAY DECREE.

The writ of *ne exeat regno* does not issue for alimony after a decree in the ecclesiastical court, pending an appeal from that decree. *Street v. Street*, 1 Turn. & R. 322. ALIMONY; NE EXEAT REGNO.

Pending an appeal from an order overruling a demurrer, the court will stay proceedings for enforcing an answer, where answering would render the appeal useless. *Wood v. Milner*, 1 Jac. & W. 636. STAYING PROCEEDINGS.

Pending an appeal from the rolls, an application to stay further proceedings, or to stay a final decree, must be made to the lord chancellor. *M'Naghten v. Boehm*, *Id.* 48. STAYING PROCEEDINGS.

Application to suspend an order of the court till an appeal, of which notice had been given, should be determined, would be more properly made to the court of appeal, particularly where that court has already interfered in the cause; but the court will suspend

their order for a given period, and to a certain extent, on motion, for the purpose of giving the party an opportunity of applying to the appellate court. *Lewes v. Morgan*, 5 Price, 468. PR. SUSPENSION OF ORDER OF COURT.

Notwithstanding appeal from decree, party may sue out subpoena for costs decreed. *Tyson v. Cox*, 3 Mad. 278. PR. SUBPOENA FOR COSTS.

An appeal pending in house of lords is no objection to deputy remembrancer taxing costs, but payment will be suspended. *Meade v. Norbury*, 4 Price, 322. PR. TAXATION OF COSTS.

An appeal does not form a ground to stay process for costs previously commenced, viz. by subpoena. Distinction where the appeal is before any step taken. *Roberts v. Tottu*, 19 Ves. 446. PR. STAYING PROCEEDINGS; PR. COSTS.

Appeal to the lord chancellor from a part of the decree, affirmed on a rehearing at the rolls; but the other party having previously appealed from another part of the decree, the second appeal brought up to the first. *Blackburn v. Jepson*, 2 V. & B. 359. See this case, 17 Ves. 473. and 3 Swan. 132.

Decree not suspended by an appeal without a special ground the subject of discretion; a legacy therefore, paid out of court upon security, notwithstanding an appeal. *Way v. Foy*, 18 Ves. 452. PR. DECREE.

Appeal generally does not stay proceedings under a decree. The costs upon a special application follow the judgment if unfavourable. *Willm v. Willm*, 16 Ves. 216. See also *Tyson v. Cox*, 3 Mad. 278. PR. COSTS.

General rule that an appeal does not stay proceedings, without especial ground. The decree being for the specific performance of a contract for purchase, according to the answer, the execution only was suspended, the master to proceed to settle the conveyance, &c. *Gwynn v. Lethbridge*, 14 Ves. 585. PR. STAYING PROCEEDINGS.

Order of the house of lords made, that proceedings under a decree of a court of equity shall not be stayed by an appeal, unless by special order, upon application to the house or the court. Writ of error generally stays execution in civil cases, not in criminal. *Jinguenin v. Benten*, 15 Ves. 180. See *Lewes v. Morgan*, 5 Price, 468. PR. STAYING PROCEEDINGS.

Petition of rehearing after an appeal from the rolls, dismissed. *E. I. Comp. v. Boddam*, 13 Ves. 421. PR. REHEARING.

Appeal to house of lords, does not stay proceedings in court below. *Wardens, &c. of St. Paul's v. Morris*, 9 Ves. 516.

Upon an appeal from the rolls to the lord chancellor or lord keeper, the cause is entirely open. *Needham v. Smith*, 2 Vern. 464.

After a decree of dismissal affirmed on appeal to the lords, bill is brought for the discovery of a deed, (said to be burnt pending the suit,) which made out the plaintiff's title, and the bill is brought, that after such discovery, the plaintiff might apply to the house of lords for relief; on demurrer the defendant ordered to answer, but plaintiff to proceed no further without leave of court. *Barbon v. Searle*, 1 Vern. 416. DISCOVERY.

Upon a prorogation, the party may proceed in the account, notwithstanding an appeal in parliament. *Propham v. Bamfield*, 1 Vern. 344.

#### 8. Practice on Generally.

Deposit on petition of appeal or rehearing, shall be 20*l*. 42 Gen. Ord. 3d Apr. 1828.

See the standing orders of House of Lords relating to appeal, collected in Bridg. Prac. Dig. 48.

Upon the hearing of a petition of appeal presented

by the defendant, leave was given to the plaintiffs to amend their bill, by making it either a bill and information, or an information. *President of St. Mary Magdalen, Oxford v. Sibthorp*, 1 Russ. 154. PR. BILL, AMENDMENT OF.

An appeal may be prosecuted in forma pauperis. *Bland v. Lamb*, 2 J. & W. 302. PAUPER.

Petition of appeal not being answered till the day after it has been presented, not to prejudice the party, being strictly entitled to have it answered immediately. *Robinson v. Newdwick*, 3 Mer. 15.

Appeal ordered to be taken off the file with costs, as upon a different case, and introducing a variety of representation not made in the court below. *Wood v. Griffith*, 19 Ves. 550.

Object and effect of the late order of the house of lords, requiring the parties to appeals to print their cases forthwith, applying generally to all appeals, to check the abuse of appealing merely for delay and vexation. *Way v. Foy*, 18 Ves. 453.

Signature of counsel on appeal to the house of lords, equivalent to the certificate on appeal to the lord chancellor. *Id*. SIGNATURE OF COUNSEL.

Plaintiff appealing from a decree dismissing the bill, is entitled to the usual order, for the production and inspection of deeds. *Church v. Barclay*, 16 Ves. 435. PR. PRODUCTION OF DEED.

Order on motion and consent, that a petition of appeal from the rolls, may be withdrawn. *Thomson v. Thomson*, 10 Ves. 30.

Upon appeal to delegates, appellant may demand an adjournment from first meeting of judges to examine the transmiss of proceedings. *Goodwin v. Giesler*, 1 Ridg. L. & S. 371. PR. ADJOURNMENT.

An appeal from the rolls to the lord chancellor cannot be reheard. *Fox v. Blackerth*, 2 Cox. 158. PR. REHEARING.

Pending appeal, plaintiff files supplemental bill to carry on decree: held, regular. *Woodward v. Woodward*, Dick. 33.

#### V. APPEARANCE.

1. Effect of, and of want of
2. When substituted, and its incidents.
3. Undertaking to appear.
4. Gratis.

##### 1. Effect of, and of want of.

The grantor of an annuity secured by an equitable charge on certain lands, which are subject to a prior charge, goes to reside abroad, but by his agent continues in the receipt of the rents and profits. The court, on the application of the annuitant, will appoint a receiver, though the grantor has not appeared to the suit. *Tunfield v. Irvine*, 2 Russ. 149. ANNUITY; PR. RECEIVER.

Subpoena was served on defendant at house in London, but he resided in country; attachments issued, and he appeared. Held, appearance waived irregularity; that it must be considered a town cause; therefore, an order obtained for six weeks time to answer, was discharged with costs, as being irregular. *Bound v. Wells*, 3 Mad. 434. WAIVER; PR. PROCESS, IRREGULARITY OF; PR. TOWN CAUSE; PR. TIME TO ANSWER.

The defendant not appearing in support of a demurrer, the court, on production of an affidavit of service of the order for setting down the demurrer, will not overrule the demurrer, but hear the plaintiff. *Penfield v. Ramsbottom*, 1 Swan. 652. PR. DEMURRER.

Defendant may move to dissolve injunction for insufficient service of subpoena, although he has not appeared. *Menzies v. Rodriguez*, 1 Price, 92. PR.



**INJUNCT. MOTION TO DISSOLVE; PR. SERVICE OF SUBPENA.**

Injunction against waste not prevented by appearance the day before the motion. *Allard v. Jones*, 15 Ves. 605. **PR. INJUNCT. TO STAY WASTE.**

A waiver of irregularity in process by appearance, does not relate back so as to bring the defendant into contempt for not appearing in time. *Robinson v. Nash*, 1 Aust. 76. **WAIVER; PR. CONTEMPT.**

An appearance is necessary to a bill of revivor. *Anon.* 3 Atk. 690. **PR. REVIVOR, BILL OF.**

Where a suit was abated, and defendant would not appear to revivor, an injunction was granted, notwithstanding the cause was not revived. *Dk. Hamilton v. El. Macclesfield*, 1 Eq. Ab. 285. **PR. ABATEMENT & REVIVOR; PR. INJUNCT.**

An irregularity in process may be cured by the defendant's appearance. *Floyd v. Nangle*, 3 Atk. 569. **WAIVER.**

But not if the appearance is entered just before the long vacation for the purpose merely of avoiding an attachment. *Anon.* 3 Atk. 567. **IB.**

Defendant making default at trial of issue, shall have day to shew cause. *Peacock v. McKeicher*, Dick. 434.

Injunction to prevent transfer of stock not granted until defendants have appeared, or are in contempt, and upon notice. *Doolittle v. Walton*, id. 412.

Defendant not appearing to bill to redeem or foreclose, decree nisi pronounced. *Kettle v. Corbin*, id. 314.

Husband and wife defendants: he only appears, and demurs: attachment against both. *Spicer v. Pakine, Cary*, 39.

Demurrer put in, defendant appeared not in person, a subpoena to make direct answer. *Hodger v. Smith*, id. 40.

Injunction granted (for not appearing) to stay proceedings at law. *Knot v. Jackson*, id. 49.

Defendant appearing gratis, attachment being out, was committed. *Riechers v. Stilman*, id. 41.

Injunction to discharge execution, defendant not appearing, though served. *Hobby v. Kemp*, id. 41.

Suit is dismissed with costs, plaintiff not appearing at hearing. *Finchar v. Buckwood*, id. 45.

Subpoena to testify in Guildhall, London, attachment for non-appearance. *Batt v. Rookes*, id. 61.

Husband appears, and wife not; attachment against both. *Monro v. Abel*, id. 65.

## 2. When substituted, and its incidents.

Appearances may be put in for defendants, having privilege of parliament, in courts of equity, on return of process of sequestration. 45 Geo. 3. c. 124. s. 4. In default of answer to bill in equity, against persons having privilege of parliament, bill shall be taken pro confesso. *Id.* s. 5. **PRIVILEGE OF PARLIAMENT.**

Any person not entering appearance within the usual time after subpoena, and justly suspected to abscond to avoid the process, court to fix a day for his appearance, to be inserted in the Gazette, and published in the parish church of the defendant, and posted in some public place. 5 G. 2. c. 25. s. 1.

Defendants brought into court by habeas corpus, and refusing to enter appearance, court to order it for them. 5 G. 2. c. 25. s. 2.

Appearance once entered by attorney, can only be struck out by leave of court. *Menties v. Rodrigues*, 1 Price, 92.

Time enlarged for appearance to a bill of foreclosure under stat. 5 Geo. 2. c. 25. notices in the parish church having been prevented while under repair. *Knowles v. Broome*, 1 V. & B. 305. **STATUTE, C. OF; PR. FORECLOSURE.**

Member of parliament refusing to enter an appear-

ance, the court appointed a clerk in court, to enter an appearance for him under statute 45 Geo. 3. c. 124. *Read v. Phillips*, 16 Ves. 436. **STAT. C. OF; MEMBER OF PARLIAMENT.**

An infant cannot appear by attorney, for he must appear by his guardian. *Dwyer v. O'Brien*, 1 Ridg. P.C. 38. (n). **INFANT.**

The mother of an infant defendant appeared as his guardian, though not really so, but the court refused to set aside the appearance on that ground. *Humphrey v. Brewer*, Vern. & Scriv. 386. **GUARD. & WARD.**

Defendant left kingdom two years preceding filing of bill; on affidavit that defendant continued abroad to elude justice, defendant ordered to appear under 5 Geo. 2. c. 25. *Mason v. Polier*, Dick. 401. *Sed quare*; vide note Wyatt's edit. 1803.

If a bill is brought against baron and feme for a demand out of the separate estate of the feme, and the husband is beyond sea, and not amenable by the process of the court, yet if the wife is served with a subpoena, she must appear and answer the plaintiff's bill. *Dubois v. Hole*, 2 Vern. 613. **FEME COVERT.**

If both husband and wife are served with a subpoena, or the husband only, but with notice that his wife is a defendant, he must appear for both, else an attachment may issue in the first case against both, and in the latter against the husband. *Prac. Reg.* 37. **HUSB. & WIFE.**

## 3. Undertaking to appear.

When plaintiff's solicitor serves defendant's solicitor with subpoena, to hear judgment, and obtains an undertaking from him to appear, and plaintiff makes default at hearing; on affidavit of these facts, bill will be dismissed with costs. *Mackness v. Johnstone*, 1 McClell. 148. **PR. DISMISSAL OF BILL.**

Undertaking, to appear to hear judgment, given by solicitor of either of parties, in a cause which has been set down, is not sufficient to make it unnecessary for the other party to prove service of subpoena to hear judgment upon such of those persons who ought to be before court, as are absent when cause is called on. *Bishop v. Bishop*, 9 Price, 481. **PR. AFFIDAVIT OF SERVICE.**

In the case, however, of an information against a corporate body, an affidavit of indorsement of undertaking, to appear at hearing, by solicitor of defendant, on the writ of *distringas*, and another affidavit stating that, on service of letter missive on bishop, his solicitor had thought it unnecessary to appear for him; decree nisi was made in the absence of the defendant. *Att. Gen. v. Poor of Alverstoke*, 9 Price, 482. **IB.**

Court will not attach party for not appearing to bill of injunction, according to undertaking of solicitor who accepted subpoena. *Pemberton v. Gilby*, 9 Price, 146. **PR. ATTACHMENT; SOL. & CLI.**

Solicitor ordered to pay all the costs occasioned by his refusing to appear for defendant at the hearing, pursuant to his undertaking, and the costs of the application. *Cook v. Broomhead*, 16 Ves. 133. **PR. COSTS; SOL. & CLI.**

Defendant by consent to appear gratis at hearing, and pray no day over, making default, decree was pronounced. *Dean v. Abel*, Dick. 287.

## 4. Gratis.

Where defendant enters appearance gratis, time within which he must answer or sue out commission is to be calculated from date of such actual appearance. *Webster v. Threlfall*, 1 S. & S. 135. **PR. ANSWER.**

Where defendant is not bound to appear before particular day, but prior thereto appears gratis, the time for answering, &c. is calculated from the actual appearance. *Hamwarst v. Wellster*, 5 Mad. 422. **IB.**

A defendant to a bill, though not served with process, may appear gratis, and refer it for impertinence. *Fell v. Master of Christ's Coll., Camb.* 2 Bro. C. C. 279. PR. REFERENCE FOR IMPERTINENCE.

By voluntary appearance defendant does not lose his costs. *Bouchee v. Grills, Dick.* 38.

Defendant appearing gratis, attachment being out, was committed. *Richers v. Stilman, Cary,* 41.

ARGUMENT. See PR. ANSWER, 17. (k). — PR. DEMURRER, 5. — PR. PLEA, 4.

## VI. ATTACHMENT.

See also PR. PROCESS.

1. Effect of.
2. When and in what cases, and cause against.
3. Affidavits in support.
4. Discharge from.
5. Against prisoners.
6. Service of.
7. Entry of.
8. Return to.
9. For want of answer.
10. For costs.
11. With proclamations.

### 1. Effect of.

Plea may be filed after return of simple attachment. *Hamilton v. Hibbert,* 2 S. & S. 225. PLEA.

A plaintiff is entitled to the common injunction immediately on the attachment issued. *Bruce v. Webb,* 2 Mer. 474. PR. INJUNCTION.

Motion for time to answer on same day attachment is sealed: attachment has the precedence. So of answer put in the same day. *Staphens v. Neule,* 1 Mad. 550. PR. TIME TO ANSWER.

### 2. When and in what cases, and cause against.

Subpoena may be sued out without affidavit out of term, to appear and answer returnable immediately: but no attachment until eight days after service. General Order, June 30, 1828. 2 Y. & J. 492. PR. SUBPOENA, SUMMONS IN VACATION; PR. VACATION.

Attachment granted for non-appearance to a subpoena served abroad. *Nichol v. Guynn,* 1 Sim. 389. S. P. *Scott v. Hough,* 4 Bro. C. C. 213. PR. SUBPOENA, SERVICE OF.

An order for time to answer, unless drawn up and served, will not stop an attachment. *Gahler v. Fitz John,* 1 Sim. 386. PR. ORDER FOR TIME TO ANSWER.

Where a defendant, after notice of the plaintiff's intention to issue an attachment, unless an order for time is obtained, procures the order, but is unable, on account of the press of business, to get it drawn up, and omits to give the defendant notice of the order until an attachment is sealed, he cannot set aside the attachment. *Kirkpatrick v. Meers,* 2 Sim. 16. PR. ORDER FOR TIME TO ANSWER.

Where a demurrer, tendered at the office to a bill, was refused on a misstatement that an attachment had issued for want of answer, an attachment issued subsequently was set aside, and leave given to demur. *Evelyn v. Griffith,* 1 M'Clel. & Y. 265. PR. DEMURRER.

Bill against husband and wife in respect of wife's executrixship; husband abroad and bankrupt. Attachment was issued against him for want of answer, Wife must be ruled, upon notice, to answer separately before attachment can issue against her. *Bunyan v. Mortimer,* 6 Mad. 278. HUSB. & WIFE; PR. ANSWER.

rate before attachment can issue against her. *Bunyan v. Mortimer,* 6 Mad. 278. HUSB. & WIFE; PR. ANSWER.

Court will not attach a party for not appearing to bill of injunction, according to undertaking of solicitor who accepted subpoena. *Pemberton v. Gilby,* 9 Price, 146. PR. UNDERTAKING TO APPEAR; SOLICITOR & CLIENT.

Attachment sealed before, though not issued till after contempt, is irregular. *Froud v. Laurence,* 1 J. & W. 657. PR. CONTEMPT.

Obedience to the writ of habeas corpus may be enforced by process of contempt. *Crowley's case,* 2 Swan. 73. S. C. Buck, 264. HABEAS CORPUS.

Mistake of defendant's name in subpoena to answer, and attachment not sufficient, to set aside proceedings, though defendant gave notice of determination to take advantage of mistake, and tenders plaintiff his demand. *Shaw v. Tutherleigh,* 2 Price, 328. PR. SUBPOENA TO ANSWER; MISTAKE.

On a motion for an attachment for refusal of production and inspection of documents pursuant to order, or for immediate inspection, the defendant objecting that the documents contained passages improper for inspection; the Ld. Ch. refused the application, but directed the defendants to pay the costs of it. *Jones v. Powell,* 1 Swan. 535. PR. PRODUCTION OF DEEDS, &c.

After an order upon a party in the cause for payment of money, the proper course is an attachment, and upon the return to that, an order for commitment. *Boces v. Tal. Strathmore,* 12 Ves. 325. PR. ORDER FOR PAYMENT OF MONEY.

After decree for debt and costs, attachment may be taken out for each separately. *Frazer v. Tichburn,* 2 Anst. 330, 413. PR. COSTS.

Not having been served with a copy of a decree for a sale, is a good cause against an attachment for not executing the conveyance to a purchaser. *Keigh v. Wood, Vern. & Scriv.* 113.

In order to set aside a sale under a decree, there must be an affidavit of a greater sum having been offered. S. C. PR. SERVICE OF DECREE.

Attachment against husband and wife for want of wife's answer, stayed against husband, but wife attached. *Leibly v. Taylor,* Dick. 372. See Dick. 133.

The brief of a party in the cause is clandestinely taken out of the chamber of his attorney, and made an improper use of by the opposite party. The court ordered the brief to be returned, and granted an attachment, not only against the person who had obtained it, but also against those who had made use of it. Though a brief is not of itself evidence against the party for whom it is prepared, yet, as a discovery of the secrets and merits of his case may be productive of perjury, or subornation of perjury, and thereby obstruct the justice of the court in which the suit is depending; the obtaining of it in a surreptitious manner, is an offence highly deserving the censure and punishment of that court. *Hateman v. Coneary,* 1 Bro. P. C. 619.

Where a solicitor has been negligent in attending to a client's business, the court can grant an attachment against him; and courts of law exercise the same summary jurisdiction over attorneys. *Lloyd v. Nangle,* 3 Atk. 568. SOLICITOR & CLIENT.

Where a solicitor's bill of costs is taxed, he may take out an attachment for them without previously taking out a subpoena, but he must serve his client with the order for taxing his bill of costs, and with the master's report of such costs. *Murphy v. Baldeston,* Barn. 266, 2 Atk. 114. PR. COSTS; SOLICITOR & CLIENT.

Attachment issues against defendant disobeying

subpoena and maltreating defendant's officer serving writ. *Rowe v. West*, Cary, 38.

Husband and wife defendants; he only appears and demurs; attachment against both. *Spicer v. Pakine*, id. 39.

Defendant appearing gratis, attachment being out, was committed. *Richers v. Stilman*, id.

Witness served to testify, pressed for soldier, attachment is stayed. *Humble v. Malles*, id. 41.

Attachment issues for non-performance of decree. *Leake v. Merrow*, id. 53.

Husband appears, and wife not, attachment against both. *Monro v. Abel*, id. 65.

Defendant appears, no bill in court. He loses subpoena; therefore no costs, but attachment is stayed. *Purry v. Morgan*, id. 69.

Attachment discharged, and bill of perjury for procuring it indirectly. *Clegge v. Warberton*, id. 72.

Attachment against defendant upon confession, that he was served. *Waters v. Herd*, id. 73. *Stow v. Maddock*, id. 82.

Maltreatment of server of writ, attachment issues. *Dustones v. Apprice*, id. 91.

Subpoena shown and offered, attachment for non-appearance. *Peris v. Thomas*, id. 94.

Plaintiff, serving subpoena, denying defendant sight, &c. of it, and no bill in court, attachment against plaintiff. *Mead v. Crosse*, id. 96.

Attachment for breaking order of court. *Stephens v. Budden*, id. 103.

Attachment discharged, subpoena counterfeit. *Baily v. Harte*, id. 105.

Attachment issues against the wife alone, and not the husband, for that she would not answer the bill. *Kries v. Macher*, Tolt. 15. *Husn. & Wife*; *PR. ANSWER*.

On the return of a subpoena, if a witness will not appear, and be examined, the party may take attachment against him; and if he appears, and deposes on the other side, his depositions may be suppressed on motion. *Dolman v. Pritman*, 3 C. R. 64. *S. C. Anon.* 2 Fre. 134. *PR. WITNESS*.

### 3. Affidavits in Support.

An affidavit that, "the (sole) defendant has been served with a true copy of a subpoena," is too loose and general to support an attachment for want of appearance. *Henchcliffe v. Gracie*, 1 M'Clel & Y 277.

In the case of articles of peace where party complained of is not in court, an attachment for breach of the peace goes on the oath of the complainant. *Exp. Gumbleton*, 2 Atk. 70. *S. C.* 9 Mod. 232. *PR. SUPPLICAVIT*.

If affidavit whereon attachment founded be filed before return thereof; held good. *Read v. Ward*, Dick. 76.

This, though contrary to the general orders of the court, has been the constant practice, and in a late case, after much discussion, the court hesitated to decide upon the point of practice, but ordered that in future, no process should issue without an affidavit previously filed. *Broomhead v. Smith*, 8 Ves. 557.

### 4. Discharge from.

If a defendant who has been taken on an attachment still refuses to answer, the plaintiff may at the same time proceed to enforce an answer by the process of this court, and bring an action against him and his sureties on the bond given to the sheriff under the

attachment. *Beddall v. Page*, 2 Sim. 224. *PR. ANSWER*; *PR. INJUNC. TO STAY WASTE*; *PR. BAIL*.

Notwithstanding, an offer has been made to pay all the expences which the party has been put to, by the irregularity in issuing an attachment, he has a right to have the judgment of the court on the question of its regularity, and is therefore entitled to the costs of the motion for setting it aside. *Froud v. Laurence*, 1 Jac. & W. 655. *COSTS*.

Subpoena served on defendant at home in London, but he resided in the country; attachment issued, and he appeared: held, appearance waived irregularity, and that it made it a town cause; order obtained for six weeks time to answer, was therefore discharged with costs as being irregular. *Pound v. Wells*, 3 Mad. 434. *WAIVER*; *PR. APPEARANCE*; *PR. TOWN CAUSE*; *PR. TIME TO ANSWER*.

Certificate discharges attachment against an executor for nonpayment of a sum of money. *Wall v. Atkinson*, Coop. 198. *EXECUTOR*; *BANKCY. CERTIFICATE, EFFECT OF*.

Defendant in contempt putting in answer to which exceptions were allowed, plaintiff not accepting costs, may go on with old process; but if in custody, old process is discharged during reference by tender of costs. *Buehm v. De Tastet*, 1 V. & B. 324. *INSUFFICIENCY OF ANSWER*; *WAIVER*; *PR. COSTS*.

After answer reported insufficient, plaintiff may proceed upon his old process of contempt without a new order, if he has not accepted costs. *Coulson v. Graham*, 1 V. & B. 331. *Id.*

Discharge by habeas corpus from commitment under an attachment for breach of a writ of execution of a decree for payment of money, on account of a devastavit as executor, committed before, though not ascertained by the report, or decreed to be paid, till after the time fixed by an insolvent act; of which the party had taken the benefit. *Wheldale v. Wheldale*, 16 Ves. 376.

Court will not upon motion discharge a person in execution for costs upon a demand arising to him upon the person to whom he is in execution. *Holworthy v. Allen*, 2 Bro. C. C. 17. *S. C.* 1 Cox, 202. *Quod vide. SET-OFF*.

Where remedy is given by attachment, as by 9 & 10 W. 3. c. 15 concerning awards, made a rule of court; the attachment is gone, and remedy lost, by the death of the defendant. *Webster v. Bishop*, 2 Vern. 444.

If one be taken upon an attachment, either in process or in execution after a decree, yet in both cases on his appearing before the register he is to be discharged, and to answer the interrogatories at large, not in custody; and if he be continued in custody, the court on motion and appearing before the register, will discharge him. *Danby v. Lawson*, Prec. Chan. 110. *PR. EXAMINATION ON INTERROGATORIES*.

### 5. Against Prisoners.

Special return to an attachment for not appearing, that defendant was imprisoned for felony, the plaintiff must proceed in the usual way by habeas corpus. *Rogers v. Kirkpatrick*, 3 Ves. 471. *PR. HABEAS CORPUS*.

Where an attachment issues against a defendant in custody in the king's bench prison, it is to be lodged with the marshal, and an habeas corpus may then be moved for before return of the attachment. *Trotter v. Trotter*, 1 Jac. 533. *PR. PRISONER*.

An attachment for non-performance of an order against one in the fleet, is directed to the warden of the fleet, and on his return that defendant is his prisoner, the party may move for sequestration. *Anon.* Mos. 301.

## 6. Service of.

Husband and wife defendants, husband abroad, wife alone served with the subpoena; attachment directed against her for want of appearance. *Rushell v. Bushell*, 1 S. & S. 164. HUSB. & WIFE.

Where an attachment issues against a defendant in custody in the king's bench prison, it is to be lodged with the marshal, and an habeas corpus may then be moved for before return of the attachment. *Trotter v. Trotter*, 1 Jac. 533. PR. PRISONER.

Where there is only one defendant, in the exchequer, the subpoena itself must be served, and not a copy of it. *De Tilton v. Sidney*, 1 Anst. 79. PR. SERVICE OF SUBPOENA.

Defendant 140 miles off served two days before end of term, attachment discharged. *Smith v. Weare*, Cary, 88.

## 7. Entry of.

An attachment must be entered in the register's book before it is issued. *Smith v. Thompson*, 4 Mad. 179. Beames' Ord. 110.

Every attachment returned on which an order for a sergeant at arms is grounded, must be entered in the register's office else irregular. *James v. Philips*, 2 P. W. 657.

## 8. Return to.

By 47th order of exchequer, where sheriff neglects to return a process delivered to him, rule may be given on last day of term for him to return writ by seal day, or be amerced 40s. *Kirkby's Ord.* 25. See 1 Fowl. Exch. 155. See also Beames' Ord. 199.

Attachment returnable within eight days after the purification. The eight days mean eight days entire. *Moolham v. Wickett*, 1 Mer. 243. TIME, COMPUTATION OF.

Where order for messenger has been issued against the sheriff for contempt in not returning attachment against defendant for not putting in answer (other attachments having been issued before) it is peremptory, and court will not stay the order, although it go to affect the sheriff not in office at the time of original neglect, nor will they enlarge the time limited by the order. *Thomas v. Matthias*, 2 Price, 32. PR. ORDER FOR MESSENGER.

The previous order to high sheriff to return the process may be well served on his under-sheriff. *Id. ib.*

Day given to sheriff to return attachment upon pain of 5*l*. *Crompton v. Meredith*, Cary, 77. See also *Stratling v. Pembroke*, id. 62. *Hadley v. Wright*, id. 109. *Clough v. Cross*, Dick. 555. *Anon.* Wyatt, Pr. Reg. 394. Harr. Pr. 118.

## 9. For want of Answer.

Exceptions to an answer having been allowed, plaintiff obtained an order to amend, and for defendant to answer the exceptions and amendments at the same time: defendant put in an answer to the amended bill only. The plaintiff then issued an attachment: Held that it was irregular, and that plaintiff ought to have moved to take the second answer off the file. *De Tastet v. Lopez*, 1 Sim. 11. PR. MOTION TO TAKE PLEADINGS OFF FILE; PR. ANSWER TO AMENDED BILL.

Attachment for want of answer to amended bill cannot issue until the amendments have been entered in six clerks' book, and there is no difference between the amendments of a bill which has been answered and those of a bill which has not been answered. *Adamson v. Blackstock*, 1 S. & S. 118. PR. ANSWER; PR. BILL, AMENDMENTS.

Defendant against whom attachment has issued for want of answer, may file plea of outlawry. *Waters v. Chambers*, 1 S. & S. 225. PR. PLEA, OUTLAWRY.

After attachment for want of answer, defendant can only answer. *Broughton v. Jones*, 3 Mad. 42.

Attachments issued for want of answer, after information that they would be sealed at the next private seal, and notice of a petition presented for an order for farther time, set aside for irregularity, due diligence having been used to obtain the order, but without costs, no communication having been made of circumstances which occasioned delay. *Barrett v. Barrett*, 3 Swan. 395.

A demurrer and answer filed by a defendant attached for want of an answer, after orders for time to plead, answer, or demur, not demurring alone, ordered to be taken off the file. *Curzon v. De La Zouche* 1 Swan. 185. PR. DEMURRER; PR. TIME TO ANSWER; PR. TAKING PLEADINGS OFF FILE.

After attachment against infant for want of answer, the proper course is a messenger to bring him into court to have a guardian assigned him. *Eyles v. Le Gros*, 9 Ves. 12. GUARDIAN; INFANT.

Defendant in confinement under sentence for felony, cannot be brought up by habeas corpus upon an attachment for want of an answer. *Rogers v. Kirkpatrick*, 3 Ves. 573. PR. HAB. CORP.

## 10. For Costs.

Demurrer to examination by witness overruled, subpoena for costs not of course. *Valiant v. Dodemead*, Dick. 92.

Costs to be paid out of estate, no subpoena lies against defendant, but part of estate to be sold. *Cannon v. Beeln*, Dick. 115.

The sheriff cannot take a bail bond upon an attachment for not paying costs, but in such case a messenger is to go to bring in the party. *Anon.* Proc. Chan. 331. PR. MESSENGER; PR. BAIL.

## 11. With Proclamations.

After contempt duly prosecuted to attachment with proclamations returned, no commission to answer shall issue, but on motion, and affidavit of party's inability to travel, or other good matter, to satisfy court touching that delay. Beames' Ord. 178.

After the return of the writ of attachment with proclamations, defendant cannot put in plea and answer. *Sanders v. Murney*, 1 S. & S. 225. *Lloyd v. Gunter*, 1 Vern. 275. PR. PLEA; PR. ANSWER.

Discharged paying ordinary fee, answer being in before. *Trussell v. Mills*, Cary, 78.

## VII. ATTACHMENT AGAINST PROPERTY.

A chose in action is neither subject to an execution at law, or to be attached in equity by creditors in the lifetime of the debtor. *Grogan v. Cooke*, 2 Ball & B. 233. CHOSE IN ACTION; EXECUTION.

## VIII. BAIL.

See also PRINCIPAL AND SURETY.

If a defendant who has been taken on an attachment and given bail to sheriff, still refuses to answer, the plaintiff may at the same time proceed to enforce an answer by the process of this court, and bring an action against him and his sureties on the bond given to the sheriff under the attachment. *Beddall v. Page*, 2 Sim. 224. PR. INJUNCTION TO STAY PROC. AT LAW; PR. ATTACHMENT.

Defendant being committed for want of answer,

his bail, under a writ *ne exeat regno*, not discharged. *Stapleton v. Peill*, 19 Ves. 615. *NE EXEAT REGNO*; *PR. COMMITMENT FOR WANT OF ANSWER*.

After injunction obtained by principal, proceeding against bail is a breach of injunction. *Chaplin v. Cooper*, 1 V. & B. 19. *INJUNC. BREACH OF*.

In an account *ne exeat regno* granted, though bail might be had at law. *Hanney v. McEntire*, 11 Ves. 55. *NE EXEAT REGNO*; *ACCOUNT*.

Defendant cannot be held to bail a second time for the same cause. *Answick v. Barklay*, 8 Ves. 596.

Plaintiff at law has a right to hold defendant to bail upon his own affidavit, but there have been cases in which the court of law has permitted an explanation of the circumstances by the affidavit of the defendant, particularly between foreigners and upon foreign transactions, and where an abuse of the process appeared, has directed common bail to be filed. *De Carriere v. De Calonne*, 4 Ves. 590.

Injunction obtained by bail against a creditor who had obtained a verdict, dissolved, the principal debtor being made a party defendant, and stated by bill to be out of jurisdiction. *Roverey v. Grayson*, 3 Swan. 145. *PR. INJUNCTION*.

In the language of the court, bail are the gaolers of the principal, hence arrest by them good even on a Sunday. *Lip. Gibbons*, 1 Atk. 239. *SUNDAY*.

Bankrupt may be surrendered by bail within the time of privilege. *Id.* 238. Vide 3 East. 145. 1 Pri. 74. *BANKCY. PRIVILEGE FROM ARREST*.

Where bail is put in above, an injunction to stay proceedings against the principal extends to proceedings against the bail. Where bail is only put in below, such an injunction extends to proceedings on the bail bond. *Stone v. Tuffin*, Amb. 32. *PR. INJUNCTION, EXTENT OF*.

The sheriff cannot take a bail bond upon an attachment for not paying costs, but in such case a messenger is to go to bring in the party. *Anon. Proc. Chan.* 331. *PR. ATTACHMENT FOR COSTS*; *PR. MESSENGER*.

To bill to be relieved against bail bond assigned by fraud to sheriff, plaintiff at law is necessary party. *Israel v. Narbourne*, 1 Vern. 87.

Commissioners of rebellion have discretion to take bail. *Inglet v. Vaughan*, Dick. 7.

Bail bonds taken on commission of rebellion usually taken in name of holder of great seal, master of rolls, or two masters in chancery. *Cary*, 58.

BILL. See CHARITY, IV.—*PR. EVID.* 13.

## IX. BILL, AMENDED.

See also *PR. INJUNCTION*, 3.

A plaintiff who had obtained the common injunction, as of course procured an order to amend, and then obtained an injunction upon the amended bill as of course: Held, that a special application ought to have been made. *Home v. Watson*, 2 Sim. 85. *PR. INJUNCTION*.

Though injunction is not applied for on original bill, yet if bill is amended, injunction will be granted as of course on defendant taking order for time to answer amended bill. *Statham v. Hughes*, 2 S. & S. 382. *INJUNC. TIME TO ANSWER*.

Where draft of amended bill is signed by same counsel who signed original bill, and no new engrossment is necessary, counsel's name need not be repeated on the amendment. *Webster v. Threfall*, 1 S. & S. 135. *PR. SIG. OF COUNSEL*.

Otherwise if by different counsel. *Id.* ib.

Where neither draft amendment nor engrossed signed by counsel, bill taken off file for irregularity. *Pitt v. Mackleux*, id. 136.

Attachment for want of answer to amended bill cannot issue till amendments have been entered in six clerks' books, and there is no difference between the amendments of a bill which has been answered, and those of a bill which has not. *Adamson v. Blackstock*, 1 S. & S. 118. *PR. ATTACHMENT*; *PR. ANSWER*.

Where original bill is amended stating a new case, but containing some of the same interrogatories as were in original bill, such interrogatories must be answered again. *Matarredo v. Maitland*, 3 Mad. 66. *PR. ANSWER*.

Where a bill has been amended, the amended bill is the only one upon record. The original bill, therefore, cannot be read as evidence to prove what a plaintiff considered his right to be at the time of filing it. *Hales v. Pomfret*, Dan. 141. *EVIDENCE*.

Time allowed defendant to answer amendments in bill is eight days, or he must within that period apply for time to answer. But on special application to be allowed to answer amended bill, even after plaintiff has replied and called on defendant to join in commission, court will grant it on condition of answering and joining commission immediately. *Church v. Legent*, 2 Pri. 45. *PR. TIME TO ANSWER*.

Injunction refused on merits in answer, is not of course on filing amended bill. *Bliss v. Boscouen*, 2 V. & B. 101. *INJUNCTION*.

Where much new matter is put in issue by an amended bill, it must be done by new engrossment; where but little, by interpolation. *Willis v. Evans*, 2 Ball & B. 220.

Injunction of course for want of answer to an amended bill, an answer having been put in to the original bill, and no injunction obtained upon that. *Nelthorpe v. Law*, 13 Ves. 323. *PR. INJUNC. FOR WANT OF ANSWER*; *PR. ANSWER*.

Plaintiff amended his bill, paying costs. The amended bill is not within the general order, 23rd June, 1794; and defendant, therefore, is entitled to the same time as upon an original bill. *Spencer v. Bryant*, 9 Ves. 231. *PR. AMENDED BILL*; *PR. TIME TO ANSWER*.

Where the bill is amended after answer, if the amended bill is not answered, the plaintiff is entitled to a decree that the bill be taken *pro confesso* generally. *Topling v. Stuart*, 4 Ves. 619. *PR. BILL, PRO CONFESSO*; *ANSWER*.

Subpoena not necessary to an amended bill. *Sheffington v. —*, 4 Ves. 66. *PR. SUBPOENA*.

Where the bill is amended after answer, by adding a defendant, the original defendant cannot answer the amended bill, nor have any order for time to answer. *Gill v. Mathews*, 3 Anst. 879. *TIME TO ANSWER*; *ANSWER*.

Amended bill is out of court by allowance of plea posterior to the date of the bill, otherwise if prior. *Jennings v. Pearce*, 1 Ves. J. 448. *PR. PLEA*.

On amended bill it is not necessary to serve new subpoenas on the original defendants. *Angerstein v. Clarke*, 1 Ves. J. 250. *PR. SUBPOENA*.

After injunction dissolved upon the merits, motion to stay trial of ejectment till full answer to the amended bill, refused with costs. *Ly. Markham v. Dickenson*, id. 30. *PR. INJUNC.*; *PR. MOTION TO STAY TRIAL*.

Original and amended bill are but one record. *Vere v. Glynn*, Dick. 441.

Where new matter is suggested by an amended or supplemental bill foreign and repugnant to the title set up by the original bill, there can be no proceedings against the defendant without serving him with subpoena *ad fac. attorn.*, nor ought the cause be brought to a hearing without such service, because defendant should have an opportunity of defending himself against such matter. *Chevers v. Geoghegan*, 6 Bro. P. C. 11.

A defendant having appeared and answered the original bill, the plaintiff afterwards amended it, at which time the defendant was out of the jurisdiction. The court will not order service on the clerk in court in the original suit to be taken as good service on the defendant of the subpoena to appear to and answer the amended bill. *Roberts v. Worsley*, 2 Cox, 389. **PR. SUBSTITUTED SERVICE.**

The original bill brought for discovery only, the amended bill prays relief; the answer to this is to be considered as a part of the answer to the original bill as much as if engrossed in the same parchment, and a part of the same record. *Helduard v. Cressy*, 3 Atk. 333. **PR. ANSWER, WHAT.**

#### X. BILL, AMENDMENT OF.

1. Generally, when necessary, when granted, and in what matters allowed.
2. Effect of, and of motion for leave to amend.
3. In what time, and order to amend in a given time.
4. When of course, or only by special application.
6. Motion to amend, necessary steps on.
6. Motion to amend without prejudice, when granted.
7. Effect of order for leave to amend.

1. Generally, when necessary, when granted, and in what matters allowed.

Replication allowed to be withdrawn, and bill amended by striking out the name of a plaintiff, and making him a defendant, and by stating such facts and circumstances relating to certain transactions between that plaintiff and the defendant as were material to show that the other plaintiffs were not, and ought not to be bound by the acts or misrepresentation of that plaintiff, respecting the property in the pleadings mentioned, or the purchase thereof, and as were material to show that such acts and misrepresentations of the said plaintiff were evidence against the defendant, the plaintiffs who made the application giving security for costs, to the satisfaction of the master, and undertaking to amend within a given time, paying the costs of the application, the usual costs of the amendment, and withdrawing the replication; the extra costs of the amendments to be costs in the cause. *Small v. Atwood*, 2 Y. & J. 512. **PR. WITHDRAWING REPLICATION.**

A bill may be amended by adding plaintiffs, notwithstanding the defendants have answered it. *Hickens v. Congreve*, 1 Sim. 500.

It is not necessary to amend a bill for the purpose of introducing facts disclosed in the answer on which the plaintiff means to rely as parts of his case, entitling him to the relief which he has prayed. *Attwood v. ———*, 1 Russ. 353.

Upon the hearing of a petition of appeals presented by the defendants, leave was given to the plaintiffs to amend their bill by making it either a bill and information, or an information. *President of St. Mary Magdalene, Oxford y. Sibthorp*, 1 Russ. 154. **PR. AFFIDAVIT.**

After plea of settled account allowed of bill, motion to amend bill by stating facts which tended to show that there was no settled account, or that plaintiff ought to be allowed to surcharge and falsify, was refused with costs. *Taylor v. Shaw*, 2 S. & S. 12. **PR. PLEA.**

Bill praying an account of tithes, and merely stating that the impropriate rector demised the tithes to plaintiff demurred to for want of title, but on argument plaintiff was allowed to amend by making the impropriate rector a party, on payment of 5*l.* costs. *Jackson v. Benson*, 1 M'Clell. 62. S. C. 13 Pri. 131. **PL. PARTIES; PL. TITLE.**

Plaintiff filing bill, and after answer amending bill, so as to make case quite reverse, ordered that he pay costs of original bill and parts of answer set forth by reason of that bill, and costs of the motion as a vexatious proceeding. *Marour v. Fry*, 2 S. & S. 113. **VEXATION; COSTS.**

Where bill had been amended three times, and the two last were by negligence of plaintiff, defendant was allowed extra costs for those latter amendments. *Watts v. Manning*, 1 S. & S. 421. **PR. COSTS; LACHES.**

If plaintiff obtain an order to amend without costs, amending the defendant's office copy, and the amendments require a new ingrossment, he may amend without a new order, paying the 20*s.* costs. *Cox v. Champneys*, 6 Mad. 314. **PR. COSTS.**

Costs of an irregular motion for leave to amend, not having been paid, a second motion was also refused with costs. *Phillips v. Stephenson*, 9 Pri. 205. **COSTS.**

If the plaintiff in a suit omits to put facts in issue by his original bill, or by amendment, leave to file a supplemental or amended bill, after the suit is at issue, ought not to be granted by the court, on the ground of inadvertence. A petition to obtain such leave ought to make out a case of new evidence lately discovered, material to the plaintiff's equity, and which, with reasonable diligence, could not have been discovered before; but in such case the suit ought to be disposed of without prejudice to the matter omitted to be put in issue, which the plaintiff may prosecute in any future suit. *McNeill v. Cahill*, 2 Bli. 229.

After commission to examine abroad sent, a witness before commission had reached its destination returned to England, and motion made to examine him *de bene esse*, but refused, and held that bill must be amended. *Athins v. Palmer*, 5 Mad. 19. **PR. COMMISSION TO EXAMINE ABROAD; PR. EXAMON. DE BENE ESSE.**

On a motion for a defendant to produce a deed before the examiner, affidavits cannot be read to prove the fact of its being in his possession, it must appear upon his answer; leave given, though the cause was at issue, to amend the bill, for the purpose of obtaining that admission. *Barnet v. Noble*, 1 Jac. & W. 227. **PR. PRODUCTION OF DEEDS; PL. ANSWER.**

Plaintiff amending, without requiring a further answer, should call on the defendant for his office-copy to be amended, but when, though he neglected this, the defendant was otherwise apprised that an amendment had been made, but permitted the cause to come to a hearing, held that he could not then object. *Woodhouse v. Meredith*, 1 Jac. & W. 204. **PR. NOTICE.**

After a reference to the master of exceptions to an answer, an order for leave to amend, and that the defendant might answer the exceptions and amendments at the same time, obtained before the report, on the allegation that the master had allowed some of the exceptions, discharged with costs. *Jub v. Barker*, 2 Swan. 265. **PR. EXCEPTIONS.**

Court will not allow plaintiff who has been dilatory in his former proceedings to amend his bill, and if refused, it is with costs. *Milward v. Oldfield*, 4 Pri. 325. **DELAY.**

Motion for leave to amend, after replications filed and subpoenas served, specifying the nature of the intended amendments, and not requiring a further answer, refused; the case being that of a bill filed in 1814, to set aside a purchase made in 1799, for fraud, inferred from great undervalue, the defendant by his answer denying knowledge of the value at the time of making the purchase, and the amendments sought to be introduced tending to fix him with the fact of such knowledge. *Dean, &c. of Christ Church v. Simonds*, 2 Mer. 467.

On a plea to a bill of discovery, the vice chancellor being of opinion that a *cestui que* trust could not file such a bill without the trustees, in whom the legal estate was vested, directed a case for the opinion of a court of law on the question where the legal estate actually was, and ordered the plea to stand over till the return of the judge's certificate. The parties not being able to agree on the case, a motion for leave to amend the bill by adding the trustee as a plaintiff, pending the vice chancellor's order, refused. *Cholmondeley v. Clinton*, 2 Mer. 71. PR. PLEA; PR. ORDER DIRECTING CASE FOR COURT OF LAW.

No instance of bill of discovery being allowed to be amended by adding parties as plaintiffs. *Id.* 74. BILL OF DISCOVERY.

Plaintiff not entitled, upon paying the common costs of amendment, to change entirely the nature of his bill, as by converting a prayer for an account against a bailiff into a bill to foreclose a mortgage, after an issue against the plaintiff, finding him a mortgagee. *Smith v. Smith*, Coop. 141. PR. COSTS.

Plaintiff cannot move to amend his bill on an affidavit of equitable facts without notice to defendant: but if circumstances of case require it, and it is late in the term, court will order defendant to accept short notice of motion. *Harrison v. Delmont*, 11 Tr. 117. PR. NOTICE.

Plaintiff cannot amend bill to enjoin further proceedings at law after verdict, without first paying into court the sum recovered at law, although the original bill was filed before verdict obtained: but he may be allowed to amend on bringing in money by a certain day. *Id.* 118. PR. INJUNCTION; PR. PAYMENT INTO COURT.

After answer, motion to amend by striking out, relief refused. *Cholmondeley v. Clinton*, 2 V. & B. 113.

After answer to a bill of discovery, motion to amend the bill by adding a prayer for relief, refused with costs. *Butterworth v. Bailey*, 15 Ves. 358. PR. BILL OF DISCOVERY.

The plaintiff praying relief to which he is not entitled, viz. a sale under a trust instead of a redemption or foreclosure as a mortgagee, cannot have the different relief under the general prayer, but the proper relief may be obtained by amendment, and for that purpose another party being necessary, liberty was given to amend by adding parties, which includes the introduction in the statement of facts consequential upon that addition, and praying such relief as he may be advised. *Palk v. Clinton*, 12 Ves. 48. S. P. *Jones v. Jones*, 3 Atk. 110. PR. PRAYER.

Where amendment is permitted, if so considerable as to deface the record, it must be taken off the file, and a new record substituted. *Boyd v. Mills*, 13 Ves. 86.

The original bill was filed by three partners, who afterwards became bankrupt, the assignees under the commission being desirous of examining one of the bankrupts as a witness; it was ordered that they should be at liberty to amend the bill by striking out the name of the bankrupt as a plaintiff, and then to examine him as a witness. *Gower v. Atkinson*, 2 Cox, 393. WITNESS; BANKRUPT.

Evidence of a plaintiff being necessary, and defend-

ant refusing to consent to his examination, the bill on motion amended by making him a defendant, and replication withdrawn on terms of costs, amending defendant's copy, and requiring no further answer. *Motteux v. Mackreth*, 1 Ves. J. 142. PR. EVIDENCE; PR. PARTY PLAINTIFF.

Administrator not brought before the master by motion after a decree passed and entered, if anything in it affecting him by way of order to pay, otherwise if only to witness what is done. *Hubergham v. Vincent*, 1 Ves. J. 68. PR. DECREE; PL. PARTIES.

Plaintiff suing in *forma pauperis*, shall not amend by leaving out defendants, without paying their costs. *Wilkinson v. Belcher*, 2 Bro. C. C. 272. PR. PAUPER; PR. COSTS.

The plaintiff amends several times, yet he shall not pay taxed costs, but only forty shillings, unless in a case of particular oppression. *El. Masserene v. Lyndon*, 2 Bro. C. C. 291. PR. COSTS.

Plaintiff amended his bill three times on payment of twenty shillings costs, and obtained a fourth order for that purpose. The amendment being frivolous, the court gave the defendant taxed costs of the former amendments. *Reunet v. Green*, 1 Cox, 253. PR. COSTS.

After demurrer allowed, bill being out of court, no amendment possible. *Watkins v. Bush*, Dick. 701.

Bill amended by striking out party and making him defendant after bill dismissed. *Duraud v. Hutchinson*, Dick. 456.

Plaintiff to pay seven pounds extra for length of amendments. *Freke v. Culppeper*, Dick. 284.

After publication passed and the cause set down, the plaintiff can amend by making parties only, and cannot introduce new charges, or put a material fact in issue which was not in the case before; such amendment if necessary must be by supplemental bill. *Goodwin v. Goodwin*, 3 Atk. 370.

After a third order of amendment a defendant will be allowed costs to be taxed. *Anon.* 2 Atk. 123. PR. COSTS.

Where amendments are so large that they cannot be added, a new engrossment and a new service on the parties is necessary. *Vernon v. Vaudry*, 2 Atk. 119.

After publication plaintiff cannot amend without withdrawing his replication. *Anon.* 1 Atk. 51. PR. REPLICATION.

On payment of twenty shillings costs, bill may be amended after answer put in, but lord chancellor said he would see how to make more adequate compensation to defendants in future. *Deggs v. Colebrooke*, 1 Atk. 396. PR. COSTS.

Demurrer to whole bill allowed: no amendment: bill out of court. *Smith v. Barnes*, Dick. 67.

Matters arising after filing the bill may be charged by way of amendment, as well as supplement. *Humphreys v. Humphreys*, 3 P. W. 351.

On a demurrer to a bill, if the demurrer be allowed the plaintiff may amend his bill. *Qy. Coningsbury v. Jekyll*, 2 P. W. 300.

Where a bill wants proper parties, it is in the power of the court to dismiss the bill without prejudice, or to give leave for the plaintiff to amend on payment of costs. *Stafford v. City of London*, 1 P. W. 420. PL. PARTIES.

In what cases bills of discovery may be amended after demurrer, by waiver of penalties, &c. *Mason v. Lake*, 2 Bro. P. C. 495. PR. DEMURRER; WAIVER OF PENALTIES.

## 2. Effect of, and of Motion for leave to Amend.

Exceptions to an answer filed after the bill has been amended, will not be taken off the file if no answer is

required to the amendments. *Miller v. Wheatly*, 1 Sim. 286. PR. EXCEPTIONS TO ANSWER.

A plaintiff after allowing more than three terms to elapse without taking any proceedings, amended his bill under an order for that purpose, and amended also the defendant's office copy and order, dismissing the bill for want of prosecution, obtained as of course on the usual certificate, within six or seven days from the amendment of the record, was discharged as irregular. *Rendall v. Beckett*, 1 Russ. 152. PR. ORDER TO DISMISS FOR WANT OF PROSECUTION.

If a bill is amended, by adding parties, after witnesses have been examined, the depositions cannot be read against the new parties. *Pratt v. Barker*, 1 Sim. 1. PR. EVIDENCE.

Plaintiff moving as of course to amend bill after exceptions to answer waives them, he must move specially for leave without prejudice. *De la Torre v. Bernales*, 4 Mad. 326. WAIVER; PR. EXCEPTIONS.

Order to dismiss bill not served before bill is amended is a nullity, and it is not necessary to move to discharge it. *Tanner v. Dean*, 4 Mad. 176. PR. MOTION TO DISCHARGE ORDER; PR. ORDER TO DISMISS.

Plaintiff wishing to amend bill after plea set down, admits plea, and on payment of usual costs of five pounds, plaintiff is at liberty to amend. *Lopes v. De Tastet*, 3 Mad. 183. PR. PLEA.

Amendment of bill after exceptions to answer allowed, do not prejudice injunction previously obtained. *Adney v. Flood*, 1 Mad. 449. INJUNCTION; EXCEPTIONS TO ANSWER.

Injunction falls by amending bill, unless expressly saved. *Bliss v. Boscawen*, 2 V. & B. 102. PR. INJUNCTION, DISSOLVING.

Although irregular to file an amended bill without leave, after an order to continue an injunction on the terms of speeding the cause, yet the amendment being material, and such as the court would have allowed, and the plaintiff offering terms which tended to prevent delay, the injunction was continued, plaintiff paying the costs of defendant's motion to dissolve it. *Webb v. Hannan*, 2 Scho. & Lef. 516. PR. INJUNCTION.

Amendment of bill merely adding a defendant, requiring no further answer, does not prevent the plaintiff from excepting to answer. *Taylor v. Wrench*, 9 Ves. 315. PR. EXCEPTIONS TO ANSWER.

A cause coming on to be heard, stood over, with liberty for the plaintiff to amend; he did amend, but did not proceed further; defendant may move to dismiss the bill for want of prosecution, and it is not necessary to set down the cause again for the purpose. *Mitchell v. Lowndes*, 2 Cox, 15. PR. DISMISSAL OF BILL; PR. SETTING DOWN CAUSE.

Bill to perpetuate testimony of modus being amended, by adding essential party, after commission executed, but before publication a new commission was granted. *Biddleford v. Partridge*, 3 Anst. 646. PR. COMMISSION TO PERPETUATE TESTIMONY.

If after a cross-bill filed, plaintiff in original bill will amend it in material parts, and thinks fit to compel an answer to the amendments at the same time with the original bill, he waives his priority of answer to the original. *Long v. Burton*, 2 Atk. 218. PR. CROSS-BILL; PRIORITY OF SUIT.

When a bill is amended both in discovery and relief, the pendency of suit as to those parts is only from the time of the amendment. *S. C. Ib.* LIS PENDENS.

### 3. In what time, and order to amend in a given time.

Regulations as to the allowance of time to amend, &c. 19th Gen. Order, 3rd April, 1828.

On order for leave to amend, plaintiff must undertake to amend within three weeks. 14th Gen. Order, 3rd April, 1828.

An order to amend, and for defendant to answer amendments and exceptions at the same time, obtained before the filing of the report, allowing the exceptions as irregular. *Rushton v. Troughton*, 2 Sim. 33.

Where a plaintiff amended his bill after answer, but did not serve a subpoena to answer the amendments or file a replication to the answer, an order obtained, as of course, to dismiss the bill for want of prosecution, after three terms from the filing of the answer, but within three terms from the date of the amendments, was held to be regular, though the defendant had obtained an order that the plaintiff should amend his bill within a limited time, and the plaintiff had also amended the defendant's office copy of the bill. *Cooke v. Davies*, 1 Turn. & R. 309. PR. BILL, DISMISSAL.

Plaintiff having obtained order that defendant may answer exceptions and amendments at same time, defendant may immediately move that amendments be made within ten days, or order be discharged. *Whitehouse v. Hickman*, 1 S. & S. 105.

Where plaintiff has obtained order to amend, the defendant having submitted to exceptions, court will order plaintiff, as of course, to amend within a given time, or discharge former order. *Benedict v. Thackeray*, 5 Price, 592. PR. EXCEPTIONS.

Order to dismiss bill obtained, but not served till eight months after. Meanwhile, order to amend obtained: Held, regular. *Young v. Smith*, 3 Mad. 196. PR. ORDER TO DISMISS; LACHES.

Order to amend, upon petition at the rolls, after notice of motion to discharge for want of prosecution for the seal, the day on which the order was obtained, and the motion could not be made regular. *White v. Hall*, 14 Ves. 208. PR. SEAL-DAY; PR. MOTION TO DISMISS.

### 4. When of course, or only by special application.

Plaintiff, before filing replication, may obtain an order for leave to amend to bill, as of course; but no further order but on special application. 13th Gen. Order, 3rd April, 1828.

Where the defendant pleads to a bill, it is of course for the plaintiff to amend, on payment of the costs of the plea, and it is not necessary that the plea should be first argued. *Parker v. Alcock*, 1 Y. & J. 195.

After plea allowed to part of bill, plaintiff cannot amend his bill without special order, to be obtained on notice of motion, stating proposed amendments. *Taylor v. Shaw*, 2 S. & S. 12. PR. PLEA.

It is not of course to amend bill after answer, by adding another person as co-plaintiff, except where such person stands in precisely the same interest as the plaintiff. *Governers of Lucton School v. Scarlet*, 13 Price, 54. S. C. 1 McClell. 17. PL. PARTIES.

Where motion to amend after answer, by adding party plaintiff, is of course, it must be on affidavit, shewing the materiality of the amendment, and that fact on which it is founded came to plaintiff's knowledge after bill filed, and consent of such party to be made co-plaintiff, should be produced and verified. *Id.* PR. MOTION TO AMEND AFFIDAVIT IN SUPPORT.

After replication and subpoena to rejoin, plaintiff cannot amend bill without special application, shewing that using all possible diligence he was not in a condition to apply sooner. *Wright v. Howard*, 6 Mad. 106.

After motion to dismiss, and undertaking to speed



cause, plaintiff can only amend on special application. *Muys v. —*, 4 Mad. 268. PR. MOTION TO DISMISS; SPEEDING CAUSE.

Amendment of bill, after exceptions allowed and not answered, does not prejudice an injunction previously obtained. Therefore a motion is of course for leave to amend, and that defendant may answer amendments and exceptions together. *Dipper v. Durant*, 3 Mer. 465. PR. INJUNCTION.

##### 5. Motion to amend, necessary steps on.

Upon an application for the plaintiff to amend his bill without prejudice, obtained on the merits, the particular amendments must be specified. *Bell v. Brookbank*, 2 Y. & J. 181. PR. INJUNCTION.

Where a bill is amended after answer, but no subpoena is served to answer the amended bill, the amendments go for nothing. *Cooke v. Davies*, 1 Turn. & R. 310.

Information amended without the sanction of the attorney general, ordered to be taken off the file, with costs. *Att. Gen. v. Fellows*, 1 Jac. & W. 254.

In an injunction cause, where exceptions are taken to an answer, it is irregular to obtain an order to amend, until the exceptions are disposed of. *Dixon v. Redmond*, 2 Sch. & L. 515. PR. EXCEPTIONS TO ANSWER; PR. INJUNCTION.

After order to dismiss for want of prosecution, the plaintiff filed a replication, and afterwards moved to withdraw the replication, and amend, on affidavit of materiality: he must also shew why the amendment could not have been made before. *Longman v. Culford*, 3 Aust. 807. PR. MOTION TO WITHDRAW REPLICATION, AND AMEND.

##### 6. Motion to amend, without prejudice, when granted.

Motion for leave to amend, without prejudice to a *ne exeat*, refused. *Grant v. Grant*, 2 Sim. 14. NE EXEAT REGNO.

Motion to amend bill of discovery after answer, without prejudice to injunction, by adding prayer for relief and otherwise, as plaintiff should be advised, refused. *Jackson v. Strong*, 1 McClell. 245. S. C. 13 Price, 494. INJUNCTION.

Amendment of bill allowed, without prejudice to an injunction obtained on merits. *King v. Turner*, 6 Mad. 255. INJUNCTION.

Injunction obtained *ex parte*. The answer was put in; whereupon motion was made to amend bill, without prejudice to injunction, and the proposed amendments were stated, but motion refused. *Penfold v. Storcht*, 3 Mad. 471. PR. INJUNCTION.

On motion for reference under 7 G. 2. c. 20. the court refused to direct master to take into account costs incurred at law, no mention of proceedings at law having been made in the bill; but leave was given to amend bill in that respect, and directed motion to stand over till bill amended. *Millard v. Mager*, 3 Mad. 433. PR. COSTS; PR. REFERENCE TO MASTER; MORTGAGE, FORECLOSURE OF.

After injunction obtained against A, one of two defendants, A and B, who afterwards put in their answers, leave was given, on application, supported by affidavit, to amend bill without prejudice to injunction; answers of B, stating facts, which were a surprise on plaintiff, and which made amendments necessary. *Vesey v. Wilks*, 3 Mad. 475. PR. INJUNCTION.

Plaintiff, in a bill for an injunction, must state at once the whole case within his knowledge; but the court, though very jealous of amendment, without prejudice to the injunction, permits even re-amendment, ascertaining precisely its nature, and, by clear and positive affidavit, that the plaintiff had not a

knowledge of the facts, enabling him to bring that case upon the record *see Sharp v. —*, 3 V. & B. 144. PR. BILL FOR INJUNCTION.

Re-amendment permitted without prejudice to an injunction, on affidavit, that the facts, which must be stated, came to the plaintiff's knowledge since the bill filed, and on payment of costs. *Id.* 145. INJUNCTION.

After answer not excepted to, liberty to amend the bill, without prejudice to the injunction, staying proceedings at law, being the common injunction not upon the merits, refused, with costs. *Turner v. Bayley*, 2 V. & B. 330. PR. INJUNCTION.

Amendment permitted after answer, without prejudice to exceptions, by praying injunction upon a devastavit, and a purpose of collusive sale by the executrix, a person of no property to the trustee. The amendment confined to the prayer. *Jacob v. Hall*, 12 Ves. 458. PR. ANSWER.

##### 7. Effect of Order for leave to amend.

After issue joined, defendant cannot move to dismiss bill for want of prosecution; but plaintiff having obtained order to amend, defendant must move for amendment in a certain time, or dismissal. *Pratt v. Holbrook*, 5 Mad. 30. DISMISSAL FOR WANT OF PROSECUTION.

After an answer has been reported insufficient, an order to amend, and for the defendant to answer amendments and exceptions together prevents the defendant from taking exceptions to the report if it be served before the exceptions are set down. *Farquharson v. Balfour*, 1 Jac. 587. PR. EXCEPTIONS TO REPORT.

Order to amend bill not served or drawn up cannot prevent the motion to dismiss for want of prosecution. *Morris v. Owen*, 1 V. & B. 523. PR. MOTION TO DISMISS.

Plaintiff having obtained the usual order to amend, and that the defendant shall answer amendments, and exception together cannot take a new exception as to any thing in the original but must go before the master upon the old exceptions, as they apply to the original bill, and upon new exceptions as to the new matter introduced by the amendments which, however, the master may consider with reference to such parts of the original bill as apply to them. *Partridge v. Haycraft*, 11 Ves. 570. PR. EXCEPTIONS TO ANSWER.

Order to amend not served or drawn up, does not prevent motion to dismiss bill for want of prosecution. *Anon.* 7 Ves. 222. PR. DISMISSAL OF BILL.

The plaintiff having an order to amend without costs, not requiring any further answer, and amending the defendant's office copy, the practice is, that the defendant must bring his office copy to the plaintiff's clerk in court, to be amended, and is at liberty to put in a further answer within eight days after service of the order, before which time the plaintiff cannot file a replication. *Lloyd v. Lloyd*, 2 Cox. 431.

Order for amendment without costs requiring no further answer; the amendment was by inserting prayer for injunction: held, the defendant might answer further gratis. *Sarony v. Dyer*, Amb. 70. PR. COSTS; PR. FURTHER ANSWER.

In general, the amendment of a bill puts an end to all process of contempt for want of an answer, and the court will not allow a plaintiff to amend without prejudice to a sequestration, notwithstanding he undertakes not to require any answer to the amendments. *Symonds v. Dr. Cumberland*, 2 Cox. 411. CONTEMPT; SEQUESTRATION.

Upon an order at the instance of a defendant to amend by a short day, or be dismissed, it is sufficient to amend by expunging another defendant, though

immaterial to the defendant, at whose instance the order was made. *Att. Gen. v. Id. Stamford*, 3 Swan. 240.

Plaintiff, in original bill, loses his priority of suit, and his right to have an answer to the original bill before he is called upon to answer cross bill, by amending the original bill, although such amendment be after the order for time to answer cross bill, until after answer to original bill. *Johnson v. Freer*, 2 Cox, 371. PRIORITY OF SUIT; CROSS BILL.

Injunction does not drop of course on plaintiff's amending bill. *Mason v. Murray*, Dick. 536.

Amendments made in bill after injunction, cannot be used in support of injunction. *Vere v. Glynn*, id. 441.

Amendment of bill after plea is not allowance of plea. *Id. ib.*

Original and amended bill but one record. *Id. ib.* Answer reported insufficient, plaintiff obtained order to amend, and that defendant may answer exceptions and amendments at same time, defendants may answer exceptions alone if put in before order is served. *Bethuen v. Bateman*, id. 296.

Bill amended after plea set down, on payment of 20s. costs, and 5l. for plea. *Vernon v. Cud*, id. 358.

Defendant put in answer; plaintiffs afterwards amends bill; defendant then put in plea to whole bill: held good. *Gambier v. Le Houp*, id. 44.

#### XI. BILL PRO CONFESSO.

See also *PR. DECREE*, 11.—*PR. EVID.* 13.—*STAT. C.* OF, II. 8.

When any bill shall be exhibited in a court of equity against a member of the house of commons, it shall not be necessary to leave a copy thereof with the defendant before sequestration for non-appearance. 47 G. 3. st. 2. c. 40. s. 1. PRIV. OF PARLIAMENT.

Bill taken *pro confesso* shall be read in evidence as an answer admitting the facts. 45 G. 3. c. 124. s. 6. *PR. EVIDENCE*.

Defendant not appearing, the plaintiff's bill to be taken *pro confesso*, his estate sequestered, and plaintiff satisfied on giving security to the court on defendant's appearance: plaintiff refusing such security, the effects sequestered, to remain under direction of the court. 5 G. 2. c. 25. s. 1.

Any person served with a copy of decree *pro confesso*, or any person not being so served, petitioning a rehearing, within seven years, and giving security for costs admitted to answer, and the cause to be reheard again. *Id.* s. 6. *PR. REHEARING*.

Not appearing within seven years after decree *pro confesso*, and petitioning for rehearing to be absolutely barred. *Id.* s. 7.

Not to affect persons beyond the seas, unless affidavit be made of their being in England within two years before the subpoena. *Id.* s. 8.

Not to extend to courts having a limited jurisdiction, unless oath be made of personal residence in such jurisdiction, one year before the subpoena. *Id.* s. 9. *INFERIOR JURISDICTION*.

If the attorney general do not put in his answer to a bill filed against him, within a reasonable time, the court will order, that unless the answer be put in by a short day, the bill be set down to be taken *pro confesso*. *Peto v. Att. Gen.*, 1 Y. & J. 509. *ATT. GEN. PR. ANSWER*.

If only one defendant, bill may be ordered *pro con-*

fesso, on motion. *Lewis v. Marsh*, 2 S. & S. 220. *PR. MOTION*.

Decree on bill *pro confesso*, is absolute, and no day given to show cause against it. *Landon v. Ready*, 1 S. & S. 44. *PR. DECREE*; *PR. DAY TO SHOW CAUSE*.

Defendant having been removed by *habeas corpus* from the King's Bench to the Fleet prison, for contempt in not putting in his answer, and having procured himself to be afterwards recommitted to the King's Bench, in order to prevent an *alias pluries*, ordered that the bill should be taken *pro confesso* against him in default of his putting in his answer by the time at which an *alias pluries* might have issued. *Sturges v. Brown*, 2 Mer. 511.

Bill against a member of parliament praying relief may be taken *pro confesso* under 45 G. 3. c. 124., which act is not confined to bills of discovery only. *Logan v. Grant*, M. P., 1 Mad. 626. *STAT. C. OF; MEMBER OF PARLIAMENT*.

The authority to take the bill *pro confesso* against a defendant having privilege of parliament, standing out process of contempt under stat. 45 G. 3. c. 124. s. 5., is confined to bill for discovery only. *Jones v. Davis*, 17 Ves. 368. In *Logan v. Grant*, 1 Mad. 626. Sir T. Plumer, V. C. refused to follow this case. *STAT. C. OF; MEMBER OF PARLT.*

On motion to discharge order to take bill *pro confesso* on payment of costs, and an offer to put in an answer, the court required to see what answer they proposed to put in. *Herne v. Ogilvie*, 11 Ves. 77. *PR. MOTION*; *PR. ANSWER*.

A decree taken *pro confesso* in the ordinary course, after appearance not under the stat. 5 G. 2. c. 25. can be impeached as any other decree, only, directly by a bill of review, or a bill to set it aside for fraud, collaterally by an original suit seeking decree inconsistent with it; such a bill, therefore dismissed with costs. S. C. 10 Ves. 563. *PR. DECREE, IMPEACHMENT*.

To obtain an order for taking the bill *pro confesso*, under the statute 5 G. 2. c. 25., the affidavit must state, that the defendant has been in England within two years before the subpoena. *Hp. Winchester v. Beator*, 5 Ves. 112. S. P. *Neale v. Neale*, id. 1.

Where the bill is amended after answer, if the amended bill is not answered, the plaintiff is entitled to a decree that the bill be taken *pro confesso*, generally. *Jopling v. Stuart*, 4 Ves. 619. *PR. AMENDED BILL*; *PR. ANSWER*.

Where there is only one defendant after all the process of contempt for want of an answer, the bill may be ordered to be taken *pro confesso*, upon motion. *Seagrave v. Edwards*, 3 Ves. 372.

Defendant being outlawed, motion, that he might appear within a limited time upon the equity of statute 5 Geo. 2. c. 25., granted, though he had not been in the kingdom for two years before the subpoena. *Clarke v. Wright*, 2 Ves. J. 188. *STAT. C. OF; OUTLAWRY*.

A bill cannot be taken *pro confesso*, under stat. 5 Geo. 2., without an affidavit of the defendants absconding to avoid process. *Short v. Downer*, 2 Cox. 84. See also S. P. *Burton v. Malloon*, Barn. 401. *STAT. C. OF*.

An order having been obtained by plaintiff that the clerk in court might attend at the hearing of the cause with the record of the bill, to have it taken *pro confesso* against one of the defendants (the others having put in their answer which had been replied to), this defendant afterwards put in his answer, and thereupon moved to discharge this order: the court would not discharge the order on motion, but reserved the consideration of the matter to the hearing. *Williams v. Thompson*, 1 Cox. 413. S. C. 2 Bro. C. C. 280.

Although a defendant has appeared and answered

the original bill, if he cannot be found to be served with a subpoena to answer a bill of revivor, the plaintiff must proceed under 5 Geo. 2. c. 25, to have the bill taken *pro confesso*. *Henderson v. Meggs*, 2 Bro. C. C. 127. PR. BILL OF REVIVOR; STAT. C. OF; PR. SERVICE OF SUBPENA.

Defendant brought up on *alias pluries habeas corpus*, bill taken *pro confesso*. *Litchfield v. Roberts*, and other cases similar. Dick. 59, 60.

After abatement, defendant having absconded, and stat. 5 G. 2. c. 25, being complied with, bill to be taken *pro confesso*. *Seagood v. Farrard*, Dick. 300. See id. 63.

Bill taken *pro confesso* upon sequestration for want of better answer, first having, on exceptions to part, been reported insufficient. *Turner v. Turner*, Dick. 316.

Bill against husband and wife taken *pro confesso*; husband died, reheard on wife's petition. *Tooke v. Clark*, id. 350.

Though bill be taken *pro confesso*, yet plaintiff must prove his charge. *Dominicetti v. Latti*, id. 588.

The defendant made default at hearing, yet plaintiff not having any equity, bill dismissed. *Spindall v. Jervis*, id. 632.

Bill produced to be taken *pro confesso*, plaintiff appearing to have no equity, bill dismissed. *Molesworth v. Tal. Verney*, id. 667.

The statute of 5 Geo. 2. for taking bills *pro confesso* against defendants, extends as well to cases where the party has been served with the former, but hath avoided the subsequent process, as to cases where it has been impossible to serve the party with any process at all. *Mauver v. Mauver*, 1 Cox, 104. S. C. 1 Bro. C. C. 388. STAT. C. OF.

The defendant being a prisoner in York gaol, and the demand so trifling, it would not bear the expense of removing him by *habeas corpus* to the Fleet; it was moved to save the expense, that for want of appearance, a bill of revivor might be taken *pro confesso*; the court refused to do it in this summary way, but left the plaintiff to the ordinary course. *Anon.* 3 Atk. 690.

Defendant brought up, on *alias pluries habeas corpus*, for contempt in not answering, bill taken *pro confesso*. *Man v. Parkinson*, 9 Mod. 266. CONTEMPT; PR. PROCESS.

After goods or real estate are seized on sequestration for want of answer, plaintiff may still proceed till he has got the bill *pro confesso*. *Davis v. Davis*, 2 Atk. 22. PR. SEQUESTRATION.

Where an order made upon the statute of 5 Geo. 2 shall be said to be obtained by contrivance, it is not sufficient to be sworn by the affidavit, that the party making it was informed, and believes that the defendants withdrew themselves, in order to avoid being served with the process of this court; it must be set forth by whom the parties received such information. *Burton v. Maloon*, Barn. 401.

If time be given for a defendant to answer, though after sequestration, and though the answer be reported insufficient, yet the bill shall not be taken *pro confesso*. *Huckins v. Crook*, 2 P. W. 556.

Plaintiff producing copy of sequestration only on motion, to take bill *pro confesso*; court refused it, but sequestration not being under seal nor executed, was held no objection. *Anon.* 10 Mod. 431. PR. SEQUESTRATION; PR. EVID. COPIES.

Whether bill taken *pro confesso* after defendants appearance and sequestration, returned. *Gibson v. Seagrington*, 1 Vern. 247.

Decree of the court of policies and assurances in London, reversed, because the bill there was taken *pro confesso* after the first summons. *Johnson v. Desmoneere*, 1 Vern. 223.

A bill being preferred against a quaker for tithes,

who refused to answer upon notice the defendant was brought to the bar, and having been brought three times before the bill was taken *pro confesso*; and it was referred to a master to examine what was due, and not to be armed with a commission for that purpose. *Anon.* 2 C. C. 237. 2 Frecc. 27. PR. ANSWER, JURAT; QUAKER.

## XII. BILL OF DISCOVERY.

Leave given to convert a bill of discovery into a bill for relief. Where after answer, a bill for discovery and for a commission is allowed to be converted into a bill for relief, the defendant is entitled to have leave to put in such an answer to the amended bill as he might have filed, if there had been no answer to the bill of discovery. *Lonsdale v. Templer*, 2 Ryss. 561. PR. FURTHER ANSWER.

No instance of a bill of discovery being allowed to be amended by adding parties as plaintiffs. *Cholmondeley v. Clinton*, 2 Mer. 74.

Order obtained by defendant in a bill of discovery for payment of his costs is regular, though plaintiff had previously become bankrupt. *Hibbertson v. Fielding*, 2 S. & S. 371. COSTS; BANKRUPT.

On bill for discovery you cannot move before answer, or unless defendant is in contempt for commission to examine abroad. *King v. Allen*, 4 Mad. 247. PR. COMMISSION TO EXAMINE ABROAD, MOTION FOR.

Exceptions *nunc pro tunc* may be filed to answer to bill of discovery. *Baring v. Peirceps*, 1 Mad. 526. EXCEPTIONS TO ANSWER; PR. EXCEPTIONS, NUNC, &c.

Plaintiff on bill of discovery must pay all expenses of defendant in resisting motions in cause, made by plaintiff. *Noble v. Garland*, 1 Mad. 314. COSTS.

Under what circumstances court will, on bill of discovery, direct search to be made in boxes of absent party, in hands of defendant as depository. *Att. Gen. v. Elliott*, 1 Price, 377. See further this case, 2 Price, 48. PR. SEARCH.

Costs of discovery refused; a commission having gone out; and defendant taking the benefit of it, cannot have all the costs. *Noble v. Garland*, 19 Ves. 376. S. C. Coop. 222. PR. COSTS; COMMISSION TO EXAMINE.

After answer to a bill of discovery, motion to amend the bill by adding a prayer for relief, refused with costs. *Butterworth v. Bailey*, 15 Ves. 358. PR. AMENDMENT.

Abatement by marriage of feme plaintiff to bill of discovery, after answer; held, that defendant cannot have his costs. *Dobson v. Julia*, 10 Ves. 31. PR. ABATEMENT AND REVIVOR; PR. COSTS.

If a cause comes to a hearing on a bill of discovery, it must be struck out of the paper; but the bill cannot be dismissed not praying relief. *Anon.* Mos. 185. But see *Gurish v. Donoran*, 2 Atk. 166. S. C. Barn. 428. PR. BILL, DISMISSAL OF; PR. HEARING.

The bill praying discovery and a commission, the defendant cannot have the costs of the discovery on the return of the commission. *Anon.* 8 Ves. 69. COMMISSION TO EXAMINE ABROAD; COSTS.

Practice, that if the defendant to a bill for discovery and a commission examines in chief, instead of confining himself to cross-examination, he shall not have costs. *Id.* 70. COSTS; EXAMINATION IN CHIEF.

Plaintiff in a bill for discovery only, is not entitled as of course to two terms, to except to the answer filed in the vacation. *Hewart v. Semple*, 5 Ves. 86. PR. EXCEPTIONS TO ANSWER.

On a bill to obtain evidence for a defence at law, when the evidence is obtained the court cannot proceed to give relief; although the party cannot have

the effect of the evidence at law from objections of form. *Lee v. Shoulbnd*, 1 Anst. 83. RELIEF.

After a decree of dismissal affirmed on an appeal to the lords, bill is brought for the discovery of a deed (said to be burnt, pending the suit) which made out the plaintiff's title, and the bill is brought to the end, that, after such discovery, the plaintiff might apply to the house of lords for relief; on demurrer the defendant ordered to answer, but plaintiff to proceed no further without leave of court. *Barbon v. Searle*, 1 Vern. 416. PR. APPEAL.

### XIII. BILL, DISMISSAL OF.

See also PR. COSTS, 10. (h).

1. General orders.
2. Generally, and what a ground for.
3. By plaintiff.
4. By consent.
5. Effect of generally.
6. For want of prosecution.

#### 1. General Orders.

Dismission, on hearing, signed by chancellor, precluded new bill. *Beame's Ord.* 8.

Except on new matter. *Id.* 8.

As to the dismissions not on hearing; course to be adopted concerning. *Id.* 8.

What suits are regularly to be dismissed on motion. *Id.* 9, 10.

Dismissions are properly, either on hearing, or on plea. *Id.* 11.

Not after examination except on special cause. *Id.* 11.

Dismission for want of prosecution, one term after answer, or course, without motion. *Id.* 11.

But after replication only on motion and order. *Id.* 11.

Dismission, or retainers upon dismission, not to be granted on petition. *Id.* 35, 215.

Dismission by a judge to be signed by him before order entered. *Id.* 106.

To be delivered to six clerk within term, after the cause determined. *Id.* 112.

To have six clerk's hand before presented for signature of the Ld. Ch., &c. *Id.* 112, 206.

Within what time dismission must be drawn up, &c. *Id.* 205.

No motion to retain, after dismission, without a certificate, that the cost of dismission are paid. *Id.* 207.

Notwithstanding a *careat* dismission may be signed if the *careat* be not prosecuted within a month. *Id.* 309.

Where a cause is brought to hearing on bill and answer, and the bill dismissed, the court may order such dismission to be with 40s. costs, or costs to be taxed, or without costs. *Id.* 450.

#### 2. Generally, and what a ground for.

Upon the plaintiff's dismissing his own bill, or the defendant dismissing the same for want of prosecution, the plaintiff shall pay to the defendant full costs to be taxed; no copy of any bill to go with the *decretum* of commission for taking the defendant's answer. 4 Ann. c. 16. s. 23. PR. COSTS.

On demurrer to the whole bill being allowed, the bill shall be dismissed, and costs shall be taxed as upon a dismissal, except the costs on the demurrer, which shall be allowed as heretofore. General Rule, Feb. 13. 1 Scho. & L. 304. PR. COSTS; PR. DEMURRER.

By General Order, 27th April, 1748, where the cause is set down on bill and answer only, or where

it is so set down after withdrawing replication, it shall be discretionary in the court to dismiss the suit with 40s. costs, or costs to be taxed, or with no costs. *Beame's Ord.* Ch. 450. PR. COSTS.

A plaintiff resident abroad, who had been ordered to give the security for costs, but had not complied, ordered to give the security, and, on default, his bill to be dismissed. *Camac v. Grant*, 1 Sim. 348. PR. SECURITY FOR COSTS.

Where there are two plaintiffs, and one of them only becomes bankrupt, the bill may be dismissed upon the usual motion. *Caddick v. Masson*, 1 Sim. 501. BANKCY.

When the plaintiff's solicitor serves the defendant's solicitor with subpoena to hear judgment, and obtains an undertaking from him to appear, and plaintiff makes default at hearing; on affidavit of these facts, bill will be dismissed with costs. *Mackness v. Johnstone*, 1 McClell. 148. PR. UNDERTAKING TO APPEAR AT HEARING.

Where a cause was not proceeded in for three clear terms after answer, the common order to dismiss the bill for want of prosecution, obtained by the defendant in the vacation after the third term, was held to be regular. *Farquharson v. Seton*, 1 Turn. & R. 378.

Where the plaintiff is misnamed in an order to dismiss a bill for want of prosecution, in consequence of an error in the six clerk's certificate, a replication filed after service of the order will not be irregular. *Semble. Verlander v. Codd*, 1 T. & R. 94. S. C. 1 S. & S. 94. MISNOMER; PR. REPLICATION.

Bill demurred to, allowed to be dismissed on payment of 5*l.* costs of demurrer. *Edwards v. Edwards*, 6 Mad. 255. COSTS; DEMURRER.

Cause once set down for hearing, bill cannot be afterwards dismissed on mere motion. *Lynce v. Wyre*, 9 Price, 166.

If vicar, claiming an account of tithes throughout a whole parish, by bill in equity, proves his right in part of the parish only; the objection, that the claim is too largely laid, is not a ground for dismissing the bill. *Scott v. Lawson*, 7 Price, 267. TITHES.

On bill for injunction against invasion of copyright, and an account: a court of law having certified that plaintiff had no interest in copyright in question, the bill cannot be dismissed on defendant's motion. *Brooke v. Clarke*, 1 Swan. 550. PR. ISSUE AT LAW.

All matters in difference being submitted to arbitration, and made a rule of court of K. B., award directed all suits in law and equity should be discontinued. This court refused to dismiss a bill in pursuance of award. *Hutchinson v. Hodgson*, 2 Anst. 361. AWARD.

Cause cannot be heard against some of defendants in absence of rest, although it is not intended to proceed against them. Bill must be formally dismissed as to them. *Rumney v. Morgan*, 4 Price, 266. PR. HEARING.

Order to dismiss a bill with costs be paid by the plaintiff's solicitor, the bill having been filed without special authority from the plaintiff. *Wright v. Castle*, 3 Mer. 12. SOLICITOR & CLIENT.

On the report against vendor's title, his bill for specific performance dismissed with costs on motion. *Walters v. Pyman*, 19 Ves. 351. VEND. & PURCH.; SPECIFIC PERF.

It is not a necessary consequence that bill will not be dismissed, because it has been retained for the purpose of a trial at law. *Harwood v. Oglander*, 6 Ves. 225. PR. RETAINING BILL.

Plea of a former suit, depending for the same cause, set down by the defendant was struck out, but the plaintiff not having procured a reference to the master within a month, the bill was, upon motion, dismissed

under the standing order. *Baker v. Bird*, 2 Ves. J. 672. **PR. PLEA; GENERAL ORDER.**

A trivial incorrectness in setting out the title of wool, and for which amends had been tendered, and the non-payment of Easter dues, which were never demanded, are not sufficient to prevent a bill from being dismissed. *Baker v. Athill*, 2 Anst. 493. **ANSWER.**

Where a cause is heard on bill and answer only, 40s. costs on dismissing the bill, unless a special case. *Bayly v. Leominster*, 1 Ves. J. 476. **S. C. 3 Bro. C. C. 529. COSTS.**

Where a master's report is against the title, a vendor's bill may now be dismissed with costs upon motion. *Bennet Coll. v. Cary*, 3 Bro. C. C. 390. **PR. COSTS; VEND. & PURCH.; TITLE.**

Bill brought in to be taken *pro confesso*, yet plaintiff appearing to have no equity, bill dismissed. *Molesworth v. Id. Verney*, Dick. 667.

Upon a bill to redeem a mortgage and non-payment at the time appointed, it is a motion of course to dismiss the bill. *Stuart v. Warvall*, 1 Bro. C. C. 581. **BILL TO REDEM. MORTGAGE.**

A defendant may move to dismiss a bill at any time before a rule to produce witnesses. *Fell v. Morris*, 1 Cox. 176.

Notwithstanding the common course of the court is to give 40s. costs upon dismissal of a suit heard on a bill and answer, yet if the party be vexatious, full costs may be given. *Mansel v. Bailes*, 1 Bro. C. C. 403. **S. C. 2 Dick. 646. PR. COSTS.**

Plaintiff having no equity, at hearing bill dismissed, though defendant made default. *Speidale v. Jervis*, Dick. 632.

Where bill is brought for title and injunction, practice is to dismiss bill, though defendant has answered and insisted on matter of title. *Wells v. Dr. Rutland*, 2 Bro. P. C. 39. **PR. INJUNCT.; TITLE.**

If more titles are claimed than defendant has kinds of titheable goods, it is the practice in exchequer to dismiss bill with costs. *Anon.* Lofft. 66. **TITHES; COSTS.**

Where suit is below dignity of court, bill will be dismissed without going into merits. *Owens v. Smith*, 2 Com. 715. **DIGNITY OF COURT.**

A dismissal upon an election to proceed at law, is not peremptory, but the plaintiff may, after he has failed at law, bring a new bill. *Cs. Plymouth v. Bladon*, 2 Vern. 32. **PR. ELECTION TO PROCEED AT LAW.**

If a bill is depending, and the plaintiff files answer for the same matters, the defendant may move to have them referred, and one dismissed; but if a bill is dismissed in the exchequer, and then filed in chancery, the defendant cannot dismiss it on motion, but must plead to it. *Anon.* Mos. 268. **PR. TWO SUITS FOR SAME MATTER.**

Where a decree is obtained by default, and upon petition a rehearing granted, if the person in the possession of the decree does not attend at the rehearing, the bill will be dismissed with costs to the petitioner. *Wilson v. Dubbs*, Sel. C. C. 50. **PR. REHEARING; PR. DEFAULT APPEARANCE AT HEARING.**

If a cause comes to a hearing on a bill of discovery, it must be struck out of the paper, but the bill cannot be dismissed, not praying relief. *Anon.* Mos. 185. But see *Gurish v. Donovan*, 2 Atk. 166. **S. C. Barn. 428. PR. BILL OF DISCOVERY; PR. HEARING.**

### 3. By Plaintiff.

Bill not to be dismissed on 20s. costs, but defendant to be paid the costs, which he swears he is out of purse. *Gen. Order*, 1 Vern. 334. **PR. COSTS.**

Motion by some of several plaintiffs, to have bill

dismissed against them with costs, granted on terms. *Hol Kirk v. Hol Kirk*, 4 Madd. 50. **PR. PARTY COMPLAINANT.**

Bill dismissed by one co-plaintiff as to himself with costs without the consent of the other. *Langdale v. Langdale*, 13 Ves. 167.

Plaintiff can in no case dismiss his bill without costs: with costs it is of course; but after motion to dismiss without costs, refused. Consent is necessary. *Dixon v. Parks*, 1 Ves. J. 402. **COSTS.**

If a defendant in equity becomes bankrupt, the plaintiff cannot therefore dismiss his own bill without paying costs; it is no abatement. *Rutherford v. Miller*, 2 Anst. 458. **BANKCY.; ABATEMENT.**

Bankruptcy of the plaintiff does not abate a suit in equity, and the bill may therefore be dismissed with costs for want of prosecution. *Davidson v. Butler*, 2 Anst. 460. *Id. ib.*

Pauper shall not dismiss without costs. *Pearson v. Belsher*, 3 Bro. C. C. 87. **PR. PAUPER.**

Plaintiff cannot on motion dismiss his bill without costs, on the ground that the court would have decreed according to it, unless consent. *Anon.* 1 Ves. J. 140.

Order made on the motion of the plaintiff to dismiss his bill without costs, the defendant having by his own act rendered the suit useless. *Anon v. Brown*, 1 Cox. 359. **S. C. 2 Bro. C. C. 186. PR. COSTS.**

Motion by plaintiff to dismiss his own bill without costs, cannot be granted without the express consent of the defendants in court. *Fidelle v. Evans*, 1 Cox, 27. **S. C. 1 Bro. C. C. 267.**

Mode of entering dismissals in times past. *Cary*, 34. Entered at large, 2 Eliz. fol. 55. *Cary*, 43.

Plaintiff after issue directed, may at any time before issue tried, move to dismiss bill. *Carrington v. Holly*, Dick. 280.

But plaintiff cannot move to dismiss after decree, or after trial of issue. *Gartside v. Isherwood*, id. 612.

Bill by two plaintiffs, dismissed as to one. *Genand v. Block*, id. 513.

Motion to dismiss a bill on payment of 20s. costs. *Anon.* 1 Vern. 116.

The plaintiff cannot move to dismiss his bill after decree. *Guilbert v. Hawkes*, 2 Free. 158. **1 C. C. 40. PR. DECREE.**

### 4. By consent.

A bill cannot be dismissed by agreement of the parties; some step in court must be taken for that purpose. *Rouse v. Wood*, 1 Jac. & W. 345.

Infants being made co-plaintiffs in two suits relative to the same matter, the court will not, before a decree, on the master's report that one suit is more for the benefit of the infants, dismiss the bill in the other suit, unless by consent. *Mortimer v. West*, 1 Swan. 358. **PR. REFERENCE; INFANT.**

After decree, the bill cannot be dismissed by consent; but an arrangement for disposing of the fund in court may have effect, by consent, on further directions. *Lashley v. Hogg*, 11 Ves. 602. **PR. DECREE, EFFECT OF.**

### 5. Effect of generally.

After the dismissal of a bill for the specific execution of an agreement, the plaintiff being unable to make a good title, an injunction to restrain him from proceeding on the agreement at law granted, on motion, the defendant undertaking forthwith to file a bill. *M'Namara v. Arthur*, 2 Ball & B. 349. **INJUNCT. TO STAY PROCS.; PR. MOTION; SPEC. PERF.**

Dismissal of a bill for redemption, for want of prosecution, has not the effect of foreclosure, not preventing another. *Hansard v. Hardy*, 18 Ves. 460.

# MORTGAGE, REDEMPTION OF; MORTGAGE, FORECLOSURE.

Order, after the bill dismissed, for payment of money out of court. *Wright v. Mitchell*, 18 Ves. 293. **PR. PAYMT. OUT OF COURT.**

Dismissal on default of payment, under decree, upon bill for redemption, operates as a foreclosure. *Ex. of Winchester v. Paine*, 11 Ves. 199. **MORTGAGE, FORECLOSURE OF; DECREE.**

The dismissal of a suit, without prejudice, either in law or equity, is no bar to a suit for same matter in another court. *Seymour v. Nosworthy*, 1 C. C. 155.

## 6. For want of Prosecution.

Answer deemed sufficient, if plaintiff shall not proceed, defendant may move at first seal after following term upon notice, that the bill be dismissed; and it shall be so dismissed, unless plaintiff file replication, and undertake to speed the cause. 16 Gen. Order, 3d April, 1828.

Time for dismissal for want of prosecution being arrived, and plaintiff having become bankrupt, ordered that it be dismissed without costs, unless assignees file supplemental bill within three weeks. *Chap v. Hallett*, 2 S. & S. 496. **BANKRUPT.**

A bill cannot be dismissed, for want of prosecution, by an order, made, as of course, upon petition at the rolls. *Van Sandau v. Moore*, 1 Russ. 441. **PR. MOTION OF COURT.**

It is of course that a plaintiff, even after the peremptory order to speed his cause, should have an order for a commission to examine witnesses, with liberty to execute the same in term time. *Field v. Soule*, 1 Russ. 82. **PR. COMM. TO EXAMINE; PR. MOTION OF COURT.**

A plaintiff, after allowing more than three terms to elapse without taking any proceedings, amended his bill under an order for that purpose, and amended also the defendant's office copy; an order, dismissing the bill for want of prosecution, obtained, as of course, on the usual certificate within six or seven days from the amendment of the record, was discharged as irregular. *Kendall v. Peckett*, 1 Russ. 152. **PR. AMENDMENT OF BILL.**

Semble, where replication is filed, defendant cannot dismiss bill for want of prosecution, but should set down the cause. *Atkinson v. Hutton*, 13 Price, 6. **PR. REPLICATION.**

Plaintiff, failing in showing special cause against an order obtained for dismissing their bill from want of prosecution, must, if he procure the bill to be retained on undertaking to speed, pay costs of motion to dismiss, as one of the terms of retaining the bill. The special cause shown being that some of defendants are in contempt, and that plaintiffs were proceeding to attach them, must be supported by affidavit. *Id. ib.* **PR. COSTS.**

Where a plaintiff amended his bill after answer, but did not serve a subpoena to answer the amendments, or file a replication to the answer, an order obtained, as of course, to dismiss the bill for want of prosecution, after three terms from the filing of the answer, but within three terms from the date of the amendments, was held to be regular, though the defendant had obtained an order that the plaintiff should amend his bill within a limited time, and the plaintiff had amended accordingly, and had also amended the defendant's office copy of the bill. *Cooke v. Davies*, 1 Turn. & R. 309. **PR. AMENDMENT OF BILL AFTER ANSWER.**

After issue joined, defendant cannot move to dismiss for want of prosecution; but plaintiff having order to amend, defendant must move for

amendment in certain time, or dismissal. *Pratt v. Holbrook*, 5 Mad. 30. **PR. AMENDMENT.**

Notice was given of motion to dismiss. On same day, motion was made, and, subsequent thereto, replication was filed. Bill is not dismissed, nor defendant entitled to costs of motion. *Reynolds v. Nelson*, 5 Mad. 60. See observations on this case, 10 Ves. 404. n. **DIVISION OF TIME; REPLICATION; PR. FILING PLEADINGS.**

On motion to dismiss for want of prosecution, the six clerk, (see obs. 10 Ves. 404. n.) in his certificate as to proceedings in the cause, (which may be obtained after motion is made) must not state any proceedings subsequent to the motion. *King v. Noel*, 5 Mad. 13. **PR. CERTIFICATE OF CLERK IN COURT.**

After motion to dismiss, and undertaking to speed cause, plaintiff can only amend by special application. *Myers v. ———*, 4 Mad. 268. **PR. MOTION TO DISMISS; PR. AMENDMENT.**

The only answer to motion to dismiss, is an undertaking to speed cause. *Stedman v. Ellis*, 4 Mad. 240. **PR. UNDERTAKING TO SPEED CAUSE.**

Defendant, who has become bankrupt since filing bill, may move to disavow for want of prosecution, so that plaintiff undertakes to speed cause. *Rhode v. Spear*, 4 Mad. 51. **BANKRUPT.**

Replication filed after the notice of, but before the motion to dismiss; motion not sustainable: defendant entitled to costs. *Spurrier v. Bennett*, 4 Mad. 39. **PR. COSTS; PR. NOTICE; PR. REPLICATION.**

On plaintiff's bankruptcy, defendant may move that assignees file supplemental bill in a given time, or that bill stand dismissed. *Wheeler v. Mullins*, 4 Mad. 171. **PR. ABATEMENT & REVIVOR; BANKRUPTCY, ETC. OF.**

Where bankrupt's bill is dismissed for want of prosecution, he cannot be made to pay costs. *Id. ib.* **COSTS; BANKRUPT, LAB. OF.**

Undertaking to speed, signed by counsel and left at registrar's office, on same day the motion to dismiss was made, held sufficient. *Lyndon v. Lyndon*, 3 Mad. 240. **PR. UNDERTAKING TO SPEED CAUSE.**

Bill after the usual motion to dismiss for want of prosecution, retained on terms of paying costs, &c. on application, within a reasonable time, not as formerly, *ex parte*, but special, on affidavit with notice. *Fuller v. Willis*, 3 V. & B. 1. **PR. RETAINING BILL.**

It is not the ordinary practice to restore a bill, which has been regularly dismissed for want of prosecution; but this may be done under the circumstances of the case. *Harman v. S. I. Waterworks Comp.*, 2 Mer. 63.

The refusal of a motion to discharge an order to dismiss, does not constitute a ground to prevent the party from applying to have the bill restored. *Id. ib.*

A bill which has been regularly dismissed, will not be restored for the mere purpose of agitating the question of costs. *Id. ib.*

Replication filed on day cause is shown against dismissal of bill, ordered to be taken off file as irregular. *Christie v. De Tastet*, 1 Price, 242. **PR. REPLICATION; PR. FILING PLEADINGS.**

Court will not hear special cause against dismissal of bill, unless notice of cause intended to be shown be previously given to defendant. *Id. ib.* **PR. NOTICE.**

Reference for scandal and impertinence, is a sufficient proceeding with effect to save a bill. *Goodwin v. Davis*, 1 Price, 373. **PR. REFERENCE FOR SCANDAL.**

Order to dismiss a bill for want of prosecution, not of course pending a reference on motion; the title alone being in question. *Briscoe v. Brett*, 2 V. & B. 377. **PR. REFERENCE AS TO TITLE.**

Motion to dismiss the bill for want of prosecution since the answer, not prevented by an injunction till answer. Notice not proper; and the production of the six clerk's certificate to the register, sufficient with-

out producing it in court. *Day v. State*, 3 V. & B. 170. PR. INJUNCTION.

In undertaking to speed cause upon motion, of dismissal for want of prosecution; the term includes the vacation following. *Finlay v. Wood*, 1 V. & B. 499. PR. UNDERTAKING TO SPEED CAUSE.

Notice is not necessary of motion to dismiss bill for want of prosecution, three terms having elapsed after answer without replication; nor is it necessary to produce six clerk's certificate on the motion, if it is produced to register when order is drawn up. *Att. Gen. v. Finch*, 1 V. & B. 368. PR. NOTICE.

Order to amend bill not served or drawn up, cannot prevent motion to dismiss for want of prosecution. *Morris v. Owen*, 1 V. & B. 523. PR. ORDER TO AMEND.

Plaintiff under an undertaking to speed his cause, obtained an order to withdraw his replication, and set down on bill and answer; but did not serve a subpoena to hear judgment, or appear when the cause was called. The bill was dismissed with costs. *Rogers v. Gore*, 17 Ves. 130. PR. SERVICE OF SUBPOENA TO HEAR JUDGMENT; PR. UNDERTAKING TO SPEED CAUSE.

Order made to dismiss the bill for want of prosecution after three terms, without replication, of course without notice, and pending an injunction staying execution. *Naylor v. Taylor*, 16 Ves. 137. See *A. note 35. S. P. Jackson v. Pownall*, id. 204. PR. NOTICE; PR. INJUNCTION.

Order, dismissing a bill for want of prosecution, after three terms expired, without any steps taken, obtained upon motion of course, not requiring notice. *Degraves v. Lane*, 15 Ves. 291.

Though generally a party cannot be heard until he has cleared his contempt, a step taken by the other party waives the contempt for all purposes, except the right to costs in the cause not to be obtained by process of contempt. Acceptance of the answer, therefore, is a waiver of the contempt, for the purpose of enabling the defendant to dismiss the bill for want of prosecution. *Anon.* 15 Ves. 174. PR. CONTEMPT AND WAIVER OF; PR. ANSWER; WAIVER.

Order to dismiss the bill for want of prosecution, cannot be had if a proceeding had been taken before the motion; but if the order has been obtained irregularly, by the misrepresentation of the plaintiff, he shall pay the costs of discharging it. *Anon.* 14 Ves. 492. PR. COSTS.

Order to amend upon petition at the rolls, after notice of motion to dismiss for want of prosecution for the seal, the day on which the order was obtained, and the motion could not be made regular. *White v. Hall*, 14 Ves. 208. PR. ORDER TO AMEND. PR. SEAL DAY.

The only answer to the motion to dismiss for the want of prosecution, is the usual undertaking to speed the cause. A special ground must be the subject of a special application. *Bligh v. —*, 13 Ves. 456. PR. UNDERTAKING TO SPEED CAUSE.

The only answer to the motion to dismiss the bill for want of prosecution, is the undertaking to speed the cause. Special circumstances must be the ground of special application. *Lambert v. Lambert*, 11 Ves. 608.

Order to dismiss for want of prosecution, regular according to the practice, though the six clerk's certificate appeared on the face of the order to be of a subsequent date. *M'Mahon v. Lissau*, 12 Ves. 465. See *Wills v. Pugh*, 10 Ves. 402., and note 404.

Order to amend, not served or drawn up, does not prevent a motion to dismiss the bill for want of prosecution. *Anon.* 7 Ves. 222. PR. ORDER TO AMEND.

After subpoena to rejoin, a bill may be dismissed

for want of prosecution. *Squirrel v. Squirrel*, 3 Swan. 250. PR. SUBPOENA TO REJOIN.

Bill retained for a twelvemonth, with liberty for the plaintiff to bring an action, and in case the plaintiff should not try such action, within a twelvemonth, then the bill was to stand dismissed with costs; the plaintiff did not try his action within the time; the bill is not *ipso facto* out of court, but the defendant must either set down the cause for further directions, or move to dismiss the bill. *Stevens v. Froed*, 2 Cox, 374. PR. RETAINING BILL.

General demurrer put in, but never argued, and no proceedings afterwards; the defendant cannot have the bill dismissed for want of prosecution, as he had an equal power to move. *Anon.* 2 Ves. J. 287. DEMURRER.

A defendant having filed a general demurrer to a bill, cannot move to dismiss the bill for want of prosecution, but should set down the demurrer for argument. *Simpson v. Denham*, 2 Cox, 377. *Id.*

A plaintiff having become bankrupt, and his assignees not having the consent of the creditors to proceed in the cause in due time, the defendants obtained an order to dismiss the bill for want of prosecution. This order discharged, under the circumstance upon the terms of the assignees filing a bill of revivor within a week. Whether bankruptcy is an absolute abatement of the suit: *quære?* *Lingard v. Wegg*, 3 Bro. C. C. 435. PR. ABATEMENT & REVIVOR; BANKCY.

Order to refer answer for impertinence, not prosecuted; is no objection to a motion to dismiss for want of prosecution, and defendant need not obtain master's report in his favour. *Railton v. Woolrick*, 3 Swan. 247. PR. REFERENCE OF ANSWER.

After an order to speed the cause, the plaintiff has a whole term and vacation to proceed in, before the bill can be dismissed. *Mangleman v. Prosser*, 3 Bro. C. C. 191; but see note *there contra*. PR. ORDER TO SPEED CAUSE.

A cause coming on to be heard stood over, with liberty for the plaintiff to amend. He did amend, but did not proceed further. Defendant may move to dismiss the bill for want of prosecution, and it is not necessary to set down the cause again for this purpose. *Mitchell v. Lowndes*, 2 Cox, 15. PR. LIBERTY TO AMEND; PR. SETTING DOWN CAUSE.

After rejoinder, a defendant cannot move to dismiss a bill for want of prosecution. *Tozer v. Tozer*, 1 Cox, 238. PR. REJOINDER.

Shewing cause against dissolving an injunction, is not such a proceeding in a cause as to prevent the bill being dismissed for want of prosecution. *El. Warwick v. Dr. Beaumont*, 1 Cox, 111. PR. SHEWING CAUSE AGAINST DISSOLVING INJUNCTION.

Bill to perpetuate testimony, may be dismissed for want of prosecution any time before replication and examination. If cause is set down to be heard, the bill will be dismissed with costs, but so as not to prejudice the perpetuating the testimony. *Anon.* Amb. 237. S. C. 2 Ves. 497. PR. BILL TO PERPETUATE.

Where defendant pleads former suit, it must be shewn that it was *res judicata*. *Brandlyn v. Ord*, 1 Atk. 571.

A bill dropped for want of prosecution, cannot be pleaded as a decree of dismissal. S. C. *Id.* PL. PLEA OF FORMER SUIT.

Where a bill is for a discovery merely, you cannot move to dismiss it for want of prosecution, but pray an order only on the plaintiff to pay defendant the costs of the suit to be taxed. *Woodcock v. King*, 1 Atk. 286.

Though the next day after the last day of the term, be not in strictness part of the term, and therefore, no motion can be made in the petty bag side, yet as to the other purposes it is part of the term, for which

reason a motion made at the time to dismiss a bill for want of prosecution, on a certificate that there had been no prosecution within three terms, of which the last term was one, was denied. *Anon.* 1 P. W. 522. **PR. TERM; TIME.**

So where the last seal continued three days, and computing the third day, according to the day of the month, the time would be expired for making a report absolute, yet this not so, it being only a continuance of the first day. *Id. ib.*

Wherever there is a plea put in to a bill, though there is an answer likewise, the bill cannot be dismissed for want of prosecution, till the plea is argued. *Anon.* Barn. 280. **PL. PLA.**

#### BILL OF EXCEPTIONS. See also PR. EXCEPTIONS, BILL OF.

### XIV. BILL OF INTERPLEADER.

See also PR. COSTS, 10 (s).—PR. EVID. 11. (f).—PR. PAYMENT INTO COURT, 2.

A bill of interpleader ought to be filed immediately after or before the commencement of proceedings at law, and not be delayed till after a judgment or verdict has been obtained; and therefore, where an interpleading bill was filed after a verdict had been obtained by one of the parties, and an injunction had been granted, on the money being paid into court, the court dissolved the injunction, though the answer of only one of the parties had come in, the plaintiff not satisfactorily accounting for the delay in filing his bill. *Cornish v. Tanner*, 1 Y. & J. 333. **DELAY.**

No affidavit is necessary to support a motion by a plaintiff in an interpleading suit, for liberty to pay the money into court, and for an injunction. *Hallbank v. Sparkes*, 1 Sim. 385. **PR. AFFIDAVIT IN SUPPORT OF MOTION; PR. PAYMENT INTO COURT.**

The plaintiff in a bill of interpleader may move at once for a special injunction on payment of the money into court, without first obtaining the common injunction. *Finlay v. Wether*, 1 Sim. 15. **PR. INJUNCTION; SPECIAL.**

Plaintiff in interpleading bill is entitled to be paid cost, out of fund, the subject of suit. *Campbell v. Solomons*, 1 S. & S. 462. **PR. COSTS; LIEN.**

Upon the hearing of an interpleading bill, evidence is admissible to shew that the plaintiff has retained possession of the subject of the suit, under an indemnity from some of the defendants. *Statham v. Hall*, 1 Turn. & R. 30. **MAINTENANCE OF SUIT; PR. EVID.**

Where the answers of several defendants to an interpleading bill, clearly shew the priority of right to be in one of them, the court will dissolve the injunction *instantly*. *Bowyer v. Pritchard*, 11 Price, 103. **PR. INJUNC., DISSOLVING OF.**

On interpleader, the answer of one defendant may be read against the other. *Id. ib.* **PR. EVID.; ANSWER.**

The injunction on an interpleading bill stays all proceedings. *Warrington v. Wheatstone*, 1 Jac. 205. **PR. INJUNC. EXTENT OF.**

In an interpleading suit the injunction may be moved for before the time for answering has expired. *Id. ib.* **PR. ANSWER; PR. INJUNC. WHEN OBTAINABLE.**

Where two parties claim fund in hands of stakeholder, the former may make motion by consent, to avoid expense of bill of interpleader, that stakeholders pay the money into court, but stakeholders cannot make such motion, they not being parties to the suit.

*Belbee v. Belbee*, 6 Mad. 28. **STAKEHOLDER; PR. PAYMENT INTO COURT.**

To support an application that service of subpoena on a bill of interpleader upon solicitor who conducts the action, might be deemed good service, it is not only necessary that party applying should state that he knows not where plaintiff at law is, and that solicitor has refused to appear, but solicitor should be stated to have positively refused to inform them where plaintiff at law is to be found, and also that the process should have been previously formally tendered to him. *E. I. Comp. v. Collins*, 6 Price, 404. **PR. SUBPENA, SERVICE SUBSTITUTED.**

A plaintiff in an interpleading bill having done all in his power to bring the parties before the court, may obtain a decree although one of defendants has not answered, and is present at the hearing, if he (having appeared to the process) has been duly brought into contempt for want of answer. *Farebrother v. Prater*, 5 Price, 303. **PR. DECREE.**

Motion for injunction to stay proceedings at law, on filing bill of interpleader and affidavit, refused. *Craggan v. Simmons*, 3 Mad. 130. **PR. INJUNC. TO STAY PROCS.**

Injunction not dissolved as of course, on one answer only coming in to interpleading bill, but plaintiff's delay to get in the other answer is a special ground for application to dissolve, or to have the money out of court. *Hyde v. Warren*, 19 Ves. 322. **PR. INJUNC. DISSOLVING.**

Principle of interpleader, that the defendant who improperly raises double claim, pays the costs, but the plaintiff who is considered as undertaking to bring the defendants before the court, must use reasonable diligence to get in the answer of one out of the jurisdiction; if he will not come in, the other who appears must have the stake, and the plaintiff will be protected, but whether he must not pay the costs, *quere?* *Martinius v. Helmuth*, cited in *Strickson v. Andersen*, 2 V. & B. 412. note (1). 2nd edition. **COSTS.**

No instance of a bill of interpleader brought to a hearing. *Id. ib.* **HEARING.**

The plaintiff in a bill of interpleader is not entitled, after replying to the answers, to move for his costs, but must set down the cause for hearing. *Jones v. Gilham*, Cooper, 49. **PR. REPLY; PR. COSTS.**

Injunction upon an interpleading bill against bankrupts and their assignees, by a debtor to the estate, sued by the bankrupts with the view of indirectly contesting the commission. *Lovells v. Cornford*, 18 Ves. 299. **INJUNC.; BANKCY. COMMISSION.**

Questions arising on bills of interpleader are disposed of in various modes, according to the nature of the question, and in the manner in which it is brought before the court: interpleading bill is considered as putting the defendants to contest their respective claims, as a bill by an executor or trustee to obtain the direction of the court upon the adverse claims of the defendants; therefore, at the hearing, if the question between the defendants is ripe for decision, the court decides it, and if not ripe for decision, directs an action or an issue, or a reference to the master, as best suited to the nature of the case. *Angell v. Hadden*, 16 Ves. 202.

Interpleading bill by a tenant, to ascertain to which of the claimants he was to pay his rents; the one establishing his title by evidence, the other making default at the hearing, payment decreed to the former, and a perpetual injunction against the other. *Id.* 203.

Costs as between defendants to interpleading bill. *Croton v. Williams*, 9 Ves. 107. **PR. COSTS; PARTY DEFENDANT.**

On a bill of interpleader, defendant who made it necessary, ordered to pay all costs; plaintiff has a lien



for his costs upon bill paid into court. *Aldridge v. Mesner*, 6 Ves. 418. PR. COSTS.

In support of a motion for injunction on interpleading bill, affidavits of the facts may be read; as it is exactly on the footing of waste. Collusion not to be presumed against the affidavit of the plaintiff in interpleading bill; nor can counter affidavit prevail against it. *Langston v. Boylston*, 2 Ves. J. 101. PR. INJUNC. AFFIDAVITS IN SUPPORT.

On bill of interpleader by the owner of an estate against the grantee, of a rent charge out of it, (assigned to secure an annuity) and the annuitant; the annuity being void, the arrears of the rent charge in court were paid to the original grantee, and the annuitant was held not entitled to have the consideration repaid out of that fund, there being only a general debt at law, and no lien. *Dk. Bolton v. Williams*, 2 Ves. J. 138. 4 Bro. C. C. 297. LIEN; ANNUITY.

After the right is decided between the parties, the costs must be paid by the defendant who is found in the wrong, to the plaintiff and the other defendants. *Dowson v. Hardeastle*, 2 Cox, 278. S. C. 1 Ves. J. 368. S. P. *Edelson v. Roberts*, id. 280. PR. COSTS.

Upon an interpleading bill, *quære*, whether the money ought not to be actually brought into court before the motion for an injunction, though the practice seems to have been, that it was time enough if brought in upon showing cause against the motion to dissolve the injunction? *Dungey v. Angore*, 3 Bro. C. C. 36. Vide sequel of S. C. 2 Ves. J. 304. PR. PAYMT. INTO COURT.

In the course of the proceedings on a bill of interpleader, a commission issued on the part of one defendant for the examination of witnesses, of which notice was given to the plaintiff, but not to the other defendant. This practice, though it may be inconvenient, is not irregular. *Brymer v. Buchanan*, 1 Cox, 425.

Decree in a suit of interpleader, against a defendant who did not appear. *Hodges v. Smith*, 1 Cox, 357. PR. DECREE PRO CONFESSO.

Tenants filing a bill of interpleader against annuitants, and bringing rents into court, paid their costs out of the rents. *Aldridge v. Thompson*, 2 Bro. C. C. 149. LANDL. & TENANT; PR. COSTS; PR. PAYMENT INTO CT.

In a bill of interpleader, a trial at law is directed between the defendants; the suit is thereby ended as to the plaintiff, so that if the plaintiff dies, defendants may proceed without reviving the cause. *Anon.* 1 Vern. 351. PR. ABATEMENT AND REVIVOR.

In a bill of interpleader, it is not necessary that the plaintiff should bring the money into court, unless the other side require it; but the plaintiff should, by his bill, offer to bring in the whole of the demand. *El. Thanet v. Paterson*, Barn. 251. PR. PAYMT. INTO CT.

#### XV. BILL TO PERPETUATE.

See also PR. EVIDENCE, 14.

Costs of perpetuating testimony of will allowed to purchaser. *Mackrell v. Hunt*, cited 2 Mad. 37. VEND. & PURCH.; PR. COSTS.

Distinction between examination to perpetuate and *de bene esse*. In a suit for the former purpose, after the examination, there is an end to the issue. *Morrison v. Arnold*, 19 Ves. 671. EXAMON. DE BENE ESSE.

Defendant to a bill to perpetuate testimony, entitled of his costs immediately after the commission executed

upon the allegation, that he did not examine any witnesses. *Foulds v. Middles*, 1 V. & B. 138. COSTS.

On a bill to perpetuate testimony, defendant entitled to costs of answering, there being no examination of witnesses. *Lecky v. Murray*, 1 Ball & B. 391. COSTS.

On a bill for examining witnesses in *perpetuum rei memoriam*: Held that publication of the depositions should not be allowed unless in a strong case. *Harris v. Cotterell*, 3 Mer. 678. PR. PUBLICATION.

Bill to perpetuate testimony merely, ought not to be brought to a hearing; but if it prays relief, the defendant may set it down for dismissal. *Vaughan v. Fitzgerald*, 1 Scho. & L. 316. PR. HEARING.

Bill to perpetuate testimony may be dismissed for want of prosecution any time before replication and examination. If cause is set down to be heard, the bill will be dismissed with costs, so as not to prejudice the perpetuating the testimony. *Anon.* Amb. 237. S. C. 2 Ves. 497. PR. DISMISSAL OF BILL.

Bill to perpetuate the testimony of a will if brought to hearing, to be dismissed with costs. *Hall v. Hodgesdon*, 2 P. W. 162. PR. HEARING.

Court will not give leave to plaintiff to examine witnesses to perpetuate testimony, though in case of a purchase of a reversion, where there can be no trial at law during the estate for life. *Hitchcock v. Sedgwick*, 2 Vern. 159.

#### XVI. BILL OF REVIEW, PROCEEDINGS AND EVIDENCE ON.

See also PLEADING, II. 5.; PR. COSTS, 10. (ii).

Bill of review, on error in law, Beame's Ord. 2.

On new matter, *id.*

Not on new proof, *id.*

Except by leave of court, *id.*

Not necessary in case of miscasting, *id.* 3.

Not allowed unless decrees first performed, *id.*

Except the act decreed would extinguish party's right at law, *id.* 4.

Party bringing bill of review to enter into recognizances, *id.*

Must deposit 50*l.* with registrar, *id.* 313.

No supplemental bill, in nature of bill of review, to be exhibited without leave of court, and party to deposit altogether 50*l.* *id.* 368.

Costs of course upon a bill of review for error; where no error in the decree. *Bolger v. Mackell*, 5 Ves. 510. PR. COSTS.

Lies to vary decree, though not signed and enrolled. *Davis v. Larner*, Dick. 42.

Supplemental bill in nature of review cannot be heard until petition to rehear original cause is presented. *Moore v. Moore*, Dick. 66.

Error discovered after report confirmed, ground for bill of review. *Worge v. Bradley*, Dick. 570.

Plea to bill of review of length of time since enrolment of decree, under which part of estate had been sold to *bona fide* purchaser who had had possession twenty-seven years. On argument of plea and appeal, leave given to withdraw plea, with liberty to plead and demur, answer or demur alone, without introducing new matter. *Gorman v. McCulloch*, 5 Bro. P. C. 597. PL. PLEA; LENGTH OF TIME; PR. PLEA, LEAVE TO WITHDRAW AND PLEAD DEMUR, &c.

Defendant filed supplemental bill in nature of review, without leave and without deposit, rectified by subsequent order and payment *ex pres* of deposit. *Loubier v. Cross*, Dick. 223.

Papers in the hands of a party to a former cause after publication had passed, though not produced then,

may be read upon a bill of review. *Standish v. Bradley*, 2 Atk. 177.

When bill of review is brought for error apparent, the constant method is for defendant to put in a plea and demurrer; a plea of the decree, and a demurrer against opening the enrolment. *Could v. Tancred*, Id. 554.

Reading the decree is unnecessary if it is fairly set forth in the bill. See 5 Bro. P. C. 597. (n.) Miffl. 166. PL. PLEA OF FORMER DECREE.

On arguing demurrer to a bill of review, what appears on the face of the decree can be read only, but after a demurrer overruled, a plaintiff may read any evidence as at a rehearing. *Catterall v. Purchase*, 1 Atk. 290. PR. DEMURRER; PR. EVIDENCE.

Where a demurrer to a bill of review is allowed, it may be enrolled, otherwise if the demurrer is disallowed. *Woots v. Tucker*, 2 Vern. 120. PR. DEMURRER, ENROLMENT OF.

Bills of review classed. After a demurrer to a bill of review for error overruled, the decree is reversed without further hearing. *Cook v. Bamfield*, 3 Swan. 607. PR. DEMURRER.

Proofs in an original bill not allowed to be read on a bill of review. *Moseley v. Maynard*, 2 C. R. 18.

#### XVII. BILL OF REVIVOR.

Where cause is set down, and subpoena to hear judgment served, and afterwards bill of revivor is filed, no new subpoena to hear judgment is necessary. *Bray v. Woodran*, 6 Mad. 72. PR. SUBPOENA TO HEAR JUDGMENT.

Plaintiff filing a bill of revivor after decree, and neglecting to revive, the defendant, having answered, allowed to proceed on the plaintiff's bill. *Gordon v. Bertrum*, 1 Mer. 154.

The defendant dying after service of the subpoena to hear judgment, whether, upon a bill of revivor, a new subpoena to hear judgment is necessary: *Quare?* *Byne v. Potter*, 5 Ves. 395. PR. SUBPOENA TO HEAR JUDGMENT; PR. ABATEMENT & REVIVOR.

A defendant to a bill of revivor cannot plead to that suit, a plea which has been pleaded by the original defendant and overruled. *Samuda v. Furtado*, 3 Bro. C. C. 70. PL. PLEA; PR. PLEA.

If, after bill for that purpose, plaintiff neglects to revive decree, defendant may, and carry on decree under plaintiff's bill. *Whitehear v. Hughes*, Dick. 203.

Devisee can only revive decree by supplemental bill in nature of revivor. *Id. ib.*

And in that case, on neglect of plaintiff, defendant may set down cause to be heard at his own instance. *Id. ib.* 284.

Statute, 5 Geo. 2. c. 15. extends to bill of revivor. *Att. Gen. v. Smith*, Dick. 135.

An appearance is necessary to a bill of revivor. *Anon.* 3 Atk. 690. PR. APPEARANCE.

If, on bill of revivor, the defendant's time for answering be out, the court will order proceedings to be revived. So, where the defendant, by his answer, insists that the plaintiff is not entitled to revive, for this ought to be shewn either by plea or demurrer; but, if in such case it appears at the hearing, that the plaintiff had no title to revive, he cannot have a decree. *Harris v. Pollard*, 3 P. W. 348.

Revivor of suit against husband and wife, on decree against wife, need not be by original bill. *Ruthil v. Litten*, Cary, 70.

Wife, after death of husband, sueth bill of revivor, and *good*. *Parrot v. Randal*. *Id.*

Plaintiff marries before answer, but no advantage taken by defendant, bill of revivor unnecessary. *Fairfield v. Greenfield*, Cary, 52.

If one of defendants is not charged in bill of revivor ordered, he shall be discharged, unless cause shewn by a day. *Heimes v. Day*, Cary, 55.

#### XVIII. CAUSE, GENERALLY, AND OF ADJOURNING, ADVANCING, CONSOLIDATING, RESTORING, RETAINING AND SPEEDING.

See also PR. COSTS, 10. (i).—PR. HEARING, AND SETTING DOWN CAUSES.—PR. BILL, DISMISSAL OF.

Cause adjourned, costs of day 10l., as well in rolls as in court of chancery. 35 General Ord. 3 April, 1828. PR. COSTS.

Where cause is compromised or abated, solicitor shall certify this to registrar of the court. 39.

At request of any person the clerk in court shall certify the dates and general descriptions of the proceedings which have taken place in any cause. 43.

Where cause is struck out of paper by laches of attorney, motion to reinstate it cannot be made till attorney pay 3s. 4d. personally out of his own pocket. Reg. Gen. February 24, 1795. Exch. 1 Ridg. L. & S. 601. LACHES; ATTORNEY & CLIENT.

Bill restored, though the order to dismiss was not obtained till after a considerable interval since the last proceedings in the cause; and, though the plaintiff had acquiesced in the order, the suit being one in which the main object was answered, when an injunction was obtained. *Barfield v. Nicholson*, 1 Sim. 494.

In equity, where a party shews upon affidavit that he was surprised by a cause being in the paper on a particular day, and being disposed of in his absence, the court, upon motion, will restore it to the paper to be heard, and a petition is not necessary for that purpose. *Rowley v. Carter*, 1 Y. & J. 511. SURPRISE.

Where the evidence proves the execution of a will, but the witnesses have not been examined as to the sanity of the testator, the cause will be adjourned at the hearing, and liberty will be given to exhibit an interrogatory to his sanity. *Abrams v. Winship*, 1 Rus. 562. WILL, PROOF OF.

No application, to take a petition out of its turn, can be heard, unless notice has been given of the intention to make such application. *In re Bell*, 1 G. & J. 182. PR. NOTICE.

Cause standing in the paper of the day, and being about to come on to be heard at the sittings, the court nevertheless granted a motion for transferring it to a future day; and that a cross cause should be advanced in the paper to be heard at the same time. *Roberts v. West*, 11 Price, 514.

Adjournment of hearing of petition in bankruptcy can only be obtained by petition in bankruptcy. *In re Hardy*, 6 Mad. 252. PETITION; BANKRUPTCY.

Where defendant in title cause submits to part of plaintiff's demand, the court will, on motion for that purpose on part of defendant, refer it to master in any stage of proceeding to ascertain what is due, and to tax costs, the defendant undertaking to pay the amount without prejudice to any other question in the cause. *Lowe v. Firkins*, 11 Price, 453. TRUTH; PR. REFERENCE TO MASTER.

A bill against several defendants being retained with liberty for the plaintiff to bring an action against one of the defendants, the trial may take place during an abatement occasioned by the death of one of the other defendants, if the decree does not direct them to attend it. *Humphreys v. Hollis*, 1 Jac. 73. PR. ABATEMENT; PR. ACTION AT LAW.

On affidavit that accident prevented filing replica-

tion in time, cause was restored on usual terms. *Att. Gen. v. Fellows*, 6 Mad. 111. **ACCUSATION.**

The probable absence of a counsel is a sufficient ground for postponing the trial of an issue. *Bearblock v. Tyler*, 1 Jac. & W. 225. **COUNSEL.**

Rector's books not to be proved *videlicet*; and leave to put off the cause, in order to prove them by interrogatories refused. *Lake v. Skinner*, 1 Jac. & W. 9. **EVIDENCE VIVA VOCE.**

Cross bill filed only just before cause coming on for hearing, not cause to adjourn it. *Coates v. Pearson*, 4 Mad. 262. *Duck*, 326. S. C. **PR. CROSS BILL.**

Cause not in the paper called on to prove a will under the circumstances. *Anon.* 4 Mad. 271.

The only answer to motion to dismiss is an undertaking to speed cause. *Steadman v. Ellis*, 4 Mad. 240. **PR. MOTION TO DISMISS.**

Causes in equity cannot be consolidated. *Forman v. Blake*, 7 Price, 654. Or all but one stayed, and the rest to be decided by that. *Id.* 8 Price, 572, *sed vid.* 1 Fowl. Pr. 214. *cont.*

Reference whether several tithe causes should be consolidated, not of course before answer. *Keighley v. Brown*, 16 Ves. 344. **PR. REFERENCE.**

Undertaking to speed signed by counsel and left at registrar's office on same day motion to dismiss was made, held sufficient. *Lyndon v. Lyndon*, 3 Mad. 240. **PR. MOTION TO DISMISS.**

On undertaking to speed cause, on motion to dismiss, plaintiff has only the term, and not the vacation also to proceed in. *Wilson v. Thompson*, 2 Mad. 123.

Motion by plaintiff to advance demurrer to bill for injunction and receiver, refused on account of delay in filing bill. *Jones v. Taylor*, *id.* 181.

On motion after order to dismiss bill for want of prosecution, supported by affidavit of merits, &c.; the bill retained on terms of paying costs. *Bellingham v. Bruty*, 1 Mad. 265. **PR. ORDER TO DISMISS BILL.**

Court will not order a cause set down for hearing to be advanced in the paper on ground that subject-matter of suit is an arbitration of matters of account, and that if award should be set aside, the applicant would, on going into account again, lose the advantage of a witness not expected to live. *Dalzell v. Bailey*, 3 Pri. 2.

After a cause is set down for hearing, it may be advanced at the discretion of the court. *Hoyle v. Linesay*, 1 Mer. 381.

Demurrer in Vice Chancellor's paper cannot be directed by him to be heard at an earlier day than the paper mentions, but may be advanced to the head of the paper of that day. *Anon.* 1 Mad. 557. **DEMURRER.**

Cause set down to obtain decrees *pro confesso* advanced in paper on motion. *Hart v. Ashton*, *id.* 175.

Bill, after the usual motion to dismiss for want of prosecution, retained on terms of paying costs, &c. on application within a reasonable time, not, as formerly, *ex parte*, but special, on affidavit with notice. *Fuller v. Willis*, 3 V. & B. 1. **PR. MOTION TO DISMISS BILL.**

In undertaking to speed cause upon motion to dismiss for want of prosecution, the term includes the vacation following. *Findlay v. Wood*, 1 V. & B. 499. **PR. MOTION TO DISMISS.**

Plaintiff, under an undertaking to speed his cause, obtained an order to withdraw his replication, and set down on bill and answer; but did not serve a subpoena to hear judgment, or appear when the cause was called. The bill was dismissed with costs. *Rogers v. Goore*, 17 Ves. 130. **PR. DISMISSAL OF BILL; PR. SERVICE OF SUBPOENA TO HEAR JUDGMENT.**

Order obtained by plaintiff, under the usual undertaking to speed his cause, for liberty to withdraw his

replication and amend the bill, discharged with costs. *Pitt v. Watts*, 16 Ves. 126. **PR. ORDER TO WITHDRAW REPLICATION AND AMEND.**

The only answer to the motion to dismiss for the want of prosecution is the usual undertaking to speed the cause. A special ground must be the subject of a special application. *Bligh v. —*, 13 Ves. 455. **PR. MOTION TO DISMISS.**

Bill by a married woman claiming under a bond by her husband, to a trustee for separate maintenance, admitted to have been destroyed by them on the ground of subsequent incontinence. The bill retained, with liberty to bring an action. *Seagrave v. Seagrave*, *id.* 439. *Husa & Wife*; *Born*.

Though by demurrer to whole bill allowed, the bill is strictly out of court, yet even after bill dismissed by order, the cause has been set on foot again. *Baker v. Mellish*, 11 Ves. 72. **PR. DEMURRER.**

Plaintiff, notwithstanding bankruptcy of defendant, and though all relief can be had under the commission, may be driven to an undertaking to speed cause by motion to dismiss with costs for want of prosecution. *Monteith v. Taylor*, 9 Ves. 615. **BANCY.**

One defendant may obtain the usual order to speed the cause by motion to dismiss for want of prosecution, though the other defendant stands out process of contempt, and it can be of no use to go to a hearing without him. *Anon.* *id.* 512. **PR. CONTEMPT.**

The cases where bill is retained that there may be a trial at law, are where it is necessary to establish a legal right in order to establish the equitable relief; but where the subject appeared to be matter of law, the bill was dismissed. *Walton v. Law*, 6 Ves. 150.

Deviso of fee-farm rents revoked in equity as well as at law by subsequent conveyance to trustee, operating an alteration of estate beyond mere purpose of securing a mortgage, but on account of laches of plaintiffs, the heirs at law; court would not give relief further than by retaining bill, with liberty to bring action, &c. to give an opportunity of taking opinion of court of law, upon question whether there is a revocation at law, or whether court of law will presume republication from the long possession, leaving open the question whether plaintiffs are entitled to any account, and for how far back. *Harmood v. O'Goulden*, 6 Ves. 199. **WILL, REVOC. OF; LACHES.**

It is not a necessary consequence that bill will not be dismissed because it has been retained for the purpose of a trial at law. *Id.* 225. **PR. DISMISSAL OF BILL.**

The defendant's producing the lease for a year, and a copy of the release, the original not being forthcoming, the bill was retained with liberty to bring an ejectment, and in default the bill to be dismissed with costs. *Snell v. Silcock*, 5 Ves. 469. **EVIDENCE; LEASE & RELEASE.**

Bill retained for a twelve month with liberty for the plaintiff to bring an action, and in case the plaintiff should not try such action within a twelve-month, then the bill was to stand dismissed, with costs; the plaintiff did not try his action within the time; the bill is not *ipso facto* out of court, but the defendant must either set down the cause for further directions, or move to dismiss the bill. *Sterens v. Pracht*, 2 Cox, 374. S. C. 2 Ves. J. 518. **PR. DISMISSAL OF BILL.**

Upon appeal to delegates, appellant may demand an adjournment from first meeting of judges to examine the transmiss of proceedings. *Goodwin v. Giesler*, 1 Ridg. L. & S. 371. **PR. APPEAL TO DELEGATES.**

After an order to speed the cause, the plaintiff has a whole term, and a vacation to proceed in before the bill can be dismissed. *Mangleman v. Prosser*, 3 Bro. C. C. 191.; but see note there contra. **PR. BILL, DISMISSAL OF.**

Bill to have a voluntary deed delivered up<sup>xx</sup>, dismissed; cross bill to execute it retained for a year, with liberty to sue upon a covenant in the deed. *Colman v. Sarrell*, 1 Ves. J. 50. S.C. 3 Bro. C. C. VOLUNTARY DEED.

Bill for a fee-farm rent retained for a year, and plaintiff to try his title at law. *D. Leeds v. Corp. of New Radnor*, 2 Bro. C. C. 338. See this case, *id.* 518.

After an undertaking to speed a cause, the plaintiff cannot as of course obtain an order to withdraw his replication and amend the bill. *Ryan v. Stewart*, 1 Cox. 397. PR. MOTION TO WITHDRAW REPLICATION & AMEND.

Bill for rent of a mine retained for a year to suffer plaintiff to try an issue as to the quantity of coal which, by the custom of the country, constituted a stack, the reservation being 1s. per stack. *Geast v. Barker*, 2 Bro. C. C. 61. ISSUE AT LAW.

Leave given to examine witness after adjournment of cause. *Bank v. Farques*, Amb. 145. PR. EXAMINATION OF WITNESS.

If the plaintiff produce the order for a subpoena to rejoin, and an affidavit of some of the parties being out of the kingdom, the court will not dismiss the bill for want of prosecution. *Anon.* 2 Atk. 604.

Though bill has been dismissed for want of such order and affidavit, yet upon producing them afterwards, and payment of costs out of pocket, the court will retain it. S.C. *ib.*

On motion to retain the bill, plaintiff must show that the order for the subpoena to rejoin was dated before the notice to dismiss. S.C. *ib.*

#### XIX. CAUSE, CONDUCT OF.

Bill filed by one creditor on behalf of self and rest, he has absolute dominion over suit till decree, and may dismiss bill at pleasure. But seems, after decree, the rest may prosecute it if they think fit. *Hansford v. Store*, 2 S. & S. 196. PR. CREDITOR'S SUIT.

Conduct of suit given, on motion to one of two co-plaintiffs, the other not appearing to have any interest. *Routinsen v. Halper*, 2 S. & S. 27.

CERTIFICATE, see PR. MASTER, REFERENCE, &c.

#### XX. CERTIORARI.

Where causes are removed by special certiorari on a bill containing matter of equity, plaintiff is, on receipt of his writ, to put in bond to prove his suggestion, within fourteen days after the receipt, which, if he do not prove then, on certificate from either of the examiners to the lord chancellor, the cause shall be dismissed with costs, and a procedendo be granted. 1st. Bacon's Order, 1618. Beame's Ord. Chan. 12. See Mif. Pl. 40. Harr. 49. Hinde's Pr. 28. 581. and the other references in Mr. Beame's note. So *Chetley v. Allen*, Toth. 145, plaintiff may examine, and have publication within fourteen days after the return of the certiorari to pray the surmises, and give the court jurisdiction; but defendant is not to examine, nor publish any to disprove it; and if on plaintiff's proofs it be retained, then plaintiff and defendant may examine orderly, touching the body of the cause, and have publication according to the rules; and though defendant examine as soon as the answer, yet shall not they be published but in ordinary course.

If the suggestions of the certiorari bill be not proved, a procedendo may be applied for and obtained, which is a writ directed to the judge of the inferior court, re-

quiring him to proceed in a cause sought to be removed into a court of equity by certiorari, plaintiff not having sufficiently proved his suggestions in such bill. *Rogers v. —*, 1 Mad. Ch. 184.

It is sufficient cause for granting a writ of certiorari to remove proceedings in replevin from a court of great sessions in Wales, that the title to the freehold is in question. *Edwards v. Davies*, 2 Russ. 153.

Plaintiff had moved proceedings in replevin from county court in Wales to court of great session, he may obtain from this court a certiorari to remove them into K. B. without any special ground shown. *Edwards v. Bowen*, 2 S. & S. 514.

Writ of certiorari to the court of great sessions in Wales, quashed, it having issued without a special ground laid first, and directing the tenor of the record instead of the record itself to be returned. *Pierce v. Thomas*, 1 Jac. 54.

Where the tenor of a record instead of the record itself is removed by certiorari out of an inferior court, it is erroneous, as no proceedings can be had upon it. *Woodcraft v. Kinaston*, 2 Atk. 317. S.C. 9 Mod. 305. Dick. 233.

Where a replevin is in a court of record, you may remove it by a certiorari, either from the court of K. B. or from this court. *Id.*

A habeas corpus and a certiorari differ; that removes the body *sum causâ*, and you declare *de novo* in the superior court. *Id.* HABEAS CORPUS.

Where a certiorari issues in order only to use the record as evidence, then the tenor if returned is sufficient, and countervails the plea of *nil tuel* record; but when the record itself is to be proceeded upon, the record must be returned. *Id.*

Whether it be before judgment or after makes no difference: in both cases the record itself must be returned. *Id.*

The court may supersede a certificate, but cannot quash it without a view of the record. *Id.*

Certiorari to remove suit from chancery of Durham to high court of chancery, on account of affinity of one party, granted. *Hilton v. Lawson*, Cary. 48.

On hearing of certiorari from mayor's court, pleadings in mayor's court opened first. *Clifford v. Beeson*, Dick. 33.

If upon a certiorari bill the cause is brought on to hearing, the court if they think fit may make a decree, or send it back to the mayor's court to be determined there; and sometimes the court sends it back after publication passed, and a subpoena to hear judgment before the cause comes to a hearing. *Stephenson v. Houlditch*, 2 Vern. 491.

Proceedings can no more be removed out of a county palatine by a certiorari bill in chancery, than by a writ of error at law in case of a judgment there. *Duckenfield v. Nosworthy*, 6 Vin. Ab. 581. pl. 23. COUNTY PALATINE.

A certiorari bill may be brought to remove a cause out of a court of equity in a county palatine to this court. *Portington v. Tarbock*, 1 Vern. 178. COUNTY PALATINE.

The plaintiff brought a certiorari bill, the defendant pleaded a decree in the mayor's court, and an enrolment which was said to be only pronouncial, and it was referred to a master to certify whether it was before the bill. *Cook v. Delebere*, 3 C. R. 67. PL. PLEA TO JURISDICTION.

Proceedings in the lord mayor's court of attachment cannot be removed by certiorari into chancery. *Souton v. Cutler*, 2 Rep. Ch. 108. A plaintiff cannot remove his own bill by certiorari. S.C. *Ex vide Curs. Canc.* 454.

The plaintiff brought a certiorari bill to remove a cause of the mayor's court, his witnesses living out of that jurisdiction, and inserted other matters relating to an account not in controversy in the mayor's

court. After examination of witnesses, the defendant moved for a procedendo, insisting that if the cause should be heard in chancery he could not be relieved, not having any bill there, but a procedendo was refused, the bill containing other matters, not determinable in the mayor's court, and the bill could not be divided, but the cause after hearing was dismissed. *Rich v. Jaques*, 1 C. C. 31.

After a decree to account in the Exchequer of Chester, the defendant shall not have a certiorari bill upon a pretence that his witnesses and deeds are out of that jurisdiction. *Davis v. Davis*, Rep. Temp. Finch. 452.

Though the plaintiff is to examine and have publication within fourteen days after the return of the certiorari, to prove his suggestions, and give the court jurisdiction, the defendant is not at liberty to examine or publish any thing to disprove it, and though the defendant should examine as soon as answer, yet the depositions shall not be published but in ordinary course, for after the plaintiff's first examination to affirm the jurisdiction, if the court retain the cause, both parties are to examine orderly to the merits and body of the cause, and have publication according to the ordinary rules. *Cheeky v. Allen*, Toth. 115. PR. PUBLICATION.

Because a certiorari was made with a long return, (skipping a term,) a procedendo awarded. *Ashley v. Gidser*, Toth. 162. Vide *Woodroffe v. Kinaston*, 1 Dick. 233. ante. S. P.

## XXI. CHARGE AND DISCHARGE.

See also ACCOUNT, VIII. 2.

In support of a charge brought in under the decree, two witnesses examined by the plaintiff to prove the defendant's hand-writing, said that they did not believe it to be his hand-writing; leave was given to the plaintiff to examine fresh witnesses to the same point. *Greenwood v. Parsons*, 2 Sim. 229. EXAMIN. OF WITNESSES.

A charge by admission in the answer can be disallowed by showing the application immediately the receipt of the money, as one transaction, not by distinct independent items on the other side of the account. *Robinson v. Seaton*, 19 Ves. 583.

Where a bill for an account is filed, if defendant set forth in a schedule to his answer an account, charging himself with sums of money, and in another schedule, an account of the disbursements of those sums, he cannot discharge himself by the second schedule, although he would be charged on his admission in the first. But this principle does not apply to a case, where an account, furnished by a party before any suit is instituted, is produced, to charge him with the items on the debit side, for the principle that a party producing a document in evidence, makes the whole evidence, then applies, and the accounting party is entitled to resort to the credit side in support of his discharge. *Boardman v. Jackson*, 2 Ball & B. 382.

A discharge carried in before a master may be referred for impertinence. *Price v. Shaw*, 2 Cox, 184. PR. REFERENCE FOR IMPERTINENCE.

The court will not order a balance upon charge and discharge in the master's office, to be paid in before the master has made his report, even upon his certificate of the same. *Far v. Mackreth*, 3 Bro. C. C. 45. ACCOUNT.

CLERK IN COURT, see PR. OFFICERS OF COURT, 3.

CLERK OF ENROLMENTS, see PR. OFFICERS OF COURT, 4.

COMMISSION, see PR. ANSWER, 8.

## XXII. COMMISSION TO ASCERTAIN BOUNDARIES AND VALUE OF LANDS.

See also BOUNDARIES.

A termor having by himself or his under tenants, suffered the boundaries between the demised premises and contiguous lands of his own to become confused, not entitled, after the expiration of the term, to a commission to ascertain them in opposition to the assignee of the lessor, who then entered, and had since continued in possession of both, it not being shown that such possession was improperly obtained. Commission to ascertain boundaries only to be granted, when the confusion has been occasioned by the misconduct of the defendant, or those under whom he claims, and only where it is shown that they cannot be ascertained without the assistance of the court. *Miller v. Warmington*, 1 Jac. & W. 184.

On a bill by a prebendary against his lessees, for a commission to ascertain the boundaries of the prebendal lands, the prebendary is entitled to name as many commissioners as his lessees. *Willis v. Parkinson*, 1 Swan. 9.

Commission to ascertain and distinguish boundaries, and, if not to be distinguished, to set out the value, upon a bill by a prebendary against lessees of the prebendal lands, also owners of other lands within the parish, with which the prebendal lands had become intermixed and confounded by reason of the unity of possession. S. C. 2 Mer. 507. See *Speer v. Crawler*, id. 410.

Bill by lord of the manor of W. against the lord of the adjoining manor of J., (who was also lessee of the manor of W.) and against commissioners under an act for inclosing lands within the manor of J., alleging confusion of boundaries arising out of the union of possession of the two manors; and that the defendants were preparing in combination together, to set out a boundary of the manor of S., which would include lands belonging to the manor of W., prayed a commission to set out the land lying within, and being part and parcel of the manor of W. The answer of the defendant, lord of the manor of J. set out boundaries, referring to perambulations made previous to the union of possession; and, the lease having expired since the filing of the bill, and it not being established in evidence, that there was any confusion of boundaries occasioned by default or neglect of the owners of J. while lessees of W., the bill was dismissed with costs, as against the commissioners, but without costs as against the other defendant. *Speer v. Crawler*, id. 410.

Jurisdiction, as to granting commission to ascertain boundaries, deduced from the writ *de rationalibus divisis*, or that *de perambulatione faciendis*. Consent, the ground upon which it was first exercised, then upon the application of a party, having an equitable claim, and no objection made; but a court of equity will not interfere between two independent proprietors, to force either to have his right so determined. *Id. ib.* JURISDICTION.

The circumstance of confusion of boundaries constitutes, *per se*, no ground for the interposition of the court. *Id.* 418.

A commission to settle the boundaries of a manor, or of a parish, ought not to be granted by a court of equity, where the interests of all parties who may probably be concerned, are not before the court. *Atkins v. Hatton*, 2 Anst. 386. PL. PARTIES.

Commissioners of perambulation must make a return, and if they cannot agree in making it, they may report specially. But before they make such return or report, the court will not grant a new commission, upon the allegation of their disagreement. *Carberry v. Munell*, Vern. & Scriv. 112.

The court will not grant a commission if defendant denies he has any of plaintiff's lands in his possession, for that would be to admit plaintiff's title in general; but if defendant has admitted plaintiff's title, and the dispute is only about the particular lands, there a commission is proper. *Hp. Ely v. Kenrick*, Bunb. 322.

On a bill to settle the boundaries of a manor, it was decreed, that each party should give to the other a note of their boundaries, and that it should be tried in a feigned issue, and the issue being found for the defendant on the first, second, and third trial, the defendant was not only allowed the costs of all the trials at law, but also the costs in equity, in regard the defendant had no bill, and the plaintiff might have tried it at law, without coming into equity. On a bill of partition, no costs on either side, because it is for the benefit of both parties. *Metcalf v. Beckwith*, 2 P. W. 376. S. P. *Lethulier v. Castlemain*, Sel. Ca. Ch. 60. Dick. 46. PR. COSTS; ISSUE AT LAW.

In this case the court ordered the commissioners to amend their return of a commission to ascertain the boundaries of a manor. *Rouse v. Barker*, Bunb. 251.

A bill does not lie to settle the boundaries of a parish, it being merely a question of law. *St. Luke's v. St. Leonard's*, 1 Bro. C. C. 40. 2 Dick. 550. S. C. nom. *Waring v. Hatham*, more fully stated, 2 Anstr. 395. *Atkins v. Hulton*, 2 Anst. 386.

The court has never entertained bills for establishing boundaries, unless where the soil itself is in question, or where there might have been a multiplicity of suits. The court has no power to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties, as some particular circumstance of fraud, or confusion, where one party has ploughed too near the other, or the like, nor has the court a power to issue commissions to fix boundaries of course. *Hake v. Coopers*, 1 Eden, 331. 2 Cox, 360. Vide *Ross v. Barker*, 4 Bro. P. C. 660. *Hp. of Durham's case*, 12 Vin. 268. That the confusion of boundaries does not *per se* constitute a ground for the interference of the court, see *Speer v. Crawler*, 2 Mer. 410. 418.

Where it does not seem the fault of either party that the lands are confounded, the court directs that the expence of the commission to settle boundaries shall be borne equally, though the interest of one party is less than that of the other; which saves the greater expence of directing the master to ascertain the proportionate value. *Norris v. Le Neve*, 3 Atk. 82. PR. COSTS.

Though in general a person cannot compel another to set forth by what title, and under whom he derives his estate, merely because his lands lie next to plaintiff's; yet on a dispute as to boundaries, or where there is unity of possession, defendant must set forth in his answer how he is entitled, especially where he has not demurred to this part of the bill. *Champernown v. Totness Borough*, 2 Atk. 112.

A bill lies not to ascertain the bounds of a manor in part, unless plaintiff establish by proof what share he claims. *Webb v. Banks*, 2 Eq. Ab. 164.

Bill against land owners to establish a right of 40l. per annua, in lieu of tithes, which by a decree temp. Car. 1. were to be paid out of particular lands to the vicar of C: decreed, a commission to ascertain the value of the land, and the owners' tithes, and

what proportion of the 40l. each tenant ought to pay. *Cuthbert v. Westwood*, Gilb. Eq. Rep. 230.

COMMISSION OF BANKRUPTCY, *see* BANKRUPTCY, VI.

COMMISSION OF LUNACY, *see* LUNACY, IV.

COMMISSION TO EXAMINE, *see* PR. EVID. 28. (1).

## XXIII. COMMISSION OF PARTITION.

*See also* ESTATE, VII.—STAT. C. OF, II. 35.

Exceptions will not lie to the return of commissioners, in a suit for partition, on the ground of inequality of value in the lots. In all cases of improper conduct in the commissioners, a motion must be made to suppress the return. *Jones v. Totty*, 1 Sim. 136. PR. EXCEPTIONS.

Where schedule written on paper was returned with commission of partition, the plaintiff's clerk in court was allowed to engross it on parchment and file engrossment, with return, in analogy to practice where foreign deposition are returned on paper. S. C. 2 S. & S. 219.

Mortgagee not a necessary party to bill for partition. *Sloan v. Sloan*, 8 Price, 518.

Commissioners under a commission of partition, have no lien on the commission for their charges. *Young v. Sutton*, 2 V. & B. 365. LAM.

The general rule as to costs of partition, seems to be, that as the party comes into equity for his own convenience instead of going to law, the rule of law should be adopted, and therefore no costs should be given until the commission, that the costs of issuing, executing, and confirming the commission, should be borne by the parties in proportion to the value of their respective interests; and there should be no costs of subsequent proceeding. *Agar v. Fairfar*, 17 Ves. 533. 558.

And in *Baring v. Nash*, 1 V. & B. 564. held the habit of court is not to give costs to hearing, and to divide expence of conveyance, and partition in proportion to interests.

Under commission of partition to four commissioners, two different returns were made by each two commissioners; the court would not act on either, but directed new commission to five commissioners. *Watson v. Northumberland*, 11 Ves. 153.

Commissioners making different returns, a new commission of partition ordered: but the defendants should not have excepted, but moved to suppress the returns; the deposit therefore ordered to be paid to the plaintiff. *Corbet v. Davenant*, 2 Bro. C. C. 252. See 6 PR. 332. n.

On a bill for partition, the costs of executing the commission, and of all necessary proceedings in the suit, must be paid by the parties in proportion to their interest. *Calmady v. Culmady*, 2 Ves. J. 568.

In *Cornish v. Gest*, 2 Cox, 27; Buller J. says, it is perfectly settled, that each party pays his own costs on a bill of partition, and that without reference to the quantity of interest that each has in the estate. And in *Hyde v. Hindly*, 2 Cox, 408. the M. B. recognised this to be the rule of the court; though he said, that, if a party entitled to forty-nine fiftieths of an estate were to bring the party entitled to the other fiftieth into court for a partition, he should hesitate

much before he made such a defendant pay half the costs.

In *Cornish v. Gest*, sup. the question was, as to the costs of one of the parties, and it was held that they must be paid by his landlord, who was the occasion of his being brought before the court.

If a bill be brought in equity for a partition, there can be no costs given on either side, because it is an amicable suit. *Anon.* 6 Vin. Ab. 332. pl. 31; it being for the benefit of both parties to have their shares in severalty. *Metcalf v. Beckwith*, 2 P. W. 375. In *Nevis v. Levene*, Amb. 237. it is said, that partition was to be at the expence of both parties; but Mr. Beames, (Costs, 48. n.) suggests, that this may be the same case with *Norris v. Le Nere*, 3 Atk. 82. and that, though stated by Amb. as a case of partition, it was a case respecting settling boundaries.

On a bill for partition, there is no occasion to examine witnesses before the hearing. Said *arguendo*, that the commissioners may examine witnesses under the commission *ore tenus*, or take their depositions in writing, as they shall think fit, and found their partition on such evidence. *Meers v. Ld. Shourton*, 1 Dick. 21.

#### XXIV. COMMISSION OF REBELLION.

Where defendants having stood out all process of contempt for want of an answer, at the return of the commission of rebellion, entered an appearance, with a clerk in court, paid the costs of contempt, and obtained the usual order for time to answer; on an application for an attachment against the defendants for not putting in their answers, the court held, that according to the established practice of the court, the defendants were entitled, on paying the costs of contempt, to appear and take the usual orders for time, in the same manner as if they had not been in contempt, but expressed its disapprobation of the practice. *Hill v. Mackay*, 2 Y. & J. 472. But see New Orders, pl. 24.

Though a commission of rebellion may be executed on a Sunday, yet the chancellor said, he should much disapprove of such an execution of it, unless in cases of absolute necessity; and if executed in church the court would punish the commissioners; and they would have been punishable at law. *Anon.* Wy. Pr. Reg. 131. In *Exp. Whitechurch*, 1 Atk. 57., it is held, that a commission of rebellion may be executed on Sunday, though it only issued for want of appearance or answer. *Super.*

By course of court, commission issues to sheriff of Middlesex only. 2 P. W. 657. n.

Defendant refusing to produce deeds, though summoned, the common order under the master's certificate, for a serjeant-at-arms, was granted. Defendant kept himself shut up in his apartments (being a lodger) except on a Sunday. A motion was then made for a commission of rebellion, but refused. *Edwards v. Pool*, 2 Dick. 693.

Defendant being in contempt to a sequestration for want of answer, put in his answer, and it was then discovered that the commission of rebellion and subsequent proceedings were indorsed "at the suit of B" only, whereas the previous proceedings were endorsed "at the suit of B, and others." On application to rectify the mistake, Ld. Ch. said, defendant had acquiesced by putting in his answer, and the first process being right, he would order it. *Bennett v. Button*, id. 135. WATER OF IRREGULARITY.

If defendant be taken under a commission of rebellion issued irregularly, he shall have his costs. *Bailey v. Devereaux*, 1 Vern. 269. Costs.

But court will enjoin action at law founded on such

irregularity of process. *Id.* PR. INJUNCT. AGAINST PROC. AT LAW.

Commissioners of rebellion, where it is on the ordinary process, not only might, but ought to take security, though a serjeant-at-arms could not. *Aliter*, where it is on an attachment or contempt of an order; they ought then to have the body in court at the return. *Jones v. Clement*, Dumb. 50. BART.

And in a case in the exchequer, where the commissioners in a commission issued on income process, refused bail, and took defendant to prison, they were ordered to attend the court with their prisoner on the following Wednesday. *Powell v. Watts*, 1 Fowl. Ex. Pr. 158. *Id.*

Commissioners in a commission of rebellion may take or refuse bail at their discretion; but if they refuse they ought to bring the party up without delay. In a case where a defendant was imprisoned six weeks under such a commission, and bail refused, the commissioner was ordered to be committed, and to pay costs. *Ingleit v. Vaughan*, 1 Ch. R. 261. 1 Dick. 7. S. C. S. P. *Anon.* Toth. 37. *Id.*

Commission of rebellion issued against a party; another appearing before the commissioners as the party, was apprehended by them, but he resisted, and tore the commission to pieces. On motion for attachment, it was granted nisi, though said per Hale, C. B., that the affirming himself to be the party against whom they have the warrant, would not excuse them in false imprisonment. *Thurbane's Case*, Hardr. 323.

A commissioner in a commission of rebellion letting defendant escape, committed till he bring in defendant, or pay the debt. *Sacherrell v. Sacherrell*, Toth. 38. In a similar case commissioners were ordered to be committed till they had paid the debt. *Nelson v. Yelverton*, id. 39, 40. IRREGULARITY OF PROCESS.

Wife taken to prison under commission of rebellion issued against her and her husband, though he was not brought in to answer. Ordered to be discharged with costs. *Rowe v. Bourne*, Choice Ca. in Ch. 171. HUSB. & WIFE.

Defendant was apprehended under a commission of rebellion, when neither the attachment nor proclamation of rebellion had been entered with the register. Contempt discharged with costs, to be paid by the clerk in court who made out the commission. *Hollingsworth v. Harding*, id. 154. See *James v. Phillips*; 1 P. W. 657.

Commission of rebellion for non-payment of costs issued against defendant to J D, who apprehended him, and delivered him to the sheriff for safe custody. On his refusal to deliver him to the commissioner, or to bring him into court, a day was given to him to do so, under pain of 10l. *Frans v. Rics*, Cary, 150.

Defendant this day made his personal appearance on a commission of rebellion, for saving his bond to the commissioners in that behalf. *Brown v. Derby*, id. 82.

#### XXV. COMMISSION OF REVIEW.

See also titles PL. & PR. BILL OF REVIEW.

Commission of review is a matter of grace. *Kennedy v. St. Casilis*, 2 Swan. 328.

Application for a commission of review, to rehear a sentence of the prerogative court, upon a will affirmed by the delegates, referred to the Ld. Ch., who certified against granting the commission, on the ground that the case did not furnish any such debt, with reference to the facts, or to import points of law, as made it expedient to grant the commission, which is prayed of the grace and benignity of the crown, regulated by sound discretion, usually withholding it upon grounds of public expediency, unless there are very cogent

reasons for believing, that the sentence is founded in error, in fact, or in law, or unless the doctrines of law, upon which it is supposed to be founded, are so questionable and important, as to make it clearly fit that they should be considered in the most solemn manner. *Engleton v. Kingston*, 8 Ves. 438.

A different conclusion of fact upon the evidence, not a sufficient ground for the extraordinary relief of a commission of review. *Id.* 471.

The prerogative of granting a commission of review, is to be exercised upon the peculiar circumstances, and the importance of the case. In this instance, a sentence of the court of delegates setting aside a will, the report of the Ld. Ch. was against the application, his lordship concurring upon the evidence, that the will was obtained, or an alteration prevented, by undue influence, and there being no question of law. Upon this proceeding no costs are given. *Exp. Fearon*, 5 Ves. 633.

Commission of review, granted upon a sentence of the court of delegates affirming a sentence of the prerogative court establishing a will. *Matthews v. Warner*, 4 Ves. 186.

As to proceedings on commission of review. *Goodwin v. Giesler*, 1 Ridg. L. & S. 371.

A commission of review is not a matter of right but of favour. *Hill v. White*, Mos. 30.

If five judges are present, and two are against the sentence, it is no cause for a commission of review. *Id.*

The prerogative court and court of delegates in England gave sentence in favour of a will, and likewise the prerogative court in Ireland; but the delegates in Ireland reversed that sentence two years after the English sentence; both sides petitioned for a commission of review. *Id.* Ch. declared he would advise his majesty to grant a commission to review the sentence in Ireland, but to suspend the commission of the first petitioners, till those commissioners had given sentence. *Id.* *ib.*

A commission of review to reverse a sentence given by the court of delegates, is matter of discretion and not of right, and if it be a heard case, the chancellor will advise the crown to deny it. *Franklin's Case*, 2 P. W. 209. Sel. Ca. in Ch. 47.

In this case, a commission was granted pending an indictment for forgery of a will. *Popping's Case*, Sel. Ch. Ca. 48.

#### XXVI. COMMITMENT.

As to the commitment for breach of a decree. Beames' Ord. 5, 6.

Where oath is made of beating or abusing a party serving process, &c. the offender on motion to stand committed, and no examination. *Id.* 204.

So on affidavit by two of scandalous or contemptuous words against court, or the proceedings thereof, the offender to stand committed on motion, &c. *Id.* 205.

A single affidavit sufficient in such case to ground attachment. *Id.*

And if contempt is confessed or proved, party to stand committed. *Id.*

For contempts against the orders or decrees of the court, an attachment first issues on affidavit; then the party is to be examined on interrogatories, and his examination referred; and if on his examination, he confess his contempt, he is to be committed; if not, the adverse party may examine witnesses to prove the contempt, and thereupon if the contempt appear, the party is to be committed; if not, or if the party that pursues the contempt fails in putting in interrogatories or other prosecution, or fails in the proof of the contempt, the party charged with the contempt is to be discharged with costs. Beame's Ord. 34. Ord. Ch. O'Keeffe's Ed. 21., where it is said (in u.) that

the practice is to grant a conditional order for an attachment, and not an absolute order in the first instance.

No commitment on a foreign affidavit, as perjury cannot be assigned. *Musgrave v. Medea*, 19 Ves. 652. FOREIGN AFFIDAVIT.

Defendant being committed for want of answer, his bail under a writ *ne erret nigro*, not discharged. *Staplyton v. Peill*, 19 Ves. 615. NE ERRET NIGRO; BAIL, DISCHARGE OF.

Comparison of handwriting, though lately admitted as evidence, if confirmed by the contents of correspondence, refused in the instance of a single letter, for the purpose of commitment. *Wade v. Broughton*, 3 V. & B. 172. EVIDENCE; HANDWRITING.

For the purpose of commitment under short order to pay money, the persons serving the order must have authority to receive the money. *Wilkins v. Stephens*, 19 Ves. 117. AUTHORITY; PR. SERVICE OF SHORT ORDER FOR PAYMENT.

Commitment for breach of franchise. *Exp. Carpenter*, Dick. 334.

If one be taken up on an attachment, either in process or in execution after decree, on appearance before the register, he is to be discharged, and to answer the interrogatories at large, not in custody; and if he be continued in custody, on motion and appearance before the register, he will be discharged. *Danby v. Lawson*, Pre. Ch. 110. 1 Eq. Abr. 351. pl. 3.

In all cases of commitment there must be an affidavit of service. *Whitehead v. Thistlethwait*, 3 Atk. 618.

A husband and wife committed. *Wheatley v. St. John*, Toth. 40.

Defendant shut up close in the K. B. *Serape v. Steward*, *ib.* Defendant committed to Bridewell. *Pope v. Newman*, *ib.* Defendant and his wife committed for non-performance of a decree. *Walker v. Ardrue*, *ib.*

CONDUCT OF SUIT. See PR. CAUSE, CONDUCT OF.

#### XXVII. CONSENT IN COURT.

See also ACQUESCENCE.—HUSE & WHI, III. 3. (d).  
—PR. DICTRY, 10.

Consent of counsel is to be given upon their own conception of the authenticity of their instructions, and if given is binding on client. *Mole v. Smith*, 1 J. & W. 673. And see *Furnival v. Bogle*, 4 Russ. 142. TIT. BARRISTER, post App. COUNSEL.

CONSOLIDATION OF CAUSES, see PR. CAUSE.

#### XXVIII. CONTEMPT.

See also PR. COSTS, 10. (1).

1. General orders.
2. What constitutes, process, and commitment for.
3. Effect of.
4. Discharge from, and effect of discharge.

##### 1. General Orders.

Contempt, when wilful and extraordinary, may, by express order, be punished by close imprisonment. Beame's Ord. 5.



When persisted in, are to be followed by fines. *Id.* 6.

What cases to be followed by a sequestration. *Id.* 15, 16.

On force and ill words upon serving process, or on words of scandal of court proved by affidavit, party to stand committed. *Id.* 34.

Other contempt against orders are to be followed by attachment, examination, &c. *Id.* 34.

If contempt proved or admitted, party to be committed; if not proved, he is to be discharged, and have costs. *Id.* 34, 35.

Those in contempt cannot be heard, except the court suspend the contempt. *Id.* 35.

Imprisonment upon contempts, where to be discharged. *Id.*

Where not. *Id.*

It is contempt to take in execution, party necessarily attending court. *Id.* 38.

Process upon contempts to be made into the county where party prosecuted resides. *Id.* 61, 199.

Unless in or about London. *Id.*

Prosecutor to use his best endeavour to execute the process, and apprehend the party. *Id.*

Or to pay good costs. *Id.*

And lose the benefit of the process returned. *Id.* 199.

Process in contempts not to issue until affidavit filed. *Id.* 142.

Attachment for not appearing only to issue on affidavit. *Id.* 169.

What that affidavit is to contain. *Id.*

After contempt prosecuted to attachment, &c., no commission to answer but on motion, &c., affidavit, or other good matter. *Id.* 178.

All attachments in process to be discharged on payment, or tender of costs, and filing plea, &c. *Id.* 200.

Party departing without being examined, to stand committed. *Id.* 200.

Then to be executed. *Id.* 201.

The consequence of his clearing or not clearing himself. *Id.*

In contempt for breach of order, &c., grounded on affidavit, the interrogatories not to go out of order, or affidavit. *Id.* 202.

Commission may be taken out to prove a contempt in certain cases. *Id.*

How to be executed. *Id.*

No commission to examine persons in contempt when aged, sick, or being servants, &c. *Id.* 203.

How to be executed. *Id.*

How masters are to certify contempts, and assess the costs thereof. *Id.*

## 2. What constitutes, process and commitment for.

Process of contempt may be resumed at the point at which it had been before cleared. 21 General Ord. 3 April, 1824.

Process of contempt to be made out in the proper county where the party is resident, and the prosecutor to endeavour to procure the first and preceding process to be executed, or else to pay costs. General Ord. 17 November. 1 C. R. 55. Begine's Ord. Ch. 60.

Defendant committed for breach of an injunction after notice of its having been obtained, although the order for the injunction had not been served. *Lansdown v. Rose*, 2 Jac. & W. 264. INJUNCTION, BREACH OF; PR. NOTICE.

Although a reference to arbitration is made under an order of the court, either party may revoke the authority of the arbitrator before the award is made; but it is a high contempt so to do. *Huggett v. Welch*, 1 Sim. 134. ARBITRATION.

The court will not interfere to relieve parties upon the terms of their paying the costs from process of

contempt issued regularly, and without any breach of good faith. *Hutton v. Tipton*, 1 Russ. 323.

The ordinary rule of the court in cases of contempt is, that there shall be a personal examination of the party. *Farquharson v. Balfour*, 1 Turn. & R. 197.

The defendant may be attended by counsel upon his examination before the master. *Id. ib.*

Revocation of the authority of an arbitrator, the submission to whose award has been made a rule of court, is a contempt. *Harcourt v. Ramsbottom*, 1 Jac. & W. 511. ARBITRATION, AWARD.

Infant trustee refusing, ordered to convey by a given day; and if he still refused, plaintiff to move that he stand committed unless cause. *In re Beech*, 4 Mad. 128. INFANT TRUSTEE.

It is a contempt of the great seal for a petitioning creditor to strike a docket at the instance of a solicitor who undertakes to prove the act of bankruptcy, and to guarantee him against any expenses, he may be put to by issuing the commission, and the court, therefore, will not, upon the petition of such a creditor, tax the solicitor's bill of costs. *Exp. Wilson, Buck*, 306. BANKRU. COMMISSION; SOLICITOR & CLIENT; TAXATION OF COSTS.

Persons violating an order are entitled to the benefit of the fact, that the order ought not to have been made. *Drewry v. Thacker*, 3 Swan. 516.

Creditor proceeding against executor at law after notice of decree to account, is so far committing a contempt that, upon application for injunction, the court will refuse him the costs of the further proceedings at law, and the costs of the application. *Curry v. Bowyer*, 3 Mad. 456. DEBTOR & CRED.; PR. DECREE TO ACCOUNT.

After an order for the taxation of a solicitor's bill, staying proceedings at law till the report, the solicitor having died before the report, and no measures having been taken for continuing the taxation, his administrative proceeding at law against the client, was held not to have committed a contempt. *Horditch v. Horditch*, 1 Swan. 53. PR. ORDER TO STAY PROCEEDINGS.

Where, previous to injunction to stay process at law, verdict in ejectment, plaintiff at law had taxed costs, and obtained writ of possession, it is a breach of injunction to sue out attachment for costs; but injunction being improperly obtained, *Ld. Ch.* would not commit for contempt. *Parfington v. Roth*, 3 Mer. 118. INJUNCTION TO STAY PROCEEDINGS AT LAW, BREACH OF.

Commitment for contempt in assaulting the deputy messenger in discharge of his duty. *Ullat v. Halmarricks*, 1 Mer. 302. MESSENGER.

Abusive endeavour to marry a ward of the court a contempt. *Wether v. York*, 19 Ves. 451. WARD OF COURT.

Parties concerned in the marriage of a male infant ward of the court attending by order, the clergyman, appearing ex officio, was discharged with costs out of pocket from infant's estate. The others ordered to attend the master on an inquiry, whether the marriage by false names was valid; and, upon the report, a suit for nullity of marriage at the expense of the infant's estate was ordered, and all parties were restrained by injunction from all intercourse, personal, by correspondence, or otherwise, with the infant. *Id. ib.* WARD OF COURT.

Service of all processes intended to bring party into contempt should be personal if possible. In what case personal service dispensed with. *Hutton v. Faulkner*, 2 Price 2. PR. SERVICE OF ORDERS.

Motion to commit upon a fourth insufficient answer refused, the plaintiff not having a report of the insufficiency of such fourth answer, though the defendant had filed a fifth answer. *Const v. Elers*, Coop. 262. PR. REPORT OF INSUFFICIENCY OF ANSWER.

Defendant may be brought to bar of court for contempt in not answering any day in term. *Wilson v. Bott*, 1 Price, 62.

Defendant brought to bar of court for contempt in not answering, being an infant. Court, on suggestion thereof, will assign him a guardian, and discharge him. *Id. ib.* INFANT; PR. GUARDIAN, APPOINTMENT OF.

Distinction upon contempt by marriage of a ward of court; a person of no property, whose only object is the fortune, is not permitted to touch it, and the whole is put in settlement; otherwise, when the husband of equal rank and fortune makes an equivalent settlement. *Pall v. Coutts*, 1 V. & B. 303. WARD OF COURT; SETTLEMENT BY COURT.

Order that defendant, a prisoner in Newgate under sentence for forgery, being brought up for want of answer, should be turned over to the Fleet, and then carried back to Newgate with his cause. *Moss v. Brown*, 1 V. & B. 78. PRISONER.

Obstructing a messenger in the execution of his warrant is a contempt of the great seal. *Exp. Page*, 1 Rose, 1. BANKCY.; OBSTRUCTING OFFICERS.

As to contumacious obstruction of messenger in bankruptcy how far contempt. See *Exp. Page*, 17 Ves. 59. *Id.*

A purchaser may be committed for disobeying an order to pay in his money. *Lansdown v. Elderton*, 14 Ves. 512. PAYMENT INTO COURT; VEND. & PURCH.

Bankrupt having escaped from prison, was retaken by the gaoler upon his return from examination, surrendering to the commissioners under the lord chancellor's order, giving him liberty to surrender after the time prescribed by the statute: not discharged, nor is the act a contempt. *Exp. Johnson*, 14 Ves. 36. BANKCY. PRIVILEGE FROM ARREST.

Contempt by breach of injunction by persons who were present in court during the motion, though absent when the order was pronounced. *Hearn v. Tummour*, 14 Ves. 136. INJUNC.; BREACH OF.

The practice of personal service as a foundation for process of contempt, dispensed with, where the party has had notice, as upon being in court on making a short order for execution of a decree. *Rider v. Kidder*, 12 Ves. 202. S. P. *De Manneville v. De Manneville*, *id.* 203. PR. SERVICE; PR. NOTICE.

Commitment in the jurisdiction of lunacy for a contempt, by the publication of a pamphlet; ignorance of the contents will not excuse the printer. *Exp. Jones*, 13 Ves. 237.

After a joint answer by husband and wife and amendment of bill, the husband going abroad, the wife being a material party cannot be brought into contempt without an order to answer separately. *Turleton v. Dyer*, 10 Ves. 442. PR. ANSWER; HUSB. & WIFE.

An answer clearly evasive on the face of it, and no reason assigned for it, is to be considered a contempt. *Thomas v. Lethbridge*, 9 Ves. 463. PL. ANSWER.

It is contempt to disturb sequestrator in possession; if sequestration is executed, a judgment creditor, though prior, can only claim to be examined *pro interesse suo*, if not executed he may take execution. *Angel v. Smith*, 9 Ves. 336. SEQUESTRATION; JUDGMENT CREDITORS.

The person to whom costs were awarded in the matter of a bankrupt, brought an action at law, founded on a written undertaking to pay these costs, recovered judgment and levied the money; ordered to acknowledge satisfaction on the judgment to refund the money, and to pay the costs to the defendants at law with the costs of this application. *In mre. Dillon*, 2 Scho. & L. 110.

The messenger under a commission of bankruptcy was put out of possession of property on board a ship, by threatening to throw him overboard, the parties

also using contemptuous language: ordered to give security for answering the bankrupt's interests. An indemnity given against the consequences of a contempt, involves the party giving it. *Exp. Dixon*, 8 Ves. 104. MESSENGER.

Solicitor arrested in his return from attending the master, discharged in the original action and subsequent detainers; the proper course is an order upon all the plaintiffs to discharge him. *Exp. Tedwich*, 8 Ves. 598. PRIVILEGE FROM ARREST; ATTENDANCE BEFORE MASTER.

The court will commit a party guilty of an act of violence in the register's office, as a contempt. *Exp. Burrows*, 8 Ves. 535.

A bankrupt, pending his examination, is protected from an arrest, made by virtue of an attachment issued for a contempt in not lodging money in court, pursuant to a decree; though the form of the process be criminal, yet if it issue to compel payment of a debt, it is an arrest, under the stat. 11 & 12 Geo. 3. c. 8. s. 28. *In mre. M'Williams*, 1 Scho. & L. 169. BANKCY. PRIVILEGE FROM ARREST.

Proceeding on bail bond in Marshalsea court, assigned according to practice of that court to one of its officers, is not a proceeding against a prohibition restraining the original action, so as to incur a contempt. *Iron v. Harris*, 7 Ves. 251. PR. PROHIBITION TO MARSHALSEA COURT, BREACH OF.

Person attending commissioners of bankruptcy under summons, is privileged from arrest; ordered, that parties arresting him and who had lodged detainers against him having notice, should discharge him: the attorney having undertaken to indemnify the officers and they acting thereon, held guilty of contempt, and ordered to pay all costs out of pocket. The chancellor also intimated, that a creditor attending to prove debt, though not under summons, is privileged. *Exp. King*, 7 Ves. 312. BANKCY. PRIVILEGE FROM ARREST; BANKCY. ATTENDANCE ON COMMISSIONERS.

Upon the marriage of a female ward of the court in Guernsey, all parties concerned were ordered to attend, and the husband was committed and restrained from receiving her visits; she also consented to quit her residence with a friend of her husband; under an intimation from the court that she would likewise be compelled so to do: the husband, after some time, was permitted to propose a settlement, but the Ld. Chancellor refused to discharge him on his undertaking to execute the settlement. *Bathurst v. Murray*, 8 Ves. 74.

The master having reported the marriage in Guernsey to be invalid, the court directed another marriage by banns. S. C.

Upon the clandestine marriage of a female ward of court, and a settlement afterwards proposed, Ld. Chancellor would not admit a provision for children of a second marriage by way of absolute settlement, but only a power to the wife to charge by way of appointment to each child, a share not exceeding the share of each child, by the first marriage. The court allowed the husband to have some part of the income independent during coverture, but the wife having, by the proposed settlement, a power of appointment in case of no children, and the husband's surviving the limitation in default of appointment, was directed to be to her next of kin, exclusive of her husband. S. C. *Et vide Stephens v. Savage*, 1 Ves. J. 154. WARD OF COURT; SETTLEMENT BY COURT.

In case of ward of court, marriage in fact is sufficient to ground contempt. *Salles v. Savignon*, 6 Ves. 672. WARD OF COURT, MARRIAGE OF.

Sequestration will issue against defendant for contempt, in not putting in examination to interrogatories before master. *Lupton v. Harcott*, 1 S. & S. 274. PR. SEQUESTRATION.

As also of not producing papers. *Trigg v. Trigg*, id. ib. (n.) *S. P. Detillem. v. Gale*, id. ib.

Plaintiff, in his return from attending a motion against him in the cause, was arrested, and a detainer lodged against him in another action; he was discharged from both: the court examining parties personally, not by affidavit. *Bromley v. Holland*, 5 Ves. 2. **PR. PRIVILEGE FROM ARREST.**

Upon a marriage with a ward of the court under gross circumstances, a proposal for a settlement of the wife's fortune, giving the husband, in the event of his surviving her, a life interest, was rejected, and the court refused even to pay out of the accumulation, his debts, chiefly contracted in the maintenance of his wife and children. *Channing v. Parsonage*, 5 Ves. 15. **WARD OF COURT; SETTLEMENT BY COURT.**

Upon a proposal for a settlement under a commitment for marrying a ward of the court, a power was directed to be inserted, enabling the wife to settle the interest of a moiety of her fortune upon any future husband for life, the husband, on undertaking by his counsel to execute the settlement, was discharged. *Winch v. James*, 4 Ves. 386. **PR. CONTEMPT; DISCHARGE.**

Where order nisi for sequestration is obtained against a privileged person, he is not in contempt unless he neglects to obey the order nisi. *Southbrook v. J. Donagel*, 3 Anst. 647. **SEQUESTRATION; PRIVILEGE.**

Where a party is taken after he has obtained an injunction, but before notice given of it, the detaining him after notice is no contempt. *Willis v. Daniel*, 1 Anst. 36. **ARREST; PR. INJUNCTION.**

A waiver of irregularity in process by appearance does not relate back, so as to bring the defendant into contempt for not appearing in time. *Robinson v. Nash*, 1 Anst. 76. **WAIVER; PR. APPEARANCE.**

It is not the practice to order a party to be committed as a close prisoner for non-payment of money. *Cul v. Mortimer*, 4 Bro. C. C. 89.

Judgment in error for want of an original writ (there having been a petition and order at the rolls for one to issue, but the order not served) the defendants ordered to consent to set it aside, but a commitment for contempt in entering it up, refused. *Pengree v. Jmas*, 2 Bro. C. C. 141.

Personal attendance of a person running off with, and marrying a ward of the court dispensed with, on offering to go before the master and settle. *Green v. Pritzer*, Amb. 602. **PR. ATTENDANCE IN COURT.**

It is a contempt to marry a ward of the court without leave, though the father of the infant be living. *Butler v. Freeman*, Amb. 301. **WARD OF COURT.**

Publisher of advertisement as to proceedings in court, committed for a contempt; but discharged on his submission and full disclosure. *Anon.* 2 Ves. 520. *S. C.* 2 Dick. 795.

Contempt towards commissioners of great seal, punishable by great seal. *Commissioners of Charitable Uses v. Hicks*, Dick. 61.

Party having knowledge of injunction, though not sealed, and proceeding at law, is guilty of contempt. *Pouel v. Follet*, Dick. 116.

Contempt in marrying ward, &c. is of criminal nature, therefore defendant in Marshalsea for debt cannot be charged in custody, but must be brought before court by habeas corpus. *Brandon v. Knight*, Dick. 160.

Defendant in contempt and in custody must be handed over to Fleet before sequestration can issue. *Kinsey v. Yardley*, Dick. 265.

Arrest under chancellor's warrant for contempt of court, good on Sunday. *Exp. Whitchurch*, 1 Atk. 55. **SUNDAY.**

Though contemptuous words were spoken of a subpoena, and the person serving is severally beaten;

yet as these facts were proved by the oath of a single person only, the court would not, in the first instance, order the party to stand committed, but made a rule upon him to shew cause why he should not stand committed. *Anon.* 3 Atk. 219. **PR. EVID.**

In all cases of commitment for contempt there must be an affidavit of service. *Whitehead v. Thistlethwaite*, 3 Atk. 619.

Where a person attends a cause to which he is a defendant, and had notice of the decree by being present when it was pronounced; if he does any act in contravention of it, he is guilty of a contempt, and liable to be committed to the Fleet. *Skip v. Harwood*, id. 564.

After the plaintiff at law had obtained judgment against P, and an award of execution on the *scire facias*, to revive a judgment; P obtains an injunction on the common terms of giving a release of errors, and afterwards brings a writ of error in the exchequer chamber: this is a breach of the order, and a contempt of the court. But the release having been given twelve years previously to the motion, the court would not consider it as a contempt, but directed only that the proceedings on the writ of error should be stayed. *Anon.* id. 298.

The court of equity has no cognizance of a libel, unless it is a contempt by being an abuse of their proceedings. *Anon.* 2 Atk. 469. **LIBEL; JURISDICTION.**

There are three kinds of contempt—scandalizing the court, abusing parties, and prejudicing mankind before a cause is heard. *Id.* 471.

Printing an order for the appointment of a receiver, with a recital of the material facts in the cause relevant to the order, and dispersing it amongst the tenants, is not a contempt, though such a practice not approved of. *Baker v. Hart*, id. 488.

Ld. Hardwicke said the giving away a ward of court at her marriage, as the father, though not an essential thing, yet is a ceremony always required, and he therefore committed the person who did it. *Morr v. Morr*, id. 158. **WARD OF COURT.**

To make persons liable to a contempt, they must be concerned in the original contrivance, and be apprized of her being a ward of court. *Id.*

The clergyman not appearing to have been concerned in the contrivance of this wrongful act, is not guilty of contempt of court. *Id.*

Defendant brought upon *alias pluries habeas corpus* for contempt in not answering bill taken *pro confesso*. *Man v. Parkinson*, 9 Mod. 266. **PR. BILL, PRO CONFESSO; PR. PROCESS.**

Where a submission to an award has been made a rule of court, it is a contempt of that court, to dispute the order, unless they can shew partiality, corruption, or misbehaviour in the arbitrators. *Lingood v. Croucher*, 2 Atk. 396. **AWARD.**

To bring a defendant into contempt in an order of taxation, a copy and the report of the sum at which the bill is taxed, must be left at his house. *Murphy v. Balderston*, id. 114.

A minister of a parish preventing an order for a defendant's appearance, being published pursuant to the 5 G. 2. c. 25., he is punishable for a contempt. *Burton v. Matthews*, id.

Lunacy commission kept back for several years, and not acted upon, is a contempt, and will be dismissed with costs. *Anon.* id. 52. **LUNACY, COMMISSION OF.**

Husband compelling wife to answer by menaces, it is a contempt. *Exp. Halsam*, id. 50.

Habeas corpus for contempt; high bailiff discharged defendant under insolvent act: high bailiff committed for contempt. *Kendal v. Barron*, Dick. 89.

Marrying an infant ward of the court, is a contempt, though the parties concerned in such marriage

had no notice that the infant was a ward of the court. *Herbert's Case*, 3 P. W. 116. **WARD OF COURT; NOTICE.**

Acts of the court as the commitment of a wardship, and in a cause depending to be taken notice of by every one at his peril. *Id. ib.*

Suing the bail below pending a writ of error in parliament, is a contempt and breach of privilege. *Throgmorton v. Church*, 1 P. W. 685. **WRIT OF ERROR.**

Advertisement inserted in the public prints, that whoever shall discover and make legal proof of the marriage in question, shall have 100*l.* reward: adjudged a contempt of the court, and the party procuring it committed as tending to perjury. *Pool v. Sachererel*, id. 675.

Order of commitment for contempt; defendant not found, sequestration issued; return *nulla bona*; liberty given to execute above warrant. *Deardan v. Halsey*, Dick. 31.

If one marries a lunatic who is under the care of the committee of the court, this is a contempt for which the person marrying may be committed, and marriage is no supersedeas of the commitment so as to take him or her out of the custody of the committee. *Mrs. Ash's case*, Prec. Chan. 203. **LUNATIC, MARRIAGE OF.**

Where a man is to perfect his answer upon interrogatories, or to be examined for a contempt, although the rule of court be that he shall be examined in four days or stand committed; yet if the party be in the country he shall have a commission to take his examination. *Anon.* 1 Ven. 187. **PR. COM. TO EXAMINE DEFENDANT ON INTERROGATORIES.**

Though a party may revoke a submission to law, made a rule of court, yet the court will regard it a contempt, and issue an attachment. *Hyde v. Pettit*, 1 Ch. Ca. 185. S. C. 2 Freem. 133. **AWARD.**

So, if the award differs from the submission, it is void both at law and in equity. *Id.* **ARBITRATION AND AWARD, REVOCATION OF SUBMISSION.**

Process of contempt cannot issue against a peer. *Pheasant v. Pheasant*, 2 Vent. 342. **PIER.**

A prosecutor may take out a commission to prove a contempt, and the contemnor can name but one commissioner, &c. cannot examine witnesses; but may cross-examine the prosecutors; but the court, on application, will give him leave to examine witnesses to some special points. *Anon.* Mos. 312.

An attachment being taken out against the defendant in Ireland; since he could not be examined in person to the contempt, a commission was granted into Ireland to examine him. *Anon.* id. 85. **PR. COM. TO EXAMINE PARTY DEFENDANT.**

All process of contempt must issue out in course to a serjeant at arms before an injunction or writ of assistance, to put the party in possession under a decree. *Vennables v. Foyle*, 1 C. R. 178. **PR. SERJEANT AT ARMS.**

One witness sufficient to prove a contempt. *Sands v. Knighton*, Toth. 41.

Upon an ordinary contempt, a commission was had by the plaintiff, who proved the contempt, positively by one witness. The defendant alleged the process was by mistake served on a wrong person, and prayed a commission to examine to it, and it was granted. *Hammond v. Shelley*, 2 C. C. 100. **PR. EVIDENCE.**

A party ordered to be examined touching his contempt. *Harvey v. Harvey*, 2 C. C. 82.

Though an injunction be irregularly obtained, it ought to be obeyed, or the party is in contempt. *Woodward v. King*, 2 C. C. 203. *Partington v. Booth*, 3 Mer. 149. **PR. INJUNC., BREACH OF.**

There can be no contempt without service of the

subpoena. *Thomson v. Baskerville*, 3 C. R. 215. **PR. SUBPOENA, SERVICE OF.**

An attachment for words against the court, uttered upon service of an order. *Witham v. Witham*, 3 C. R. 41.

No contempt for disobedience of an order, unless the party is served with a writ of execution of it. *Mayer v. Peacock*, 3 C. R. 22. **PR. SERVICE OF ORDER.**

Attachment against defendant, and subpoena against one maltreating officer serving writ on defendant. *Rose v. West*, Cary, 38.

Defendant appearing gratis, attachment being out, was committed. *Richers v. Stillman*, id. 41.

Defendant's attorney ordered to stay proceedings at law. Defendant proceeds and gets judgment. Injunction granted to bring money levied into court, and defendant to answer contempt. *Segewick v. Redman*, id. 44.

A man committed for terrifying a witness, about to be examined. *Patridge v. Patridge*, Toth. 40.

### 3. Effect of.

Defendant demurring after process of contempt issued, demurrer ordered off file. *Mellor v. Hull*, 2 S. & S. 321. **DEMURRER; PR. TAKING PLEADINGS OFF FILE.**

Defendants in contempt for want of answer, an injunction having been granted till answer, are not in a situation to make any application to court to cut down or dissolve the injunction, before answer put in. *McCallum v. Beale*, 10 Price, 130.

Defendant being in contempt for want of answer, puts in one, and obtains order for discharge, upon payment or tender of costs of contempt: costs tendered, but not accepted. Answer excepted to, and referred, and, after warrants to proceed before master, defendant submits to exceptions; plaintiff did not proceed immediately on former contempt, but waited for answer to exceptions. Held, defendant entitled to order for time to answer exceptions. *Cox v. Champneys*, 6 Mad. 262. **WAIVER; PR. EXCEPTIONS; PR. TIME TO ANSWER EXCEPTIONS.**

Party in contempt obtaining an order for commission to take "plea, answer, or demurrer," may put in a plea. *Barber v. Crawshaw*, 6 Mad. 284. **COMMISSION; PLEA.**

Under a decree to account made upon taking the bill *pro confesso* against a defendant who has appeared but not answered, he cannot attend the master without the leave of the court; but leave to attend given, and the sequestration discharged, upon payment of the costs of the contempt of the suit. *Heys v. Heys*, 1 Jac. 49. **PR. ATTENDANCE BEFORE MASTER; PR. DECREE, PRO CONFESSO.**

An attachment sealed before, though not executed till after, a party is in contempt, is irregular. *Froud v. Lawrence*, 1 Jac. & W. 657.

Defendant in contempt for want of answer, may, without consent, move for a commission to take same. *Mainwaring v. Wilding*, 3 Mad. 41. **PR. COM. TO TAKE ANSWER.**

Special injunction to restrain distress will be granted before answer, if defendant is in contempt for not answering. *Heming v. Emms*, 1 Price, 386. **DISTRESS FOR RENT; PR. INJUNC. SPECIAL.**

Mortgagor, defendant to a bill of foreclosure, being in contempt, cannot obtain the reference, on motion, under the stat. 7 Geo. 3. c. 20. *Hewitt v. McCartney*, 13 Ves. 560. **MORTGAGE, STAT. C. OF; REFERENCE.**

One defendant may obtain the usual order to speed the cause, by motion to dismiss for want of prosecution, though the other defendant stands out process of contempt, and it can be of no use to go to a hearing

without him. *Anon.* 9 Ves. 512. *PR. SEEDING CAUSE.*

General rule, that parties must clear their contempt before they can be heard. *Voules v. Young*, 9 Ves. 172. *Beame's Ord.* 35.

A demurrer may be put in after the time for answering is out, provided a process of contempt has not issued against the defendant. *Sowerby v. Warder*, 2 Cox. 268. *PR. DEMURRER WHEN PUT IN.*

Injunction nisi not dissolved by putting in answer, unless costs of contempt be paid. *Hall v. Darney*, Dick. 289.

Where defendant prevents plaintiff rejoining by standing out processes of contempt, plaintiff is entitled to examine *de bene esse*. *Cotney v. Athill*, Dick. 355.

Defendant in contempt for want of answer, puts in insufficient one, plaintiff may go on with process where he left off. *Bronfield v. Chichester*, Dick. 379.

Defendant, before praying time to answer, or being in contempt, restrained from selling diamonds. *Toninus v. Prout*, Dick. 387.

On question whether defendant could be heard before his contempts were cleared, though he offered to pay all plaintiff's demands, ordered, that he should bring before master, principal, interest, and costs, and then be at liberty to move to discharge. *Sequestration. Id. Wenman v. Osbaldiston*, 2 Bro. P. C. 276. *MOTION TO DISCHARGE SEQUESTRATION.*

Upon a decree for payment of money, after a writ of execution, and an attachment returned, court refused to give leave to defendant to be examined, unless he gave security to abide the decree. *Roper v. Roper*, 2 Vern. 91. *PR. DECREE; PR. EXAM. OF DEF. ON INTERROGATORIES.*

One of the defendants is in contempt, and stands out to a sequestration, and the cause is heard against the other defendants; yet he may come in and answer, and the cause may be heard again as to him. *Phillips v. Dk. of Buck*, 1 Vern. 223.

If the defendant is in contempt for not answering, and, on motion, he obtains time to answer, if it be not expressly ordered that all contempts in the mean time shall be staid, the plaintiff may go on and prosecute the defendant for not answering. *Anon.* 1 Vern. 104. *PR. ORDER FOR TIME TO ANSW.*

A party may move to discharge an order, though he is in contempt for not obeying it. *Hill v. Hisel*, Mos. 258. *PR. ORDER, DISCHARGE OF.*

#### 4. Discharge from, and effect of discharge.

Persons in custody for contempt of courts of equity for non-payment of money or costs, shall be entitled to the benefit of the insolvent acts. 49 G. 3. c. 6. s. 1. *INSOLVENT DEBTOES.*

A party who has taken the benefit of the insolvent act is entitled to be discharged from custody without payment of costs of contempt cleared previously, such costs having been included in his schedule of debts. *Frans v. Williams*, 1 McClell. 577. *PR. COSTS OF CONTEMPT.*

Contempt for want of answer, may, after answer is filed, be discharged by waiver on the part of plaintiff. *Huskins v. Lloyd*, 1 S. & S. 393. *WAIVER; ANSWER.*

The defendant is not to be discharged out of custody upon the master's report of the sufficiency of his examination, till the plaintiff has seen the examination. *Farguharson v. Balfour*, 1 Turn. & R. 202.

Defendant, to clear his contempt, must not only tender costs, but must obtain order to discharge contempt. *Green v. Thompson*, 1 S. & S. 121. *PR. COSTS.*

Where person has been in custody for any given time under attachment for contempt in disobeying injunction, he may be discharged, if the portion of

his imprisonment, be shown to be commensurate with degree of offence, on payment of costs of contempt, though it be opposed by plaintiff. *Adlard v. Smith*, 6 Pri. 321.

Party in custody for contempt in disobedience of process of court, will not be discharged without undertaking not to bring action for arrest, when by his own devise the process had been served in point of fact on another person of the same name. *Bland v. Bulkley*, id. 34.

When defendant is in custody for a contempt in not putting in an answer, and he puts in one which plaintiff accepts, plaintiff cannot recover costs under process of contempt, and sensible he loses them. *Conist v. Ebers*, 1 Mad. 530. *COSTS; WAIVER.*

The application to discharge must be to the court of which the proceeding is a contempt. *Last's case*, 2 V. & B. 374. *PRIVILEGE FROM ARREST.*

Defendant in custody under an attachment, and a messenger ordered, discharged on putting in his answer; but on exceptions allowed the plaintiff, not having accepted the costs, resumes the process where it stopped; if costs were accepted, he begins again. Costs on motion against settled practice. *Hill v. Turner*, 2 V. & B. 372. *PR. COSTS.*

By accepting answer, immediate right of costs under process of contempt are waived. *Smith v. Bladfield*, id. 100. *PR. COSTS; WAIVER.*

Punishment for contempt in marrying ward of court is discretionary, and not dispensed with from length of time. Rule as to settlement. *Bull v. Contry*, 1 V. & B. 292. *LENGTH OF TIME.*

Defendant in custody, for want of his examination, discharged immediately on putting it in; but if on reference, it proves insufficient, the plaintiff not having accepted the costs, may proceed from the last process. *Bonus v. Flack*, 18 Ves. 287. *PR. PROCESS; PR. COSTS.*

Defendant taken upon the process for want of an answer, on putting in an answer is entitled to be discharged without waiting for the report that it is sufficient. *Waters v. Taylor*, 16 Ves. 418. *PR. ANSWER.*

Though generally a party cannot be heard until he has cleared his contempt, a step taken by the other party waives the contempt for all purposes, except the right to costs in the cause, not to be obtained by process of contempt. Acceptance of the answer, therefore, a waiver of the contempt, for the purpose of enabling the defendant to dismiss the bill for want of prosecution. *Anon.* 15 Ves. 174. *PR. ANSWER; PR. BILL, DISMISSAL OF; WAIVER.*

Defendant having put in three insufficient answers in custody for want of fourth, is entitled to discharge on filing of fourth answer. *Balfour v. Farguharson*, 1 S. & S. 72. *ABIL. 1 Turn. & R. 184.* See also *Bailey v. Bailey*, 11 Ves. 151. *PR. ANSWER.*

Upon a proposal for a settlement under a commitment for marrying a ward of the court, a power was directed to be inserted enabling the wife to settle in interest of a moiety of her fortune upon any future husband for life, the husband, on undertaking by his counsel to execute the settlement, was discharged. *Winch v. James*, 4 Ves. 386. *PR. CONTEMPT; WARD OF COURT; SETTLE.*

In general the amendment of a bill puts an end to all process of contempt for want of an answer, and the court will not allow a plaintiff to amend without prejudice to a sequestration, notwithstanding he undertakes not to require any answer to the amendments. *Nymonds v. Ds. Cumberland*, 2 Cox. 411. *AMENDMENT; SEQUESTRATION.*

Defendant in contempt discharged on putting in an answer and depositing the utmost sum to which costs would amount, subject to taxation. *Broughton v. Martyn*, 4 Bro. C. C. 296.

Order that the master may proceed on exceptions to an answer put in by a person in custody for want of an answer *de die in diem*, but the defendant cannot be detained in custody, and the bills of costs must be delivered immediately. *Wallop v. Brown*, 4 Bro. C. C. 212.

An insufficient answer does not entitle defendants to be discharged from process of contempt. *Id.* 223. (n). ANSWER, INSUFFICIENT.

There must be a reference to the master for a proper settlement, before contempt for marrying a ward of court can be cleared. *Stevens v. Savage*, 1 Ves. J. 154. WARD OF COURT; PR. REFERENCE; SETTLEMENT BY COURT.

Estate ordered to be sold for debts; money raised under sequestration paid into court, though contempt cleared. — *v. Bennett*, 1 Ves. J. 89. PR. PAYMENT INTO COURT; PR. SEQUESTRATION.

Defendant, in custody for want of further answer, putting it in, will be discharged on paying the costs of the contempt. If that answer or any further one proves to be insufficient, the plaintiff may resume the process where it left off. *Child v. Brabson*, 2 Ves. 110. S. P. *Anon.* 1 Ch. Ca. 238. *Id.* *Abergavenny v. Ly. Abergavenny*, Kel. 5. PR. INSUFFICIENCY OF ANSWER.

Affidavits of defendant's illness and inability to put in answer are admissible evidence on which to ground application to discharge process of contempt and receive answer, though the suit be instituted in Ireland and the affidavits sworn in England. And though a decree has been taken *pro confesso* in consequence of contempt. *Benson v. Vernon*, 3 Bro. P. C. 626. PR. EVIDENCE.

Where defendant is in contempt, and puts in insufficient answer, and plaintiff accepts costs, contempt is waived; and to resume contempt, process must issue *de novo* from its commencement. Otherwise if costs had not been accepted. *Huistwell v. Grainger*, 1 Eq. Ab. 351. WAIVER.

The defendant is in contempt to a seigneur at arms, for not answering, and then puts in an insufficient answer. If the plaintiff's clerk in court accepts the costs, it purges the contempt; but if the costs be not accepted, the plaintiff may go on in his process of contempt where he left off for a further answer. *Anon.* 2 P. W. 481.

A general act of pardon, though with an exception of contempts, stands to pardon contempts in marrying infant wards of a court of equity. *Phipps v. Anglesea*, 1 P. W. 696. PARDON.

Witness unable to travel discharged of contempt. *More v. Wreham*, Cary, 99.

The defendant committed to the Fleet for not performing a decree and a sequestration, and the plaintiff put in possession of the lands, shall not be discharged till the lands are assured to the plaintiff, or money and damages satisfied. *Perryman v. Denham*, 1 C. R. 152.

If the contempt be pardoned, the defendant is *rectus in curia*, and may proceed as if no process had issued. *Anon.* 1 C. C. 238.

An attachment after a decree for dismissal is in nature of an execution at law, and a general pardon may pardon the contempt but not the debt. *Bartram v. Dannel*, Rep. T. Finch, 253.

Contempt discharged by a general pardon. *Anon.* 1 C. C. 238.

#### XXIX. COPIES.

See also PR. EVIDENCE 15.

The.

Copies in chancery shall contain fifteen lines. Beame's Ord. 39. 108. 186.

How to be written. *Id.* 80. 108. 186.

How to be subscribed. *Id.* 30. 108. 186. 241.

Of pleading, not to be made before they are filed, and the hand of six clerk put to them. *Id.* 110. 140. 186. 240.

Not to be made of depositions or answers, until returned to six clerk, &c. *Id.* 111.

Not to be delivered, &c. until signed by the proper officer. *Id.* 240.

Nor close copy made, until office copy paid for. *Id.*

Nor used, unless under hand of proper officer. *Id.* 241. &

Exception. *Id.*

When signed by six clerk, he is to write thereon the date, number of sheets, and subscribe same. *Id.*

No copy of depositions to be used, not under hand of proper officer. *Id.* 301.

No copies of records or proceedings in other courts to be entered as read on hearing in chancery, unless such copies be first proved in open court as exhibits on such hearings, in consequence of an order made in that behalf. *Ord. Ch. Irel.* 27th June, 1800. O'Keefe's Ed. 89.

Defendant, sued as executor, admitted to have certain accounts, &c. in his hands, which he was ordered to deposit for plaintiff's inspection. Afterwards a reference was directed for taking the accounts, to make out which, defendant applied to be allowed to take copies of the accounts, which was refused at the office, unless he would pay for office copies: Held, on motion, that he was entitled to this liberty as his right. *Gabbit v. Currendish*, 2 Anst. 546.

Application for a copy of interrogatories relating to a contempt, denied. *Welsh Copper Co. v. Moore*, 1 Dick. 335.

#### XXX. COSTS.

See also BANKRY. XIII. 9.; XVII. 6.—PR. ARREST & REVIVOR, 2. (b).—PR. ATTACHMENT, 10.—STAT. C. OF, II. 16.—VEND. & PURCH. VIII.

1. Generally.
2. How lost.
  - (a) Generally.
  - (b) By fraud.
  - (c) By tender of demand.
3. Apportionment and contribution.
4. From what fund.
5. Payment and tender, when necessary, and effect of.
6. Security for.
7. Setting off.
8. When stayed by appeal.
9. Taxation.
  - (a) Generally.
  - (b) Costs of taxation of costs.
  - (c) Effect of, and of costs not being taxed, and of appeal, rehearing and revivor for.
  - (d) Where party shall pay taxed costs, or only fixed costs.
  - (e) Whether costs in cause, or extra costs.
  - (f) Allowances beyond taxed costs, and of costs, whether as between party and party, or attorney and client.
10. In cases of — on suits for — or by or to.
  - (a) Abandonment after notice to appear, &c.
  - (b) Account.
  - (c) Amendment.

- (d) Appeal.
- (e) Attorney-General and Crown.
- (f) Bankrupt and insolvent.
- (g) Bank of England.
- (h) Bill, dismissal of.
- (i) Cause standing over, or struck out of paper.
- (j) Charity.
- (k) Commissioners of bankrupt.
- (l) Contempt.
- (m) Creditors.
- (n) Cross cause.
- (o) Decree for administration of assets.
- (p) Demurrer or plea allowed, submitted to, or overruled, or ordered to stand for answer.
- (q) Discovery.
- (r) Dower.
- (s) Executors, trustees, committees, &c.
- (t) Exceptions allowed or overruled.
- (u) Hair at law.
- (v) Husband and wife.
- (w) Incumbrancers, mortgagors and mortgagees, equitable and legal.
- (x) Infant, pr. ami, and guardian.
- (y) Insufficiency of answer.
- (z) Interpleader.
- (aa) Irregularity of process.
- (bb) Issues at law.
- (cc) Lunacy.
- (dd) Parties improperly joined, or served with notice, &c.
- (ee) Pauper.
- (ff) Perpetuating testimony and commission to examine.
- (gg) Proof of debts before master.
- (hh) Receiver.
- (ii) Review.
- (jj) Solicitor.
- (kk) Specific performance and sales judicial.
- (ll) Witness.

#### 1. Generally.

Solicitor for two defendants will not be allowed separate costs of answer for each, unless properly incurred. 27th General Ord. 3d April, 1828.

Every warrant for attendance before the master shall be peremptory, and solicitor not attending, shall be disallowed his fee, or attending more than one hour, it shall be increased in proportion. 59th General Ord. 1b.

Where two counsel are proper, the costs of retainer to be allowed, though both be of outer bar. 33d General Ord. 1b.

Sworn clerks and waiting clerks shall only receive fees when they attend and their attendance is necessary. 37th General Ord. 1b.

Where a plaintiff, by the present practice of the court may obtain that relief by petition, for which a supplemental bill was formerly necessary, and prefers the latter course, the supplemental bill is not demurrable; but the proceeding will be taken into consideration on the question of costs. *Davies v. Williams*, 1 Sim. 5. PL. DEMURRER; PL. SUPPLEMENTAL BILL.

The costs of documentary evidence not read, nor entered as read, were disallowed. *Stuart v. Greenall*, 1 McClell. 705. S. C. 13 Price, 755. PR. EVIDENCE.

Devisee cannot retain his own debt in priority to costs. *Lovnes v. Stotherd*, 1 S. & S. 461. DEVISEE; RETAINER.

Erasures in answer and in jurat, and alterations in commission do not furnish ground for taking answer

off file. Motion refused without costs. *Gwynn v. Bodmer*, 9 Price, 320. PR. ANSWER, ERASURE IN; PR. TAKING PLEADINGS OFF FILE.

Although, in a charity case, the proper relief may be granted, though not prayed for, yet the state of the record is to be considered with reference to the question of costs. *Att. Gen. v. Hartley*, 2 Jac. & W. 370. CHARITY.

The answer of a peer upon his protestation of honour may be read on the question of costs. *Dawson v. Ellis*, 1 Jac. & W. 524. EVIDENCE; PEER.

In creditor's suit, the plaintiff's solicitor having refused to attend the accountant-general with master's report, unless a contribution was made to him of one shilling in the pound. On motion, he being ordered to attend on payment to him of the fee of six shillings and eight pence for attendance with each creditor, and his claim disallowed, the costs thereof were allowed to such as had tendered him the six shillings and eight pence, but not otherwise. *Shortley v. Selby*, 5 Mad. 448. TENDER.

Assignees who are brought before the court upon supplemental bill may be liable to costs of whole suit, *Whitcomb v. Minchin*, 5 Mad. 91. ASSIGNEES; PR. SUPPLEMENTAL BILL.

Here there is great doubt in a question, costs will not follow the decree. *Deurden v. Ld. Byron*, 8 Price, 465.

Where plaintiff's bill in equity is ancillary to his legal title, and he fails at law, though defendant benefited by bill, plaintiff must pay costs in equity. *Menrick v. Whishaw*, 4 Mad. 272.

Right of defendants under a decree reserving costs, to a continued representation of all the original plaintiffs, (though not necessary parties,) as a security. *Blackburn v. Jepson*, 3 Swan. 138. PL. PARTIES.

Answer, though not evidence in cause, may be read as to costs. *Howell v. George*, 1 Mad. 13. EVIDENCE; ANSWER.

Protection of commissioners of bankruptcy to bankrupt from arrest granted at a private meeting on the application of the bankrupt, the day after he was served with notice, and before the first public meeting, good order on the plaintiff in the action to discharge the bankrupt, and the officer to pay the costs. *Exp. Wood*, 18 Ves. 1. S. C. 1 Rose, B. C. 46. BANKRUPT, PRIVILEGE FROM ARREST.

No general rule as to costs, the court must be governed by circumstances. *Skirrett v. Athy*, 1 Ball & B. 435.

Costs in equity in the discretion of the court, upon the circumstances not following the event by a positive rule, as at law, though *prima facie* that is the course, and circumstances must be brought forward by the party who fails. In this instance, a bill by a vendor for a specific performance the report being against the title, the bill was dismissed with costs upon the circumstances, the purchaser having taken possession at the instance of the vendor representing the title to be perfect, though possession taken generally is of weight as to costs. The court looks at the answer upon a question of costs. *Vancouver v. Bliss*, 11 Ves. 458.

Costs are entirely in discretion of court. *Bromley v. Holland*, 7 Ves. 28.

Defendant ordered to deposit books in the hands of the deputy remembrancer for inspection of other party, and afterwards ordered to account, in doing which he must refer to these books, is not obliged to pay the fees of the office in taking copies. *Gabbitt v. Cavenish*, 2 Anst. 547. PR. EVIDENCE.

After decree for debt and costs, attachments may be taken out for each separately. *Frazer v. Thoburn*, 2 Anst. 380. PR. ATTACHMENT.

A sum certain given for costs where small. *Wilding v. Wilding*, 4 Bro. C. C. 100.

Exceptions are not regularly taken to the master's

report for costs only, but should be by petition. *Pitt v. Mackreth*, 3 Bro. C.C. 321. PR. EXCEPTIONS TO MASTER'S REPORT: PR. PLUTION.

A made a will, giving his personal estate to his five infant children by his first wife: he afterwards marries a second wife, by whom he had one child, who died soon after his birth; on the death of A, the executors attempted to prove the will, but were opposed by the widow on the ground that the will was revoked by the second marriage: a deed was then executed, by which the wife agreed on certain considerations to permit the will to be proved. The widow having married a second husband, they filed their bill in this court to set aside the deed, as having been obtained by fraud or surprize, and to have the assets administered, as in the case of an intestacy. This court directed the parties to proceed in the prerogative court, and reserved further directions. The prerogative court decided in favour of the will. The plaintiff appealed to the delegates, but afterwards agreed to abandon the appeal on payment of 200*l*. This court then directed the accounts of the personal estate, &c. Notwithstanding the plaintiffs failed in setting aside the will, yet as, in any case, it was necessary that the accounts should be taken in this court, the plaintiffs had their costs out of the fund. *Thompson v. Sheppard*, 2 Cox, 161.

Application for costs refused, there being no bill in court. *Eip. Proctors*, Dick. 634.

Bill dismissed, costs given against one defendant, and plaintiff to pay other defendants theirs. *Guest v. Harris*, 1*l*. 644.

Sequestration improperly executed; therefore, though bill to be taken *pro confesso*, and sequestrators to account, costs were reserved generally. *Heater v. Waterman*, 1*l*. 335.

Costs in equity are discretionary, and given to the time of the decree at law, *unless directed by the court*, and wait until the final judgment. *Jones v. Carter*, 2 Atk. 409.

Demurrer overruled, and costs paid. On re-arguing, demurrer allowed; costs to be refunded. *Oats v. Chapman*, Dick. 143. S.C. 1 Ves. 512. 2 Ves. 100. DISMISSAL.

Voluntary release by a party to his opponent not to defeat the clerk in court of his lien for costs. If the suit had ended in a *bona fide* compromise for a reasonable consideration paid, it would have been otherwise. *Anon.* 2 Ves. 25. REFUSAL; SOL. & CLERK.

It is conscience and not an authority which directs the court in giving costs. *Corp. of Bedford v. Lenthall*, 2 Atk. 552.

Commissioners of charitable uses have no power under 13 Eliz. c. 4. to give costs, but this court can do it. *Aulet v. Dodd*, 2 Atk. 249. COUNTERY.

As it may accelerate a decree, the court postpones the consideration of costs till a cause comes back from the master. *Scarborough v. Birkin*, 2 Atk. 111.

Plaintiff may apply for costs when defendant gives unnecessary trouble in carrying a decree into execution. *Id.*

In equity as well as at law, costs follow the justice of the demand. *Roberts v. Kiffin*, 2 Atk. 113.

Exemplary costs disused. *Waltham v. Broughton*, 2 Atk. 43.

Decree for costs necessarily follows a decree for principal and interest. *J. L. Comp. v. Ekins*, 2 Bro. P.C. 382. S.P. *Gambon v. Shaw*, 1 Ves. 339.

Solicitor brings a bill for his fees: plea of statute, that the plaintiff had not signed his bill, good. *Norris v. Bacon*, 1 Vern. 312. PL. PETIT; LITIGATOR & CLERK, SIGNATURE OF BILL OF COSTS.

A bill may be brought for solicitor's fees only, if for business done in this court: and so it may where the business is done in another court, if it relates to

another demand made by plaintiff in this court. *Rumelagh v. Thornehill*, 1 Ves. 203. 2 Ch. Ca. 153. S.C. SOL. & CLERK.

Billet served, and no bill in court, costs awarded. *Porter v. Coleman*, Cary, 100. *Cook v. Baker*, 1*l*. 83.

Costs allowed for want of bill, though billet lost. *Id.* 107. *Brown v. Stoyek*, 1*l*. 109.

No costs allowed on disclaimer. *Read v. Hawstead*, 1*l*. 109.

Costs allowed, defendant being on commission of rebellion. *Morgan v. George*, 1*l*. 1*h*.

Costs for want of bill. *Parsons v. Hilford*, 1*l*. 75.

Costs given against plaintiff and clerk who made process before bill in court. *Garneton v. Bradwell*, 1*l*. 33.

Subpoena served at suit of persons unknown, and no bill in court: server pays costs. *Anon.* 1*l*. 64.

Plaintiff requiring defendant to appear, shewing no writ and no bill in court, pays twenty shillings costs. *Syers v. Cotts*, 1*l*. 68.

Defendant appears, no bill in court, subpoena is lost by him, therefore no costs, but attachment is stayed. *Parry v. Morgan*, 1*l*. 69. Sed. vid. 1*l*. 74.

Costs for want of bill. *Grey v. Gurney*, 1*l*. 69.

Costs to solicitor of defendant, on affidavit of being served with process, and of defendant's impotency to attend, no bill being in court, allowed against plaintiff. *Griffith v. Prestwick*, 1*l*. 72.

Costs for want of bill, upon showing writ, but not delivering it. *Symons v. Pinsonby*, 1*l*. 72.

Costs for want of bill, though subpoena lost, yet allowed. *Metham v. Fouchant*, 1*l*. 74. Sed. vid. *Parry v. Morgan*, 1*l*. 69.

## 2. How lost.

(a) Generally.

(b) By fraud.

(c) By tender of demand, &c.

## (a) Generally.

Where plaintiff's solicitor, with notice, suffers defendant to satisfy plaintiff's demand, without taking effectual security for payment of his costs, the court will not suffer him to proceed in suit against defendant for recovery of them. *Morse v. Cook*, 1 M'Cl. 211. S.C. 13 Pri. 437. SOL. & CLERK, LIES.

If claim of plaintiff in title suit be larger than he can support, the court will give costs against him for the excess, up to the time of his giving notice of abandoning any part of the excessive demand made by the bill. *Wolley v. Brownhill*, 13 Pri. 500. S.C. 1 M'Cl. 317. TITLES.

Objection for want of parties not being taken till hearing, defendant does not get his costs. *Court v. Egan*, 1 S. & S. 106. PL. PARTIES.

The messenger having defendant in custody under an attachment, and having afterwards let him go at large upon his undertaking to pay the costs, cannot use the process to compel payment. *Jenkins v. Sandys*, 1 Jac. 233. PR. MISTAKE.

Where defendant is in custody for contempt in not putting in an answer, and he puts in one which plaintiff accepts, plaintiff cannot, under process of contempt, recover costs; and semble, he loses them. *Cox v. Ebers*, 1 Mad. 530. WAIVER; CONTEMPT.

No costs where the caveat was not unreasonable. *Exp. For. IV. & B. 67. PATENT; CAVEAT.*

Nor where question fairly raised. *Stains v. Morris*, 1 V. & B. 8.

Costs not given on a motion, unless mentioned in the notice. *Munn v. King*, 18 Ves. 297. PR. NOTICE OF MOTION.

Bill by representatives of annuitant for arrears, brought twenty-two years after death of annuitant,



dismissed with costs. *Smallman v. —*, 2 Atk. 71. ANNUITY, ARREARS.

Where bond set aside against public policy, at suit of the *particeps criminis*, no costs are given: secus, where at suit of an innocent party. *Debenham v. Or*, 1 Ves. 277. BOND AGAINST PUBLIC POLICY.

If an obligee will put in a bad answer, and insist on more than what is really due, he shall lose his costs in equity, though entitled to them at law. *Forward v. Duffield*, 3 Atk. 555. OBLIGOR & OBLIGEE.

If a defendant disclaims generally, and the plaintiff replies to her answer, and serves her with a subpoena to rejoin, she is entitled to have costs against him for the vexation. *Williams v. Longfellow*, 3 Atk. 582. PR. VEXATION.

The master, to whom it was referred, reported the proceedings under a commission for examination of witnesses irregular; on exceptions, the court thought them regular, and allowed the exceptions, and the party who succeeded had his costs of the application. *Ld. H.* discharged the order for costs, because the plaintiff's was not a vexatious proceeding; but in the master's opinion, well founded; and the rule is not to give costs, but where no just ground appears for the proceeding. *Anon.* 3 Atk. 235.

Where there has been no demand for, or payment of rent for thirty years, defendant will not be made to pay costs in equity. *Anon.* 2 Atk. 14.

Where defendant will not admit a general right, but puts plaintiff to proof of it, he shall pay costs of suit. *Trinity House v. Ryall*, 2 Bro. P. C. 389.

On decree for tithes, and report of only 9s. due, yet party entitled to his costs. *Griffith v. Lewis*, 2 Bro. P. C. 407.

Defendant does not lose his costs by appearing voluntarily. *Boucher v. Grills*, Dick. 38.

Costs not always to follow the event of the cause, as where, though money was found due to the defendant upon account, yet it appearing to be much less than had been claimed by the defendant's answer; in that case the defendant was allowed no costs. *Att. Gen. v. Brewers' Comp.* 1 P. W. 376.

In all suits where, at the hearing it shall appear plaintiff had not probable cause of suit, defendant shall have the utmost costs. *Beame's Ord.* 24.

If replication is not filed before subpoena to rejoin is returnable, defendant to have costs. *H.* 109.

A defendant endeavouring to get the plaintiff to come to an agreement with him, to take a very small sum of money in satisfaction of all his interest in the estate, is a reason for making him pay costs of suit. *Arver v. Osborne*, Barn. 349.

Plaintiff suing for thirteen different species of tithes, proved but one, yet the court decreed costs generally. *Smith v. Morgan*, Bun. 335. But see reporter's note, *id. ib.* TITHES.

### (b) By fraud.

A creditor being obliged to re-convey, on payment of what was due on an estate in the West Indies, acquired by an unconscientious use of legal process, was deprived of costs subsequent to the payment of money into court. *Ld. Cranston v. Johnston*, 5 Ves. 277. DEBT; CRED.

Apothecary agreed to give his patient fifty guineas to receive five hundred, or an annuity of one hundred, if he should survive a year, which he did; bill against executors dismissed, as plaintiff could not succeed at law, but without costs, on account of the money actually advanced, which must have been repaid upon a bill to set aside the agreement. *Priestly v. Wilkinson*, 1 Ves. J. 214. FRAUD; BARGAIN.

No costs to any party claiming under a contract not meritorious, even though recovered upon; not

even to a trustee. *Colman v. Sarrell*, 1 Ves. J. 55. DEEDS, VOLUNTARY.

In case of a gross fraud, the court will give costs to be ascertained by the party's own oath. *Dyer v. Tynewell*, 2 Vern. 123. 2 Freem. 112. S.C. FRAUD.

### (c) Tender of Demand.

The costs of a suit for payment of a legacy which the executor and residuary legatee had offered to pay, ordered to come out of the testator's general estate, because the executor had qualified his offer to pay, by a restriction which he had no right to impose. *Walter v. Patey*, 1 Russ. 375. EXOR.

Where defendant in a title cause sets up a modus, and is desirous of protecting himself from costs, he should move for an order that plaintiff accept sums admitted due by answer, or proceed at peril of costs; and court will notice the tender by minute. The motion may be made without notice or payment of money into court. *Davis v. Mosley*, 9 Phil. 211. MODUS; TITHES; PR. PAYMENT INTO CT.

Answer stating tender before bill filed, but not proved, will not save costs. *Milnes v. Davison*, 3 Mad. 374. PL. ANSWER; TENDER.

In a suit for various articles of tithes, the defendant offered to pay into court the value of all but one article, with costs: held, he must pay costs incurred by claim of whole of them. *Worrall v. Millor*, 3 Aust. 632.

Tender must be very express, and formal to prevent costs. *Gannon v. Stone*, 1 Ves. 339. TENDER.

If to a bill for tithes, defendant does not show a previous tender, or make one by his answer, plaintiff shall have an account; if the tender be only by answer, defendant shall account with costs, but if made before, he shall save his costs. *Anon.* Bunb. 28. That a tender may be made after answer, vide *Bp. Euter v. Trenchard*, Bunb. 47. TITHES; TENDER.

### 3. Apportionment of, and Contribution for.

Where the same solicitor acts for an executor and the other co-defendants, the estate will be charged in respect of the executors costs only, with that proportion of the sum due to the solicitor from his clients, which the executor, as between himself and the co-defendants, ought to bear. *Harmer v. Harris*, 1 Russ. 155. EXOR.; SOL. & CLIENT.

There being no issue joined between co-defendants, the answer of one cannot be read against the other, even as to costs, other than as a suggestion on which court may direct inquiry before master. *Cherret v. Jones*, 6 Mad. 267. CO-DEFENDANTS; EVIDENCE; ANSWER.

Where one of several co-defendants in a title cause, wherein a general decree for costs had been made, survived the rest, the court refused to order the costs to be apportioned so as to relieve the survivor from the whole of them. *Michel v. Bullen*, 6 Price, 87. APPORTIONMENT.

Apportionment of the costs of granting a lease of a lunatic's estate, between the estate and the lessee. *Etp. Prickett*, 3 Swan. 130. LUNATIC; LEASE.

When different demands arise in a cause, the costs should be arranged as the equities between the parties require. *Shim v. Gough*, 2 Ball & B. 34.

In equity, the costs are arranged according to the equities of the parties; and the solicitor's lien is only upon the balance under that arrangement. *Taylor v. Popham*, 15 Ves. 72. SOL. & CLIENT; LIEN.

Several defendants entitled to a fund in equal shares, and long enquiries being necessary as to one share only, the costs were apportioned. *Baseri v. Serra*, 14 Ves. 313.

Under a joint order for costs, one party absconded,

and was never served: a proceeding against the other good. *Exp. Bishop*, 8 Ves. 333.

On a bill for partition, the costs of executing the commission, and of all necessary proceedings in the cause, must be defrayed by the parties in proportion to their interests. *Canons of St. Paul's v. Crickett*, 2 Ves. J. 567. PARTITION.

In cases of partition, where the parties are entitled unequally, if the plaintiff be entitled to the smaller share, the costs shall be borne equally. *Sed quare*, if the plaintiff be entitled to the larger share. *Hyde v. Hurdlev*, 2 Cox, 408. *Id.*

Though the interest of one party is more considerable than that of the other, yet they shall equally bear the expence of a commission for settling boundaries, and separating freehold from copyhold. *Norris v. Le Neve*, 3 Atk. 83. BOUNDARIES, COMM. TO SETTLE.

Where two defendants were sued for tithes, and one made default, the court decreed the whole costs against the other, and left him to get the contribution as he could. *Lloyd v. Mackworth*, Bunb. 138. TITHES.

Plaintiff brought his bill for thirteen sorts of tithe, and proved only one sort due: though he did not abridge his replication, yet the court decreed him his costs generally. (But the reporter says too hastily decreed.) *Smith v. Morgan*, Bunb. 335. *Id.*

#### 4. From what Fund.

In transfer of stock, &c., L. C. may direct costs to be paid out of fund, &c. 6 Geo. 4. c. 74. s. 16. STOCK, TRANSFER OF.

Plaintiff, in interpleading bill, is entitled to be paid his costs out of fund in court, subject of suit. *Campbell v. Solmans*, 1 S. & S. 462. INTERPLEADER; LIEN.

Person made party to suit only for protection of trustees, is entitled to his costs out of trust fund. *Hicks v. Wrench*, 6 Mad. 93.

On petition, under the stat. 56 Geo. 3. c. 60., for a re-transfer of an unclaimed stock that has been transferred to the sinking fund, the costs are in general to be paid out of the stock in question. *Exp. Martin*, 1 Jac. 55. PR. RE-TRANSFER OF UNCLAIMED DIVIDENDS.

In a suit for account of residue, one of residuary legatees having, by assigning and taking benefit of insolvent act, rendered two supplemental bills necessary, the additional costs are to be borne by his share. *Bruce v. Ormond*, 2 J. & W. 435.

Costs of unsuccessful defence of an infant, charged not upon general fund, but on his own share. *Orford v. Churchill*, 3 V. & B. 59. INFANT.

Where question arises on interest in a trust fund separated from general residue, the costs must come out of the particular fund; and, having been given by decree, as specifically prayed by bill, out of the general personal estate, the decree, although affirmed in other respects, was corrected in that particular; being considered as relief prayed, and therefore not within the rule against appeal for costs only. *Jenour v. Jenour*, 10 Ves. 562. TRUST; APPEAL.

Bill by infant dismissed with costs, upon facts which, though not known when the bill was filed, might have been with reasonable diligence. The next friend not allowed the costs out of the infant's estate; but whether they shall be repaid, and from what fund, or by whom, was reserved until the hearing. *Pearce v. Pearce*, 9 Ves. 548. INFANT; PROCHIN AMI.

Costs of a suit for legacy out of the residue: the suit being rendered necessary either by the conduct of executrix, who was the residuary legatee, or by the

disposition of the testatrix. *Wilson v. Brownsmith*, 9 Ves. 180. LEGACY.

Where the suit is occasioned by a difficulty arising from the will of the testator, the costs are to be paid out of the general fund. *Pearson v. Pearson*, 1 Scho. & L. 12. WILL, C. or.

Costs of doubt upon meaning of will are to be paid out of general property. *Barrington v. Tristram*, 6 Ves. 345. *Id.*

When a testator expresses himself so ambiguously as to make it necessary to come to this court, the costs shall be paid out of his general assets. *Jolliffe v. East*, 3 Bro. C. C. 25. *Id.*

Tenants filing a bill of interpleader against annuitants, and bringing rents into court, paid their costs out of the rents. *Aldridge v. Thompson*, 2 Bro. C. C. 149. LANDL. & TEN.; PR. INTERPLEADER; PR. PAYMT. INTO COURT.

"Costs to be paid out of estate;" no subpœna lies against defendant, but part of estate to be sold. *Cannon v. Bealy*, Dick. 115.

On bill for specific legacy, costs were decreed out of the other part of testator's personal property, that legacy might be complete. *Bagshaw v. Newton*, 9 Mod. 283. LEG. SPEC.

Where a bill is brought to secure and have the benefit of a contingent interest devised over, the costs shall be paid out of the assets of the testator, who, by his will, has occasioned the difficulty. *Stodhouse v. Hodgson*, 3 P. W. 303.

If an infant sues for a legacy, costs must be paid out of the assets, and not out of the legacy. *Anon.* Mos. 5. INFANT; LEGACY.

The defendant, who was decreed to pay the costs, having run away, and the prochein amy poor, the solicitor was paid the bill of costs out of the money lodged in court for the benefit of the plaintiffs during their infancy. *Stephens v. Muddu*, Mos. 319.

#### 5. Payment or Tender when necessary, and effect of.

Under order of 5th August, 1818 (3 Mad. 318) motion cannot be made till costs given by order, are paid. *Bellchambers v. Gianni*, 3 Mad. 550. GEN. ORD. C. or.

Costs of an irregular motion, for leave to amend, not having been paid, a second motion was also refused with costs. *Phillips v. Stephenson*, 9 Price, 205. PR. BILL, MOTION FOR LEAVE TO AMEND.

Defendant in custody under an attachment, and a messenger ordered, discharged on putting in his answer: but on exceptions allowed, the plaintiffs not having accepted the costs, resumes the process where it stopped; if costs were accepted he begins again; costs on motion against settled practice. *Mill v. Turner*, 2 V. & B. 372. PR. CONTEMPT.

After answer reported insufficient, plaintiff may proceed upon his old process of contempt, without a new order, if he has not accepted costs. *Wilson v. Graham*, 1 V. & B. 331. INSUFFICIENCY OF ANSWER; PR. PROCESS; WAIVER.

Defendant in contempt, putting in answer to which exceptions were allowed, plaintiff not accepting costs may go on with old process; but if in custody, old process is discharged, pending reference by tender of costs. *Boehm v. De Tastet*, 1 V. & B. 324. PR. ANSWER, INSUFFICIENCY; PR. PROCESS; WAIVER.

Practice of staying proceedings till costs of former proceedings paid, is not applied to the case of a suit, as ejectment at law, and a suit in the spiritual court by some of the next of kin disputing, as paupers, a will, on the ground of incapacity, the plaintiff in equity being another next of kin. *Wild v. Hobson*, 2 V. & B. 105. JURISDICT.; PR. STAYING PROC. By accepting answer, immediate right of costs un-

der process of contempt, are waived. *Smith v. Blofield*, 2 V. & B. 100. **WARRANT; PR. CONTEMPT.**

Defendant in custody for want of his examination discharged, immediately on putting it in; but if, on reference, it proves insufficient, the plaintiff not having accepted the costs, may proceed from the last process. *Bonus v. Flack*, 18 Ves. 287. **PR. PROCESS; PR. CONTEMPT, DISCHARGE FROM CUSTODY.**

To prevent decree *pro confesso*, defendant should have not only the answer on file, but also a receipt for costs; the answer being actually filed without payment or tender of costs, the defendant was remanded, to give an opportunity of moving, to take it off the file for irregularity, but plaintiff having taken an office copy of an answer that course failed. *Sedgeir v. Tyte*, 11 Ves. 202. **PR. DECREE PRO CONFESSO; PR. ANSWER; WAIVER.**

The court refused to vacate the enrolment of a decree, dismissing the bill with costs, by default, and afterwards, upon a new bill for the same purpose, granted a motion for time to answer until a month after payment of the costs of the other cause, adopting the practice at law. *Pickett v. Laggan*, 5 Ves. 702. **PR. VACATING ENROLMENT OF DECREE; PR. TIME TO ANSWER.**

After an assignment of a mortgage, payments to the mortgagee, with notice, must be allowed by the assignee, the registry, the premises being in 'Middlesex, is not notice for this purpose. Tender: after the bill filed, of the balance, deducting the payments to the mortgagee, with costs, deprived the assignee of subsequent costs. *Williams v. Sorrell*, 4 Ves. 389. **REGISTRY OF DEEDS; NOTICE; TENDER; MORTGAGE & MORTGEE.**

The plaintiff filed his bill in chancery, and dismissed after answer; he then filed another bill in exchequer for same matter: proceedings stopped till costs in chancery paid. *Baldwyn v. Malo*, 3 Anst. 835. **PR. STAYING PROCS.**

Bill for tithes, *modus set up as defence*; motion by defendant, to pay up arrears of *modus*, with costs up to time, refused; but plaintiff proceeding and then abandoning suit, costs after tender allowed to defendant. *Dean, &c. of Bristol v. Donnesthorpe*, 1 Anst. 272. **TENDER; TITHES.**

Injunction *nisi* not dissolved by putting in answer until costs of contempt be paid. *Hall v. Darney*, Dick, 289.

Plaintiff allowed to bring a bill of review without paying the costs decreed in the original cause, upon making oath he was not worth 40*l.* besides the matter in question. *Filton v. Macclesfield*, 1 Vern. 264. **PR. PAUPER; PR. BILL OF REVIEW.**

Where a defendant has demurred, he may assign another cause of demurrer at the bar, paying costs, and if such cause of demurrer is overruled, he ought to pay double costs; but when a defendant has pleaded, and there is no demurrer in court, he cannot demur at the bar, though he would pay costs. *Durdant v. Reilman*, 1 Vern. 78. **PR. DEMURRER OR TENUS.**

#### 6. Security for.

The bond for security of plaintiff's costs shall be in penal sum of 100*l.* 40 Gen. Order, 3d April, 1828.

A plaintiff resident abroad, who had been ordered to give the security for costs, but had not complied: ordered to give the security, and on default, his bill to be dismissed. *Camas v. Grant*, 1 Sim. 348. **PR. BILL, DISMISSAL OF.**

Plaintiff compelled to give security for costs, on affidavit of his residing in Ireland, the cause not having been at issue, and the venue laid in Middlesex, and proceedings stayed in the meantime. *Moloney v. Smith*, 1 McClell. & Y. 213.

Prochein ami becoming insolvent, and receiving goods after answer filed; motion, that he might be removed and another appointed, refused as informal; but leave given to apply to stay proceedings, until he be changed, or security given for costs. *Pennington v. Oliver*, 1 S. & S. 264. **PR. P. AMI; PR. MOTION; INSOLVENCY.**

Prochein ami withdrawing himself, ordered, on substitution of new one, to give security for costs already incurred. *Davenport v. Davenport*, 1 S. & S. 101. **P. AMI.**

Plaintiff resident in Ireland ordered to give security for costs. *Hill v. Beardon*, 6 Mad. 46.

Mortgage by client to attorney for costs due, and to become due, held a valid security for the costs then due only. *Williams v. Piggott*, 1 Jac. 598. **ATT. & CLIENT; MORTGAGE; FRAUD, FID. SIT.**

Held, that an attorney cannot take a mortgage from his client for securing future costs. *Jones v. Tripp*, 1 Jac. 322. **SOLR. & CLIENT; FRAUD, FID. SIT.**

Mere imprisonment of plaintiff does not entitle defendant to security for costs. *Baddeley v. Harding*, 6 Mad. 214. **IMPRISONMENT.**

Where action is directed to be brought in court of law, and plaintiff resides abroad; motion for security of costs thereof must be made in equity. *Desprey v. Mitchell*, 5 Mad. 87. **MOTION.**

Cestui que trust using trustee's name as co-defendant ordered to give latter security for costs. *Annealey v. Simeon*, 4 Mad. 390. **TRUSTEE, AND CESTUI QUE TRUST.**

Where plaintiff is bound to give security, each defendant suing by separate clerk, in court is entitled to separate bond of 40*l.*, though only one is payable. *Lowles v. Robertson*, 4 Mad. 465.

Security for costs by plaintiff, refused; an answer being by mistake filed after defendant knew plaintiff was abroad, but sworn long before. *Dyott v. Dyott*, 1 Mad. 186.

A plaintiff residing in England, obliged, on filing a bill in Ireland, to give security for costs, notwithstanding 41 Geo. 3. c. 90. s. 5. gives an attachment in England to enforce an order or decree made in Ireland for payment of money; the practice of the court not being altered by that act. *Mullett v. Christmas*, 2 Ball & B. 422.

Plaintiff resident in England ordered to give security for costs after appearance by defendant, but before answer. *Stackpole v. O'Callaghan*, 1 Ball & B. 566.

Security for costs by a plaintiff, gone abroad, refused after answer, on affidavit of his intention to return; and his family remaining in this country. *White v. Groathead*, 15 Ves. 2.

Order to stay proceedings until security given for costs, upon affidavit, that the plaintiff, since the answer, had abandoned this country and resides in the Isle of Man. *Weeks v. Cole*, 14 Ves. 518.

The usual security for costs by a plaintiff residing out of the jurisdiction, not increased upon special circumstances as distress; unless the plaintiff asking some favour, terms may be imposed upon him. *Ogilvie v. Herne*, 11 Ves. 598.

Defendant, after an order for time, cannot have security for costs from plaintiff living out of jurisdiction. *Anon.* 10 Ves. 287. **PR. ORDER FOR TIME.**

Plaintiff residing abroad; not ordered to give security for costs where there were co-plaintiffs residing in England. *Walker v. Easterby*, 6 Ves. 612.

The simple fact that the plaintiff is gone abroad is not a sufficient ground to compel him to give security for costs. *Hoby v. Hitchcock*, 5 Ves. 699.

Plaintiff, by an order of the secretary of state, confined, and to be removed out of the kingdom.

under the alien act, ordered, on motion after appearance and before answer, to give security for the costs, according to the practice where the plaintiff is resident abroad. *Seiluz v. Hanson*, 5 Ves. 261. ALIEN; PRISONER.

If plaintiff is insolvent, and gives a wrong residence, ordered to give a note of residence or security for costs. *James v. Gilladam*, 2 Aust. 552. INSOLVENCY.

Application for security of costs on account of plaintiff leaving kingdom, refused. *Adams v. Colethurst*, id. ib.

Plaintiff in equity becoming bankrupt will not be compelled to give security for costs. *Anon.* 2 Aust. 407. BANKCY.

The court refused to make a prochein ami, in indigent circumstances, give security to answer costs. *Squirrel v. Squirrel*, 2 Dick. 765.

Plaintiff is not compellable to give security for costs, unless he state himself, or if he sworn, that he is resident abroad, or going to reside abroad. *Green v. Churnock*, 2 Cox, 284. S. C. 3 Bro. C. C. 371. 1 Ves. J. 396.

Affidavit to ground an order for a plaintiff to give security for costs, when it doth not appear by the bill that he lives abroad out of the jurisdiction of the court, if he hath left the kingdom since filing, the bill must go on and say to settle abroad. *Anon.* 2 Dick. 775.

Security for costs not granted, after any step taken by defendant. *Craig v. Bolton*, 2 Bro. C. C. 609.

A defendant may apply for security for costs after answer, if he had no notice, at the time of answering, that the plaintiff was out of the jurisdiction; but if he takes any step in the cause after such notice, he waives the security for costs. *Id. ib.*

Master to settle security to be given for costs by plaintiff, foreign merchant. *Odwyer v. Salcedor*, Dick. 372.

Where plaintiff under protection of foreign ambassador, he must give security for costs. *Adderly v. Smith*, id. 35.

Where one plaintiff resident in England, no security is required for costs. *Winthorpe v. Royal Exchange Assurance Comp.* id. 232.

The ancient sum of 40*l.*, as the amount in which security must be given to answer costs on the plaintiff's residing abroad, is not increased under adverse motion on any special circumstances. If, however, such a plaintiff asks a favour of the court, further terms may be imposed on him. *Gage v. J. y. Stafford*, 2 Ves. 557.

Consul abroad, plaintiff in suit need not give security for costs. *Colebrook v. Jones*, id. 154.

Where plaintiff is abroad, and the defendant becomes apprised of it, he cannot obtain security for costs, if he afterwards takes any other step in the cause, such as applying for time to answer. *Mellioruchy v. Mellioruchy*, 2 Ves. 24. S. C. Dick. 147.

Defendant applying within seven years to put in answer, &c., according to 5 G. 2. c. 25., he must give approved security for costs. *Bp. Rochester v. Knapp*, Dick. 70.

If an ambassador's servant brings a bill, he must give security to answer costs, as being a person privileged. *Gordwin v. Archer*, 2 P. W. 452.

A prochein ami shall not be obliged to give security because he is a privileged person. *Anon.* Mos. 86. PR. PROCHIEIN AMI.

If the plaintiff is in the service of a foreign envoy, he must give security to pay costs. *Anon.* id. 175.

Where it appears upon affidavit that the prochein ami is insolvent, he must give security for costs. *Wale v. Sutter*, Mos. 47. *Anon.* id. 86. PR. PROCHIEIN AMI.

The court of exchequer refused to allow a deposit of 40*l.*, the amount of the security, to stand in the stead of the security. *Ker v. Ds. Munster*, Bun. 35.

Where the defendant usually resided at Oporto, and had not answered, but was in contempt, the court ordered him to give plaintiff security for costs until answer or further answer. *Anon.* id. 183.

The court will compel a Scotchman to give security for costs as a foreigner. *Ker v. Ds. Munster*, id. 35.

A motion, that defendant residing at Oporto should give security for costs before he returned there, refused, the answer having been filed. *Whitehead v. Murat*, id. 183.

Where the original defendant who had obtained security for costs became bankrupt, his assignees, who had become parties by supplemental bill, were held entitled to call for a fresh security, as they could not have the benefit of the recognizance already entered into. *Ogborne v. Bartlett*, Beame's on Costs, 359. BANKCY. ASSIGNEES.

### 7. Setting off.

In a suit for the administration of assets, a debtor to the estate, who is entitled to have his costs of suit out of the fund, will not be allowed to receive payment of them while his debt continues unsatisfied, but the costs due to him will be set off *pro tanto* against the debt due from him. *Harmer v. Harris*, 1 Russ. 155. ADMIN. OF ASSETS; DEBTOR & CRED.

Court will not direct costs of suit and of action between same parties to be set off against each other. *Wright v. Mudie*, 1 S. & S. 266.

Costs at law and in equity between the same parties set off, after decree omitting such a provision. *Shine v. Gough*, 2 Ball & B. 33. PR. DECREE.

Costs ordered to be paid, but not taxed until after the bankruptcy of the person to receive them, cannot be set off by the party, from whom they were due, proving a debt under the commission. *Eap. Rhodes*, 15 Ves. 539. BANKCY. SETT-OFF.

Where there are costs in equity and at law due from the opposite parties, the court will not set off the costs at law against those in equity, if the solicitor in equity claims his lien on the latter. *Smith v. Brocklesby*, 1 Aust. 61. SOL. & CLIENT, LIEN.

Court will not upon motion discharge a person in execution for costs upon a demand arising to him upon the person to whom he is in execution. *Holworthy v. Allen*, 2 Bro. C. C. 17. S. C. 1 Cox, 202. *quod vide*. PR. EXECUTION, DISCHARGE.

Bill praying relief as well as discovery whilst plaintiff was proceeding at law in same account, though amended by striking out the part which prayed relief; and bill was thereupon dismissed, and costs of the dismissal were taxed to the defendant at 38*l.* Plaintiff recovered judgment against defendant in damages and costs to the amount of 440*l.*, and petitioned to set off costs at law against costs in equity. *Ld. Hardwicke* thought it reasonable; and if the precedents would justify him, said he would grant the petition. *Gurish v. Donovan*, 2 Atk. 166.

### 8. When stayed by appeal.

An account of tithes hay being decreed, the defendant appealed from so much as directed an account in respect of lands in the township of S, and the decree was to that extent ultimately reversed; pending the appeal the plaintiff took the account as to all the lands, including those in the township

of S, the court, on application, refusing to restrain him. On an application for costs, held, that it was convenient that the whole account should be taken at the same time, and refused costs on either side as to that part of account relating to the township of S. *Drake v. Smyth*, 1 M'Clel. & Y. 380. **TITLE ACCOUNT.**

Notwithstanding appeal from decree, party may sue out subpoena for costs decreed. *Tyson v. Cox*, 3 Mad. 278. **PR. APPEAL.**

An appeal pending in house of lords is no objection to deputy remembrancer taxing costs, but payment will be suspended. *Meade v. Norbury*, 4 Price, 322. **PR. APPEAL, EFFECT OF.**

Appeal, generally, does not stay proceedings under a decree. The costs upon a special application follow the judgment if unfavourable. *Willan v. Willan*, 16 Ves. 216. See also *Tyson v. Cox*, 3 Mad. 278. **PR. APPEAL, EFFECT OF, ON PROCEEDINGS.**

### 9. Taxation.

(a) *Generally.*

(b) *Costs of taxation of costs.*

(c) *Effect of, and of costs not being taxed, and of appeal, rehearing, and revivor for.*

(d) *Where party shall pay taxed costs, or only fixed costs.*

(e) *Where costs in cause, or v. v. costs.*

(f) *Allowances beyond taxed costs, and of costs, whether as between party and party, or attorney and client.*

#### (a) *Generally.*

Regulations where a master is directed to settle a conveyance, or to tax costs. 76th Gen. Order, 3rd April, 1828. **PR. SETTLEMENT OF CONVEYANCE.**

The master was ordered to tax the costs of all parties, and the amount was directed to be paid out of the assets of the testator in the cause by his executors, who were to be at liberty to pay the costs of certain parties to A, their solicitor. A was an attorney of K B and C P, but never had been admitted as a solicitor in the court of chancery, and the master for that reason disallowed the whole of his charges, except what he had paid to his clerk in court. He had, however, previously received from his clients to the full amount of his bills. The clients then petitioned for an order on the master to review his certificate and tax A's bills; but their petition was dismissed. *Prebble v. Bognhurst*, 2 Sim. 247. **SOLICITOR.**

In equity, the proper mode in this court of objecting to the master's taxation of costs is to move upon affidavits, stating the ground of objection, for leave to file exceptions to the report. *Wright v. Southwood*, 1 Y. & J. 420. **PR. MASTER'S REPORT.**

Where a solicitor engaged in various suits, obtained payment out of court of a sum of money standing in trust in the cause, and retained it towards his costs, and upon a subsequent taxation of his bill it appeared, that at the time he obtained payment of the money he had in fact already been over paid, the court refused, upon a motion for that purpose, to charge him with interest, the parties having made considerable delay before they taxed the costs, and there being no fraud or laches imputable to the solicitor. S.C. id. 527. **SOL. & CLIENT; INTEREST; LACHES.**

Where decree orders defendant to retain his costs, when taxed, out of the balance in his hands, and pay the residue into court, if the defendant delays to get costs taxed, plaintiff must move that he may bring his bill of costs to be taxed within limited time, and not

that he may pay in the whole balance. *Newsome v. Shearman*, 2 S. & S. 95. **PR. DECREE.**

A solicitor's bill having been partly taxed, and paid, an order, obtained as of course, referring the bill generally for taxation, was discharged with costs. The conduct of the solicitor cannot be adduced in support of such an order; and the costs of affidavits upon that subject were ordered to be paid as between solicitor and client. *Chilton v. Pardon*, 1 Turn. & R. 301. And see *Gretton v. Leyburne*, id. 407. **SOL. & CLIENT; PR. COSTS, WHO PAY.**

An order, directing the costs of the suit to be taxed, warrants a taxation up to the time of the master's making his report. *Semble. Id.* 304.

A solicitor cannot obtain the taxation of his agent's bill, without bringing the amount into court. *Ostle v. Christian*, 1 Turn. & R. 324. **PR. PAYMT. INTO COURT; SOL. & AGENT.**

The court refused (but without costs) a motion for special direction to master, requiring him to deduct in his taxation of costs of the parties, the costs which he should allow to defendant from those which he should allow to plaintiff (who had become insolvent) after decree had been passed and acted upon. *Rumney v. Beale*, 10 Price, 113. **INSOLVENCY; SET-OFF.**

Taxation of costs not ordered on application of solicitor himself. *Sayers v. Walond*, 1 S. & S. 97. **SOL. & CLIENT.**

A party liable under a bond of indemnity for the costs of another, having on a compromise, paid what the solicitor stated to be the amount of them, is entitled afterwards to have the bill taxed. *Bulme v. Paver*, 1 Jac. 305.

It cannot be made one of the terms of the compromise of a suit, that the solicitor's bill should be paid without taxation. *Semb. Id.* 307. **AGREEMENT.**

Where a commission is taken out upon a debt due to a solicitor for costs, any creditor may have the bill of costs taxed, if the bankrupt, at the time of his bankruptcy, was not concluded. *Exp. Prideaux*, 1 G. S. J. 28. **BANKRUPTCY, PROOF IN; SOL. & CLIENT.**

A party who by agreement has paid the bill of costs of another party, cannot apply for a taxation. *Langford v. Nott*, 1 Jac. & W. 291.

A settlement of a bill of costs during the continuance of the suit, while the client has no professional adviser, except the solicitor himself, is not a bar to its taxation. *Crossley v. Parker*, 1 Jac. & W. 460. **SOL. & CLIENT.**

Charges by a country solicitor, for attending the cause in London, to be allowed in some cases; but the circumstance of their being undertaken by the direction of the client, is not alone a sufficient ground for allowing them, as the solicitor himself is better able to judge of their necessity. *Id. ib.*

The bill of town agent of attorney, cannot be ordered to be taxed on motion of client. *Willmore v. Bryan*, 8 Price, 677. **PRIN. & AGENT; SOL. & CLIENT.**

Costs of notice of motion to confirm master's report that answer was impertinent, allowed on taxation. *Donison v. Curry*, 8 Price, 87. note. **PR. NOTICE OF MOTION.**

Not of course for to refer to master, bill of costs up to the choice of assignees, already taxed by commissioners. Particular objections must be stated. Solicitor refusing to give copy of bill, sufficient to ground it. *Exp. Sutton*, 4 Mad. 395. **BANKCY. COSTS IN TAXATION OF.**

Where the amount of a solicitor's bill up to the choice of assignees, is *prima facie* exorbitant, it is of course to refer it to the master to be taxed. *Exp. Emery*, Buck. 422.

It is of course upon an *ex parte* application to have an order to tax a solicitor's bill. If the solicitor wish

to modify or discharge the order, he must apply to the court for that purpose. *Exp. Hewitt*, Buck. 388.

It is a contempt of the great seal for a petitioning creditor to strike a docket at the instance of a solicitor, who undertakes to prove the act of bankruptcy, and to guarantee him against any expences he may be put to by issuing the commission, and the court therefore, will not upon the petition of such a creditor, tax the solicitor's bill of costs. *Exp. Wilson*, Buck. 306. **BANKCY. COMM.; CONTEMPT; SOLR. & CLIENT.**

Exceptions do not lie to master's report as to costs, nor can there be a re-taxation as to quantum. Irregularity in proceedings, or master acting on mistaken principle, may induce court to interfere. *Fenton v. Crickett*, 3 Mad. 496. **PR. MASTER'S REPORT; EXCEPTIONS.**

Order directing taxation of a solicitor's bill for business done in the court of great sessions, discharged; the court not assuming jurisdiction for that purpose alone. *Exp. Partridge*, 3 Swan. 398. **GREAT SESSION; JURISDICT.**

Reference of a solicitor's bill of costs, to be taxed upon the application of one of two trustees and executors, by whom he had been employed in the conduct of the cause, and in other matters relating to the executorship; the executor making the application not having acted, and his co-executor refusing to consent to the application, the bill having been long since paid by the acting executor, but unknown to the parties beneficially interested, and no settlement of the executorship accounts having been made, notwithstanding repeated applications, until lately, and the *cestuique* trusts (one of them a married woman) having executed a release to the executor: motion, on behalf of the solicitor, to discharge the order of reference, refused; the *cestuique* trust having a right to use the name of his trustee for the purpose of taxation, and the release to the executors, not operating to prevent him from prosecuting against the solicitor the remedy given him by the statute. *Hazard v. Lane*, 3 Mer. 285. **TRUSTEE.**

The court has no jurisdiction to order the taxation of a solicitor's bill of costs, for business done in a cause in the court of great sessions in Wales, where there is no detention of title deeds, nor any other matter besides costs in dispute. *Exp. Partridge*, 2 Mer. 500. **JURISDICT.; COURT OF GREAT SESSION IN WALES.**

Bill of costs by a solicitor under commission of bankruptcy, though approved of by commissioners, and stated and allowed in accounts of assignees, held taxable under 5 Geo. 2. c. 30. s. 46. See 6 Geo. 4. c. 16. s. 14. *Exp. Gregson*, 3 Mad. 49. **BANKCY. COSTS.**

Taxation of a solicitor's bill refused, after a security given, payment and acquiescence; some charges, though improper, not being so gross as to amount to fraud. *Plenderleath v. Fraser*, 3 V. & B. 174. **LENGTH OF TIME; ACQUIESCENCE.**

Generally a bond, taken by a solicitor from the client in the progress of a cause, subject to taxation. *Id.* 175. **SOL. & CLIENT; BOND.**

Solicitor may proceed to tax his costs after a verdict at law, with a view to commence an action in his own name for the amount, after a final settlement between the parties by arbitration without his concurrence, notwithstanding an injunction to stay execution. *Brooks v. Bourne*, 1 Price, 72. **INJUNCT. BREACH OF.**

No jurisdiction for taxing a solicitor's bill of costs for obtaining an act of parliament. *Exp. Wheeler*, 3 V. & B. 21. **JURISDICT.; ACT OF PARLIAMENT.**

Taxation of a solicitor's bill in the house of lords, only through the recognizance. *Id.* 22.

Though the court will open a solicitor's bill, and order taxation, after several years and a security given, or even payment, upon gross errors, fraud or undue

pressure, where nothing appeared but a trifling inaccuracy, and under other favourable circumstances, the court would not restrain proceeding upon a security, obtained while business was depending. *Cooke v. Settee*, 1 V. & B. 126. **SOLICITOR'S & CLIENT; SECURITY; LENGTH OF TIME; FRAUD, FIN. SIT.**

An attorney's bill of costs settled and paid, or after judgment in an action, not to be referred for taxation of course; as it may upon a special case of fraud, or improper charges, notwithstanding payment, a release, judgment, or other security. *Langstaffe v. Taylor*, 14 Ves. 262.

Order in bankruptcy for taxation of a solicitor's bill, for business done in bankruptcy, and otherwise. *Exp. Arrowsmith*, 13 Ves. 124. **BANKCY. SOLICITOR'S BILL.**

Order for taxing a bill of costs, entitled in the cause, if obtained by the party to the cause, regular under the general jurisdiction. But a person not a party in the cause, must apply *ex parte* under the stat. 2 G. 2. c. 25. s. 22. Such an irregularity would be waived by proceeding under the order. *Bignol v. Bignol*, 11 Ves. 328. **INTITULING PLEADINGS.**

Proceeding before I.d. Ch. as exercising the visitatorial power upon a royal foundation, is not within 2 G. 2. c. 23. s. 23., as to taxation of bill of costs. *Exp. Dunn*, 9 Ves. 547. **STAT. C. OF.**

Where an attorney has been seven years without getting his bills taxed after an order so to do, and they are lost in the mean time in the master's office, the court will not allow it to go again to the master. *Yea v. Yea*, 2 Anst. 494. **LACHES; SOL. & CLIENT.**

Several bills were delivered in, settled and paid, in the course of a long cause, and a receipt in full given; at the end of the cause the client moved to refer them all for taxation. The order was discharged. *Pistor v. Dunbar*, 1 Anst. 186. **LENGTH OF TIME; ACQUIESCENCE.**

Where any part of solicitor's bill relates to business done in this court the whole may be taxed, although part of the business was for other persons jointly with the person applying. *Margerum v. Sandiford*, 3 Bro. C. C. 233.

Order on the application of a solicitor to tax his own agent's bill. *Corner v. Luke*, 2 Cox, 173. **SOLR. & AGENT.**

Bill may be taxed after bond and mortgage given as security for same. *Aubrey v. Popkin*, Dick. 403.

And also after payment made for purpose of getting papers from solicitor's hands. *Id.* ib. 404.

Solicitor's bill taxed without bringing the money into court as formerly. The judgment not afterward opened for the client to have an account taken in respect of monies due to him. *Anon.* 2 Ves. 452. **PR. PAYMT. INTO COURT.**

Where the poverty of a plaintiff would not allow her to carry on the cause, her costs were ordered to be taxed and paid to her, to enable her to go on with the cause. *Jones v. Coreter*, 2 Atk. 400.

Though the plaintiff has not replied to the defendant's answer, yet desisting him to do an act will entitle the defendant to his costs to be taxed. *Sutton v. Stone*, id. 101.

Court will order attorney's bill to be taxed, though he has a mortgage to secure payment. *Walmesley v. Booth*, id. 29. **SOLR. & CLIENT.**

Court refused to order account of attorney's bill taxed by prothonotary of C. P. *Osbaldeston v. Cross*, 2 Com. 612. **ACCOUNT; JURISDICTION.**

The usual order for taxation, empowers the master to examine the solicitor as to what money he had received only, but upon proper affidavits the court will order him to be examined as to his disbursements. *Anon.* Mos. 331. **PR. EXAMINATION BY MASTER; SOLICITOR.**

And where an order of taxation and payment the

solicitor assigned his bill to a purchaser and absconded, the court was inclined to think, that the purchaser could not stand in place of the solicitor, until he had procured him to be examined under the order. *Wilson v. Williams*, Barn. 263. *Id. ib.*

On the client's neglecting to attend the master on the taxation of the bill, the chancellor would not order him to bring the money into court, but only that the order of reference should be discharged, if he did not procure a report in a fortnight. *Anon.* Mos. 68. *PR. ATTENDANCE BEFORE MASTER; PR. PAYMENT INTO COURT.*

In a suit against an attorney, for the purpose of having his bills of costs on the plaintiff taxed, and for an injunction against his proceeding at law in the mean time, defendants moved that the costs might be taxed as between attorney and client, but the court said, that the rules of taxation of costs, as between attorney and client, did not apply where they appear in the court as party and party in a cause, and that these costs therefore must be taxed as between party and party. *Spelman v. Woodbine*, 1 Cox, 49. *SOL. & CLIENT.*

#### (b) Costs of Taxation of Costs.

If bill of costs is taxed after solicitor's death, his representative will not be ordered to pay costs of taxation, although more than a sixth is deducted. *In re Cole*, 2 S. & S. 462. *SOL. & CL.*

Sums deducted in respect of business done for a third person, at the alleged retainer of the client, but the authority not proved, are always computed as deductions in the question of costs of taxation. *Rigby v. Edwards*, 5 Mad. 20.

Where solicitor became liable to costs of taxation, but without deducting them, brought an action for taxed costs; on petition the action was staid, and reference made to master to tax costs of taxation, after deducting which, solicitor was ordered to be paid costs. *Exp. Bellott v. Lingard*, 4 Mad. 379. *PR. STAYING PROCS.; PR. PETITION.*

Held that a solicitor must pay the costs of the taxation of his bill of costs, reduced by the taxation more than one-sixth of the amount, which reduction arose from the master disallowing extra fees, paid to the commissioners for travelling expences. *Exp. Inman*, 1 Buck. 129.

Where bill reduced one-sixth part, solicitor pays costs of taxation. *Exp. Hatheray*, 2 Mad. 329.

Rule of taxation is adopted in bankruptcy, if more than one-sixth is deducted, solicitor pays costs of taxation. *Exp. Westall*, 3 V. & B. 141. *BANKCY.*

Solicitor allowed costs of taxation, the reduction of his bill being less than a sixth, charged with costs of proceedings before the master, creating useless expence. *Yea v. Yea*, 14 Ves. 154. *SOL. & CL.*

Where the solicitor was guilty of great delay in bringing in his bills, the court will not give him his costs of the taxation, although less than one-sixth part is taken off. *Yea v. Yea*, 2 Anst. 589. *LACHES.*

On taxation of costs, the court cannot make the attorney pay the costs of the taxation, unless for improper items in the bill, amounting to a sixth. *S. C.* *Id.* 494.

Though not a sixth deducted from bill, circumstances having given sufficient ground of suspicion for necessity of taxation, costs of taxation were refused to solicitor. *Webb v. Stone*, 1 Anst. 260.

Solicitor's bill reduced to less than one twenty-eighth part, costs of taxation refused him. *Ramden v. Hilton*, Dick. 322.

#### (c) Effect of, and of costs untaxed, and of appeal, rehearing, and revivor for.

An order signed and passed cannot be corrected in respect of costs, by a separate petition as to costs only, where the question is, not as to the personal payment of costs, but whether they are payable out of a particular fund, a petition for rehearing may be presented for the purpose of determining that question. *Exp. Baines*, 1 G. & J. 259.

By original and supplemental bill an agreement is made a rule of court, which determines all matters in difference in the suit, but reserves the question of costs. A petition dismissed, which prayed the direction of the court as to costs; the court enters into the question of costs only as incidental to its decision upon the merits of the cause. *Gibson v. Id. Cranley*, 6 Mad. 365.

Court will not hear suit for settlement of costs only, even on mutual consent. *Roberts v. Roberts*, 1 S. & S. 39.

*Ne erant* does not lie in respect of costs taxed in a chancery suit. *Goodman v. Sayers*, 5 Mad. 471. *NE EXERAT REGNO.*

Order discharged, on ground that costs of two previous applications, which had been refused with costs, had not been paid. *Killing v. Killing*, 6 Mad. 68. *PR. ORDER, DISCHARGE.*

If costs are not taxed, however, non-payment is no objection. *Id. ib. n. (b).*

If either party die before taxation of costs, they are lost. *Jupp v. Geering*, 5 Mad. 375. *DEATH; TAXATION.*

So, if not before bankruptcy, they cannot be proved under commission. *Id. ib.* 377. note (m). *BANKCY. TAXATION.*

The general rule being, that there shall be no revivor for costs alone, yet, where the costs have been taxed previous to the abatement, it seems there is a right to revive merely for the purpose of having them paid; and where the abatement has happened by the death of the party in whose favour the costs were awarded, it is the settled practice of the court that his representative may revive for such purpose. *Swetten v. Mayor, &c. of Colchester*, 2 Mer. 113. *PR. ABATEMENT & REVIVOR.*

A cause is not out of court for this purpose, in consequence of the bill being dismissed. Enrolment of the decree not necessary to entitle the representative of a party to revive for costs; revivor for costs decreed out of a particular fund is another exception to the general rule. *Id. ib.*

Though no appeal is allowed on matters of costs only, they may be considered on an appeal on other grounds. *Fitzgibbon v. Scanlan*, 1 Dow, 270. *APPEAL.*

Where, at the hearing of an original and cross cause, the cross bill was dismissed with costs, and an account directed in the original suit, and the plaintiff died before the account was taken, the court held it a decree executory, and therefore that the representative of the plaintiff was entitled to revive for the costs of the cross cause. *Kemp v. Mackrell*, 3 Atk. 812. 2 Ves. 580. *PR. ABATEMENT & REVIVOR.*

And where a duty is also decreed, or when the costs are directed out of a particular fund, though nothing in the decree remains to be done, the case is held to be an exception to the rule. *Id. ib.*

Distinction, where costs are disposed of as a subject of relief; an appeal not open to the objection, upon an appeal for costs only. *Taylor v. Popham*, 15 Ves. 72. *PR. APPEAL.*

No revivor for costs alone, unless they are to be paid out of estate. *Jenour v. Jenour*, 10 Ves. 572. *PR. REVIVOR.*

Abatement by marriage of feme plaintiff, to bill of

discovery after answer; held that defendant cannot have his costs. *Dobson v. Juda*, 10 Ves. 31. PR. ABATEMENT & REVIVOR; PR. BILL OF DISCOVERY.

Revivor for costs only, on the death of the plaintiff, entitled to them, though before the report, and they were not to come out of a particular fund. *Morgan v. Scudamore*, 3 Ves. 195. PL. REVIVOR.

After verdict, on issue directed, leases decreed to be delivered up to the plaintiff: after the master had settled the amount of the costs, but before report the plaintiff died: on demurrer to so much of the bill by his devisee, as prayed revivor: the court inclined to hold to the rule, not to revive for costs only: not applicable, where the party to receive them dies; also that the taxation would relate to the time when the amount was settled, so as to take it out of the rule; but the demurrer was overruled, as it did not appear on the bill that the decree had been executed by delivering up the leases. S. C. 2 Ves. J. 313. *Id.*

Where the party to pay costs dies, and they are not taxed, no revivor for them only, because a personal demand. *Id. ib.* 315.

After a decree passed, the court will not, on a petition, give the costs of the suit to a defendant, although a mere trustee, and as such entitled to them, if they had been asked for on the hearing. *Colman v. Suerell*, 2 Cox, 205. LACHES.

Plea to bill of revivor for costs, which had been taxed and ordered to be paid into the bank, overruled. *Hall v. Smith*, 1 Bro. C. C. 438. S. C. 2 Dick. 649. PL. PLEA; PL. REVIVOR, BILL OF.

There shall not be an appeal or rehearing for costs only. *Newton v. Bennet*, 1 Bro. C. C. 140. S. C. 2 Dick. 594. PR. APPEAL; PR. REHEARING.

An appeal or rehearing for costs only, allowed under particular circumstances. *Cowper v. Scott*, 1 Eden, 17. S. C. 1 Bro. C. C. 141. PR. APPEAL.

Where costs are decreed to all parties out of a real estate, though one of them die before taxation, the costs are a lien upon the estate, and the heir at law of the deceased party is entitled, and there being nothing in the decree executory, there is no occasion to revive. *Blower v. Morret*, 1 Dick. 254. 3 Atk. 772. LIEN.

The court inclines against the rule of not reviving for costs untaxed, and therefore will not enforce it, if the decree remains in any part unexecuted; and if the decree is against an executor, for a sum with costs, out of assets, and the executor pays the sum, but not the costs, and dies, it is held a decree executory, and the plaintiff entitled to revive. *Johnson v. Peck*, 2 Ves. 465. S. C. *Johnson v. Lecker*, 3 Atk. 773. PR. ABATEMENT & REVIVOR.

Revivor is allowed for costs taxed. Costs die with the party, unless taxed, and even where taxed in the lifetime of such party, and the person to pay them is in prison, he will be discharged, unless there be a revivor within a reasonable time; this in like manner as in a case of sequestration. *White v. Hayward*, 2 Ves. 461. S. C. 1 Dick. 173. *Id.*

Though the strict rule be not to allow revivor merely for costs which have not been taxed, the court leans against enforcing it, if there be any thing in the decree yet remaining to be executed. *Johnson v. Peck*, 2 Ves. 465. *Id.*

Defendant's examination insufficient; plaintiff died; suit revived; ordered to tax costs of insufficient examination. *Lyne v. Ably*, Dick. 143.

Though, generally speaking, costs die with the party if they have not been taxed, several exceptions are allowed to it, and revivor may be for costs alone under particular circumstances, as where a duty is decreed, or where out of a particular fund, though no more to be done. *Kemp v. Mackrell*, 2 Ves.

PR. ABATEMENT & REVIVOR.

Where a solicitor's bill of costs is taxed, he may take out an attachment for them without previously taking out a subpoena, but he must serve his client with the order for taxing his bill of costs, and with the master's report of such costs. *Murphy v. Balderston*, Barn. 266. 2 Atk. 114. SOL. & CLI.; PR. ATTACHMENT.

A representative of a person who had obtained an order to tax a bill, can revive it only on an undertaking to pay. S. C. 2 Atk. 114. PR. ABATEMENT & REVIVOR; EXORS. & ADMORS.

Baron and feme bring a bill to redeem a mortgage; defendants plead to the bill, and the plea overruled, and costs given to the plaintiffs, which by the course of the court are 5*l.*; baron dies; the feme by survivorship shall have the costs. *Coppin v. —*, 2 P. W. 496. HUSB. & WIFE; ABATEMENT & REVIVOR; SURVIVORSHIP.

Suit may be revived for costs taxed. *Edgill v. Brown*, Dick. 62.

No revivor for costs only, though taxed, unless decree is enrolled. *Glenham v. Stutwell*, Dick. 14. But see 2 Mer. 113.

(d) Where party shall pay taxed costs, or only the ordinary costs.

On allowance of plea or demurrer plaintiff shall pay defendant taxed costs of it; and if it be to whole bill, then the further taxed costs of the suit. 31 Gen. Order, 3d April, 1828.

Ordered, that if a party gives notice of motion, and does not move accordingly, he shall, when no affidavit is filed, pay to the other side 40*s.* costs upon the production of the notice of motion. But where an affidavit is filed by either party, the party giving such notice of motion, and not moving, shall pay to the other side costs to be taxed by the master, unless the court itself shall direct, upon production of the notice of motion, what sum shall be paid for costs. Gen. Order, 5th August, 1818. S. C. 1 Swan. 128. 1 Wils. 309.

In regard to dismissing bill, where the cause is set down on bill and answer only, or where it is so set down after withdrawing a replication, it shall be discretionary in the court for the future, to dismiss with 40*s.* costs, or costs to be taxed, or with no costs. Gen. Ord. April 27, 1748. 2 Atk. 288. Beame's Ord. 450.

Taxed costs allowed on overruling frivolous exceptions to an answer to a bill for discovery, instead of 40*s.* costs, the ordinary costs. *Jones v. Steele*, 1 McClel. & Y. 274. PR. EXCEPTIONS.

Where bill had been amended three times, and the two last were by the negligence or error of plaintiff, the defendant was allowed extra costs for those latter amendments. *Watts v. Manning*, 1 S. & S. 421. PR. BILL, AMENDMENT; LACHES.

Bill demurred to allowed to be dismissed on paying 5*l.* costs of demurrer. *Edwards v. Edwards*, 6 Mad. 255. PR. DISMISSAL OF BILL; PR. DEMURRER.

Taxed costs are given in exchange on allowing a demurrer to the whole bill. *Jones v. Jones*, 7 Price, 663. PR. DEMURRER.

Form of order when full costs are given on allowance of demurrer under Lord Rosslyn's Order, 6 Feb. 1792. (Beame's Orders, 456). *Pilkington v. Wignall*, 2 Mad. 348. PR. ORDER, FORM OF; REG., GENERAL, C. OF.

Party liable to full costs beyond the 5*l.*, on allowance, or overruling a plea or demurrer at the discretion of the court. Order of Court, 6 Feb. 1794. 4 Bro. C. C. 545. Beame's Ord. 456.

Full costs may be given under the above order, though application not made for three weeks after allowance of demurrer. *Wood v. Dignoley*, 1 Mad. 32. DEMURRER; REG., GENERAL, C. OF.

Order to withdraw replication on payment of 20*s.*



costs of course; the General Order, 27 April, 1748, giving a discretion to exceed 40s. costs in case of dismissal on bill and answer. *Cowdell v. Tatlock*, 3 V. & B. 19. PR. WITHDRAWING REPLICATION; REG. GEN., C. OF.

Full costs on a demurrer allowed to a third bill for the same cause, under the General Order, 1794, upon a subsequent application. *Griffith v. Wood*, 1 V. & B. 307. PR. DEMURRER; REG. GEN., C. OF.

On demurrer to the whole bill being allowed, the bill shall be dismissed, and costs shall be taxed as upon a dismissal, except the costs on the demurrer, which shall be allowed as heretofore. General Rule, 1804, Feb. 13. 1 Scho. & L. 364. PR. BILL, DISMISSAL; PR. DEMURRER.

Demurrer set down for argument being submitted to, and the bill amended, 5l. costs were allowed. *Anon.* 9 Ves. 221.

Demurrer allowed in the exchequer upon argument with 30s. costs. In another suit in chancery, between the same parties, and to the same effect, it was ordered on motion, that the defendant should have time to answer till payment of those costs, but without prejudice to an application to dismiss the bill. *Holbrooke v. Cracroft*, 5 Ves. 706. PR. TIME TO ANSWER.

Where a cause is heard on bill and answer 40s. costs on dismissing the bill unless a special case. *Bayly v. Corp. of Leominster*, 1 Ves. J. 474. 3 Bro. C. C. 529. PR. DISMISSAL OF BILL.

The plaintiff amends several times, yet he shall not pay taxed costs, but only 40s., unless in a case of particular oppression. *El. Masserene v. Lyndon*, 2 Bro. C. C. 291. PR. AMENDMENT.

Plaintiff amended his bill three times on payment of 20s. costs, and obtained a fourth order for that purpose. The amendments being frivolous, the court gave the defendant taxed costs of the former amendments. *Rennet v. Green*, 1 Cox. 253. PR. BILL, AMENDMENT.

Notwithstanding the common course of the court is to give 40s. costs upon dismissal of a suit heard on bill and answer; yet, if the party be vexatious, full cost may be given. *Mansel v. Boules*, 1 Bro. C. C. 403. S. C. 2 Dick. 646. PR. DISMISSAL OF BILL.

Bill amended after plea set down on payment of 20s. costs, and 5l. for plea. *Vernon v. Cue*, 1 Dick. 358.

Where the court did not think the answer full enough, and directed an issue upon the merits, this is not hearing a cause upon bill and answer only, but a subsequent proceeding, and therefore out of the rule of dismissal with 40s. costs. *Newson v. Grey*, 2 Atk. 286.

Where a cause is referred to a master to take an account, the court looks on the reference as a subsequent proceeding beyond the bill and answer, and will dismiss the bill with costs to be taxed. *Ib.*

Where principal and interest is not paid on the day fixed by the master, on the defendants setting down the cause again, the bill will be dismissed with costs to be taxed. *Ib.*

Where a plaintiff, merely to keep his cause alive, replies, and afterwards withdraws his replication, and sets it down on bill and answer only, that it may be dismissed with 40s. costs; this is evading the justice of the court; for otherwise he must have paid the full costs. *Ib.*

If answer reported sufficient, and, on exceptions, held insufficient, defendant is not to pay 40s. costs for insufficient answer. *Knightly v. Deacon*, 1 Dick. 82.

After a third order of amendment, a defendant will be allowed costs to be taxed. *Anon.* 2 Atk. 123. PR. AMENDMENT.

On payment of 20s. costs, bill may be amended after answer put in; but Ld. Ch. said he would see

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how to make more adequate compensation to defendant in future. *Deggs v. Colebrooke*, 1 Atk. 396. PR. BILL, AMENDMENT.

Bill not to be dismissed on 20s. costs, but defendant to be paid the costs which he swears he is out of purse. General Ord. 1685, 1 Vern. 334. PR. DISMISSAL OF BILL.

### (e) Costs in Cause, or Extra Costs.

Costs occasioned to defendant by amendment of plaintiff's bill, are part of defendant's costs in the cause. 29th Gen. Order, 3rd April, 1829.

Costs occasioned plaintiff by insufficiency of defendant's answer, part of plaintiff's costs in the cause. 28th Gen. Order, 3rd April, 1828.

Plaintiff disallowed costs of amending bill: the costs occasioned to defendant by such amendment, shall be deducted from costs he pays. 30th Gen. Order, 3rd April, 1828.

In suit to redeem, costs of exceptions allowed to report of impertinence in an examination put in by defendant, are to be costs in the cause: plaintiff is entitled immediately to costs occasioned by false affidavit; that one of plaintiffs was dead. *Bally v. Williams*, 1 McClell. & Y. 334.

Party making successful motion is entitled to his costs, as costs in the cause; but the party opposing it, is not entitled to his costs, as costs in the cause. *Per V. Ch.* 1 S. & S. 357. PR. MOTION.

Party making unsuccessful motion not entitled to costs, as costs in the cause; but party opposing it, is entitled to his costs, as costs in the cause. *Id. ib.*

Where motion made by one party, and not opposed by another, costs of both parties are costs in cause. *Id. ib.*

As contrary to the principle of the court, an action on a post obit was restrained, and subsequent motion to set aside the injunction was refused with costs; such case being against the general rule, that costs of motion for injunction, or to dissolve an injunction, refused, are costs in the cause. *Marsack v. Reeves*, 6 Mad. 108. PR. INJUNCTION TO STAY PROCEEDINGS AT LAW.

Where defendant in title cause examines many witnesses, whose testimony is inadmissible to any extent, the court will give the plaintiff his costs of the rejected depositions, independently of the result of the cause. *Petch v. Dalton*, 6 Price, 232. PR. EVID. DEPOSITIONS OF WITNESSES.

A writ of execution of an order for payment of money was issued, and afterwards an attachment, on which defendant was taken, and he paid the money: motion afterwards made for reference to master, to tax subsequent costs, and that defendant might be ordered to pay such costs, was refused. *Collins v. Oump*, 3 Mad. 390.

Plaintiff having put in an examination reported insufficient by master, defendant held entitled to reference to tax costs in respect of it. *Hubbard v. Hewlett*, 2 Mad. 469. PR. EXAMINATION.

Answer being referred for impertinence, and reported not impertinent, order, upon motion, to refer it to the master to tax the defendant's costs. *Tyrril v. Radtger*, 1 Mer. 132. PR. REFERENCE FOR IMPERTINENCE.

Separate report under circumstances allowed as to costs alone, without waiting for general report in the cause. *Edes v. Ross*, 2 Mad. 448. PR. SEPARATE REPORT.

Where bill is reported impertinent, the defendant is entitled to a reference to tax costs *instantly* after report made. *Muscott v. Hulhed*, 4 Bro. C. C. 222. PR. IMPERTINENCE.

Plaintiff to pay 7l. extra for length of amendments. *Frels v. Culpepper*, 1 Dick. 284.

Where the master reports an answer insufficient, and upon exceptions, it is held to be sufficient, the party succeeding in the application is not entitled to costs, but they shall abide the event of the cause. *Arion* 3 Ark. 335.

But the court on special motion may give costs, though the master reports in favour of the other party. *Id.* *ib.*

(f) *Allowances beyond taxed costs, and as between attorney and client, or party and party.*

Costs as between solicitor and client, allowed to the Archbishop and Bishop when made parties to a suit, respecting the validity of the election of a vicar. In what case trustees are allowed costs only, as between party and party. *Idenbrough v. Arch. of Canterbury*, 2 Russ. 93.

The exchequer never orders costs to be taxed, as between attorney and client. *Teatles v. Newitt*, 8 Price, 570. *S. P. Fontaine v. Fyler*, 9 Price, 105. *Sharples v. Sharples*, 13 Phil. 749. *S. C.* 1 M'Clel. 505.

Bill by one residuary legatee against the other, for the administration of estate usual decrees made and held on further directions, costs should be taxed as between solicitor and client. *Tonnes v. Taylor*, 5 Mad. 470.

Court will not allow executor, interest on costs paid by him, pending a suit respecting the estate. When interest is allowed, it is only from the time of the balance having been struck on the general report. *Gordon v. Trail*, 8 Price, 416. INTEREST, *see* section.

Costs to a defendant in a mortgage by conveyance of goods, as to plaintiff in bills of interpleader, not as between attorney and client but according to the course of the court is between party and party. *Hubbard v. Hubbard*, 19 Ves. 205.

When litigation is vexatious, full costs should be given, *aliter* where a true question has been raised for the opinion of court. *O'Donohue v. Lane*, 1 Bill & B. 264. VEXATIOUS LITIGATION.

Charges of a sale to be taxed under the head of just allowances, not of costs. *Crump v. Baker*, 18 Ves. 283. SALE.

Affidavit in bankruptcy ordered to be taken off the file as irrelevant and frivolous, with costs as between attorney and client. *Tip Shop v. n.*, 13 Ves. 476. BANKRUPT AFFIDAVIT RELEVANT.

Debts contracted in London made payable in London, the expence of commission to a bank remitting money, falls on debtor. *Cash v. Keenon*, 11 Ves. 314. DEBTOR'S CREDITOR.

Trustee, or next friend of infant, is entitled to full expences beyond taxed costs, under the head of just allowances. *Feun v. n.*, 10 Ves 181. TRUSTEE, PROCHAM AMI.

Court refused prochain ami the costs beyond the taxed costs. *Osborne v. Dunn*, 7 Ves. 121. PROCHAIN AMI.

In charity cases the court often gives the relator costs beyond taxed costs. 11 125. CHARITY RELATOR.

On opening biddings, the court in the refusal of costs of the purchaser will not give a particular direction for a specific expence. *Ham* 2 Ves. J. 286. SALES, BIDDING, OPENING BIDDING.

Cost as between attorney and client against parties to a fraudulent bankruptcy, except those who discovered and gave evidence, and the attorney deprived of the office of master extraordinary, and committed. *Ap. Thorp*, 1 Ves. J. 394. FRAUD.

Costs of solicitor attending execution of commission *provd.* *Hammond v. Wordenorth*, Dick. 381.

Additional costs on long amendments, granted. *Rose v. Stuart*, Dick. 58.

Mortgagee having been at great charges to defend a suit at law brought by the heir of the mortgagor, who endeavoured to defeat the mortgagee by an entail, but could not prevail, upon a bill afterwards brought by the heir to redeem, mortgagee allowed his free costs expended in the suit, and not tied down to the costs taxed. *Ramden v. Langley*, 2 Vin. 530. MORTGAGEE & MORTGAGOR, ACCOUNT.

Allowed also costs in taking out administration to the mortgagor, principal creditor. *Id.* *ib.*

A trustee shall be allowed his full and necessary costs and shall not be confined in his account to the costs taxed, of course, in obtaining a decree. *Amand v. Brathwaite*, 2 Ch. C. 138. TRUSTEE.

Defendant cannot have from plaintiff, costs expended by defendant's father before his death. *Lloyd v. Pours*, Dick. 16.

10 In cases of—suits for—and by or to.

- (a) Affidavit after notice to appear &c.
- (b) Account.
- (c) Amendment.
- (d) Appeal.
- (e) Attorney general and crown.
- (f) Bankrupt and insolvent.
- (g) Bank of England.
- (h) Bill, dismissal of.
- (i) Cause standing over, or struck out of paper.
- (j) Charity.
- (k) Commissioners of bankruptcy.
- (l) Contempt.
- (m) Credit.
- (n) Cross cause.
- (o) Decree for administration of assets.
- (p) Demurrer applied for, submitted to, overruled, or ordered to stand for answer.
- (q) Discretion.
- (r) Doctor.
- (s) Executors, trustees, committees, &c.
- (t) Exceptions allowed or overruled.
- (u) Flea at law.
- (v) Husband and wife.
- (w) Incumbents, mortgagors and mortgagees, equitable and legal.
- (x) Infant, proxy, and guardian.
- (y) Insufficiency of answer.
- (z) Interpleader.
- (aa) Irregularity of process.
- (bb) Issue at law.
- (cc) Lunacy.
- (dd) Parties improperly joined or served with notice, &c.
- (ee) Pauper.
- (ff) Pleading, testimony, and commissions to examine.
- (g) Proof of a bill before master.
- (hh) Receiver.
- (ii) Return.
- (jj) Solicitor.
- (kk) Specific performance and sales judicial.
- (ll) Witness.

(a) Affidavit after notice to appear.

Ordered, that if a party gives notice of motion and does not revive accordingly, he shall, when no affidavit is filed, pay to the other side 40s. costs, upon production of the notice of motion. But when an affidavit is filed by either party, the party giving such notice of motion and not moving shall pay to the other side costs to be taxed by the master, unless the court itself shall direct upon production of the notice

of motion what sum shall be paid for costs. Gen. Order, 5th August, 1818. S. O. 1 Swan. 128. 1 Wils. 309.

Where proceeding fails from non-attendance, master may certify the costs to be paid by the party in default, and court, on motion or petition, will order payment. 55th Gen. Order, 3rd April, 1828. PR. NON-ATTENDANCE BEFORE MASTER.

Petitioner not appearing respondent is entitled to costs on producing his own affidavit of having been served. *Exp. Garth*, 2 G. & J. 392.

Where costs of day are ordered, service of the order is not necessary but to found a preliminary objection to hearing of petition; an affidavit of demand is necessary. *Exp. Leech*, id. 78.

A party is not subjected to costs by the abandonment of motion after one single notice of motion. *Hurd v. Parlington*, 1 M'Clel. & Y. 40. PR. IN EXCH.; MOTION, ABANDONMENT OF, AFTER NOTICE OF.

Where court is moved for payment of costs under general order, 5th August, 1818, (3 Mad. 318. 1 Swan. 328.) on account of a notice of motion which has been abandoned, such notice of motion must be mentioned to the court, and must also be produced to registrar before he draws up order. *Whitely v. Haigh*, 3 Mad. 437. GEN. ORD. C. OF; PR. MOTION ABANDONMENT; PR. NOTICE OF MOTION.

Before this order, a party was at liberty to give and abandon three notices of motion without paying costs. *Shelly v. Shelly*, 8 Ves. 316. *Anderson v. Palmer*, 14 Ves. 151. *Witcombe v. Minchin*, 1 Wils. 1.

And a renewed motion cannot be made until the costs occasioned by the former notice of motion are paid. *Bellchambers v. Giant*, 3 Mad. 550. See also *Tarent v. Trewitt*, Bunb. 86.

Objection to a motion, upon the right to costs of previous notices abandoned, cannot be made until the fourth. *Anderson v. Palmer*, 14 Ves. 151. PR. NOTICE OF MOTION, ABANDONMENT OF.

A motion had been made, the effect of which was allowed, but the party moving was ordered to pay costs for a deficiency of notice. It was then moved and ordered, that to avoid the expence of taxing upon a sum that must be trifling, a sum certain should be ordered for costs. *Wilding v. Wilding*, 4 Bro. C. C. 100.

If three notices of motion are given, the party cannot move on a fourth without paying the costs of the three first. *Tarent v. Trewitt*, Bunb. 86.

Suit dismissed with costs, plaintiff not appearing at hearing. *Fincham v. Backwood*, Cury, 45.

Plaintiff showed defendant subpoena, but delivered no note of day of appearance; defendant appeared but finds no bill, he shall have good costs and attachment against plaintiff. *Brightman v. Portrell*, id. 59.

#### (b) Account.

In a suit for partition and an account, the defendant improperly disputing the plaintiff's title, ordered to pay so much of the costs as related to the account and to the proof of the plaintiff's title. *Hill v. Pullbrook*, 1 Jac. 574. PARTITION.

Plaintiff always pay costs where an account turns against him, or where he prevails, in nothing but what he might have insisted on at law. *Lyre v. Parnel*, 6 Vin. 267, pl. 23.

It is the constant course of the court where mutual account is decreed, to reserve costs till after the report, that the court may have it in their power to punish the wrong-doer. *Rider v. Bailey*, 6 Vin. 332, pl. 32.

A decree for costs necessarily follows a decree for

payment of principal and interest. *E. I. Comp. v. Ekins*, 6 Vin. Ab. 365, pl. 13. 2 Bro. P. C. 382.

Costs generally follow the event of an account, but where the account is intricate or doubtful, there shall be no costs. *Pitt v. Page*, 1 Bro. P. C. 1. S. C. 6 Vin. Ab. 332, pl. 32. ACCOUNT.

#### (c) Amendment.

If plaintiff shall not amend his bill within four days after order obtained and demurrer put in, grounded on an error in the bill, and pay the costs, the demurrer shall be determined in open court. Ord. Exch. *Kirby's Ed.* 8. See 1 Fowl. 126.

Plaintiff filing bill, and after answer amending bill, so as to make case quite reverse. Ordered that he pay costs of original bill, and parts of answer set forth by reason of that bill, and costs of the motion as a vexatious proceeding. *Mavour v. Fry*, 2 S. & S. 113. PR. VEXATION.

If plaintiff obtain an order to amend without costs amending the defendant's office-copy, and the amendments require a new engrossment, he may amend without a new order paying the 20s. costs. *Carv. Champneys*, 6 Mad. 314.

Plaintiff not entitled upon paying the common costs of amendment, to change entirely the nature of his bill, as by converting a prayer for an account against a bailiff into a bill to foreclose a mortgage, after an issue against the plaintiff finding him a mortgagee. *Smith v. Smith*, Coop. 141. Et vide (n.) to *Mazarredo v. Maitland*, 3 Mad. 72.

Plaintiff amended three times on payment of 20s. costs, and then obtained a fourth order, which defendant moved to discharge, and that the master might tax the costs of the former amendments. Motion granted, on the amendments appearing to be frivolous and vexatious, and in fact repetitions of what was in the former bill. *Rennet v. Green*, 1 Cox, 253.

But in *Masarene v. London*, 2 Bro. C. C. 291, Ld. Chancellor refused a similar application, saying, that the mere statement of the number of sheets in the several amended bills was not sufficient to break through the general rule, but in order to do this, there must be a case of particular oppression.

Order for amendment without costs requiring no further answer; the amendment was by inserting prayer for injunction: Held, the defendant might answer further gratis. *Sarory v. Dyer*, Amb. 70. PR. FURTHER ANSWER.

Plaintiff, after amending four times, applied again and obtained the common order to amend on payment of 20s. costs. The amendments being long, defendant was put to considerable expence in taking a copy, and therefore applied to have the order discharged. This the court refused to do, but directed plaintiff to pay defendant 7l. costs beyond the 20s. *Froke v. Culpepper*, 1 Dick. 284. But where, in a similar case, defendant had consented to the amendments on terms, the court refused to discharge the fourth order, or to allow full costs. *Brindal v. Thompson*, Barn. 333, 2 Ark. 123. S. C.

The cause went off at the hearing for want of parties: under the usual order for leave to amend by adding parties, plaintiff struck out several charges which had been examined to, and defendant accepted the costs. On a second hearing, the like objection was made, and the like order obtained. Plaintiff amended again by striking out some farther charges, and adding new matters, and praying relief against defendants generally. On motion to discharge the amendment as irregular, plaintiff insisted there was no difference between plaintiff's striking out before the hearing and waiving at the hearing, such parts as he

should be advised. Per J. d. Chancellor, The difference is obvious; by preventing the matter struck out from coming before the court, he prevents the court from ordering payment of costs of such part as is waived, and thereby from doing that justice to defendant which it otherwise would. As to the first amendment, defendant has stopped himself from complaining of it by accepting the costs. As to the second, it is irregular, and as the irregularity appears, the court will judge of it without sending to a master. Plaintiff to pay the costs. *Bullock v. Perkins*, Dick. 110.

J. d. Chancellor said, he would not in any case oblige a plaintiff to pay more than 20s. costs to a defendant after answer put in, on the amendment of the bill, but he would consider how in future to make a defendant a more adequate compensation after a long answer, and other necessary proceedings on his part. *Deggs v. Colebrook*, 1 Atk. 396.

Plaintiff amended under the common order on payment of 20s. costs. The amendments being long, he was ordered to pay 3l. additional costs. *Rouse v. Stuart*, Dick. 58.

No proceedings on an amended bill till the costs of the former proceeding are discharged. *Cyge v. Lister*, 4 Vin. Ab. 444, pl. 9.

#### (d) Appeal.

Parties liable to full costs, beyond the deposit on rehearings and appeals at the discretion of the court. Order of Court, 30th April, 1700. 4 Bro. C. C. 545, revived by Ord. 7th Feb. 1794. Beames' Ord. 314. 458.

The part of the order as to paying further costs to be taxed, is said, by Mr. Beames, to have been acted on in two instances only, which he mentions. This liability to costs beyond the deposit, applies to the case of exceptions disallowed, as well as to that of the re-hearing of exceptions. *Purell v. Macnamara*, 12 Ves. 166. It seems to be the modern practice, that upon a re-hearing, an undertaking should be entered into to pay such costs subsequent to the decree as the court shall think proper. Vide *Fowles v. Young*, 9 Ves. 173. Beames' Ord. Ch. 461. (n. 6.)

All applications for a re-hearing to be made within six months after the decree pronounced; the party applying for it to deposit 10l. within ten days after the order; in default, the order for the re-hearing to stand discharged without any motion. Ord. Exch. 13th Nov. 1731. 2 Fowl. Ex. Pr. 235.

By an Ord. Ch. Irel. 14th Nov. 1698, on a petition for re-hearing, 5l. deposit was to be paid within six days, or in term time within three days; but by a subsequent Order (7th July, 1752), it was ordered there should be no deposit, but the order on the petition to be, that the petitioner should be at liberty to re-hear, on paying such costs as should be adjudged at the re-hearing.

A party having appealed against one part of decree in a suit, where the title is not in issue, thereby virtually submits to the rest of it, and cannot afterwards present a new appeal against other parts of same decree. When such appeal is presented, party served with it ought not to answer, but to present a counter petition to have it dismissed. If he treats it as an effective appeal by answering and suffering it to proceed before he presents a counter petition, he will not have costs. *Norbury v. Meade*, 3 Bligh, 261.

Where considerable delay has occurred in prosecution of suit, costs are not given, though decree is reversed. *McLough v. Steran*, 3 Bligh, 101. LACHES.

An appeal does not form a ground to stay process of costs previously commenced, viz. by subpoena; action where the appeal is before any step taken.

*Roberts v. Totty*, 19 Ves. 446. P. APPEAL; P. STAYING PROCEEDINGS.

Distinction between costs of an appeal before the House of Lords, and of soliciting a bill, which any one may do. *Exp. Wheeler*, 3 V. & B. 22. PROCEEDINGS IN HOUSE OF LORDS.

A suit was suffered to sleep for more than twenty years, without any step by either party. This, though no bar to the relief, is a good reason for not giving costs where they would have otherwise followed the judgment. *Cane v. Allen*, 2 Dow. 289. 299.

On application for a rehearing, an order is made that petitioner should be at liberty to rehear the cause on payment, within a week after service of a taxed bill of costs, of all costs incurred since the decree. On appeal from this order it was declared, that there was no sufficient ground for imposing these terms; but that it would have been sufficient for the court to require the appellant to give security for, or submit to pay, the costs in case the decree should be materially varied at the rehearing. *Houghton v. West*, 2 Bro. P. C. 91. 98.

The cause was set down *ad requisitionem defend.*: plaintiff appeared, and prayed to adjourn, consenting to appear gratis. On the cause coming on again, plaintiff made default, and the bill was dismissed. Plaintiff then obtained an order to rehear, and on motion to discharge the order, he was ordered to pay defendant's costs, and to consent to pay such further costs as should be awarded against him on the rehearing, otherwise the order to be discharged. *Terran v. Waite*, Dick. 732.

If a decree *nisi* be made absolute on default, and there is a petition for a rehearing, and the person in possession of the decree does not attend at the rehearing, the bill will be dismissed with costs as to the petition. *Wilson v. Dalbs*, Sel. Ca. Ch. 50.

A party bringing a frivolous appeal, ordered to pay 50l. costs, and on disobeying this order, she was ordered into the custody of the gentleman usher of the black rod until payment. *Blake v. Blake*, 7 Bro. P. C. 241.

Rehearing granted on the petition of plaintiff, on the penalty of treble costs, if plaintiff be not relieved. *Bowen v. Edwards*, 1 Rep. Ch. 222.

#### (e) Attorney-general and crown.

Where, in a charity information, the relators are allowed their costs of proceedings, which the attorney general has attended separately by his own solicitor, without an order from the court for so doing, the attorney general will not be allowed his separate costs. *Att. Gen. v. Dove*, 1 Turn. & R. 328. CHARITY INFORMATION; ATT. GEN.

Where charity information is filed, without relator, under 59 G. 3. c. 91. court has jurisdiction to order defendant to pay costs to attorney general. *Att. Gen. v. Ashburnham*, 1 S. & S. 394. CHARITY; ATT. GEN.; RELATOR.

No such general principle in equity that the crown cannot receive costs. *Id.* 397. CROWN.

#### (f) Bankrupt and insolvent.

Obligor, though insolvent, and so stated in bill, may yet be made party defendant, and shall pay his own costs. *Haywood v. Ovey*, 6 Mad. 113. P. L. PARTY; OBLIGOR & OBLIGEE; INSOLVENCY.

A, the maker, B, the indorser, and C, the indorsee of promissory note, with interest: note when due is dishonoured. A, agrees with C, to sell C goods, and take back note in part payment: part of goods given to C, and note given to A, and destroyed; A becomes bankrupt, and sale to C vacated. On bill for account by C, against B and A, account directed with costs.

against B, but dismissed as against A, without costs, C undertaking to prove note against A's estate for B's benefit. *Gregory v. Bessell*, 6 Mad. 186. **BANKRY.** **PROOF; PROMISSORY NOTE; ACCOUNT.**

Where bankrupt's bill is dismissed for want of prosecution, he must be made to pay costs. *Wheeler v. Malins*, 4 Mad. 128. **BANKRY.; LIAB. OF; PR. BILL, DISMISSAL OF.**

Before the bankruptcy, the bankrupt commenced an action which was afterwards prosecuted by his assignees, and failed; the bankrupt having obtained his certificate, was taken in execution for the costs. Petition for payment of these costs out of the estate, refused, on the ground that the bankrupt had, by his wilful misrepresentations, induced the assignees to pursue the action. *Exp. Seaman*, 1 Glyn & Jam. 260.

Assignees brought before the court by supplemental bill may be made liable to the costs of the whole of the suit, where they improperly resist plaintiff's demand; but the V. Ch. refused to give costs against the assignees in this case, because plaintiff had made no application to them on the subject of the suit, before the filing of the supplemental bill. *Whitcomb v. Minchin*, 5 Mad. 91.

It is not of course to refer to the master a bill of costs up to the choice of assignees, already taxed by the commissioners, but particular objections must be stated. If the solicitor refuses to give a copy of his bill, a reference will be made. *Exp. Sutton*, 4 Mad. 395.

Where a bankrupt obtains leave to surrender after the time for surrendering is expired, he must pay the costs of the surrender. *Exp. Carter*, id. 391.

An order was made in bankruptcy referring a solicitor's bill to be taxed, and reserving the question as to the costs of the taxation. The costs were taxed, and one-sixth taken off, and the solicitor brought an action for the amount, without deducting the costs of taxation. On petition, the action was stayed, a reference directed to tax the costs of the taxation, and that the amount, after deducting the costs of taxation, be paid to the solicitor. *Exp. Bellott*, id. 379.

Where a bankrupt presented an unnecessary petition, his solicitor was ordered to pay 40s. costs. *Exp. Parker, Buck*, 313.

Where a petition to stay a certificate fails, it is not of course that the petitioner should be ordered to pay the costs. *Exp. Stevens, Buck*, 389. 4 Mad. 256. Vide *Exp. Enderby*, 5 Mad. 76. *Exp. Bryant*, 1 G. & J. 206.

It is a contempt of the great seal for a petitioning creditor to strike a docket at the instance of a solicitor, who undertakes to prove the act of bankruptcy, and to guarantee him against any expenses he may be put to by issuing the commission, and therefore the court will not, on the petition of such creditor, tax the solicitor's bill. *Exp. Wilson, Buck*, 306.

Where an issue was directed to try the validity of a commission, in which the assignees were plaintiffs, and the bankrupt defendant, and the latter succeeded, the former were made to pay the costs of the trial; but not of the petition to supersede the commission, because it was their duty to appear and resist it. *Exp. Edwards*, id. 232.

If a bankrupt brings an action to supersede his commission, and fails, he pays costs, like any other plaintiff; but if he comes into equity for the same purpose, he escapes the payment of costs. *Exp. Bilhild*, id. 220.

The general rule in bankruptcy is, that you cannot have costs, unless the petition prays them. *Exp. Atkinson*, id. 215.

If a creditor be brought before the court to have his debt expunged, and no good grounds are shown why it should be done, as a general rule he is entitled to

his costs. But where the assignees had a fair cause for bringing him before the court, and the affidavit he made on his proof was calculated to mislead, the court refused him his costs. *Exp. Hustler*, id. 171. 177.

Though an attorney, by signing his name in conformity with the general order, is not to be considered as guaranteeing the success of a petition in bankruptcy, yet where it appears to have arisen out of his interest views, he will be made to pay the costs of it. *Exp. Cuthbert*, 1 Mad. 78.

Petition by a commissioner, a barrister, to have paid his fees and disbursements under five several commissions in which he had acted as commissioner: held, that the solicitor who undertook to act under the commission, was bound to pay the commissioners their fees, for they have a right to the payment of their fees at each meeting, and the hand for paying them must of necessity be the solicitor's, for the petitioning creditor or assignees are not necessarily present. *Exp. Griffith*, id. 56.

The party to whom costs were awarded in a bankruptcy matter brought an action on a written undertaking to pay them, recovered judgment, and levied for the money; Ld. Redesdale said, he would never suffer costs awarded by this court to become the subject of an action, particularly costs awarded in bankruptcy, which are to come out of a fund over which he would lose all control if the order made by him in the bankruptcy were to be proceeded in elsewhere. The party was ordered to acknowledge satisfaction on the judgments, to refund the money, and to pay the costs of the defendants at law, with the costs of this application. *In re Dillon*, 2 Sch. & L. 110.

Costs personally against an uncertificated bankrupt, in a case of fraud and misconduct. *Locke v. Bromley*, 3 Ves. J. 40. **FRAUD; BANKRUPT.**

After answer put in, plaintiff became bankrupt, and his assignees not reviving the suit, defendant obtained the common order to dismiss, taxed costs, and procured the master's report. Plaintiff desired time, and promised to pay the costs; but afterwards applied to discharge the order for dismissal, as irregularly obtained. Clarke, M. R. seemed to think it irregular, but held, that by asking for time, and promising to pay, he had waived the irregularity. *Hall v. Chapman*, 1 Dick. 348.

Plaintiff insolvent during cause, costs decreed against him; not relieved against those costs incurred before insolvency. *Smith v. Fry*, Dick. 288.

Where a solicitor carries on suits, and was employed by the assignees, without the authority of the majority in value of the creditors, the estate of the bankrupt is not liable to his bill for such suits. *Exp. Hitchlugh*, 1 Atk. 210.

Some months after bill filed, plaintiff became bankrupt, and his assignees not answering, defendant obtained the common order to dismiss the bill with costs. Petition by plaintiff, the bankrupt, to be relieved against the costs, dismissed. *Exp. Berry*, 1 Dick. 81. In 2 Dick. 740, it is stated, that the bankrupt was also in contempt for non-payment of money ordered to be, and a *quære* added, whether it was not for this reason that the costs were considered by Ld. Hardwicke as part of the contemnor's punishment?

Bankrupt fraudulently debited himself with less than he sold some diamonds for, which were consigned to him. He would have been liable to costs; ergo, his assignees shall pay them. *Child v. Pitt*, Sel. Ch. Ca. 16.

#### (g) Bank of England.

Where a testator possessed of stock in the government fund, bequeaths it specifically, the bank cannot

refuse to permit the executor to transfer it, he not having assented to the legacy. The bank having, under these circumstances, refused to permit the executor to transfer a legacy, decree was made against them with costs. *Franklin v. Bank of England*, 1 Russ. 575. BANK OF ENGLAND; TRANSFER OF STOCK.

The costs of the bank, paid out of the capital of a legacy, for the security of which they were made parties. *Hammond v. Neame*, 1 Swan. 38. BANK OF ENGLAND; PL. PARTIES.

If bank of England are unnecessarily made parties to suit, within 39 & 40 G. 3. c. 36. bill will be dismissed as against them, with costs to be personally paid by plaintiffs. *Edridge v. Edridge*, 3 Mad. 386. BANK OF ENGLAND.

Specific bequest of stock to the executrix for life, and after her death to her daughter absolutely at twenty-one. The bank resisting a transfer according to an agreement to relinquish the life interest without the direction of the court, are entitled to costs. *Austin v. Bank of England*, 8 Ves. 522. TRANSFER; BANK OF ENGLAND.

Bequest of stock to executor for life, remainder to M W, the executor, having brought M W's reversionary interest, and the bank refusing to allow a transfer, the court ordered a transfer to be made accordingly, but nevertheless gave the bank their costs. *Pearson v. Bank of England*, 2 Bro. C. C. 529. S. C. 2 Cox, 175. But see note there. BANK OF ENGLAND; TRANSFER OF STOCK.

The bank being made parties to discover what sum the executrix had transferred into her own name, need not be brought on to a hearing; the plaintiffs therefore ordered to pay their costs. *Williams v. Williams*, 2 Bro. C. C. 87. BANK OF ENGLAND.

Where the answer of the bank is not replied to, and the bill is dismissed as to other defendants, the bank are to have only 40s. costs. *Craicu v. Smith*, 2 Fowl. Ex. Pr. 351. *Pate v. Quince*, id. 352.

#### (h) Bill, dismissal of.

Upon the plaintiff dismissing his own bill, or defendant dismissing the same for want of prosecution, the plaintiff shall pay to the defendant full costs to be taxed; and no copy of any bill to go with the *dedimus*, or commission for taking the defendant's answer. 4 Ann. c. 16. s. 23. PR. BILL, DISMISSAL.

A bill being filed by a shareholder in a joint stock company against the directors and other shareholders, in order to have the partnership dissolved, and the proper accounts taken; fourteen of the directors, who appeared by the solicitor of the company, having filed fourteen separate answers with long schedules to each, all of which answers and schedules were nearly verbatim the same: Held that, in that stage of the cause no inquiry could be directed into the necessity or expediency of filing those separate answers with a view to the defence of the suit. The plaintiff in such a suit, notwithstanding the adoption of such a mode of defence, will not be permitted to dismiss his bill without costs on his application, nor will any reference be directed to the master with a view to modify the costs which the plaintiff shall pay. *Van Sandau v. Moore*, 1 Russ. 441. PR. INQUIRY; PR. ANSWER.

Plaintiff failing on showing special cause against an order obtained for dismissing the bill for want of prosecution, must, if he procure the bill to be retained on undertaking to speed, pay costs of motion to dismiss, as one of the terms of retaining the bill. The special case shown being that some of defendants are in contempt, and that plaintiffs were proceeding to attach them, must be supported by affidavit. *Atkinson v. Hutton*, 13 Price, 6. PR. BILL, CAUSE AGAINST, DISMISSAL OF.

Where defendant in equity is plaintiff at law, and on issue directed by equity as to tithes, obtained three successive verdicts, which were successively set aside in equity, and, after the last, reformed his issue, so that the plaintiff in equity found it necessary to dismiss his bill. The court ordered each party to pay his own costs at law and equity. *Williamson v. Thompson*, 11 Price, 745.

Where defendants at law file bill for discovery and relief by cancellation of deeds, and bill is dismissed with costs; they having good defence at law, and they succeed at law, and afterwards petition for a re-hearing on account of cost, on grounds that they were substantially entitled to such cancellation of deeds. The order was made, but without costs. *Duncan v. Worrall*, 10 Price, 31. PR. RE-HEARING; DELIVERY UP OF DEEDS TO BE CANCELLED.

Where by mistake in the registrar in the name of the cause, the order to dismiss was drawn up by defendants after plaintiff had undertaken to speed the cause, the plaintiff must indemnify defendant against the costs of the order. *Hibbertson v. Cooke*, 11 Mad. 248. PR. OFFICERS OF COURT, MISTAKE BY; PR. ORDER TO DISMISS.

Replication filed after the notice of, but before making the motion to dismiss, motion not sustainable; defendant entitled to costs. *Spurrer v. Bennett*, 4 Mad. 39. PR. MOTION TO DISMISS; PR. NOTICE; PR. REPLICATION.

On decree for dismissal of bill, the decree was prefaced with a direction for the payment of some motions prior in the cause. *Wild v. Hobson*, 4 Mad. 49.

Bill by purchaser, for specific performance, ordered to be dismissed for defect of title, a necessary party not chusing to concur in conveying. Order to dismiss without costs, it being against the principles of the court to order the defendant to pay the plaintiff his costs on such dismissal. *Lewis v. Loxham*, 3 Mer. 429. See the notes there. SPECIFIC PERF.; PL. PARTY.

Order to dismiss the bill for want of prosecution cannot be had if a proceeding had been taken before the motion, but if the order has been obtained irregularly by the misrepresentation of the plaintiff, he shall pay the costs of discharging it. *Anon.* 14 Ves. 492. PR. DISMISSAL FOR WANT OF PROSECUTION.

Plaintiff can in no case dismiss his bill without costs; with costs it is of course; but after motion to dismiss without costs, refused; consent is necessary. *Dixon v. Parks*, 1 Ves. J. 402. PR. MOTION TO DISMISS.

Defendant examined as a witness, bill as to him dismissed with costs. *Weymouth v. Boyer*, 1 Ves. J. 417. PARTY DEFENDANT, WITNESS.

Where a master's report is against the title, a vendor's bill may now be dismissed with costs upon motion. *Bennet Coll. v. Carey*, 3 Bro. C. C. 390. VENDOR & PURCH.; TITLE; PR. DISMISSAL OF BILL.

Order made on the motion of the plaintiff to dismiss his bill without costs, the defendant having, by his own act, rendered the suit useless. *Knox v. Brown*, 1 Cox, 359. PR. DISMISSAL OF BILL.

A co-plaintiff may dismiss his bill as against himself, with costs, without the consent of the other plaintiffs. It is a motion of course. *Bathew v. Needham*, Wy. Pr. Reg. 179, recognised and followed in *Langdale v. Langdale*, 13 Ves. 168.

Plaintiff cannot move to dismiss his bill without costs, on the ground that defendant had become bankrupt, so that all hopes of obtaining the end of the bill were defeated; for bankruptcy does not abate the suit. *Rutherford v. Miller*, 2 Anstr. 469. *Sellas v. Dawson*, cited id. n., (reported 2 Dick. 738.) *Davidson v. Butler*, id. n.; Co. B. L. 575. S. C. *Monteith v. Taylor*, 9 Ves. 615. *Rhode v. Spear*, 4 Mad. 51. S. P. And in *Lingard v. Wegg*, 3 Bro. C. C.

435, an order to dismiss was set aside, plaintiff having become bankrupt: but there was also an affidavit that the motion to dismiss had been made without notice. But on the bankruptcy of a sole plaintiff, defendant may dismiss for want of prosecution, with costs. *Butler v. Davidson*, 2 Fowl. 32. But where plaintiff in such case has obtained his certificate, the court, on producing it, will dismiss the bill, without costs. *Tait v. Carwick*, 2 Fowl. 33.

In *Bayly v. Leominster*, 1 Ves. J. 476. 3 Bro. C. C. 529, the Ld. Ch. said, that Ld. Hardwicke's order did not alter the practice generally as to the costs on bill and answer, but gave a direction to vary it, if a special case were made; and in the present case, on a cause heard on bill and answer, the bill being dismissed with costs generally, a motion was granted to vary the decree, by reducing the costs to 40s.

Plaintiff in a pauper cause cannot move to dismiss but on payment of costs. *Pearson v. Belsher*, 3 Bro. C. C. 87.

By the answer it appeared, that though, if the suit proceeded, the plaintiff would certainly obtain in equity the relief he sought, yet that there was a more summary way of obtaining it at law. Plaintiff moved to dismiss his bill with costs, but though the motion was not opposed, the court said it could not be granted without the express consent of the other parties. *Anon.* 1 Ves. J. 140. And in *Dixon v. Parks*, 1 Ves. J. 402, where some bonds, which were the object of the suit had been found, so that plaintiff had his remedy at law, a similar motion was made, with the same result; but the bill was dismissed with costs by consent, on paying the costs of the motion.

Under the late Irish act, (25 G. 3. c. 51.) the costs on dismissing bills are to be taxed, as if the bill were dismissed at the hearing with full costs, the taxation being not upon the rule of costs between party and party, but upon the rule where full costs are ordered. *Wynne v. Byrne*, O'Keeffe's Ord. 77.

A motion by plaintiff to dismiss his own bill without costs cannot be granted without the express consent of defendants in court. *Fidelle v. Evans*, 1 Cox, 23. Vide *Anon.* 1 Ves. J. 141.

By Order Ch. (Irel.) 12th May, 1744, O'Keeffe's Ed. 59, after a conditional decree or dismissal obtained, the party desiring to shew cause, instead of 5l. costs, must pay full costs, to be taken up from the service of the subpoena to hear judgment.

When a conditional decree or dismissal has been pronounced, defendant must pay the 5l. four days at least before the hearing, on shewing cause, or in default, he shall not be admitted to shew cause against confirming the same, unless the parties against whom such decree or dismissal is obtained shall be out of the kingdom; in which case, if plaintiff applies for an order to serve defendant's clerk therewith, such service must be made the term before the same shall be heard, and the subpoena be made returnable on some day in such term. Order Ch. (Irel.) 29th June, 1720. O'Keeffe's Ed. 31. In *id.* 45, defendant not attending upon hearing on a conditional decree, the Ch. declared, that where the party is out of the kingdom, and service ordered on the clerk, there should be six weeks' notice before the return of the subpoena.

On motion to dismiss a bill on hearing and answer only, with 20s. costs, Ld. Keeper said, for the future it should be referred to a master to tax defendant his costs in such a case. *Anon.* 2 Vern. 116. But in the affidavit of the costs out of pocket, defendant must specify the particulars. *Anon.* *id.* 334. But now, by statute 4 Anne, c. 16. s. 23, and by 25 Geo. 3. c. 51. (Irel.) full costs to be taxed are to be allowed in all cases where plaintiff dismissed his own bill, or it is dismissed for want of prosecution. By the 18th Order Exch., if plaintiff will dismiss his

bill before he reply, he shall pay 40s. costs, unless court, on motion, shall think fit to increase them. And by Order, 27th April, 1748. (Beame's Order 450. 2 Atk. 288,) where any cause is dismissed on a hearing on bill and answer (a case that comes not within the statute, *supra*) the court may give costs to be taxed. See *Mausel v. Bowles*, 2 Dick. 646. 1 Bro. C. C. 403. In *Johnson v. Brown*, 3 Atk. 1, (previous to the order) Ld. Hardwicke gave costs to be taxed, on dismissing a bill on a cause heard on bill and answer. Before this last order, it seems to have been common for applications to be made for leave to withdraw replication, in order to set causes down on bill and answer only, and by that means get the bill dismissed with 40s. cost only. See *Pott v. Reynolds*, 3 Atk. 565. In *Newsham v. Gray*, 2 Atk. 288, which gave rise to the order, Ld. Hardwicke considered that the court's directing an issue on the merits, was to be looked upon as a subsequent proceeding beyond the bill and answer, and dismissed the bill with full costs.

After a decree, plaintiff may not move to dismiss his bill, on payment of costs. *Guilbert v. Hawles*, 1 Ch. Ca. 40. But till there has been a final decree, plaintiff may, in any stage of the cause, apply to dismiss on payment of costs, even after an issue has been directed and found in defendant's favour. *Carrington v. Holly*, 1 Dick. 280. 2 Mad. Chan. 390, states, that this report is not warranted by the Reg. Book.

Plaintiff, having no equity, bill dismissed at hearing though defendant made default, but without costs. *Spetdall v. Serves*, Dick. 632.

If more tithes are claimed than defendant has lands of titheable grounds, it is the practice in exchequer to dismiss bill with costs. *Anon.* Loft. 66. TITHES; PR. IN EXCH. BILL, DISMISSAL OF.

Plaintiff files bill and becomes bankrupt, assignees neglect to revive order to dismiss bill with costs. Petition by bankrupt for relief against costs, refused. *Exp. Berry*, Dick. 81.

(i) *Cause standing over, or struck out of paper.*

Cause adjourned, costs of day 10l., as well in rolls as in court of chancery. 35 General Ord. 3d April, 1828. PR. ADJOURNMENT OF CAUSE.

Where cause is struck out of paper by default of plaintiff, defendant shall be allowed costs thereof. 34 General Ord. 3d April, 1828.

Cause on hearing ordered to stand over for want of parties. Defendant not allowed costs of day, because answer did not state that objection. *Mitchell v. Bailey*, 3 Mad. 61. PR. PARTIES; PR. ANSWER.

The same was held with regard to defendant not demurring. *Anon.* cited 3 Mad. 62. note.

When cause stands over with leave to amend bill, and motion becomes necessary that plaintiff should amend within limited time, plaintiff pays costs of such motion, but notice of motion must not be silent as to such costs. *Cox v. Allingham*, 3 Mad. 393. PR. MOTION FOR LEAVE TO AMEND, &c.

Party, having objection of form to petition, ought to be prepared to answer merits in case objection is overruled. If necessary that petition should stand over to enable him to file affidavits, he pays costs. *Exp. Bellott*, 2 Mad. 261.

If the office-copies of the pleading, or proofs necessary to be read for one party, on hearing of a cause, be not signed by the proper officer, the cause must stand over on payment of 5l. costs for the day's attendance to the other party. *Att. Gen. v. Milward*, 1 Cox, 437. OFFICE COPIES; PR. EVIDENCE; SIGNATURE.

A trustee not appearing at the hearing of the cause, a decree was made against him, with liberty to shew cause against it. Under this order, he set down the

cause again, and prayed his costs, which were given him on paying the costs of the day on the former hearing. *Norris v. Norris*, 1 Cox. 183. **TRUSTEE.**

(j) *Charity.*

Although in charity cases, it is the duty of the court to grant the proper relief, though not prayed for, yet, with reference to costs, which are quite in the discretion of the court, it will look to the state of the record. *Per* Ld. Ch. in *Att. Gen. v. Hartley*, 2 Jac. & W. 370.

Where an information was filed, involving most extensive enquiries, containing gross imputations on the conduct of individuals, and allegations not proved, upon which no relief was or could be given, the court ordered the costs of all parts of the information, with respect to which defendants had sustained costs by reason of the allegations of misconduct and abuse of office, to be paid by the relators. *Id.*

A charity petition against trustees, under circumstances, held vexatious, and bill dismissed with costs. *In re Chertsey Market*, 6 Price, 261.

Costs given to an heir as between attorney and client, the Ld. Ch. observing that it was frequently done in charity causes where the heir has made no improper point. *Currie v. Pur*, 17 Ves. 462, 468.

Where a lease had been granted for ninety-nine years of a charity estate, which would be bad without proof of its being for the charity, the court, under circumstances of long possession permitted, and that defendant was only the representative of the lessee, the lease was set aside without costs, on consideration that defendant gave up the lease without farther trouble. But the court said this case was to be considered as no authority with reference to persons taking such leases of charity estates, and that in future they should not get off so easily. *Att. Gen. v. Owen*, 10 Ves. 562.

In charity cases the court often gives costs beyond taxed costs. *Osborne v. Deane*, 7 Ves. 425. *Et vide Att. Gen. v. Taylor*, there mentioned.

On information for a charity, relator appearing to have no title, there can be no decree but to dismiss the information; and in that case costs cannot be given out of the charity. *Att. Gen. v. Oglander*, 1 Ves. J. 246. **PR. INFORMATION.**

The relator, by the information, insisted on a claim, which was afterwards abandoned, having, as was alleged, shaped the whole information with a view to his own demand. As, however, directions were to be given, so that the information had a foundation, the relator was not made to pay costs. *Att. Gen. v. Bolton*, 3 Atk. 321. S. C. 3 Anst. 820.

Where the information was quite false, and contrary to the right, the relators were ordered to pay the costs. *Att. Gen. v. Smart*, 1 Ves. 72. *Att. Gen. v. Parker*, id. 43. 3 Atk. 576. **PR. CHARITY RELATOR.**

And in *Att. Gen. v. Middleton*, 2 Ves. 327., an information was dismissed with costs, against the relator, because it appeared to proceed from a private motive of revenge in him, and that from a very improper cause.

Where it appeared that a suit was instituted purely for establishing charities, and the estate was very ample, the relators and defendants were ordered their costs as between solicitor and client. *Att. Gen. v. Curte*, Beame's Costs, 343. 1 Dick. 113. *Moggridge v. Thackwell*, 1 Ves. J. 475. 7 Ves. 36. *Et vide Currie v. Pur*, 17 Ves. 462.

There is no instance of costs being ordered out of a charity estate, unless on a bill brought to establish it. *Att. Gen. v. Stafford Borough*, Bar. 33.

Where an information sought a specific perform-

ance of an agreement between three executors, trustees of a charity, to nominate each a third part absolutely, it was dismissed with costs, against the relators. *Att. Gen. v. Gleg*, 1 Atk. 356.

The commissioners of charitable uses cannot decree costs on the statute 43 Eliz.; but if there be an appeal from their decree, Ld. Ch. may decree the costs, not only of the appeal, but likewise of the commission; and though they decree payment of them, yet that shall not, upon an appeal, be sufficient to reverse the decree; for Ld. Ch. may either increase or lessen the costs, or exempt the party from them entirely. *Rockley v. Kclay*, 1 Eq. Ab. 126. *Precedent* Ch. 111. S. C. but not S. P. *Aylet v. Dodd*, 2 Atk. 239. *Burford Corp. v. Leathall*, id. ib. 551. In *Wharton v. Charles*, Finch. 83., a decree of the commissioners for charitable uses for payment of costs, was excepted to, as not within their powers, and the decree, as to the costs, was reversed.

A new information was filed after a former, and two verdicts on full evidence, in intrusion. Ordered, that the Att. Gen. name a relator, and he to shew cause why he should not be answerable for costs. *Att. Gen. v. Puckering*, 2 Fowl. 372.

(k) *Commissioners of bankruptcy.*

Costs to commissioners in bankruptcy, made parties to a petition, without sufficient ground, viz. for refusing to admit the affidavit of an absent creditor proceeding at law, not permitting the examination of the petitioning creditor by a person who had not proved a debt, and admitting the full proof of a creditor claiming a lien on papers in his hands as agent in town for the bankrupt, an attorney. *Exp. Steele*, 16 Ves. 161.

Commissioners of bankruptcy may be ordered to pay costs in respect of conduct out of the course of their duty as commissioners. *Exp. Searth*, 15 Ves. 293.

Commissioner struck out, and ordered to pay costs. *Exp. Edwards*, 6 Ves. 4. cited.

(l) *Contempt.*

Party taken up on process of contempt irregularly issued, on being discharged, to have his full costs to be taxed by the six clerk not towards the cause (by the Master, Wy. Pr. Reg. 49.). Ld. Clarendon's Order, 1661, Beame's Ord. 199.

Upon every examination and proof of a contempt referred to the master, the master shall, in his certificate assess the costs to either party, without other order or motion. Beame's Ord. 203. See Wy. Pr. Reg. 137.

Defendant in contempt must pay his costs before his appearance or answer be accepted. Ord. Exch. (9). Kirkby's Ed. 6. Beame's Ord. 35. S. P.

Party who has taken the benefit of the insolvent act, is entitled to be discharged from custody without payment of costs of contempt cleared previously, such costs having been included in his schedule of debts. *Evans v. Williams*, 1 M'Clel. 577. **DISCHARGE OF INSOLVENT DEBTOR.**

Defendant to discharge his contempt must not only tender costs, but obtain order to discharge his contempt. *Green v. Thompson*, 1 S. & S. 121. **CONTEMPT.**

In *Fowles v. Young*, 9 Ves. 172., Eldon, C. recognized it to be a general rule that parties must clear their contempt before they can be heard. And so said in Wy. Pr. Reg. 138. But you may move to discharge an order, though you be in contempt for disobeying it. *Hill v. Russel*, Mos. 259.

But a step taken by the other party, as an acceptance of the answer, waives the remedy by pro-



cessa of contempt for enforcing immediate payment of the costs, which then become costs in the cause. *Anon.* 15 Ves. 174; followed in *Smith v. Blofield*, 2 Ves. & B. 100.

Sheriff taking party on attachment for contempt or not paying costs, and suffering party to go at large, ordered himself to pay those costs, and costs of contempt. *Solly v. Greathead*, 11 Ves. 170. S. P. *Lewitt v. Letteney*, Beame's Costs, 352. *SHERIFF, LIAB. OF.*

Costs by plaintiff for prosecuting contempt, and issue proved. *Wrayford v. Wright*, Cary, 82.

Defendant having been discharged by a general pardon, plaintiff was ordered to pay forty shillings costs, for suing out process of contempt against him. *Jones v. Jones*, id. 79.

A defendant examined touching a contempt, and discharged thereof, shall have costs, of course. *Atkinson v. Ailoff*, Toth, 71. *PR. CONTEMPT.*

#### (m) Creditors.

See also *PR. COSTS*, (m) & (o).

A creditor where debt has been disallowed by the master, and allowed by the court upon petition, is not entitled to costs. *Watkins v. Mule*, 1 Jac. 155. *PR. DECREE TO ACCOUNT, PROOF IN L.R.*

In a creditor's suit, it appearing that there were no assets applicable to the payment of the plaintiff's debts, the plaintiffs ordered to pay the costs. But other creditors, entitled to a specific lien having proved, ordered to pay the costs of the proceedings relative to their debts. *Bluett v. Jessop*, 1 Jac. 240.

Creditors and next of kin going in before a master, pay expences of establishing their claim, as such; but if, after having so done, they are permitted to mix in the cause as parties, they may, in respect of such proceedings, be entitled to their costs. *Waite v. Waite*, 6 Mad. 110.

A plaintiff in a creditor's suit, waives all claim to contribution, by not calling for it until a creditor has been admitted to prove. *Shortley v. Selby*, 5 Mad. 447.

In *Curry v. Bowyer*, 3 Mad. 456, the Vice Chancellor said, that he should consider a creditor's proceeding at law, after notice of a decree to account, so far in the nature of a contempt, that on the motion for the injunction he would refuse the costs of the further proceedings at law, and of the application.

Creditor defendant, contesting the mode of taking the accounts, and failing, knowing a balance to be against him, is liable to costs. *Skirrett v. Athy*, 1 Ball & B. 435.

If an heir at law is a creditor, and is brought into court as defendant; the circumstance of his having examined witnesses, and of having failed in the trials of issues at law to ascertain the validity of his ancestor's will, shall not deprive him of his costs in equity. *Burne v. Breen*, id. 308.

On a bill by creditors on behalf of themselves and others, after the usual decree, a creditor moved for his costs of proving his debt before the master. Two cases—*Orwell v. Ld. Hinchinbrooke*, and *Skeene v. Pepper*, were cited, in the first of which a similar application was granted, and in the other the costs were directed without the question being raised. The court thought it was too dangerous a practice, and refused the application. *Abell v. Sereech*, 10 Ves. 355. *Vide Waite v. Waite*, 6 Mad. 110.

Until notice of the decree, the party seeking to restrain a creditor from proceeding at law, on the ground that there is a decree to account, pays the costs occasioned by not giving notice and suffering him to go on; but after notice he has no costs. *Paxton v. Doug-*

*las*, 8 Ves. 521. *Dyer v. Kearsley*, 3 Mer. 483. n. And the rule is the same as to legatees. *Jackson v. Leaf*, 1 Jac. & W. 229.

Where a creditor had, by an unconscientious use of legal process, acquired possession of an estate, he was deprived of costs subsequent to the payment of money into court. *Id. Cranstown v. Johnston*, 5 Ves. 277.

Where a bill by a creditor to have the benefit of a decree to account was dismissed for laches in plaintiff, the court doubted as to the costs; but as the laches were not all on one side, the bill was dismissed without costs. *Hercy v. Dinwoody*, 2 Ves. J. 87.

After a decree for an account, by which costs were given to all parties generally out of the estate, creditors, parties to the suit, were held entitled to their costs before any of the creditors coming in before the master could be paid their debts. And where regular proceedings are taken after the decree between the parties, plaintiffs and defendants, there is no occasion to give notice of such proceedings to the creditors before the master. *Hare v. Rose*, 2 Ves. 558.

A creditor insisting by his answer on more than is really due, he shall lose his costs in equity, though entitled to them at law. *Forward v. Duffield*, 3 Atk. 555.

On a bill by creditors a sale was decreed by consent, and the creditors to be paid according to their priorities. Costs shall notwithstanding be paid to all in the first place. *Brace v. Dk. of Marlborough*, Mos. 50.

A as creditor of B, files a bill against the proper parties, for a sale of A's estate, alleging that he had by his will charged it with the payment of his debts. On the trial of ejectment, a verdict was found against will; whereupon A's bill was dismissed with costs. But on appeal, decree as to costs was reversed. *Squire v. Pershall*, 2 Bro. P. C. 396.

A legatee or creditor coming in before the master, and not a party, shall have his costs; for he might have brought a bill for his legacy or debt, which would have put the estate to further charge. *Maxwell v. Wetenhall*, 2 P. W. 27.

Where creditor, by judgment recovered, is afterwards found guilty of fraud, respecting the whole of his demand, he shall pay costs, both at law and in equity. *Lloyd v. Wynne*, 2 Bro. P. C. 374. *FRAUD, JUDGMENT BY.*

#### (n) Cross Cause.

The application to equity by cross bill, to establish moduses against a bill to overturn them, being matter of favour. Costs in equity are never allowed. *Morrell v. Gregson*, 11 Price, 421. *MODUS.*

Cross bill being for a mere legal title, dismissed with costs, though the original bill was dismissed. *Calverley v. Williams*, 1 Ves. J. 213.

On a bill to foreclose, the court in case the defendant redeemed, would not decree he should pay the costs of a cross cause which he had brought to redeem, and was still depending. *Anon. Mod. 45. MORTGAGOR & MORTGEE.*

#### (a) Decree for Administration of Assets.

Creditor proceeding at law against executor after decree to account, allowed his costs at law previous to notice of decree, but not those of motion to restrain his proceedings. *Anon.* 2 S. & S. 424. S. P. *Curry v. Bowyer*, 3 Mad. 456. *CREDITOR'S SUITS.*

Legacy assigned upon certain trusts: trustee, notwithstanding notice of former decree for administration of assets, files bill for payment of legacy. Court refused to assign legacy to him, he having acted imprudently, or to give him costs; and executors refused costs, because they should have moved to stay pro-

ceedings, instead of answering trustees' bill. *Puckwood v. Maddign*, 1 S. & S. 232. TRUSTEE; EXOR.

Injunction to stay proceedings at law was granted, a decree for reference to take an account having been obtained on creditor's suit against executors before action brought: but defendant not having notice of decree, or of this application, it was ordered that all his debts should be first paid. *Farlow v. Wilson*, 11 Price, 95. PR. NOTICE; PR. INJUNC. TO STAY PROCS. AT LAW.

The direction for creditors coming in under a decree to contribute to the costs, not enforced in practice. *Bluett v. Jessop*, 1 Jac. 243. CREDITOR'S SUIT; CONTRIBUTION.

A legatee agreeing, after a decree for the administration of the estate obtained in chancery by another legatee, to stop proceedings in a suit previously instituted by him in the exchequer, allowed his costs up to the time of his having notice of that decree. *Jackson v. Leaf*, 1 Jac. & W. 229. LEGATEE.

A bill was filed against an executor, who had been previously applied to for accounts, and gave none, but by his answer he set them forth; plaintiff afterwards took a decree for an account, and it then appeared that the statement given by the answer was correct. The Vice Ch. gave plaintiff the costs up to the decree, and to defendant the costs of the subsequent proceedings. *Anon.* 4 Mad. 273.

Where the question was, whether a legacy lapsed or not, and it was held it did, the costs of ascertaining the right to it were ordered to be paid out of it, in exoneration of the general residue. *Skraymer v. Northcote*, 1 Swan. 566. 572. Et vide *Cresswell v. Cheslyn*, 2 Eden, 123.

Where a claim to a bond as a *donatio mortis causi* was established, the costs of the suit were given out of the estate. *Gardner v. Parker*, 3 Mad. 185.

The costs of the bank, when made parties for the security of a legacy, must come out of the capital of the legacy. *Hammond v. Neume*, 1 Swan. 38.

If a bill for the payment of a legacy be dismissed, plaintiff will not be entitled to his costs out of the estate, though there be ambiguity in the will. *Lister v. Sherringham*, 1 Newl. Pr. 397.

Costs of a litigation in the course of administering a will are given out of general assets, or, in case of a deficiency, out of the fund. *Hampson v. Brandwood*, 1 Mad. 394.

Though it is true that the rule that costs shall come out of the estate prevails where a question arises between the individual and the person taking the bulk of the estate, how far the bulk of the estate is to answer for a legacy, a sum of money, or a portion, yet if there is no question between the latter and persons claiming against him the bulk of the estate, but after he has paid out of the bulk, and done all that is incumbent on him, a question arises as to the interest in that property, clearly severed from the bulk, the expense of questions touching that fund ought to be thrown on the fund itself. *Jenour v. Jenour*, 10 Ves. 579.

Where a suit was rendered necessary either by the conduct of the executrix, who was also the residuary legatee, or by the disposition of the testatrix, costs were given out of the residue. *Wilson v. Brownsmith*, 9 Ves. 180.

A decree against an executor is in nature of a judgment at law; after that he may, on motion, without filing a bill for an injunction, restrain a creditor suing at law. The executor must pay the costs till the notice, but not after notice; and he must make an affidavit as to funds in his hands. *Paxton v. Douglas*, 8 Ves. 520. INJUNC. TO STAY PROCS. AT LAW.

Where a residue was disposed of to charitable purposes, costs were given to the executor, next of kin,

and attorney-general, out of the fund. *Moggridge v. Thackwell*, 7 Ves. 36.

Where a bill has been filed, and a decree made for an account, and a creditor comes before the master, but afterwards brings an action, the court will enjoin: but where the defendant has not applied in the first instance, it shall be without costs. *Hardestale v. Chettle*, 4 Bro. C. C. 163. INJUNC. TO STAY PROCS. AT LAW.

The costs of a bill by an infant legatee to have the legacy were formerly given out of the estate; but, in *Whopham v. Wingfield*, 4 Ves. 630, the court said, that, in future, the costs would not be given in such case; as under the legacy act, (36 Geo. 3. c. 52. s. 32.) an executor has only to pay the legacy into court, and the infant, when of age, may petition for it. See also *Anon.* Mos. 6.

The costs of executing the will are always paid out of a residue undisposed of. *Howse v. Chapman*, 5 Ves. 550.

Legacy to such person of the name of M as should, within a certain time, prove his relationship to testator. Such a person established a claim in the master's office, and he was held entitled to all his costs out of the general assets, (the executors admitting assets) except those of making out his pedigree. *Wallis v. Williams*, Beame's Costs, 338. Et vide *Wilson v. Brownsmith*, 9 Ves. 180.

After a verdict, on an issue directed, found against the legitimacy of a person claiming a legacy as a legitimate child, the court refused costs against him, as he had always borne the name of the family, and been received in it. *Forbes v. Taylor*, 1 Ves. J. 99.

When a specific legacy is claimed in this court, the legatee must have his costs out of the testator's general estate, for otherwise it would be to abridge his specific legacy. *Bugshaw v. Newton*, 9 Mod. 263. *Nisbet v. Murray*, 5 Ves. 158. Except costs of inquiries as to the specific legacy. *Barton v. Cook*, 5 Ves. 464.

Bill by next of kin against executors, for the residue, dismissed without costs, because when the next of kin are disappointed of the residue, it is some excuse for their litigating the executors' right to it. *Brasbridge v. Woodruffe*, 2 Atk. 69.

Wherever a testator has expressed himself so ambiguously as to create such a difficulty as to his meaning, as to make it necessary to come into a court of equity, his general assets must bear the costs. *Studholme v. Hodgson*, 3 P. W. 303. *Jolliffe v. East*, 3 Bro. C. C. 27. *Baugh v. Reed*, id. 195. 1 Ves. J. 527. S. C. *Att. Gen. v. Hurst*, 2 Cox, 365. S. C. 3 Bro. C. C. 380, nom. *Att. Gen. v. Winchelsea*. *Barrington v. Tristram*, 6 Ves. 349. *Pearson v. Pearson*, 1 S. & J. 12. And it makes no difference that the doubt was introduced by the parol evidence for the defendant. *Nourse v. Finch*, 1 Ves. J. 362.

By giving a legacy to an infant, the testator makes it necessary to come into this court for directions how to lay it out; the costs of such application must therefore come out of his assets. *Anon.* Mos. 6. But such applications are rendered unnecessary by the statute 36 Geo. 3. c. 52. s. 32.

In a creditor's suit against the administrator, and account decreed, the master reported that defendant had assets sufficient to satisfy plaintiff's demand: costs were decreed generally against the administrator. *Dary v. Seys*, Mos. 264. PR. MASTER'S REPORT OF SUFFICIENCY OF ASSETS.

(P) Demurrer or plea allowed, submitted to, overruled, or ordered to stand for answer.

On overruling plea or demurrer defendant shall pay costs, unless otherwise ordered. 32 Gen. Order, 3d April 1828.

Costs on allowing or overruling plea or demurrer. Beame's Ord. Pr. 320. 457.

Where defendant puts in a plea, he must set it down by the Wednesday se'nnight following, or it is to stand overruled. If so overruled, or if overruled at the hearing, defendant is forthwith to pay 40s. costs; if it be ordered to stand good, plaintiff to pay 30s. costs. If defendant will put in an answer two days before the day appointed for the hearing of the plea, or give notice thereof to plaintiff's attorney, he is to pay plaintiff 20s. costs. Ord. Exch. (10), Kirkby's Ord. 6. Whenever a plea is filed so late in or after the term that it cannot be argued by the sittings after that term, or if filed before the seal day after term, it shall be put down to be argued in the first Wednesday of the succeeding term. Ord. Exch. 17th April 1766. *Id.* 38.

If plaintiff shall, two days before a plea is appointed to be heard, give notice to defendant that he will reply thereto, plaintiff shall then reply thereto within a week without costs, or in default defendant to be dismissed with 30s. costs. If two days before the hearing plaintiff will give notice that he admits the plea, he may do so on payment of 20s. costs. Ord. Exch. (12.) *Id.*

All pleas, &c. to be set down to be argued on every Wednesday in the term; and whenever a term begins on a Wednesday, all pleas filed on or previous to the last day of the preceding sitting of the court to be argued on such Wednesday; and all pleas filed on a Wednesday in term, to be set down for that day se'nnight, if within the term. Ord. Exch. 10th May 1777. 1 Fowl. 39.

On demurrer allowed to a bill for a commission to examine witnesses *de bene esse*, plaintiff having, on an *ex parte* application, obtained an order to examine the witnesses, was ordered to pay, besides the usual costs of the demurrer, the costs of the depositions, but not of those taken on cross-examination. *Dew v. Clarke*, 1 S. & S. 108.

In the exchequer, on allowing a demurrer to the whole bill, taxed costs are given. *Jones v. Jones*, 7 Price, 663.

A plea had been set down, but at the hearing plaintiff declined arguing it, stating his intention to amend. By desiring to amend, plaintiff admits the validity of the plea; it must therefore be allowed with usual costs. *Lopes v. De Tancet*, 3 Mad. 183.

Three weeks after a general demurrer had been allowed, defendant moved for full costs, on an affidavit shewing a case of vexation. On the authority of *Griffiths v. Wood*, 1 V. & B. 307. the Vice-Chancellor granted the motion. *Wood v. Dynely*, 1 Mad. 32. And in *Pilkington v. Wignall*, *id.* 240. 245. full costs were given. The order drawn up was, that plaintiff should pay the costs of the demurrer, beyond the usual costs, to be taxed, &c. Defendant contended, that by full costs, in the general order, is meant the full costs of the suit, as well as of the demurrer, but the court considered the order to have been drawn up according to the usual form. S. C. 2 Mad. 348.

When plea is ordered to stand for answer, with liberty to except, plaintiff is entitled to costs. *Hawling v. Butler*, 2 Mad. 245. PLEA ORDERED TO STAND FOR ANSWER.

In *Griffiths v. Wood*, 1 Ves. & B. 307, on application under the general order 6th Feb. 1794, 4 Bro. C. C. 545, full costs were given on a demurrer allowed to a third bill for the same cause; plaintiff having also since filed a fourth.

After a demurrer had been set down to be argued, plaintiff submitted, and the bill was amended. The court, on application, allowed 5l. more than the usual costs, on account of the expense defendant had been put to. *Anon.* 9 Ves. 221.

Demurrer filed bad; demurrer at bar good; defend-

ant does not have costs. *Wood v. Thompson*, Dick. 510.

On reversing an order for allowing a demurrer, if plaintiff has received the costs on the allowance, they must be refunded. *Oats v. Chapman*, 1 Ves. 642. 1 Dick. 148. 2 Ves. 100.

Demurrer to examination by witness overruled, subpoena for costs not of course. *Valiant v. Dodamead*, Dick. 92. S. C. 2 Atk. 592.

Defendant in a pauper cause pays costs on overruling plea and demurrer. *Scotchmer v. Foulhard*, 1 Eq. Ab. 125. PR. PAUPER.

#### (q) Discovery.

Order obtained by defendant in bill of discovery for payment of his costs, is regular, though plaintiff had previously become bankrupt. *Hibbertson v. Fielding*, 2 S. & S. 371. BANKRUPT.

As to how far vicar plaintiff in title cause is compellable to produce, for inspection, &c., vicar's books, and those of predecessors, admitted by him in his answer to cross bill by defendant, to be in his possession, and to contain entries relating to payments of sums of money, as compositions corresponding in amount with the money payments set up by defendant as modus relied on. The costs of all proceedings had, for obtaining the discovery by such means, must be paid by party so acquiring it. *Firkins v. Lowe*, 13 Price, 193. S. C. 1 McClell. 73. PR. PRODUCTION OF DEEDS; TITHES; EVID.

Where bill prays relief against all defendants but one, against whom it only prays discovery, he cannot after answer obtain order for his costs; such order discharged. *Att. Gen. v. Burch*, 4 Mad. 178. WAIVER.

Plaintiff, in bill of discovery, must pay all expenses of defendant in resisting motions, in cause made by plaintiff. *Noble v. Garland*, 1 Mad. 344.

See general observations on costs in equity. *Hampson v. Brandwood*, 1 Mad. 392 to 395.

Costs of discovery refused, a commission having gone out, and defendant taking the benefit of it cannot have all the costs. S. C. 19 Ves. 376. S. C. Coop. 222. PR. COMMISSION TO EXAMINE; PR. DISCOVERY.

Defendant to a bill of discovery is entitled to the costs of the discovery, immediately on putting in a full answer, and his right to these costs is not waived by his subsequently accepting the costs of an amendment, nor by his neglecting to serve the plaintiff with the order for costs of discovery, until after he has himself been served with the order to amend. *Coventry v. Bentley*, 3 Mer. 677.

The proper time to pray for costs of discovery is after the commission is returned. *Banbury v. —*, 9 Ves. 103.

The bill praying discovery and a commission, the defendant cannot have the costs of the discovery till the return of the commission. *Anon.* 8 Ves. 69. COMMISSION TO EXAMINE ABROAD.

Practice, that if the defendant to a bill of discovery and a commission, examines in chief, instead of confining himself to cross-examination, he shall not have costs. *Anon.* 8 Ves. 70. EXAM. IN CHIEF.

Plaintiff pays the costs upon a bill of discovery. *Simmonds v. Ld. Kinnaird*, 4 Ves. 746.

Rule that plaintiff in bill of discovery shall pay costs in all cases, is too general; he ought only where he files a bill in the first instance; not where compelled to it by defendant's refusal. *Weymouth v. Boyer*, 1 Ves. J. 423.

#### (r) Dower.

Though by analogy to rule at law, costs do not follow degree for dower merely, they are given upon a

vexatious resistance. *Worgan v. Ryder*, 1 V. & B. 20. DOWER.

No costs to plaintiff in a writ of dower. *Mundy v. Mundy*, 2 Ves. J. 128. *Id.*

The general rule is, that costs in dower are not given under a commission to set out dower any more than under a writ of dower, at common law: a vexatious resistance, however, forms exception to it. *Jucas v. Culcraft*, 1 Bro. C. C. 134. S. C. 2 Dick. 594. *Id.*

(a) *Executors, trustee, and committees.*

Trustees of a charity cannot be allowed the costs of an unsuccessful attempt to obtain an act of parliament, to enable them to administer the property of the charity of an improved plan, though the failure arose from accidental circumstances, and though their motives were fair and proper. *Att. Gen. v. Mansfield*, 2 Russ. 501. CHARITY TRUSTEE.

A creditor files a bill against an executrix, and she states by her answer that there are no assets for the payment of his debt; he however persists in the suit, and the result of the account in the master's office is, that there are no assets unadministered, though the executrix is charged with more than she had admitted: held, that the bill is to be dismissed without costs as against the executrix. *Robinson v. Elliot*, 1 Russ. 599. EXECUTOR.

Costs refused to a plaintiff, who having in his hands a sum of money belonging to an infant, institutes a suit to have that sum secured for the infant, though there was a trustee of a settlement, to whom it might have been paid. *Ellis v. Ellis*, 1 Russ. 368. TRUSTEE.

Where executor sues in the joint character of creditor and legatee, he is liable to pay additional costs, if any, caused by claim as a creditor unsupported. *Sharples v. Sharples*, 1 M'Clel. 506. S. C. 13 Price, 745. EXECUTOR.

Plaintiff being himself an executor, filing bill as creditor and legatee for an account of the estate of testator, is entitled, having obtained a decree, to costs out of fund in court, although he obtained no more information than had been offered to him. S. C. 13 Price, 745. EXECUTOR: ACCOUNT.

The costs of the committee of a lunatic trustee, conveying under the statute, must be paid by the cestuique trusts. The estate being vested in the lunatic upon trusts for securing an annuity, and subject thereto upon trust for the grantor of the annuity, the grantee and the assignees of the grantor of the annuity were ordered to defray equally the committee's costs of an application by them for a reconveyance of the estate. *Exp. Pearce*, 1 Turn. & R. 325. LUNATIC TRUSTEE.

A party to whom a legacy was assigned upon certain trusts, having filed a bill against the executors, to recover the legacy, notwithstanding he had notice of a subsisting clause for the administration of assets, the court refused him his costs, on the ground that he had acted imprudently. *Paickwood v. Maddison*, 1 S. & S. 232. EXECUTOR.

Trustee seeking direction and indemnity of court, as to execution of trusts, is always allowed his costs, unless act required to be done leads to no responsibility, and motives of trustee are obviously vexatious. *Curtis v. Chandler*, 6 Mad. 123. TRUSTEE.

The costs of a committee of a lunatic mortgagee, requisite to enable him to re-convey to the mortgagor under the stat. 4 Geo. 2. c. 10, including the costs of the reference, are to be paid out of the lunatic's estate, whether the application be made by the mortgagor, or by the committee, which is the usual course. *Exp.*

*Richards*, 1 Jac. & W. 264. LUNATIC MORTGEE; STAT. C. OF.

On summary proceedings in charity, the trustees are entitled to costs under the act, but the chancellor doubted whether he had any jurisdiction to give costs generally. *In re Bedford Charity*, 2 Swan. 532. JURISDICTION: CHARITY.

Where executor had refused an account, but on bill filed he gave one in his answer, and plaintiff took decree for account; and on master's report, the account proved correct, court gave plaintiff costs up till decree, and defendant those of subsequent proceedings. *Anon.* 4 Mad. 273. ACCOUNT; PL. ANSWER; EXECUTOR.

Persons nominated trustees by an instrument which being void, passes no trust fund, not allowed costs, as between solicitor and client. *Mohun v. Mohun*, 1 Swan. 201. TRUSTEES.

Trustee is entitled to costs, unless he acts from motives of caprice or obstinacy. *Taylor v. Glanville*, 3 Mad. 176. TRUSTEE.

If a suit would have been proper and the executor a necessary party, though the executor had mis-conducted himself, he ought not to pay all the costs of such suit, though in the course of the suit it appears that he has mis-conducted himself; but if the mis-conduct of the executor was the sole occasion of the suit, he ought then to pay costs. *Per Vice Ch. in Tebbis v. Carpenter*, 1 Mad. 290. 308; in which case his Honor allowed executors their costs up to the time of the decree, but charged them with the costs of subsequent inquiries, which were solely occasioned by their breach of trust. *Exon.*

Administration is taken out in 1771. Distribution to certain extent is made, but a large sum is retained on fraudulent pretences. No effectual stir is made against administration till 1792, and that is protracted by admonition in court below, till 1810: held, notwithstanding lapse, that administrator should pay interest with annual rests for whole period, on sum undistributed, with costs incurred since original decree. *Stackpoole v. Stackpoole*, 4 Dow. 209. ACCOUNT; INTEREST; ADMIN.

Costs of the committee of a lunatic trustee, conveying within the statute, must be paid out of the lunatic's estate. *Exp. Bridges*, Cooper, 290. LUNATIC; CONVEYANCE; STAT. C. OF.

Where plaintiff's bill for specific performance of an agreement for sale was dismissed, plaintiff must pay the costs, though he was only a trustee for sale. *Edwards v. Harvey*, Coop. 40. TRUSTEE.

Interest and costs decreed against a steward upon fraud, wilful concealment, &c. and in such cases generally, there is no limitation of time. *Hardwicke v. Vernon*, 14 Ves. 504. P. & STEWARD; ACCOUNT; INTEREST.

Where trustees for sale purchased through a trustee at an undervalue, though without fraud, and by auction, and the cestuique trusts being infants, and therefore incapable of discharging the trustees, the relief as to a re-sale was given with costs against them; but as to the other part of the case, with regard to accounts that must have been taken, they must have their costs, as they would have been entitled to them in the ordinary case. *Sanderson v. Walker*, 13 Ves. 601. *Et vide Hall v. Hallett*, 1 Cox, 134. 141. TRUSTEE.

In *Raphael v. Boehm*, 13 Ves. 590, an executor was charged with interest, and with the costs of the inquiries and accounts relating to the breach of trust; but on the cause coming on for further directions, he was allowed such costs of the subsequent proceedings as were consequential on those of which the costs were allowed him by the former decree, and which arose principally by a necessary investigation as to the rule by which they were to be charged. So, *Parock v. Redington*, 5 Ves. 800, where an executor, guilty of

misapplying trust funds, was made to pay the costs as far as related to the transaction in question. *EXOR.*

When the court gives interest against executors as a remedy for a breach of trust, the costs follow of course. *Seers v. Hind*, 1 Ves. J. 294. *Rocke v. Hunt*, 11 Ves. 62. *Masley v. Ward*, id. 583. But in *Ashburnham v. Thompson*, 13 Ves. 404, the M. R., in giving costs against executors, went into the circumstances as a ground for it, observing that he did so, seeing the rule laid down in so general a manner in *Seers v. Hind*, to which he was not quite prepared to accede, as there might be many cases in which executors must pay interest which would not be cases for costs. *EXORS.*

Where the costs of a trustee are directed to be taxed, that means as between party and party. But where a trustee has expended money by reasonably and properly taking opinions, and procuring directions that are necessary for the due execution of his trust, he is entitled not only to his costs, but also to his charges and expences, under the head of just allowances. *Fearn v. Young*, 10 Ves. 184. Trustees, however, in chancery, on application, generally obtain costs as between attorney and client. *Beame's Costs*, 157. *TRUSTEES.*

It is a settled rule, that executors of an insolvent shall not have costs; they need not have. *Imitiz v. Adair v. Shaw*, 1 Sch. & Lef. 280. *EXORS.; INSOLVENCY.*

Necessary costs of infant trustee ordered to convey under stat., allowed. *Exp. Cant*, 10 Ves. 554. *INFANT TRUSTEE.*

Where trustee by neglect occasions the suit, no costs are given him, but against him, of course. *O'Callaghan v. Cooper*, 5 Ves. 117. *Caffrey v. Darby*, 6 Ves. 488. *TRUSTEE.*

Costs refused to a trustee, setting up a trust different from what it really was: but general misconduct, &c. is not a sufficient ground. *Ball v. Montgomery*, 2 Ves. J. 191. 4 Bro. C. C. 339. *TRUSTEES.*

Trustee not deprived of costs for slight misconduct, in respect of which he is charged with interest. *Sammes v. Rickman*, 2 Ves. J. 36. *TRUSTEE.*

Trustee ordered to pay costs on misconduct. *Davison v. Parrot*, 3 Bro. C. C. 236. *TRUSTEE.*

Agreement for a lease of a farm, referring to a paper containing the terms, bill for specific performance according to such clauses as had been read to the plaintiff, parol evidence to prove that was refused, and the bill dismissed. Bill being dismissed without costs as a hard case, parties made trustees without their knowledge, and as such being necessary parties to the bill, cannot have costs against plaintiff, but left to their remedy against their principal, otherwise perhaps, if plaintiff had prevailed; because then, those costs might have been given over against other defendants. *Bradis v. St. Paul*, 1 Ves. J. 326. *SPECIFIC PERFORMANCE; EVID. PAROL.*

Costs to committee of lunatic, refused, because he had not passed his accounts regularly, though no fraud. *Exp. Clarke*, 1 Ves. J. 296. *COMMITTEE OF LUNATIC.*

Where a trustee committed a breach of trust from a mistake of his powers, he was made to pay costs. *E. Poulet v. Herbert*, 1 Ves. 297. *TRUSTEE.*

Costs of course, out of the fund to agents, receivers, and trustees, who have accounted fairly, and paid money into court. Costs cannot be given to a college individually, nor as a corporation, unless proved so. *Att. Gen. v. City of London*, 1 Ves. J. 246. 8 C. 3 Bro. C. C. 171. *TRUST.*

Where an executor had spent more about the legate than the amount of the legacy, the court thought it too hard to give costs against him, though

there was a decree for the payment of the legacy. *Davies v. Austen*, 1 Ves. 241. *EXOR.*

An executor who ought to have been a co-plaintiff, was made a defendant, and Ld. Chancellor for some time, doubted whether he was entitled to his costs; but at length ordered them to be paid to him. *Blount v. Burrow*, 3 Bro. C. C. 90. *EXOR.; PL. PARTY.*

Executor having three guineas per annum for collecting rents, a trustee as to the residue of personal estate: and not having brought an action to recover a bond debt, was charged therewith: having put the next of kin to prove their relationship, ordered to pay the costs of taking the accounts. *Lawson v. Copeland*, 2 Bro. C. C. 156. *EXORS., LIABILITY OF; EXORS. BENEFICIALLY INTERESTED.*

A bill being made necessary by a trustee's refusal to join in a conveyance, the court was of opinion that the trustee should pay the costs of the suit. The decree was, that plaintiff should pay the costs of all the other defendants, and have them over from the trustee. *Jones v. Lewis*, 1 Cox, 199. *TRUSTEE.*

It is a general rule that an executor is entitled to costs as far as goes to the taking the account; but where an executor by his delay had caused all the expences, except the taking the first account, the court said they could not separate the expences, and therefore gave him no costs. *Newton v. Bennett*, 1 Bro. C. C. 362. *EXOR.*

Executors usually are to be exempt from paying costs, even though great difficulties and delay have been occasioned by them; for the court will overlook these circumstances, if it can. *Hall v. Hallet*, 1 Cox, 141. *Id.*

Executor as such, employing solicitor, is allowed his costs. *Macnamara v. Jones*, Dick. 587.

Where a debt of a testator is recovered against an executor at law, costs are given *de bonis propriis*; but in equity it is discretionary whether the executors shall pay costs or not. *Uvedale v. Uvedale*, 3 Atk. 119. *EXOR.*

Costs were given personally against an executor up to the decree, when the defence was on a wrong foot, and the answer evasive and contradictory. *Reich v. Kennigall*, 1 Ves. 124. So, where an executor has obtained a release of a legacy without any consideration. *Horsley v. Chaloner*, 2 Ves. 84. *EXOR.*

Though executors are not to pay costs, yet they shall not be allowed any, because they are supposed to reimburse themselves by the credit they take in the account kept by them. *Humphrys v. Moore*, 2 Atk. 108. *EXORS.*

Though an administrator is entitled to his costs up to the account, the subsequent costs will be reserved, if his conduct be such as to induce the court to do so. *Landon v. Green*, Barn. 389. *ADMIN.*

If trustee files bill, and brings cestuique trust before court for his own private interest, he shall pay whole costs of suit. *Henley v. Philips*, 2 Atk. 48. *TRUSTEE.*

Where the estates of two testators have been blended, so as to create confusion, the executor of an executor shall be excused costs, though it appeared he had assets enough to pay the plaintiff's debt. *Sandys v. Watson*, 2 Atk. 80. *EXOR. LIABILITY OF.*

Where a trustee by his improper conduct occasions the necessity of the suit, he shall pay the costs. *Fell v. Luthwidge*, Barn. 319. *TRUSTEE.*

If an executor commit a fraud, he will not be allowed costs out of the estate, though the testator has directed that his executors, for any expences they might be put to, should be allowed their costs out of his estate. *Hide v. Heywood*, 2 Atk. 126. *FRAUD; EXECUTORS.*

It is not an invariable rule, that an administrator should be allowed costs, at all events. *Wilkins v. Hunt*, 2 Atk. 151. *ADMINISTRATOR.*

The rule in relation to costs, to be paid by an executor defendant is the same in equity as at law. *Jeffries v. Harrison*, 1 Atk. 468. EXOR.

An executor filed a bill to prove the will against the heir, and to have a defective surrender supplied, charging that the estate was otherwise insufficient. The heir, by a cross bill, insisted that there was more than sufficient to pay all the debts, exclusive of the copyhold not surrendered; whereupon the original bill was dismissed with costs against the executor as to that point; because the executor confessed the matter in a second answer to the cross bill, but had suppressed it in the first answer, and charged the contrary in the original bill. *Mallabar v. Mallabar*, Ca. temp. Talb. 79. *Id.*

A trustee misbehaving himself, ordered to pay costs out of his own pocket, and not out of the trust estate. *Lloyd v. Spillet*, 3 P. W. 347. *Fell v. Lutwidge*, Barn. 314. S. P. TRUSTEE.

Bill for an account against an administrator; the master reported assets sufficient in defendant's hands. Costs given generally against defendant, and not out of assets; as at law, when defendant pleads *plene admin.*, judgment is given *de bonis propriis*, si non, &c. *Davy v. Seys*, Mos. 204. *Prissick v. Viguere*, Colles' P. C. 346. ADMOR.

Corporation nominating schoolmaster, contrary to the particular tenor of their charter, are liable to costs. *Town of Salop v. Att. Gen.* 1 Bro. P. C. 402. CORPORATION.

Governors of a charity, though not guilty of corruption, yet if extremely negligent, to pay costs. *East v. Hyal*, 2 P. W. 284. CHURCH.

Executor brings a very frivolous bill, which was dismissed with costs out of the assets. *Cole v. Rumney*, Sel. Ca. Ch. 62. EXOR.

A, on death bed, desires executor not to trouble B for bond debt, executor puts bond in suit; bond ordered to be delivered up to be cancelled, and costs paid by executor of law and equity, but reversed as to costs. *Wekett v. Raby*, 2 Bro. P. C. 386. EXOR. BOND; WAIVER OF; DEEDS, DELIVERY UP TO BE CANCELLED.

Bill by an administrator. Defendant demurs, and the demurrer is allowed. Bill dismissed with costs, and so said to be the constant course in equity. *Frazer v. Moore*, Bunn. 63. ADMOR.

Corporation being trustees for charity, and in possession of charity estate, and suppressing or concealing evidence relating to charity are liable to costs of suit. *Borough of Hertford v. Poor of Hertford*, 2 Bro. P. C. 377. TRUSTEES, LIABILITY OF; FRAUD; CONCEALMENT OF EVIDENCE.

Where executors make an unfair appraisalment, and otherwise misbehave themselves in their trust, they shall be liable to costs. *Sheppard v. Smith*, 2 Bro. P. C. 372. EXORS.

If a bill be filed against a trustee for an account, to which he submits by his answer, though on taking the account he be found in debt, yet he shall not pay costs unless he has misbehaved himself. *Parrot v. Treby*, 1 Eq. Abr. 125. Pre. Ch. 254. S. C. TRUSTEE.

Where trustees of charity mismanage fund, and neglect its objects, held, liable personally for deficiency, and to pay costs of suit. *Harbardscher's Company v. Att. Gen.*, 2 Bro. P. C. 370. TRUSTEES, LIABILITY OF.

Where an answer of an executrix was falsified by proof, and she appeared to have acted fraudulently, she was made to pay costs. *Vaughan v. Thurston*, Colles' P. C. 175. EXOR.

Executors guilty of a breach of trust, ordered to pay costs. Order confirmed on appeal, with a direction that the costs having been taxed *ex parte*, the court should send them back to the master to be related. *Bretland v. Cope*, Colles' P. C. 97. *Id.*

Bill for a residue. Defendant, the executor, by his answer stated declarations of the testatrix that her other relations should have no more than their express legacies, and hoped to prove that the surplus was intended for the executor. He was made to pay costs for thus insisting on the surplus. *Bayly v. Powell*, Pre. Ch. 92. 2 Vern. 361. *Id.*

#### (1) Exceptions allowed or overruled.

Costs upon exceptions were submitted to before order of reference; and where some exceptions allowed and others disallowed upon reference. General Rule, Nov. 12, 1803. 1 Sch. & L. 241.

The deposit on filing exceptions with the register to be 5*l.* Ord. Ch. 21st July, 1710. Beame's Ord. 320. So for every exception, or branch of an exception that shall be overruled as frivolous, the exceptant shall pay 20*s.* costs, and for every exception or branch, though not opened, but waived, 10*s.* costs, over and above the 5*l.* deposit. Ord. Ch. 21st July, 1710. Beame's Ord. 320. Vide *Read v. Ward*, Dick. 111.

Where a great number of exceptions were taken to an answer, and shortly before the argument the defendant submitted to answer them, in consequence of which it was urged, that the answer was clearly evasive, and that the ordinary costs were greatly inadequate, yet the court refused to give extra costs, but reserved the consideration of them until the hearing of the cause. *Atwood v. Small*, 2 Y. & J. 72.

Where exceptions are taken to the master's certificate of the taxation of costs, on the ground that he has not charged the solicitor with all the monies received by him, with which he ought to have been charged, and such exceptions are allowed, and the master directed to review his report, in that respect the court does not give the exceptant the costs of such proceedings, on the ground that they are necessary to correct a mistake, or misapprehension of the master. *Wright v. Southwood*, 1 Y. & J. 527. PR. EXCEPTIONS TO MASTER'S CERTIFICATE.

Court refused to allow defendant costs, in case where only four out of thirty-five exceptions taken were allowed, five only having been argued, and one of those overruled. *Daniel v. Bishop*, 13 Price, 15.

The course of the court is to allow 40*s.* on overruling exceptions, and 60*s.* on allowing. *Id.* *ib.*

When several exceptions are taken to an answer, and the master reports the answer insufficient, and one general exception is taken to his report, and some of the exceptions to the answer are allowed, some disallowed, and some waived, the court in its discretion may order the deposit to be divided. *Dawson v. Busk*, 2 Madd. 184.

Exception to the report and in general terms, that the master had reported the examination insufficient, whereas he ought to have reported it sufficient, is regular, but not to be enlarged, and therefore being overruled, costs beyond the deposit were given. *Purcell v. McNamara*, 12 Ves. 166. PR. EXCEPTIONS TO MASTER'S REPORT; PR. EXCEPTIONS, DEPOSIT ON.

Nine exceptions were taken to each answer in two cases which came on to be argued at the same time, and were all overruled. Plaintiff was ordered to pay 10*l.* costs in each case. *Gwynn v. Ansell*, 2 Fowl. 9.

If a bill be referred for scandal and impertinence, and so reported, exceptions being taken to the report and allowed, the plaintiff shall have the costs of the reference; but he shall not, on exceptions being allowed to the master's report of irregularity. *Broomfield v. Chisster*, Amb. 466. PR. EXCEPTIONS TO MASTER'S REPORT.

Exceptions were taken to an answer, which was accordingly reported insufficient; but on exceptions the

court held it sufficient. The party succeeding in the application is not entitled to costs, but they shall wait the event of the suit. *Anon.* 3 Atk. 235.

Exceptants to a decree of charitable uses were allowed costs on those exceptions on which they prevailed, and on those where they did not; the respondents were held entitled to costs. *Corp. of Burford v. Lenthall*, 2 Atk. 551.

Exceptions being frivolous, exceptants to pay 20s. for every exception overruled, and 10s. for every one waived. *Read v. Ward*, Dick. 110.

#### (u) Heir at Law.

Heir at law is usually entitled to an issue *devis. vel non*, and is not liable to pay costs, notwithstanding the issue is found against him and will established. *Tucker v. Sanger*, 1 M. Cl. & Y. 425. S. C. 13 Price, 609. *ISSUE DEVIS. VEL NON.*

In suit against heir at law to establish will, if he examines witnesses in chief, he must pay his own costs. He is in no such case made to pay the costs of others. *Id.* 445. *lb.*

In what cases an heir at law is refused his costs in an issue *devis. vel non*. *Id.* 439. 445. *lb.* *ISSUE DEVIS. VEL NON.*

In a charity cause, costs as between attorney and client, to the heir, making no improper point. *Currie v. Pye*, 17 Ves. 462.

Heir at law defendant, contesting the will and failing, but establishing a claim in the cause, as creditor, against testator's estate, charged with payment of his debts, is entitled to his costs. *Burne v. Breene*, 1 Ball & B. 308.

Heir at law, defendant, desiring an issue upon a will, in which he failed, entitled to his costs in equity; no costs on either side as to the issue; ordered to pay costs of a groundless motion for a new trial. *White v. Wilson*, 13 Ves. 87. *ISSUE AT LAW.*

Heir at law has a right to his costs, though he cross-examine plaintiff's witnesses; but if he examine witnesses on his own part, he shall not have costs as to that. *Vaughan v. Fitzgerald*, 1 Scho. & L. 316.

Where an heir at law is brought by order before the court, though there is no resulting trust in his favour, he shall have his costs. *Att. Gen. v. Haberdasher's Comp.*, 4 Bro. C. C. 178.

Bill of heir at law against devisee where vexatious, dismissed with costs. *Soul v. Brownton*, 3 Bro. C. C. 214. *VEXATION.*

Heir at law raising a point against a will and failing, costs were refused to and against him; but an executor or trustee merely submitting a point for opinion of court, though he fail, they shall have costs. *Rashleigh v. Master*, 1 Ves. J. 205. S. C. 3 Bro. C. C. 99. *EXOR. & TRUSTEE.*

The devisee for a mortgagee filed his bill against the heir and executor of the mortgagor, for a foreclosure, and also made the heir of the mortgagee a party in order to establish the will against him. This latter party cannot have his costs out of the estate. *Skipp v. Wyatt*, 1 Cox, 353. *HEIR AT LAW; MORTGAGEE & MORTGAGE.*

Bill by devisee against heir at law to establish will and execute trusts, but prays no more; plaintiff to pay costs. *Brown v. Bagn*, Dick. 300.

Bill established against heir at law's bill, he pays costs at law and equity; but on bill by devisee, no costs on either side. *Johnson v. Gardner*, Dick. 313. S. P. *Quirk v. Boteval*, Dick. 396.

Reference before master in favour of defendant on exceptions, overruled. Defendant does not pay costs of reference. *Sterens v. Long*, *id.* 282.

Bill by disinherited heir at law, to have inspection of deeds, dismissed without costs. *Lemon v. Allen*, Amb. 163. *INSPECTION OF DEED.*

If heir at law bring bill for discovery, it is not of course that he shall pay costs; but he shall be allowed to amend, and pray inspection of deeds. *Id.* 163. *DISCOVERY.*

Costs given to heir at law where he brings bill to dispute will, or bill against him to establish it. *Blinkehome v. Feast*, Dick. 153.

Otherwise if heir at law infant. *Id.* *lb.*

The court will give costs against an heir in case of spoliation, or secreting of a will. *Berney v. Eyre*, 3 Atk. 387.

An heir is entitled to his costs, for it is the law which casts the descent upon him; but otherwise, as to an executor, because he may renounce. *Humphrey v. Morse*, 2 Atk. 408. *Biddulph v. Biddulph*, 2 P. W. 285. *Uvedale v. Uvedale*, 3 Atk. 119. *HEIR & EXECUTOR.*

But if an heir brings a bill to set aside a will for insanity, instead of an ejectment, he shall pay costs if he fails. *Webb v. Clavenden*, 2 Atk. 424.

An heir at law is made a defendant and insists on his title, he shall have his costs though it goes against him, but if an heir at law be plaintiff, and miscarries in his suit, he shall not have costs, but on his suit appearing to be groundless, shall pay costs. *Luxton v. Stephens*, 3 P. W. 373.

Bill by devisee against an heir to prove a will as the heir, he cross-examines the plaintiff's witness, and refuses to release his right, yet the heir shall have his costs given him on motion, otherwise if he examines witnesses of his own. *Biddulph v. Biddulph*, 2 P. W. 285.

Heir at law, or heir-male, to the honour of the family, if probable cause to contend for the family estate, shall not pay costs. *Shules v. Barrington*, 1 P. W. 482.

Heir at law disputing will, though on trial there were shown no ground for disputing it, yet held he was entitled to his costs at law and equity. *Crew v. Jolliff*, *Pruc. Chan.* 93. *ISSUE AT LAW.*

#### (v) Husband and Wife.

Husband and wife defendants; husband without order for wife to answer separately, puts in separate answers, stating wife not to live with him, and he had no controul, &c. He being taken on attachment for want of wife's answer; ordered to be discharged, and wife to answer separately, and indemnify husband as to costs. *Garey v. Whittingham*, 1 S. & S. 163. *PR. ANSWER; PR. INDEMNITY.*

The separate property of a wife in the hands of the court, is liable to the costs of a suit instituted by her touching that property. *Barlee v. Barlee*, *id.* 100.

Settlement on marriage, of stock belonging to the wife in trust, after death of the wife, if the husband survived, for him for life, if no issue, the whole to re-vest in the wife, with power of appointment, if none to her next of kin. The wife eloped, and lived in adultery; on the bill of the husband to have the dividends paid to him during their joint lives, evidence of such intent, or that they should be to the separate use of the wife, refused; but held to belong to the husband for the mutual support of both. *Demond*, that the costs and also the expences of the husband in a groundless suit instituted against him by the wife in the ecclesiastical court, should be paid out of the accumulation, and the only surviving trustee appearing not to be indifferent, that the future dividends should be paid into court. *Ball v. Montgomery*, 2 Ves. J. 191. 4 Bro. C. C. 339. *EVIDENCE; ADULTERY.*

Where a husband had by imposition induced his wife to transfer part of her separate property to him, on a bill by her against him for a specific performance of an agreement before marriage, he was

made to pay costs on account of the fraud. *Lampert v. Lampert*, 1 Ves. J. 31.

Wife cannot be taken in execution for costs. *Jones v. Champion*, Dick. 160.

Bill by husband (who was also administrator of his wife) to be relieved against a bond given by the wife to her aunt before marriage, without the intended husband's knowledge. The bill was dismissed, because a consideration was sworn to in the answer; but the court would have excused the husband the costs, had he not been liable to them as administrator to his wife, who, if she had survived her husband, could not have said her aunt should lose her costs, because of that concealment, which was at the wife's own request. *Blanchet v. Foster*, 2 Ves. 264.

Bill to establish a purchase from a wife, of separate estate, without the trustees joining. The court decreed a specific performance, and gave costs as against the husband, but refused them as against the wife. *Grigby v. Cor*, 1 Ves. 517.

Where a feme covert has been guilty of fraud, solely without the husband, no precedent of his paying costs. *Cotton v. Luttrell*, 1 Atk. 453.

Bill by husband and wife for a legacy given to the wife. Defendant, the executor, had offered, before the bill filed, and again by his answer, to pay the legacy on plaintiff's making a proper settlement on his wife. The court refused costs on either side, because a man ought not to pay costs for insisting on a right which the law gives him; but the settlement was ordered to be made at the husband's own charge. *Brown v. Eaton*, 3 P. W. 202.

Bill for redemption by a husband and wife, to which defendant put in a plea which was overruled, with the usual costs to plaintiffs. The husband then died. The wife held entitled to the costs by survivorship. *Coppin v. ———*, 2 P. W. 496.

Feme sole brings bill, and pending the suit marries, and her husband and wife bring bill of revivor and obtain decree with costs. They shall have costs for the whole suit, except the bill of revivor. *D'Urban v. Knight*, 1 Vern. 318. PR. ABATMENT & REVIVOR.

Wife sues out subpoena as single, she being at time married. Husband and wife must pay costs. *Hastings v. Jugges*, Cary, 36. S. P. *Piers v. Guesc*, id. 139.

(w) Incumbrancers, mortgagor and mortgagee, and equitable mortgage.

Where a prior decree had ordered the costs of a defendant mortgagee to be taxed, he will be entitled to his costs, though it appears at the hearing on further directions, that his debt was paid off before the commencement of the suit, and that he had set up an improper defence. *Wilson v. Metcalf*, 1 Russ. 530.

Where legacy is charged on land, and price of land is insufficient to pay legacy, a mortgagee of devisee of land shall not be allowed his costs in a suit against him and devisee for raising and payment of the legacy. *Shackleton v. Shackleton*, 2 S. & S. 242.

Mortgagee in possession is in general entitled to his costs incurred in that character, but is charged with costs occasioned by his conduct when overpaid. *Archdeacon v. Bowes*, 1 McClell. 149. 167. S. C. 13 Price, 353.

Under a bill by a second incumbrancer, a receiver being appointed, and the first incumbrancer taking the benefit of the suit, the costs are to be paid in the first instance, before the demand of the first incumbrancer. *White v. Bp. of Peterborough*, 1 Jac. 402.

Mortgagee resisting the right to redemption, on the ground of a decree of foreclosure collusively obtained, decreed to pay so much of the costs as was occasioned by his resistance. *Harrey v. Tebbutt*, 1 Jac. & W.

197. MORTGAGE, REDEMPTION OF, FRAUD, DECREE BY.

A case nom. *Taylor v. Baker*, lately decided (Exch.) was cited in S. C. in which defendant was a first mortgagee, plaintiff a second; defendant took from the mortgagor an agreement for charging another sum on the premises. In his answer he denied notice of the second security, and having got the legal estate, attempted to tack the subsequent advance to his mortgage. Plaintiff however proved notice upon him, and the court, for his fraudulently setting up the second agreement, made him pay the costs.

The costs of the committee of a lunatic trustee, incurred on the petition for him to reconvey, and of the reference, are to be paid out of the lunatic's estate, whether the application be made by the mortgagor, or by the committee, which is the usual course. *Exp. Richards*, 1 Jac. & W. 264.

On motion for reference, under 7 Geo. 2. c. 20., the court refused to direct master to take into account costs incurred at law, no mention of proceedings at law having been made in the bill; but leave was given to amend bill in that respect, and motion to stand over in meantime. *Millard v. Mayor*, 3 Mad. 433. PR. REFERENCE TO MASTER; MORTGAGE, FORECLOSURE OF.

Equitable mortgagee by deposit of deeds, with a writing expressing the terms of the deposit, is entitled on a petition in bankruptcy for a sale, to have his costs out of the produce of mortgaged premises. Scrus, if no such writing. *Exp. Trex*, 3 Mad. 372. See also *Exp. Harris*, cited id. *Exp. Sikes*, Buck. 349. BANKCY; EQUITABLE MORTGAGE.

Mortgagee on bill to redeem insisted that heir at law was living. Master, on reference, reported him dead. Exceptions were twice taken thereto, and issue directed, by which he was also found to be dead. Mortgagee not to pay costs of issue, as it was not vexatious, so long as court thought necessary to direct issue. *Wilson v. Metcalf*, 3 Mad. 45. ISSUE AT LAW; VEXATION.

Where a sale or mortgage is a fraud on prior incumbrancer, court will give costs against vendee or mortgagee, on setting aside the deeds. *Taylor v. Baker*, 5 Price, 306. SETTING ASIDE DEEDS OBTAINED BY FRAUD.

A purchaser of property collaterally charged to secure a bond debt, for which he mortgages the purchased estate, and pays the remainder of the purchase money, is not entitled to insist on having the property reconveyed to him, free of incumbrance, before he pays the sum so secured by mortgage; and if he file a bill to have the estate reconveyed to him, a declaration of court as to the persons entitled to receive the money, where there are two sets of claimants, he will be considered as merely a mortgagor, filing bill to redeem, and must pay all costs, although he has paid the money into court. *Drew v. Henson*, 5 Price, 319. VIND. & PURCH.

Mortgagor filing bill to redeem must pay costs of persons claiming under the mortgage. *Whetherell v. Collins*, 3 Mad. 255.

On a petition for the sale of mortgaged premises by an equitable mortgagee, under a written agreement for a mortgage, the petitioner is entitled to costs. *Exp. Brighten*, 1 Swan. 3. Buck, 148. S. C. PR. PETITION FOR SALE; EQUITABLE MORTGAGE.

Equitable mortgagee is not entitled to costs on application for sale of pledge, &c. though it is owing to bankrupt that no regular mortgage was made. *Anon.* 2 Mad. 281. BANKCY. PETITIONS; EQUITABLE MORTGAGE.

Equitable mortgagee praying sale of mortgaged estate, pays costs of petition, and of assignees' appearance to it, not out of produce of mortgaged estate, but personally; but if assignees oppose petition on fri-



volous or mistaken grounds, they pay costs occasioned by such opposition. *Exp. Horne*, 1 Mad. 622. **BANKCY., SALE IN; EQUITABLE MORTGAGE.**

Equitable mortgagee must pay the costs of his petition for sale. *Exp. Warry*, 19 Ves. 472. **BANKCY. PETITION; EQUITABLE MORTGAGE.**

On a bill for an account against a bailiff, an issue was directed, in which defendant was found to be a mortgagee, and plaintiff amended his bill accordingly. The court, on motion before hearing, held defendant entitled to all the costs sustained by him up to the time of amendment, beyond what he would have been put to, if the bill had been originally a bill for a foreclosure, such as the costs of the issue and of the application. *Smith v. Smith*, Coop. 141.

Mortgagee, under circumstances, not allowed his costs. — *v. Trechthick*, 2 V. & B. 181.

Usual decree for redemption and account, against mortgagee in possession, who had been overpaid, but there being no reservation in the decree as to costs, and the redemption being decreed on payment of principal, interest, and costs, defendant was declared entitled to his costs. *Trimleston v. Hamill*, 1 Ball & B. 377. 386.

Defendant by his fraudulent conduct, though considered as mortgagee in possession, deprived of his costs. *Morony v. O'Dea*, 1 Ball & B. 169. **FRUD.**

Under the bill by the mortgagee, the second and third mortgagees came in to be paid, the first being deficient, the costs were paid in the last place. *Kenebel v. Scribner*, 13 Ves. 370.

A mortgagee is always entitled to costs, unless there be positive misconduct on his part. *Lofius v. Swift*, 2 Scho. & L. 642.

Mortgagee allowed costs of procuring administration to an incumbrancer, under will of mortgagor, as a necessary party to foreclosure. *Hunt v. Foxnes*, 9 Ves. 70. **ACCOUNT.**

Mortgagee, though generally entitled to costs, is deprived of them, if they be occasioned by improper conduct, and even then he may pay costs. *Detillin v. Gale*, 7 Ves. 581.

Bill to redeem, and to order it to master to take account, &c. The report finds mortgagee overpaid; it is too late to object to his having his costs. *Gilbert v. Colbidge*, 2 Anst. 442.

In *Woodroff v. Soys*, Beame's Costs, 43, it is said that if a mortgagee contrive to hold the land after he is satisfied by perception of profits, the mortgagor coming to redeem will be entitled to costs instead of paying them.

After a bill of foreclosure filed by the assignee of a mortgagee, a tender of what was due to the mortgagee with costs up to that time, deprives the assignee of subsequent costs. *Williams v. Sorrell*, 4 Ves. 389.

Bill of foreclosure dismissed with costs so far as it sought to tack a bond to a mortgage against creditors. *Hamerton v. Rogers*, 1 Ves. J. 612.

Bill of foreclosure by devise of a mortgagee, against the heir and executor of the mortgagor, the mortgagee's heir being also made a party, to have the will established again. Plaintiff must pay the heir his costs, and he shall not be entitled to have them over from the estate, the heir being a necessary party, by reason of the mortgagee's disposition of his property. *Skipper v. Watt*, 1 Ves. 53. So in *Heatherell v. Collins*, 3 Mad. 2. On a bill to redeem, costs were allowed to the assignee in trust of the mortgagee, and to the cestui que trust.

A mortgagee insisted on a payment of a lease as absolute, when it appeared on evidence it was intended to be a mortgage only. *Per cur.* It would be going too far to make the assignee pay the costs; but he certainly has forfeited his own costs. *Franklin v. Fern*, Barn. 30.

And where on a bill for redemption defendant had

insisted on deeds which were intended only to be mortgages, as absolute conveyances, he was ordered to pay plaintiff's costs. *England v. Codrington*, 1 Eden, 174.

Where a mortgagee and real creditor is brought before the court to have his security impeached, if the bill is dismissed, there is hardly an instance in which it is not with costs. *Diet. in Tanner v. Irie*, 2 Ves. 467. *Vide Lewis v. Hyde*, 2 Vern. 185, where a mortgagee, defendant in equity, was allowed his costs in an action at law brought against him to set his security aside.

Where tenant by elegit has received rents and profits beyond the debt, though he shall account to the debtor, yet he shall not pay costs. In such case appeal may be for the costs only, where defendant decreed to pay them. *Orren v. Griffith*, Anbl. 520. S. C. 1 Ves. 249. **ERROR; ACCOUNT; PR. APPEAL.**

There are several cases of mortgages in which, though very reasonable proposals may be made, yet if no proof of actual tender, the court, on a bill to foreclose, will not refuse costs. *Diet. in Gammon v. Stone*, 1 Ves. 339. But in *Detillin v. Gale*, 1 d. Eldon mentioned a case of *Shuttleworth v. Lawther*, in which a mortgagee was made to pay costs on the ground of a tender, and an appropriation of the money, which was paid into the bank, and refused.

On decreeing a redemption, the court refused costs on either side, for though naturally the costs follow the redemption, the right to redeem had been disputed, and it was a doubtful title. *Kirkham v. Smith*, 1 Ves. 258.

Mortgage redemption resisted, and mortgagee ordered to pay costs. *Baker v. Wand*, 1 Ves. 160.

If on a bill to redeem, the usual decree and reference are made, and a day appointed to redeem, if the mortgagor does not redeem on the day, the court will dismiss the bill with costs to be taxed, considering the reference as a subsequent proceeding beyond the bill and answer. *Diet. in Neusham v. Gray*, 2 Atk. 286.

On a bill to foreclose, the court refused to order defendant, in case he redeemed, to pay the costs of a cross cause which he had brought to redeem, and which was still depending, because the court could take no notice that there was such a cause depending. *Anon. Mos. 45*. See a dict. in *Howard v. Queen's Trustees*, 2 Mod. 173, that if a mortgagor be foreclosed, he pays no costs.

Mortgagee shall not operate his pledge with costs, which he occasions by an unjust defence. *Mecatt v. Almgatroyd*, 1 P. W. 395. **ACCOUNT.**

A mortgagee is always considered as *prima facie* entitled to costs, unless there be some circumstance of positive misconduct. *Anon. 2 Eq. Ab. 237*. *Gammon v. Stone*, 1 Ves. 339. *Lofius v. Swift*, 2 Scho. & L. 657. *Detillin v. Gale*, 7 Ves. 581, in which case the court said it was admitted that there is no instance in which a mortgagee has been called on to pay costs, and it is clear as to some he cannot, for some are the necessary effect of the suit to redeem; but it is not of necessity that because he is mortgagee, he is to have his costs; certainly, so long as he acts reasonably, he ought to be indemnified from the expence of delivering the estate from the incumbrance the owner himself put upon it.

Where a mortgagor only joined in the sale of lands, the bill being for that end, he shall not pay costs. *Anon. 2 Eq. Ab. 237*.

On a bill by an heir to redeem, the mortgagee was allowed the costs of defending an action at law, brought against him by the heir, who endeavoured to defeat the mortgage by a supposed entail; and also the costs of taking out administration as principal creditor.

ditor of the mortgagor. *Ramsden v. Langley*, 2 Vern. 536.

The second mortgagee brings a bill to redeem the first mortgagee, who had been put to great charge in foreclosing the mortgagor. Held, the costs which the first mortgagee has been put to shall not be taxed as in case of an adversary's suit, but he shall be allowed all his costs and charges, as is done in case of a solicitor who lays out money for his client, and the profits of the mortgaged premises shall be first applied to pay off those costs before they go to sink the principal. *Jomar v. Hyde*, 2 Vern. 185.

(x) *Infant, pr. ami, and guardian.*

Infant coming of age may dismiss bill filed for him, but cannot make *prochain ami* pay costs, unless he prove suit improperly instituted. *Anon.* 4 Mad. 461. *INFANT PROCHAIN AMI.*

The next friend of an infant plaintiff cannot move that another may be substituted for him; for the court will not then allow him, by withdrawing himself, to escape from costs to which he may be liable. *Melling v. Melling*, 4 Mad. 261.

In *El. Orford v. Churchill*, 3 Ves. & B. 59, 71. on a bill to have the rights of parties under a settlement ascertained, the costs of an unsuccessful infant defendant, as between solicitor and client, were pressed for out of the general fund; but they were thrown upon the infant's share.

Motion by a plaintiff, that the name of a co-plaintiff, as a next friend, might be struck out, and a new next friend substituted, on the ground that the evidence of the next friend was necessary, granted, on the terms that the next friend should give security for the costs incurred in his time. *Witts v. Campbell*, 12 Ves. 493.

An infant trustee ordered to convey under the statute of Anne, is entitled to his necessary costs. The Ld. Ch. said, that in taxing them, the master would not allow any thing that was not necessary, as for instance, a brief to counsel to consent for an infant, to which no attention could be paid. *Exp. Cant*, 10 Ves. 554.

An application being made by a trustee for costs as between attorney and client, the court said that, with regard to an infant, the question is, whether charges not coming strictly under the head of costs, cannot be given under just allowances; for as the infant himself cannot incur charges and expences, if they cannot be claimed under just allowances, and the next friend is to be at the whole expence of the infant beyond the costs, persons will deliberate before they accept that office. *Fearns v. Young*, 10 Ves. 184.

Where a bill on behalf of infants was dismissed on a fact which might have been previously known, had the next friend used reasonable diligence, he was refused costs out of the infant's estate. *Pearce v. Pearce*, 9 Ves. 548.

A continued employment of an attorney by infant client, after the latter comes of age may amount to an undertaking to pay a prior bill of costs. *Guy v. Burgess*, 1 Smith. 117. *INFANT; SOLIC. & CLIENT.*

Motion by a *prochain ami*, that in some way he might have costs beyond taxed costs. Per M. R. If the *prochain ami* is to a certainty to have all that exceeds the taxed costs, that leads him to be very careless: the inquiry could be only what was properly expended, the Ld. Ch. has refused such a reference. No order was made. *Osborne v. Denne*, 7 Ves. 424.

Writ of *ne exeat regno* obtained by a resident here, against a resident in the West Indies, upon a demand arising there, when the answer came in was discharged under the circumstances with costs, against the *prochain ami* of the infant plaintiff, but upon the

admissions in the answer the defendant was ordered to give security to abide the decrees. *Roddam v. Hetherington*, 5 Ves. 91. *NE EXEAT REGNO; FOREIGNER; PROCHAIN AMI.*

Motion by defendant after answer, that plaintiff should name a new next friend of sufficient ability to pay costs, it appearing by affidavits, that when the answer was put in, defendant had not found out the next friend, who now turned out to be worth nothing. On the other side were produced affidavits that the next friend had a clear income of 44l. a year. Ld. Ch. said, the circumstance that defendant could not find the next friend, would have been a better ground than that he has found her with such an income: I doubt whether a next friend ought to be discharged on account of poverty. But here defendant need not have answered; he should have said, he had taken pains to find out the next friend, and could not. It is very clear a next friend would not be allowed to sue in *forma pauperis*. I think it very dangerous to displace a next friend, though perhaps there may be a case gross enough for it; but here every thing is in favour of the next friend, who swears affirmatively she has 44l. a year, while defendant only swears negatively. Motion refused. *Anon.* 1 Ves. J. 409.

Motion after answer, that a *prochain ami* might give security for costs, or another be named, on the ground that he was in indigent circumstances, refused, Ld. Thurlow saying, he did not think the court could enquire into the circumstances of a *prochain ami*, any more than it could into those of any common plaintiff. *Squirrel v. Squirrel*, 2 P. W. 297. (n). 2 Dick. 765. S. C. See Beame's Costs, 188.

The costs of the petition are to be allowed to the guardian in his accounts. *Exp. Saller*, 3 Bro. C. C. 500. Vide S. C. 2 Dick. 769. *GUARDIAN, APPOINTMENT OF.*

Nothing short of a dishonest intention will be sufficient to fix a *prochain ami* personally with costs; no degree of mistake, nor misapprehension will be sufficient. *Whittaker v. Marlur*, 1 Cox, 285. *PROCHAIN AMI.*

In this case the *prochain ami* produced a written avowal by the solicitor, that the suit was commenced without the privity of the *prochain ami*, but the court said it could take no notice of the question as between *prochain ami* and the solicitor, but must take it to be the act of the *prochain ami*, who ought to make a direct application against the solicitor, if he had acted improperly. S. C.

Motion on infant's behalf to restrain defendant executor from receiving more of personal estate, and rents and profits of real estate, and for receiver; *prochain ami*, ordered to pay costs of motion refused. *Buckley v. Buckridge*, Dick. 395.

The next friend of an infant allowed costs, though the bill had been dismissed, the master having previously reported the suit for the infant's benefit. *Tanner v. Irie*, 2 Ves. 466. S. C. Dick. 168. *PROCHAIN AMI.*

Petition by *prochain ami* that the infant, being now come of age, might repay him the costs expended in the suit: ordered to show cause. *Brown v. Jones*, 2 Fowl. Ex. Pr. 375.

Infant defendant pays no costs of contempt. *Perkins v. Hamond*, Dick. 287.

Plaintiff pays costs of messenger against infant. *Id. ib.*

A *prochain ami* need not be a relation, but then he must be a person of substance, because liable to costs. *Anon.* 1 A. 670.

It seems that had the infant proceeded in the cause, he would have been liable to the whole costs. Vide *Rodsd.* pl. 21, 124. In *Morgan v. Compton*, 2 Fowl. 376. an infant dying before costs, which were ordered

to be paid on a dismissal, were taxed, a motion that the next friend might pay them, was denied.

Bill by an infant dismissed for want of prosecution, but before the costs were taxed; the infant died; it was admitted, that by the death of the *prochain ami*, the costs would have been lost, and so they are by the death of the infant. *S. C. Bunb. 332.*

A feme covert had by her *prochain ami* brought her bill against her husband, but suspecting collusion between her husband and the next friend, after a considerable progress in the suit, she moved to change the next friend, which the court allowed, on the new one's entering into a recognizance to answer the costs and abide the event. *Lawley v. Halpen, Bunb. 310.*

By the decree in a suit on behalf of infants, the money recovered was brought into court, and put out for the benefit of the infants, defendant to pay the costs. He having absconded, a motion by the solicitor for the plaintiff, in which he was joined by *prochain ami*, the father of the infant, who was very poor, was granted, that the solicitor might be paid his costs out of the money in court. *Staines v. Muddox, Mos. 319.*

On affidavit that one named next friend to an infant had absconded, and was not worth any thing, it was ordered that he should give security for costs, the quantum to be settled by the master, and all proceedings stayed in the mean time. *Wile v. Kutter, Mos. 47.*

So on a motion that a next friend might give security for costs, or a new one be appointed, on the ground that the one in this case was a privileged person, the court refused to grant such a motion, except on affidavit that the next friend is in mean and doubtful circumstances. *Anon. Mos. 86. Vide Squirrel v. Squirrel, 2 P. W. 297. (n). 2 Dick. 766.*

An infant by *prochain ami* brings a bill, and never stirs in it after he comes of age, and the bill is dismissed. The infant and *prochain ami* are both liable to pay costs. *Turner v. Turner, 2 P. W. 297. S. C. Sel. Ca. in Cha. 49. 1 Stra. 708. 2 Eq. Ab. 238. INFANT; PR. AMI.*

Decree against an infant and his trustees, that the costs should be paid out of the trust money, reversed, because the money was to be laid out in land, whereof the infant was only tenant for life. *Peller v. Husband, 6 Vin. 365. pl. 10.*

#### (y) Insufficiency of answer.

By the 16th Rule of the Exch. a defendant putting in a second insufficient answer shall pay double costs, as if the first answer had, on hearing, been held insufficient; and so on a third insufficient answer, treble costs; and on a fourth insufficient answer, defendant shall pay such costs as the court shall think fit, and stand committed, and to be examined on interrogatories. *Kirkby's Ord. Exch. 10.*

And by Order of the 31st April, 1700, after referring to the preceding order, it is ordered, that after a third insufficient answer, defendant shall be examined on interrogatories, and stand committed till answer, and not only pay 4*l.*, but such further costs as the court shall direct. *Beame's Ord. 318.*

If the first answer be ruled insufficient, defendant shall pay 40*s.* costs, if the answer was put in in person; if it came in by commission 50*s.*; on a second answer reported insufficient unto any of the points formerly certified, 3*l.*; on a third insufficient, 4*l.*; and on a fourth insufficient, 5*l.*, and be examined on interrogatories, and be committed till he has perfectly answered them. *Beame's Ord. 183. Id. 29. S. P. Newl. Pr. 183. Wyl. Pr. Reg. 29. Harr. 200. Const v. Ebers, 1 Mad. 532.*

If within eight days after service of exceptions defendant satisfies plaintiff of the invalidity of them, or

amends his answer, or consents to do so within a certain time, and amends it accordingly, he shall pay 20*s.* costs; if he fail to do so, or puts in a second insufficient answer, plaintiff may get it referred, and if it be held insufficient, defendant shall pay 40*s.* costs. *Beame's Ord. 182. Id. 78, 79. S. P.*

If plaintiff procures a reference of an insufficient answer within the above time, and it be held good, he shall pay 40*s.* costs. *Id. 182. So, in Beswick v. Fox, Toth. 86., if a man except to an answer and has it referred, and it falls out to be good, defendant shall have costs. See also Gilb. For. Rom. 103. S. P. Beame, 79. The reference shall in such case be void, as obtained surreptitiously.*

If an answer be reported insufficient, plaintiff may immediately take out process against defendant for his costs, and to make a better answer. *Beame's Ord. 210.*

The general rule as to costs of insufficient answers. *Const v. Ebers, 1 Mad. 530.*

If the answer be reported sufficient, and on exceptions to the report is held insufficient, defendant is not to pay 40*s.*, the costs of an insufficient answer. *Knightly v. Deacon, 1 Dick. 82.*

Exceptions for insufficiency having been allowed to the answers, the plaintiff amended; defendant answered the amendments, to which answer exceptions were taken and allowed. The defendant shall pay costs as for a third insufficient answer. *Harmes v. Immins, Bun. 203.*

Plaintiff accepting a third answer before he receives the costs of the second, does not waive them. *Brotherton v. Chance, id. 34.*

#### (z) Interpleader.

Principle of interpleader that the defendant who improperly raises double claim, pays the costs; but the plaintiff who is considered as undertaking to bring the defendant before the court, must use reasonable diligence to get in the answer of one out of the jurisdiction; if he will not come in, the other who appears must have the stake, and the plaintiff will be protected; but whether he must not pay the costs, *Qu.?* *Martinus v. Helmuth, cited in Stevenson v. Anderson, 2 V. & B. 412. note (1). 2nd edit.*

The plaintiff in a bill of interpleader is not entitled, after replying to the answers, to move for his costs, but must set down the cause for hearing. *Jones v. Gilham, Coop. 49. PR. REPLICATION.*

A defendant in an interpleading suit, who, as a consignee of goods, stood in the character of trustee, was not allowed his costs, as between attorney and client, but as between party and party, according to the course of the court. *Dunlop v. Hubbard, 19 Ves. 205.*

Costs as between defendants to interpleading bill. *Cocton v. Williams, 9 Ves. 107. PARTY DEFENDANT.*

On bill of interpleader, defendant who made it necessary ordered to pay all costs. Plaintiff has lien upon fund paid into court for his costs. *Aldridge v. Measer, 6 Ves. 418.*

After the right is decided between the parties, the costs must be paid by the defendant who is found in the wrong, to the plaintiff and the other defendants. *Dowson v. Hardcastle, 2 Cox, 278. S. C. 1 Ves. J. 368. S. P. Edensor v. Roberts, id. 280.*

On a question in an interpleading suit, whether plaintiff should receive his costs out of the rents paid in, or await the event of the suit, and recover them against the parties who should ultimately appear to be wrong in the interpleader, the court said the tenants ought to have their costs in all events, and there being a fund in court, to be sure of them out of that fund. *Aldrich v. Thompson, 2 Bro. C. C. 149.*

Plaintiff in interpleader, if he behave properly, has

costs from defendant who succeeds, and latter has plaintiff's costs and his own from unsuccessful defendant. *Hendry v. Key*, Dick. 291.

(an) Irregularity of process.

Notwithstanding an offer has been made to pay all the expenses which the party has been put to by the irregularity in issuing an attachment, he has a right to have the judgment of the court on the question of its regularity, and is, therefore, entitled to the costs of the motion for setting it aside. *Fround v. Lawrence*, 1 Jac. & W. 655. PR. ATTACHMENT.

Defendant, where plaintiff issues process to which he has no right, entitled to costs. *Swift v. Swift*, 1 Ball & B. 326.

(bb) Issue at Law.

See also PR. COSTS, 10. (u)

Vicar, after issue directed to try modus, suffering bill to be taken *pro confesso*, pays costs. *Drake v. Smyth*, 1 M'Clel. & Y. 380. TITHES.

As to costs of issue at law in general, relative to tithes, see *id. ib.*

Where, after two trials of an issue on modus, in both of which defendant (in equity) obtained verdicts, the court dismissed bill as to tithes, covered by modus with all costs at law and in equity, except the costs of the first trial of the issue, as to which they ordered each party to pay his own costs, the question raised by motion for new trial having been doubtful. *Stuart v. Greenall*, 13 Price, 755. S. C. 1 M'Clel. 705.

The verdict on the first trial of an issue in a title cause being for the defendant, in consequence of a misdirection of the judge, and on the second trial, being for the plaintiff, the costs of the suit of the motion for a new trial, and of the second trial, given against the defendant, but no costs given of the first trial. *Beardlock v. Tyler*, 1 Jac. 571.

New trial of an issue on the validity of a modus. Two new trials having been ordered for misdirection, and the verdict on the third trial, as in the two former, being in favour of the defendant, the plaintiff was ordered to pay the costs of the applications in equity, (except those of the first application to the Ld. Ch.) and the costs of the lost trial at law. *White v. Tisle*, 3 Swan. 342.

Where there are several issues, and some are found for plaintiff, and others for defendant, the parties will be allowed costs on issues found in their favour, and must pay in those against them. *Prevoost v. Bennett*, 2 Price, 272.

Plaintiff withdrawing issue, pays costs. *Brookland v. Golding*, Wightw. 100.

Though an heir brought into equity to have the ancestor's will established against him, may demand an issue, yet, if he sets up insanity, he shall not have his costs of the issue. *Berney v. Eyre*, 3 Atk. 387. *White v. Wilson*, 13 Ves. 87. 91. *Burne v. Breen*, 1 Ball & B. 308.

Wherever the material issue is found for the party who sets down the cause for further directions, he must have the costs at law. *Blackburn v. Gregson*, 1 Bro. C. C. 420. 425.

Equity will not give costs for not going to trial on an issue directed, but where a court of law would have done so; and therefore, where notice of trial was countermanded in time, costs were refused. *Moore v. Beris*, Haamer, 73. Bridg. Pr. Dig. 337.

If, on an issue to try the bankruptcy of G, he be found no bankrupt, and costs are given against the

petitioning creditor, there costs of equity will follow of course. *Exp. Gulston*, 1 Atk. 138.

On issues directed by a court of equity to try a modus, though established by two verdicts, the plaintiff is entitled to his costs at law only, and not in equity. *Clifton v. Orchard*, 1 Atk. 610. MODUS.

On a bill to settle the boundaries of a manor, it was directed, that each party should give to the other a note of their boundaries, and that it should be tried in a feigned issue; and the issue being found for the defendant on the first, second, and third trial, the defendant was not only allowed the costs of all the trials at law, but also the costs in equity, in regard the defendant had no bill, and the plaintiff might have tried it at law without coming into equity. On a bill of partition, no costs on either side, because it is for the benefit of both parties. *Metcalfe v. Beckwith*, 2 P. W. 376. BILL TO SETTLE BOUNDARIES.

Though the verdict was against the plaintiff's title, yet, the title being probable, the court refused costs against him. *Trethewy v. Hoblin*, 2 C. C. 9.

Issues being directed to be tried at bar, the court would not make part of the order, that the defendant should pay only *nisi prius* costs, if they were found against him. *Vise. Falmouth v. Innes*, Mos. 87.

But where a party has prayed an issue, the court has directed it, on the terms that he would be contented with *nisi prius* costs. *Baker v. Hart*, 3 Atk. 542. 1 Ves. 28.

(cc) Lunacy.

The nearest relation of a supposed lunatic ordered to pay the costs occasioned by their opposition to a petition for a commission of lunacy presented by strangers to the family. *In re Smith*, 1 Russ. 348. LUNACY, COMM. OF; NEXT OF KIN.

Upon granting a lease of the lunatic's estate, the usage is, that the committee pays the expenses of the inquiry, and the lessee of the lease. *Exp. Prickett*, 3 Swan. 130.

On a reference to pass the accounts of committees of lunatics, the master may not make extraordinary allowances, without a special order. See the authorities collected in 1 Collins. Lun. 306.

No costs to a party suing out a commission of lunacy, which was never acted upon, and afterwards superseded; because the property never having come into the possession of the crown, there is no fund out of which costs can be given. *Exp. Glover*, 1 Mer. 4269. LUNACY, COMM. OF.

Traverse of a verdict of unsound mind, under a commission, being the right of the party, cannot be refused, and prevents the crown taking the custody, and consequently allowing the costs of the proceedings, however meritorious: but they were given out of a fund of a lunatic in court, in a cause on the principle on which the court protects persons in a state of incapacity, though adult, and objects of a commission, assigning guardians, &c. *Sherwood v. Sanderson*, 19 Ves. 280. S. C. Coop. 108. LUNACY, COMM. TRAVERSE OF.

Proposals laid before the master for appointment of committees were disapproved of; a petition was then preferred that he might review his report, which he was ordered to do. Other proposals were laid before the master by the same party, and also disapproved of; and an unsuccessful opposition was made to the petition for confirming the report. Costs of all these proceedings granted. *Exp. Fust*, 1 Collins. Lun. 461.

Upon the return of the traverse to the inquisition of lunacy, finding that the party was a lunatic at the time of her marriage, and at the time of taking the inquisition, but at that time (the verdict) was not a lunatic, the commission was superseded: but the

Ld. Ch. doubted the propriety of such a double issue. No costs to the party taking out a commission of lunacy which is traversed with success, however meritorious the case: the property never coming to the possession of the crown, there is no fund. *Exp. Ferne*, 5 Ves. 832. LUNACY, COMM. OF.

If a petition for a commission be wholly groundless, it will be dismissed with costs. *Exp. Ward*, 6 Ves. 579.

The negligence of a committee is a sufficient reason, though there be no fraud, to induce the court to refuse him costs. *Exp. Clarke*, 1 Ves. J. 296.

If the persons in whose custody a lunatic is, refuse to produce him to the commissioners, the court has made them pay costs. *Exp. Southcot*, 2 Ves. 401. Amb. 111.

A solicitor employed on part of a lunatic, can have no action against him for his bill of costs. *Burnesley v. Powell*, Amb. 102. LUNATIC; SOL. & CLIENT.

(dd) Parties improperly joined, or served with notice of motion, &c.

See also PR. COSTS, 10, (a).

A, being entitled to parcel of tithes, was made defendant in suit by person B claiming to be entitled to tithes, against occupiers, joined with them in answer, and insisted on his right to tithes. Court retained bill, with liberty to bring action; if not, bill to be dismissed with costs: action determined by verdict for plaintiff. On further hearing, account against occupiers was decreed, and they and A were ordered to pay costs. *Wing v. Murrell*, 1 McClel. & Y. 620. TITHES IMPROPRIATOR.

A party, who is served with a petition, but who has no interest in the order to be made upon it, is not entitled to the costs of appearing on the hearing of that petition. *Garey v. Whittingham*, 1 Turn. & R. 405. But see note, *id.* 407. PR. PETITION.

Land owner, not being an occupier, made defendant in suit for tithes, is entitled to have the bill dismissed as against him, with costs; but if he mixes in defence, &c., it will be dismissed without costs. *Markham v. Smyth*, 11 Price, 126. PR. PARTY.

A party, not interested in a motion, who is served with notice, is entitled to the costs of appearing. *Henenge v. Aikin*, 1 Jac. & W. 377. MOTION, NOTICE OF.

A bill being dismissed with costs, a person who was made a co-plaintiff, without his authority or knowledge, is liable for the costs to the defendant, but is entitled to be indemnified by the solicitor. *Wade v. Stanley*, 1 Jac. & W. 674.

Where inappropriate rector, not being an occupier, is made party to bill for tithes, and a decree is made for plaintiff, he is not (but under particular circumstances) liable to pay costs. *Pitch v. Dutton*, 8 Price, 9. See also *Leathes v. Nevitt*, *id.* 566. S. P., and *Williamson v. Hutton*, 9 Price, 187. S. P. TITHES, IMPROPRIATOR OF.

Where a lay impropriator is not a necessary party, and ought to demur, if he does not, but suffers the cause to go to a hearing, court will not give him costs. *Williamson v. Hutton*, 9 Price, 187. PR. PARTY.

The names of two of the petitioners having been made use of without their knowledge, this circumstance must be made the subject of a distinct application against the solicitor, and cannot be insisted on upon the hearing of the petition. *Exp. Stuckey*, 2 Cox, 283.

Although the name of one of the plaintiffs was made use of without his authority, yet he must remain liable to the costs of the suit, and must recover from

the solicitor any expence he may be put to on that account. *Dundas v. Dundas*, 2 Cox, 236. S. P. *Exp. Stuckey*, *id.* 284.

Cause at issue: one of plaintiffs applies to have name struck out of bill, on ground that he knew not of its insertion. Defendant objected, he being only plaintiff of ability, to pay costs: objection good, and application refused; but solicitor, who inserted plaintiff's name, ordered to indemnify him. *Titterton v. Osbourne*, Dick. 350.

(ee) Pauper.

Before any one can be admitted pauper, he must give security for the costs accrued before such admission. Ori. Exch. 24th May, 1717.

All small writs sealed for persons suing in *formd pauperis* to be sealed without fee. Ld. Hardwicke's Order, 28th November, 1743. Beame's Order, 413. Order, 12th February, 1662. *Id.* 153, and 18th November, 1668. *Id.* 234. S. P. After an admittance in *formd pauperis*, no fee, profit, or reward shall be taken of such party admitted, by any counsellor or attorney for the dispatch of the pauper's business, so long as he be continued in *formd pauperis*: any one offending in this respect to undergo the displeasure of the court, and such further punishment as the court shall inflict; and the pauper to be dispaupered. Ld. Clarendon's Order, 1661. Beame's Order, 215, 216.

When a pauper plaintiff obtains a decree for payment of money, it is to be drawn up on stamps, as in a *dives* suit. *Hansard v. Kemys*, 1 Jac. & W. 189.

Proceedings stayed until costs of former suit by same party suing in *formd pauperis* in causes only of great vexation. *Wild v. Holson*, 2 V. & B. 112. STAYING PROCEEDINGS; PR. VEXATION.

Costs to a pauper, whether more than out of pocket, *quære*? *Frost v. Preston*, 16 Ves. 160.

Plaintiff a pauper; costs of impertinence expunged from the answer ordered to be taxed as *dives* costs to be paid into court. *Rattray v. George*, *id.* 232. PR. IMPERTINENCE.

In *Pearson v. Belchier*, 4 Ves. 627., the court would have dismissed the bill with costs, had not plaintiff been a pauper; but it was said that a pauper is liable to be committed for filing an improper bill, otherwise they might be guilty of great oppression; as to which, see *Exp. Shaw*, 2 Ves. J. 40.

And in *Pearson v. Belcher*, 3 Bro. C. C. 87., a pauper plaintiff having moved to dismiss the bill as against two defendants, the court ordered it to be on payment of costs. See also *Corbett v. Corbett*, 16 Ves. 407., in which case Ld. Eldon considered the authorities on this subject.

One of the defendants was admitted to sue in *formd pauperis*. The decree ordered generally, that the costs of all parties should be taxed and paid out of the estate; the costs of the pauper defendant shall be taxed as *dives* costs. *Wallop v. Warburton*, 2 Cox, 409.

If a trustee defendant is in the situation of being sued in *formd pauperis*, but is clearly entitled to his costs out of the estate, his costs will be ordered to be taxed as *dives* costs. *Id.* 411. TRUSTEE.

Plaintiff suing in *formd pauperis*, shall not amend by leaving out defendants, without paying their costs. *Wilkinson v. Belsher*, 2 Bro. C. C. 272. PR. AMENDMENT.

Pauper can have no more than pauper's costs. *Denn v. Russel*, Dick. 427.

In *Hinckley v. Appleby*, cited 1 Cox, 409., defendant was ordered to pay a pauper plaintiff 50*l.* on account of her poverty, without prejudice, and plaintiff afterwards obtaining a decree, was allowed

her costs, which were taxed as *dives* costs in the usual manner. And in *Jones v. Cozeter*, 2 Atk. 399., it being suggested that plaintiff would not be able, on account of her poverty, to carry on the cause, unless defendant were directed to pay something to her in the mean time, Ld. Hardwicke ordered the costs, decreed to be paid to plaintiff, to be taxed, and paid to her by defendant, to empower her to go on with the cause. See also *Dickenson v. Mavie*, 2 Dick. 582. *Tillotson v. Hargreaves*, 4 Mad. 172.

Where a pauper claimed as heir at law against a will and deed which were disputed, and the bill had been retained with liberty to bring an action, the tenants were ordered to pay plaintiff 150*l.*, to enable him to go to trial. *Perishat v. Squire*, 1 Dick. 31. *Boame's Costs*, 379. S. C. inserted from the Register Book, from which it appears that this indulgence was extended also to one of the defendants.

Where the plaintiff a pauper had a decree for the duty and costs, and the master taxed full costs, yet on motion, ordered plaintiff and his solicitor to make oath before a master of what they had paid, or were to pay, and that to be allowed, but no further. *Angell v. Smith*, Proc. Chan. 219.

Defendant to a bill by a pauper plaintiff put in a plea and demurrer, which were both overruled; and it was insisted that he should have no costs, being at none; but Lord Somers ordered him his costs like other suitors; for though he is at no costs, or but small costs, yet the counsel and clerks do not give their labour to the defendant, but to the pauper. *Scatcherd v. Foulkard*, 1 Eq. Ab. 125. See *Wallop v. Warburton*, 2 Cox, 409.

A pauper is liable to costs, precedent to his admission to sue as such. *Anon. Mos. 66.*

(ff) *Perpetuating testimony, and commissions to examine.*

If by default of him that has the carriage of a commission, or of his commissioners, nothing is done, he shall pay all the other's costs, to be ascertained by the party's oath, and shall renew the commission at his own charges. Ld. Clarendon's Ord. 1661. Beame's Ord. Ch. 192. Ld. Coventry's Ord. Id. 72. *verbat.* Ord. Exch. Irel. How. Pr. Ex. Irel. 579. S. P. Ord. Exch. 2 Fowl. 69. S. P.

In Ireland, by stat. 13 Geo. 2. c. 9. s. 2. where defendants in suits to perpetuate testimony, stand out process of contempt to a sequestration, and the sequestrators return that no effects of such defendant are to be found within the kingdom to be sequestered, plaintiff, in publishing such defendant's name in the Dublin Gazette, and the return of the sequestrators, for two days in each week, for six weeks successively, shall, on application, have leave to examine his witnesses against such defendants, and pass publication in case such defendants had answered, and the cause regularly at issue. And by s. 3. the same proceedings are directed, under similar circumstances, in the case of commissions to examine witnesses *de bene esse*.

Party obtaining commission to examine abroad, pays costs; but if other party examines under it in chief, he pays proportionately. *Jackson v. Strong*, 13 Price, 309. PR. COMMISSION TO EXAMINE ABROAD.

On demurrer allowed to bill for commission to examine *de bene esse*, the plaintiff having on an *ex parte* application obtained an order to examine witnesses, was ordered to pay to the defendants, besides the usual costs of the demurrer, the costs of the depositions, but not those taken on cross-examination. *Dew v. Clarke*, 1 S. & S. 115. PR. EXAMINATION, DE BENE ESSE.

Commission to examine to credit should be executed before decree: costs given on this ground.

*White v. Russell*, 1 V. & B. 151. PR. EVID.; COMMISSION TO EXAMINE AS TO CREDIT OF WITNESS.

Defendant to a bill to perpetuate testimony, entitled to his costs immediately after the commission executed upon the allegation, that he did not examine any witnesses. *Foulks v. Midgley*, 1 V. & B. 138. BILL TO PERPETUATE.

On a bill to perpetuate testimony, defendant entitled to costs of answering, there being no examination of witnesses. *Lecky v. Murray*, 1 Ball & B. 391. Id.

On bill for discovery and commission abroad and injunction, defendant was entitled to costs on the discovery and injunction as incidental thereto, but costs refused to either party as to commission. *London Assur. Comp. v. Ilunkley*, 1 Anst. 9. PR. DISCOVERY.

Bill to perpetuate and no relief prayed, defendant has costs if he does not examine witnesses. *Blinkshorne v. Feast*, Dick. 153.

Where a devisee brings a bill merely in *perpetuum rei memoriam*, and the heir at law only cross-examines the witnesses produced to confirm the will, he is entitled to his costs; but if he examines witnesses to encounter the will, he shall not have his costs. *Berney v. Eyre*, 3 Atk. 387. *Blinkshorne v. Feast*, Dick. 153. *Vaughan v. Fitzgerald*, 1 Scho. & L. 316. HEIR AT LAW.

Where a plaintiff in a bill to perpetuate the testimony of witnesses has examined, and thereby had the fruit of her bill, neither herself nor defendant are entitled to costs. *Coddington v. England*, 2 Atk. 167.

But in *Lecky v. Murray*, 1 Ball & B. 292. Lord Manners said, he conceived this rule applied only to those cases where both parties avail themselves of the examination of witnesses. And according to the present practice, defendant, on an allegation that he has not examined any witnesses, is entitled to his costs on a bill to perpetuate immediately after the commission executed. But if on a bill by a devisee to perpetuate, the heir at law does no more than cross-examine the witnesses, he is entitled to his costs. *Berney v. Eyre*, 3 Atk. 387. And where it appears reasonable, though not absolutely necessary, to perpetuate the testimony of witnesses to a will, the court will, in the case of a purchaser, allow him his costs. *Mackrell v. Hunt*, 2 Mad. 35. n.

When a multiplicity of actions has been brought where the custom might have been tried in one, it is such a vexation that the plaintiff in equity shall have the costs both in law and equity. *Coddington v. England*, 2 Atk. 167.

Plaintiff having examined his witnesses under a bill to perpetuate, defendant moved for his costs. Order to shew cause granted. *Bower v. Thomson*, 1 Fowl. 50.

On a bill brought to prove a will *per testes*, and to perpetuate the testimony of witnesses, the defendant has no other remedy to have his costs than by moving for them. — *v. Andrews*, Barn. 333.

And though the defendant has cross-examined the plaintiff's witnesses, yet if he has examined no witnesses of his own, he shall be allowed his costs. *Id.* And the circumstance that the defendant has brought a cross bill makes no difference as to his right to costs in the original cause upon the return of the commission. *Id.*

A bill for perpetuating testimony only, ought not to be brought to a hearing; if it be, it will be dismissed with costs; but plaintiff has the benefit of the depositions at law, notwithstanding such dismissal. *Hall v. Hodgesdon*, 2 P. W. 162. *Anon.* 2 Ves. 497. Amb. 237. S. C. *Mackrell v. Hunt*, 2 Mad. 37. n.

Plaintiff sued out a commission; defendant's commissioners joined and signed plaintiff's interrogatories,

and witnesses were examined on plaintiff's part, and defendant's commissioners signed the depositions, after which it was discovered that in the commission, the title of the cause was mistaken. On a motion to suppress the depositions, *Ld. Chancellor* ordered the commission to be amended, but plaintiff to pay the costs of the motion, and to be at the expence of sealing a new commission for the examination of defendant's witnesses, and the master to settle a time and place for the execution of such commission. *Robert v. Millechamp, Dick. 22.*

(gg) Proof of debts before master.

See also *Pr. Costs*, 10. (m).

General rule that creditors going before master pay expences, but if afterwards they become parties, they are entitled to such costs. *Waite v. Waite, 6 Mad. 110. DENTON & CREED.*

Under special circumstances only, a creditor proving before master is allowed his costs. *Harvey v. Harvey, id. 91. DEBT. & CRED.; BANKR. PROOF.*

Costs of proving debt before master upon usual decree upon creditor's bill, not allowed. *Abell v. Screech, 10 Ves. 355.*

Legatee or creditor's coming in before a master for his legacy or debt, shall have his costs. *Maxwell v. Weitenhall, 2 P. W. 27.*

(hh) Receiver.

See also *Pr. Costs*, 10. (s).

Receiver allowed costs of application to be discharged. *Richardson v. Ward, 6 Mad. 266. Pr. DISCHARGE.*

(ii) Review.

See also *Pr. Costs*, 10. (d).

No bill of review to be put in unless the party preferring it enters into recognizance for costs. *Ld. Bacon's Order, (5). Beame, 4 Ir. Ord. Ch. (28). O'Keefe's Ed. S. P. By Order 12th March, 1700. Beame, 312. Anon. 2 P. W. 283.* a party preferring a bill of review must first deposit 50*l* to answer costs. And by Order, 17th Oct. 1741, *Beame 306.* this rule is extended to supplemental bills in nature of bills of review. See *Astel v. Montgomery, 2 Atk. 138.* which led to the last mentioned order. Also *Moore v. Moore, 2 Ves. 597. 1 Dick. 66.,* where *Ld. Hardwicke* states his reasons for making it; and *Mr. Dickens'* observations in *Gartside v. Isherwood, 2 Dick. 612.* where he draws the distinction between a bill of review and a bill in nature of one. By 34th Ord. Exch. 1 Fowl. 100, party bringing a bill of review shall pay the costs taxed or due in the former cause, and enter into such recognizance as the court shall direct for the further costs.

Costs of course upon a bill of review for error: where no error in the decree. *Bolger v. Mackell, 5 Ves. 610.*

On motion for leave to file a bill of review on recent discovery of new evidence, an order nisi was made, on payment of costs as between solicitor and client. *Hilton v. Davies, 2 Fowl. 102.*

After a bill of review demurred to, plaintiff moved to dismiss his bill as not being regularly filed, upon payment of costs out of the 50*l*. deposit, which was granted. *Bp. of Durham v. Lyddall, 2 Eq. Ab. 175. 4 Vin. 415. affirmed, 2 Bro. P. C. 22.*

Plaintiff moved on his solicitor's affidavit of new matter being discovered since the decree, for leave to file a bill of review without first paying the costs decreed, but the court refused it, for payment of costs ought to be performed rather than any other part of the decree. And the court thought the affidavit of the party himself necessary, and that of the solicitor not sufficient, or that if the party himself should, under particular circumstances be excused, there ought at least to be an affidavit corroborating that of the solicitor. *Id.*

Order for dispensing with costs, upon bringing a bill of review, ought to be set out in the bill. *Fallon v. Marcelesfield, 1 Vern. 292.*

No costs are given upon a bill of review, whereby money obtained by the defendant under the decree in the original cause, was decreed back again to the plaintiff. *Jackson v. Eyre, 3 C. R. 15. 2 Freem. 181. S. C. Jackson v. Degry, Nel. 83.*

(ij) Solicitor.

Where cause postponed from non-attendance of solicitor, he shall pay the costs, at the discretion of the court. 36th Gen. Order, 3rd April, 1828.

But filed by solicitor from instructions of brother-in-law of plaintiff, solicitor having never received any communication from plaintiff himself, dismissed, and solicitor ordered to pay costs; plaintiff having absconded before bill was filed. *Hall v. Bennett, 2 S. & S. 78. Sol. & Client.*

A solicitor's bill having been partly taxed and paid, an order, obtained as of course, referring the bill generally for taxation, was discharged with costs. The conduct of the solicitor cannot be adduced in support of such an order, and the costs of affidavits upon that subject were ordered to be paid as between solicitor and client. *Chilton v. Pardon, 1 Turn. & R. 301.* And see *Gretton v. Leyburne, id. 407. Pr. Costs; TAXATION OF SOLICITOR'S BILL; Sol. & Client.* Attorney, under circumstances, ordered to pay costs of an improper petition. *Eap. Cuthbert, 1 Mad. 78. BANKR. PETITION.*

Solicitor ordered to pay all the costs occasioned by his refusing to appear for defendant at the hearing, pursuant to his undertaking, and the costs of the application. *Cook v. Broomhead, 16 Ves. 133. Pr. UNDERTAKING TO APPEAR.*

An attorney saying he only followed directions in drawing deeds, under fraudulent circumstances, will not excuse him from paying costs. *Beunet v. Vade, 2 Atk. 328.*

Upon solicitor's appearing to be guilty of a gross neglect, the court will order him to pay the costs. *Faukes v. Pratt, 1 P. W. 593.*

(lk) Specific performance between vendor and purchaser, and other parties generally, and in sales judicial.

One of the terms of an agreement, was, that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made good by a certain time. The counsel being of that opinion, a bill by the purchaser for a specific performance, with a compensation, was dismissed with costs, and an application afterwards made by the plaintiff that his deposit might be set off against the defendant's costs, and the surplus, (if any) paid to him, was refused with costs. *Williams v. Edwards, 2 Sim. 78.*

A purchaser under decree is entitled to his costs when master reports against title, though no fund in court. *Smith v. Nelson, 2 S. & S. 557. Pr. SALES JUDICIAL.*

If the master reports against the title to an estate,

purchased under a decree, the purchaser will be paid the costs of the reference out of the funds in the cause. *Reynolds v. Blake*, 2 S. & S. 117. REFERENCE AS TO TITLE.

Purchaser brought into court on a doubtful title ought to be discharged with costs. *Blope v. Clannorris*, 3 M. & C. 62.

A vendor seeking a specific performance should have his title prepared, and therefore, where the abstract delivered is imperfect, he pays the costs of the suit up to the time of the defects being supplied. *Wilson v. Allen*, 1 Jac. & W. 623.

Specific performance without costs, the suit being occasioned by the refusal of the vendor to produce documents insisted on by the purchaser, some of which were necessary and others not. *Neuell v. Smith*, id. 263.

In sales judicial on opening biddings, as to costs of former purchaser. See *Farlow v. Weildon*, 4 Mad. 460. PR. SALES JUDICIAL; OPENING BIDDINGS.

Specific performance decreed without costs, the abstract delivered not containing a satisfactory title. *Wilson v. Clapham*, 1 Jac. & W. 36.

If purchaser makes frivolous objections to title, he pays costs, but not otherwise. *Thorpe v. Freer*, 4 M. & C. 466.

Purchaser making fair objection to title, does not pay costs. *Aislabie v. Rice*, 3 Mad. 256.

Specific performance decreed with costs, in a case when the defendant objecting to title had been served with notice of a prior decision in a different cause in favour of the same title, against a similar objection. *Biscoe v. Wilks*, 3 Mer. 456. TITLE.

Costs of perpetuating testimony of will allowed to purchaser, *Mackrell v. Hunt*, cited 2 Mad. 37. PR. BILL TO PERPETUATE TESTIMONY.

Vendor not making good title when bill filed, pays costs till report of good title. *Harford v. Purrier*, 1 Mad. 532. TITLE.

Party having contracted with person, since dead, for the purchase of advowson, but had taken no steps during the life of vendor to enforce contract, and for a considerable time after his death, (objecting to title on ground of outstanding judgment and creditor's suit pending :) Held not entitled as against devisee to present if a vacancy occur in meanwhile, though he insists on completion of contract, and if in consequence of his insisting on such right, bill to ascertain it become necessary, a decree for plaintiff will carry costs as far as his claim came in question, though it be part of decree, that, subject to next presentation, he be permitted to complete the contract. *Wylie v. Bp. of Ely*, 1 Price, 292. PRESENTATION TO BENEFICE.

Title established before master not being clear on abstract, vendor pays costs. ——— v. *Collinge*, cited 3 V. & B. 143. note. PR. REFERENCE TO MASTERS.

Costs to a purchaser; the vendor having established his title before the master, after contest, upon a different ground from that in the abstract delivered. *Fielder v. Higginson*, 3 V. & B. 142. REFERENCE OF TITLE.

A re-sale on opening biddings producing considerable increase of price, is no ground for giving party his costs of opening biddings. *Trefusis v. Clinton*, 1 V. & B. 361.

A tenant having by his conduct made his title to a renewal doubtful, and thereby rendering a suit for it necessary, was on obtaining a renewal, decreed to pay all the costs. *Burrett v. Pearson*, 2 Ball & B. 189. RENEWAL OF LEASE; LANDL. & TENANT.

Vendor not making a good title ordered to pay costs, though he was only a trustee to sell. *Edwards v. Harvey*, Coop. 40. TITLE.

A person who opened bidding not being the pur-

chaser, allowed his expenses on the circumstances against the general rule, having interposed at the instance and for the benefit of the family. *West v. Vincent*, 12 Ves. 6.

Person who opened biddings, but was not the purchaser, allowed his costs on the special circumstances, having opened them, not on his own account, but for the benefit of the family. *Owen v. Foulks*, 9 Ves. 348.

A person who opened biddings, but was not the purchaser, the estates upon the re-sale going considerably higher, cannot on that ground have his costs. *El. of Murrelesfield v. Blake*, 8 Ves. 214.

Person opening biddings, though not purchaser, is in no case entitled to costs. *Rigby v. M'Namara*, 6 Ves. 466.

The vendors having by their misrepresentations occasioned the suit, were ordered to pay all the costs. *Harrison v. Coppard*, 2 Cox, 319.

A bill for a specific performance of an agreement was made necessary, by trustee refusing to join in the conveyance. The court being of opinion, that the trustees ought to pay all the costs of the suit, the decree was, that the plaintiff should pay the costs of all the other defendants, (although he had a decree against them;) and recover over the whole costs from the defendant, the trustee. *Jones v. Lewis*, 1 Cox, 199. TRUSTEES.

A landlord who does not litigiously oppose a covenant for renewal, shall be entitled to his costs. *S. C. ib.* 137. *Donerale v. Chartres*, 1 Ridg. P. C. 137. LEASE, RENEWAL OF; LANDL. & TENANT.

Purchaser pendente lite, on filing supplemental bill, is liable to all costs from beginning of suit. *Anon.* 1 Atk. 89. PURCHASER PENDENTE LITE.

Bill to have execution of articles for the sale of some copyhold lands to plaintiff, on payment of 538*l.* to defendant R, a guinea being paid in part, and to compel the lord of the manor to admit plaintiff in fee, according to the agreement, which was decreed, but there being no tender of a surrender to the lord, and consequently no refusal, he was to have his costs. *Sayle v. Reeves*, Gilb. Eq. Rep. 188.

## (II) Witness.

Plaintiff examining defendant as a witness, pays his costs. *Harvey v. Tebbutt*, 1 Jac. & W. 197. PR. EXAM. OF PARTY DEF.

A party attending commissioners for the purpose of being examined as the property of the bankrupt, is not entitled to have his expenses paid or ascertained till his examination is concluded. *Eap. Roscoe*, 2 Rose, 345. BANKCY. WITNESS, COSTS.

Demurrer by witness overruled, he to pay costs. *Wardell v. Dent*, Dick. 334.

Though on a demurrer to a person's being examined as a witness being overruled, a subpoena cannot be taken out against him for costs, yet the court will give them upon an application by motion. *Vaillant v. D'Almeida*, 2 Atk. 592.

A witness examined at a commission swears reflecting words, yet he ought not to pay costs, it being the commissioners' fault to take down such depositions. *Anon.* 2 P. W. 406. SCANDAL, &c.

Costs shall be paid to witness before he testifies. *Belgrave v. El. of Hertford*, Cary, 62.

Witnesses served to testify, entitled to costs. *Pearce v. Crawthorne*, id. 61.

Defendant examined as witness, where he is the only evidence for plaintiff, and if no cause for plaintiff, plaintiff pays costs. *Fyfield v. Vinore*, id. 45.

Costs for witness served to testify before lord mayor, awarded. *Rowe v. Guybone*, id. 35.



## XXXI. COURT, PRACTICE IN, AND GENERALLY.

That in future, in making out the general paper of causes for hearing after every term, the general order made on the 21st May 1778, for having a separate column for causes, in which publication has not passed, be abided by, and that no cause be removed to the column for causes in which publication has passed, until publication has actually passed in such cause. Gen. Order, 20th Jan. 1819.

On shewing cause on the merits against an order nisi, for dissolving an injunction, the plaintiff is not entitled to the reply. *Tyrell v. Vanderille*, 1 Y. & J. 404. PR. INJUNC.

In equity the rules of court, in respect of practice, are to be strictly observed, only where the occasions which rendered them requisite, are pressing, and require their observance. *Vinter v. Bickley*, 12 Price, 460.

Rules of practice will always yield to special circumstances, verified by evidence. *Butler v. Bulkeley*, 2 Swan, 374.

Personal attendance of a person running off with, and marrying, a ward of the court, dispensed with on offering to go before the master and settle. *Gren v. Pritzer*, Ambl. 602. PR. CONTEMPT; WARD OF COURT.

If plea is allowed, and goes on to bring, defendant is to open the case. *Ellis v. Uret*, Dick. 330.

## XXXII. CREDITOR'S SUIT.

See also PL. PARTIES, 7.—PR. COSTS, 10. (m).—PR. DECREE, 5.

In a creditor's suit of administering the assets of B, a joint creditor of A and B was permitted to prove, A having become bankrupt, and it appearing that there were no joint assets of A and B. *Cowell v. Sikes*, 2 Russ. 191. PR. DECREE FOR; ADMIN. OF ASSETS; DEBT. & CRED.

In a creditor's suit instituted by simple contract creditors, in which the assets, after the payment of the costs, being insufficient for the discharge of the specialty debts, are apportioned among the specialty creditors; these specialty creditors are entitled without contributing to the extra costs of the plaintiff, to the use of the order for the payment of the money, and of the report founded upon it, so as to enable them to get the fund out of court. *Lerumie v. Brasier*, 1 Russ. 72. PR. PAYMT. OUT OF C.; PR. ORDER FOR PAYMT.

Creditor proceeding at law against executor, after decree to account, allowed his costs at law previous to notice of decree, but not those of motion to restrain his proceedings. *Anon.* 2 S. & S. 424. DECREE TO ACCOUNT; COSTS.

Bill filed by one creditor on behalf of self and rest, he has absolute dominion over suit till decree, and may dismiss bill at pleasure; but secus, after decree, the rest may prosecute it if they think fit. *Hanford v. Storie*, 2 S. & S. 196. PR. CONDUCT OF SUIT.

Where one of plaintiffs in creditor's suit dies, after decree, his personal representative has a right to revive. *Burney v. Morgan*, 1 S. & S. 358. PR. ABATEMENT AND REVIVOR.

Creditor cannot sue on behalf of himself and others who have no common interest with him. *Id. ib.*

Where, under order made in a creditor's suit, supplemental bill is filed by a creditor, not a party to the original suit, on behalf of himself and other creditors, to have the benefit of the decree in that suit, the propriety of order which authorised creditor to file supplemental bill, cannot be questioned at hearing of supplemental cause. *Houlditch v. Marq. Donegan*,

## 1 S. &amp; S. 491. PL. SUPPLEMENTAL BILL; PR. ORDER.

A creditor, who makes out a *prima facie* case of misconduct in trustees, is entitled to a decree that they shall account for whatever they might have received without their wilful default or neglect, though in a prior suit instituted by another creditor, and conducted without collusion, a common decree for an account has been previously made against them. *Shepherd v. Tourgood*, 4 Turn. & R. 379. TRUSTEES, LIAB. OF; ACCOUNT.

Biddings not opened, even in creditor's suit upon advance of 350l. being less than 10 per cent. *Gurstone v. Edwards*, 1 S. & S. 20. PR. SALES, JUDICIAL, OPENING BIDDINGS.

In a creditor's suit, it appearing that there were no assets applicable to the payment of the plaintiff's debts, the plaintiffs ordered to pay the costs; but other creditors entitled to a specific lien, having proved, they were ordered to pay the costs of the proceedings relative to their debts. *Bluet v. Jenson*, 1 Jac. 240. PR. COSTS.

The direction for creditors coming in under a decree, to contribute to the costs, not enforced in practice. *Id.* 243. PR. COSTS; CONTRIBUTION.

The reason why creditors are excluded unless they come in within a limited time, is because they could not be known to the court or ascertained, unless they should appear; but that does not apply to legatees, who are therefore not to be excluded from the benefit of a decree by not coming in to claim. *Anon.* 9 Pri. 210.

Demurrer to bill by creditors praying sale of testator's real estate, to pay unsatisfied debts for want of sufficient personal, where he had directed his debts to be paid by his executors, and devised his real estate, on ground that it was not a charge on real estates, overruled without prejudice, as being premature. *Sanderson v. Wharton*, 8 Pri. 680. PL. DEMURRER.

A creditor coming in under a decree, though only interested in the first part of it, will be permitted to prosecute it on the ground of delay. *Edmunds v. Acland*, 5 Mad. 31. In *Fleming v. Prior*, *id.* 423. leave was given to a creditor to prosecute a suit.

If creditor file bill on behalf of himself and other creditors, and obtains decree and dies, another creditor may obtain order to file supplemental bill if representative of first plaintiff does not revive in a limited time. *Dixon v. Wyatt*, 4 Mad. 392. PR. ABATEMENT AND REVIVOR.

The master ought to allow in an executor's accounts the expence of an accountant, where the nature of the accounts justifies it. *Henderson v. McLeer*, 3 Mad. 275.

In this case, and on several other occasions, the Vice Chancellor said, that if a creditor proceeds at law after notice of a decree against the executor for an account, he should consider it so far in nature of a contempt, that on motion for an injunction to restrain proceeding at law, he would refuse the creditor the costs of the further proceedings at law, and of the application. *Curre v. Bowyer*, 3 Mad. 466.

Bill against an executor, and the usual decree for an account. The master by his report stated that a discharge offered to him had not been allowed, for want of evidence to support it; but that he had received it as a claim. On overruling an exception, taken on the ground that additional evidence, establishing the claim, could be produced, the court will not order the master to receive such evidence, but the matter must go back to him, and if he then refuses it, a distinct motion must be made, ordering him to receive it. *Redifer v. O'Brien*, 3 Mad. 43.

Creditor having been restrained from proceeding at law on account of decree obtained, although to pro-

secute suit, where proceeding on decree delayed for some years. *Powell v. Wulworth*, 2 Mad. 183. *S. R. Cross v. Hunter*, 2 Ves. J. 105. LENGTH OF TIME; PR. DECREE.

Motion by a plaintiff in a creditor's suit, for leave to go before the master and prosecute a cause instituted by the next of kin of the deceased, on the ground of wilful delay in that suit. *Per* Ld. Ch. It is admitted that if the suit, which this is an application for leave to prosecute, had been a suit by creditors on behalf of themselves and others, this application would not have been unusual. Undoubtedly the practice ought to be so; because the creditor may very well be the friend of the party or his representative, and inclined unjustly to favour the estate; and the court will, for the purpose of prompting to diligence, even go so far as to give costs to a party applying. A creditor formerly was not allowed to come in under a decree obtained by a residuary legatee, but it was determined that he might, on principles, fully as much applying to the case of a next of kin suing an administratrix, as of a residuary legatee suing an executor. Supposing there were no authority for it, I should not hesitate to say, that a creditor ought to be allowed to prosecute a suit by next of kin if there be sufficient proof of want of a reasonable diligence. *Sims v. Ridge*, 3 Meriv. 458.

Motion on behalf of a defendant for an injunction against a party's proceeding at law upon a verdict which would entitle him to a judgment *de bonis propriis* against an executor, refused; for his judgment would be of no service to him if he were delayed by a suit here until it could be ascertained whether there are assets of the testator to answer his demands, which might not be till after all chance of recovery against the executor *de bonis propriis* is entirely gone. *Terrence v. Featherby*, 3 Mer. 480. *Brooke v. Skinner*, cited, and stated in (n.), which was the case of a similar application, and the Ld. Chancellor said, that if plaintiff at law recovered a judgment *de bonis testatoris*, he would not suffer execution to be taken out; but that if he recovered *de bonis propriis*, he could not restrain the execution. In *Dyer v. Kearsley*, id. (n.), plaintiff had obtained the usual decree in a creditor's suit for an account. An action being then commenced against the executors by another creditor, to which they had obtained time to plead, and after the decree, suffered judgment by default; plaintiff in equity moved to restrain plaintiff at law from suing out execution, and the Ld. Chancellor said, that the executor's suffering judgment to go by default, was no more than his saying that he was ready to do whatever a court of law or equity might think proper, and granted the injunction. It appears by the above that this injunction may be obtained, on the application of the plaintiff in equity, as well as of the executor himself. A similar order was made on the plaintiff's application in *Cox v. King*, 3 Mer. 483. n.

In the case of creditors suing on behalf of themselves and all others, the death of one does not abate the suit, because the representatives of the deceased plaintiff may then come in under the decree; but where the bill is by some creditors on their own behalf only, it is a question whether the death of one works an abatement. *Baddy v. Kent*, 1 Mer. 361. A creditor who has come in before the master and contributed, may revive if the cause abates. *Pitt v. Richmond*, 1 Eq. Ab. 3.

Creditor allowed on motion to prove his debt under decree on creditor's suit, though money apportioned amongst creditors, and transferred to accountant general, on paying costs of motion, and of re-apportioning funds. *Angell v. Haddon*, 1 Mad. 529. DECREE, PROVING UNDER.

In a suit for the administration of assets, the examination of the executors (defendants) to interroga-

tories exhibited by plaintiff, a co-executor, under a decree for an account, is taken for the benefit of all parties; and therefore the other defendants, creditors, and legatees, may take copies. *Dyott v. Anderton*, 3 Ves. & B. 176.

The court will not, on the motion of a creditor coming in under a decree directing a sale of lands devised for payment of debts, set aside a lease obtained *pendente lite* from the devisee under the will, with a leasing power. *Moore v. McNamara*, 2 Ball & B. 186. PR. MOTION; ASSIGNMENT, PENDENTE LITE.

Injunction granted against an account, commenced by plaintiff while proceeding under a decree to account for the same matter; for where a decree has been pronounced, it is a contempt to proceed at law. *Mocher v. Reed*, 1 Ball & B. 318. *Wilson v. Wetherherd*, 2 Mer. 406. S. P. decided on the authority of this case.

Order obtained by plaintiff under the usual undertaking to speed his cause, for liberty to withdraw his replication and amend the bill, discharged with costs. *Pitt v. Watts*, 16 Ves. 126. PR. UNDERTAKING TO SPEED CAUSE.

Creditors let in at any time, while the fund is in court, though the time has elapsed. *Lashley v. Hogg*, 11 Ves. 602. PL. PARTIES.

Where an executor has become bankrupt, or insolvent, so as not to have the means, or refuses to act, the court will permit a creditor to bring a bill for himself against persons accountable to the estate, and have administration. *Burroughs v. Elton*, 11 Ves. 29.

In general, judgment creditors may go into the master's office to prove their debt without a *sci. fa.*; giving in evidence only, the record of the judgment, and swearing that the debt is due. A plaintiff, however, must make himself out a judgment creditor by evidence, strictly speaking, and such as he has a right to proceed on. S. C.

When a decree for an account has been obtained in a suit by a creditor on behalf of himself and other creditors, a prior creditor who in the mean time has obtained judgment in an ejectment grounded on an elegit, shall not be allowed to get into possession. *Sumner v. Kelly*, 2 Sch. & L. 398.

After a decree for an account against an executor, defendant may restrain a creditor from suing at law, on motion, and without filing an injunction bill, though until lately that remedy against a creditor was never granted, unless a bill for an injunction had been filed. *Paxton v. Douglas*, 8 Ves. 520.

If a creditor coming in under a decree requires relief, which cannot be had by re-hearing the original cause, he ought to file the cross-bill. *Latouche v. Dunsany*, 1 Sch. & L. 137.

Bill by a creditor against an administrator, who, by his answer, stated he believed the debt was due. It being thought doubtful whether this was a sufficient foundation for a decree, plaintiff consented to exhibit an interrogatory. *Hill v. Binney*, 6 Ves. 738.

In the case of a creditor or next of kin, if they can state a case that the representative is colluding with the debtors to the estate, and diminishing the fund, they have a right upon that ground to make the debtor a party to obtain a discovery, and to prevent the payment of the money for a settlement of the account by collusion between the representative and the debtor. In this case a strong case of collusion was made out, and the debtor made a party. *Doran v. Simpson*, 4 Ves. 651. 665. And see *Beckley v. Dorrington*, 6 Ves. 749. (cited) where one of two residuary legatees brought his bill against the executor and other residuary legatee and a debtor, suggesting no fraud, nor any negligence in the executor. The bill was dismissed at the rolls, and on appeal the decree affirmed. In *Aisner v. Rowley*, (next case) the Ld. Ch. said it was very difficult to define what collusion is; it must depend

on the circumstances; and where a creditor seeks to appropriate to himself the advantage arising from the too great facilities the executor may have given him to substantiate his demand, or too great readiness in admitting it, the case, as against a creditor, must be examined with very nice and critical attention, before it can be said there is not collusion.

And the general principle recognized in the last case, applies equally to the case of a creditor overpaid by an executor, where no collusion is proved. *Alsager v. Rowley*, 6 Ves. 748. In *Benfield v. Solomons*, 9 Ves. 86, Ld. Ch. said, that in all such cases as the present, it is very convenient to state the facts upon which the allegation of collusion is made. There is great inconvenience in joining issue on a general allegation, defendant not having a hint of any one fact from which it is to be inferred.

Several estates subject to mortgages, which had been paid off, were sold under a decree for payment of debts; a bond creditor had brought in a charge of his debt, which was allowed; and a general report had been prepared, but none of the parties had proceeded to complete it, though the decree had been pronounced about eight years. Motion on behalf of this creditor on affidavit, and notice for an order to shew cause why he should not have leave to prosecute the decree; granted. *Bowen v. Webb*, 2 W. & A. 212.

Any creditor may obtain an order for prosecuting a decree for an account. *Creuze v. Hunter*, 2 Ves. J. 105.

Motion on behalf of a creditor who had proved before the deputy remembrancer his demand on the estate in the cause, refused, because each creditor might claim the same privilege. *Bowen v. Webb*, 2 Anst. 361.

Bill by specialty creditors on behalf of themselves and others, against devisees and executors for an account, stating that a former bill had been filed by residuary legatees, under which the usual account of personal estate had been decreed, and that it appeared the personal estate was insufficient, and charging that the real estate was liable to payment of debts, but that it was pretended the attorney general, who was made a party, had claims on the real estate on behalf of his Majesty, and praying that if necessary the real estate should be applied. Demurrer for want of equity overruled, the present bill going farther than the former, and bringing new parties before the court; and the former cause will not be useless, as the court can order the account in one cause to be used in the second. *Law v. Rigby*, 4 Bro. C. C. 59.

Where defendant had not applied in the first instance for an injunction, but allowed the action to go to trial, the court doubted as to the costs, and as defendant did not press for them, they were not given. *Hardcastle v. Chettle*, 4 Bro. C. C. 162.

Bill by creditors against an executrix for an account. Upon the hearing, the usual accounts were directed, but before they were taken, the creditors filed another bill against the executrix, and against debtors to the estate, stating insufficiency of assets, and charging collusion between the executrix and the debtors, but which was denied by the answer. Bill dismissed with costs, as it was only sustainable in case collusion had been proved, and if allowed, a bill might be filed by every single creditor against every individual debtor. *Elmslie v. McCaulay*, 3 Bro. C. C. 624. The general principle that a debtor to the estate cannot be made a defendant to a bill by a creditor or residuary legatee against the executor, unless there be collusion, insolvency, or some special case, is established by many decisions. As to this subject see *P. L. PARTIES*, 7.

In *Burroughs v. Elton*, 11 Ves. 29, a judgment creditor was permitted to sue, the circumstance that the heir and personal representative of the debtor were unable or unwilling to sue, being considered as taking the case out of the rule.

Held, that where a single creditor brings a bill, there is no general account of debts directed, but the course is to direct an account of the personal estate, and of that particular debt, which is ordered to be paid in course of administration; and all debts of a higher or equal nature may be paid by the executor, and must be allowed to him in his discharge. *Att. Gen. v. Cornthwaite*, 2 Cox, 45.

Bill by A on behalf of himself and other creditors against B and C, trustees for sale. B's representatives allege by answer, that D was also an acting trustee: Held, that D was not a necessary party. *Routh v. Kinder*, 3 Swan. 146.

Bill by trustees under a will against the executrix, who was also heir at law, and persons claiming under the will, for the directions and indemnity of the court. By a decree in the cause, the proper accounts were directed for the payment of the debts and legacies, after which a bond creditor brought an action at law. The executrix filed an injunction bill to restrain the proceeding at law, and the present defendant insisted that he knew nothing of the decree, was no party to it and ought not to be bound by it. But the court held, that as the creditors might come in before the master, an injunction should be granted, for having taken the fund into its own hands, the court will not permit the executor to be pursued at law. *Brooks v. Reynolds*, 2 Dick. 603. 1 Bro. C. C. 183. *Kenyon v. Worthington*, 2 Dick. 668. *Goate v. Fryer*, 2 Cox. 201. *Hardcastle v. Chettle*, 1 Bro. C. C. 162. *Paxton v. Douglas*, 8 Ves. 520. And the injunction in such case will go not only to stay execution, but will be extended to stay trial. *Kenyon v. Worthington*, *Goate v. Fryer*, ante. But in the latter case, as the action was commenced before the bill filed, the creditor, if he came in under the decree, and discontinued his action, was allowed to prove his costs at law, in addition to his debt, but if he chose to let his action remain till he saw what became of the fund, then the action must remain suspended.

After a decree for satisfaction of creditors, on a bill by some on behalf of the rest, plaintiffs in that suit refused to come in under the decree, but brought an action at law. An injunction bill was filed against them, in their answer to which they admitted the facts, and insisted that their names were used as plaintiffs without their consent. Injunction however granted. *Douglas v. Clay*, 1 Dick. 393.

Bill by creditor in the court of exchequer and decree. Other creditor brought a bill in chancery for the same purpose, and the court decreed the account, &c., saying that the decree in the exchequer was not complete. *Coyngarne v. Jones*, Amb. 613. JURISDICTION; DECREE IN THE EXCHEQUER.

Decree for an account of the estate of plaintiff's testator come to his hands, and of his debts, and that the creditors should come in before the master. Plaintiff being a creditor was allowed to go in and prove his debt, and the master to examine him relating thereto. *Newman v. Norris*, 1 Dick. 259.

Plaintiff came in under a decree (though no party to the suit) to receive satisfaction for a debt for which he had filed a bill. If plaintiffs in the former cause delay prosecuting, plaintiff in the other was to be at liberty to prosecute the decree in the name of the plaintiff, indemnifying them. *Torin v. Fowke*, 1 Dick. 235.

Creditor having come in under decree and prayed commission, has made his election. *Farnham v. Burroughs*, Dick. 63.

Creditor having proved debt under decree, after proceedings at law, put to election. *Dennet v. Coker*, id. 144.

It has never been reduced to a general rule, that only one bill shall be depending where a number of creditors are concerned, and therefore, where two

bills were brought by different sets of creditors, to carry into execution a trust term created for payment of debts; an order to refer them to a master to certify which would be most for the creditors' benefit, was discharged. *Anon.* 3 Atk. 602. PR. MULTIPLICITY OF SUITS.

To a bill by creditor under statute of fraudulent devises, against assignee of bankrupt devisee, the heir at law must be party. *Warren v. Staveell*, 2 Atk. 125.

Actions at law were brought by bond-creditors against an heir at law, who was also devisee; other bond-creditors also filed a bill against him, and got a decree for a sale of the real assets descended. The heir then brought a bill to restrain those bond-creditors who sued at law. Injunction granted. *Martin v. Martin*, 1 Ves. 211. See observations on this subject there.

Bill by a creditor on behalf of himself and others against the executor and devisee. The present plaintiff came in and proved his debt under that decree, and afterwards filed his bill in the name of himself and other creditors, against the executor, and makes the heir at law a party. Plea of pendency of former suit, allowed. *Neve v. Weston*, 3 Atk. 557.

Injunction granted to restrain a creditor who had come in under a decree for an account, from proceeding at law, on the ground that by doing so he had made his election to proceed in this court. *Farnham v. Burroughs*, 1 Dick. 63.

A, as creditor of B, files a bill against proper parties for a sale of B's estate, alleging that he had by his will charged it with the payment of his debts. On trial of ejectment, a verdict was found against the will. Whereupon A's bill was dismissed with costs; but on appeal decree as to costs, was reversed. *Squire v. Pershall*, 2 Bro. P. C. 396. COSTS.

Bill by administrators as creditors to the intestate, with three or four of the creditors, against trustees (appointed by parliament) for payment of debts. Decree for sale, and that all the creditors might come in, &c. Then plaintiffs, as other creditors, filed a bill against administrators, and trustees, to discover personal estate, and have lands sold. Objected that plaintiffs might come in under former bill, but held that this bill was well brought, as it called the administrators themselves to account, which could not be on former bills. *Guevers v. Dauby*, 3 Rep. Ch. 216.

### XXXIII. CROSS BILL.

See also PR. COSTS, 10. (n).

If a bill and cross bill be filed, the plaintiff in the original bill has a right to the first answer, and may move to stay proceedings in the cross cause, till the original bill is answered, though the plaintiff in the cross bill may be in a situation to enforce an answer first. The right of the plaintiff in the original bill to make the motion, was held not to have been waived, by his having taken out the common orders for time to answer the cross bill. *Harris v. Harris*, 1 Turn. & R. 165. PR. ORDER FOR TIME TO ANSWER; WAIVER; PR. ANSWER.

Court will not grant a defendant in a title suit, who has filed a cross bill against plaintiff for discovery, time to answer the original bill, until after the answer to the cross bill is put in. Defendant should amend the answer, if necessary. *Dolben v. Whittingham*, 11 Price, 28. PR. TIME TO ANSWER.

Court will not enlarge publication after answer to original bill, till the answers in a cross bill come in; but they will require an affidavit, verifying facts stated

in cross-bill. *Edwards v. Morgan*, id. 399. PR. ENLARGING PUBLICATION; PR. ANSWER.

The application to equity by cross-bill, to establish moduses against a bill to overturn them, being matter of favour, costs in equity are never allowed. *Morrell v. Gregson*, id. 421. MODUS; PR. COSTS.

Though original bill be filed in exchequer, yet cross-bill may be filed in chancery. *Parkerv. Leigh*, 6 Mad. 115. EXCHEQUER; JURISDICTION.

Cross bill filed only just before cause coming on for hearing, not cause to adjourn it. *Coates v. Pearson*, 4 Mad. 262. BUCK. 326. S. C. PR. CAUSE, ADJOURNMENT OF.

After motion for a month's time, after cross bill is answered, to answer the original bill, and the month is expired, a motion cannot be made as of course for further time to answer the original bill. *Noel v. King*, 3 Mad. 183. PR. TIME TO ANSWER.

Plaintiff in original bill amending after cross bill filed, loses his right to priority of answer; but in order to stay proceedings on original bill, defendant in original must obtain order for that purpose. S. C. 2 Mad. 392. PR. STAYING PROCS.; PR. ANSWER, PRIORITY OF.

Depositions in cross cause, taken after publication of those in principal cause, not admissible in evidence on re-hearing of the latter. *Taylor v. Obee*, 3 Price, 83. PR. EVID. DEPOSITIONS.

Court will not make an order on motion that plaintiff in cross cause, (who has not examined witnesses on his part in the original cause, after having obtained an order to enlarge publication), shall be at liberty to read depositions taken on his behalf in a cross cause, after publication of the depositions taken on behalf of the plaintiff, on hearing of original cause, on an application to put the cross cause into the short paper for that purpose, supported by affidavit of total ignorance on part of parties interested, and their attorneys, of the depositions published; and this, however satisfactory the affidavit in support of such motion may, in point of fact, be in the particular instance. *Ridley v. Obee*, 3 Price, 26. PR. EVID. PUBLICATION.

Cross bill taken *pro confesso* ordered on motion to be read at hearing of original cause. *Cory v. Gertcken*, 2 Mad. 43. PR. EVID. BILL PRO CONFESSO.

Answer to cross bill not allowed to be read, though the original bill and answer was read, there having been no further proceedings on cross bill and answer. *Bennett v. Neale*, Wightw. 325. EVID.

Defendant to a bill for specific performance, on proving an agreement different from that insisted on by the plaintiff, may have a decree upon his answer, submitting to perform. A cross bill, therefore, formerly the course, being unnecessary, would be dismissed with costs. *Fife v. Clayton*, 13 Ves. 546. SPEC. PERF.

Reference upon the title; an objection to the specific performance on the ground that premises to which no title could be made, were represented as included in the purchase, and were a principal inducement to the purchaser, failing upon the evidence. Cross bill for specific performance according to answer, dismissed with costs, as unnecessary. *Stapylton v. Scott*, 13 Ves. 425. *Id.*

If a creditor coming in under a decree requires relief, which cannot be had by re-hearing the original cause, he ought to file a cross bill. *Létouche v. Ld. Dunsany*, 1 Scho. & L. 149. DEBT. & CRED.; PR. DECREE TO ACCOUNT.

Plaintiff in original bill loses his priority of suit, and his right to have an answer to the original bill, before he is called upon to answer cross bill, until after answer to original bill. *Johnson v. Freer*, 2 Cox, 371. PRIORITY OF SUIT; AMENDMENT.

There are cause and cross cause, and the plaintiffs in the original cause are many, several of whom are

out of jurisdiction, others not to be found, and some, peers of the realm; a motion that service on the clerk in court should be good service, refused; but plaintiffs shall not pass publication in the original cause, till they have answered the cross bill. *Anderson v. Lewis*, 3 Bro. C. C. 429. PR. SERVICE SUBSTITUTED.

If defence to bill for specific performance of agreement for a purchase, depends merely on want of title in vendor, defendant ought to rest on his answer, and not file cross bill, to have it delivered up, or to prevent an action, for plaintiff cannot succeed at law. *Hilton v. Barrow*, 1 Ves. J. 284. SPEC. PERF.; VEND. & PURCH.

Cross bill, being for a mere legal title, dismissed with costs, though the original bill was dismissed. *Calverley v. Williams*, 1 Ves. J. 213. PR. COSTS.

A cross bill is a defence, and so connected with the original that they are always considered but as one cause. *Kemp v. Muckrell*, 3 Atk. 812.

If, after a cross bill filed, a plaintiff in an original bill will amend it in material parts, and thinks fit to compel an answer to the amendments at the same time with the original bill, he waives his priority of answer to the original. *Long v. Burton*, 2 Atk. 218. S. C. Dick. 82. AMENDMENT; PR. PRIORITY OF SUIT.

Bill abated by marriage of plaintiff, no revivor till after cross bill filed, loses priority. *Waller v. Payer*, Dick. 260.

Evidence in the cross cause concerning the matters in issue in the original cause not allowed to be read after a decree in that cause: otherwise, as to the depositions in the cross cause not relating to the matters put in issue in the original. *Wilford v. Beasley*, 3 Atk. 501. PR. EVID.

Court will not stay proceedings in an original cause till the answer comes in to the cross bill, but will stay publication only. *Ramkissensett v. Baker*, 1 Atk. 21. PR. STAYING PROCEEDINGS.

Where defendant in a cross bill, but plaintiff in the original, is in contempt, for not putting in an answer to the cross bill, the proper motion is not to stay proceedings in the original cause, but to enlarge publication in the original to a fortnight after the answer is come in to the cross bill. *Creswick v. Creswick*, 1 Atk. 291. PR. ENLARGING PUBLICATION.

The original bill is to be first answered; but if the plaintiff, after his cross bill filed, amend his bill, he loses his priority. *Steward v. Roe*, 2 P. W. 435. PR. ANSWER.

First bill to be answered before the cross bill. A brings his bill against B and C, who put in insufficient answers, and prefer their cross bill against A. B becomes a bankrupt; his assignees bring their bill in nature of a bill of revivor against A: they shall not go on till C has answered A's bill. *Child v. Frederick*, 1 P. W. 266. PR. ANSWER.

Cross bill in nature of a defence, and were first allowed that the party might state his own case more to his advantage than he could as a defendant; but the same matter cannot be examined to after publication. A cross bill should be brought time enough to be examined to before publication in the original suit passes. *Ward v. Eyles*, Mos. 377.

Where no process is taken out upon the original bill, and a cross bill is filed, the plaintiff in the original suit cannot compel defendant to answer his bill first. *Price v. Coningsby*, Bun. 124.

After publication in the original cause, plaintiffs in the cross cause moved for a commission to examine witnesses, which was granted, though it was urged that it would tend to cure the defects of that evidence which had been adduced in the original suit. *Scott v. Allgood*, (Exch.) Prac. Reg. 87. PR. COMMISSION TO EXAMINE.

CURSITOR. See PR. OFFICERS OF COURT, 5.

DE BENE ESSE. See PR. EVID. 28. (f); 29. (b).

### XXXIV. DECREES.

See also INTEREST, PECUNIARY, VI.—PR. COSTS, 10. (o).

1. General orders concerning.
2. Form and construction of.
3. General effect of.
4. To account.
5. For administration and distribution of effects.
6. Of foreclosure or redemption of mortgages.
7. Who bound by. See also, INFANT, II. 3.
8. Obtaining generally.
9. Obtained by fraud.
10. Obtaining by consent.
11. Pro confesso, and by default. See also PR. BILL, PRO CONFESSO.
12. Service of.
13. Adding to, altering, rectifying, and varying minutes of.
14. Entry, drawing up, and enrolment of.
15. Of the suspension, prosecution of, and carrying into execution of.
16. Impeachment, discharge, and reversal of.
17. Lost.

#### 1. General orders concerning.

Not to be reversed, &c., being under great seal, but on bill of review. Beame's Order, 1.

Not to be made on pretence of equity against express provision of act of parliament. *Id.* 5.

Imprisonment for breach of a decree, is in nature of an execution, and the custody ought to be straight. *Id.* 5.

Obstinate disobedience to a decree to be followed by injunction and fines. *Id.* 5, 6.

What processes follow decree for possession of land. *Id.* 6.

In committal for breach of decree, party not to be discharged until decree performed. *Id.* 6, 206.

Decrees bind only those served with process *ad audiendum judicium*, or who appeared personally in court. *Id.* 7.

As to the effect of a decree on a purchaser antecedently to suit and pendente lite. *Id.* 7.

Decrees of provincial counsel enforced in chancery. *Id.* 17.

So of courts of requests.

Where cause formerly heard in other courts, decree to be first heard. *Id.* 18.

As to decrees on suits after judgment. *Id.* 19.

Decrees of weight to be pointed out by the registrar to chancellor when presented. *Id.* 21.

Decrees made at rolls when to be presented to chancellor. *Id.* 21.

Decrees in other courts may be read without order. Secus, as to depositions. *Id.* 31.

Decrees may be carried from six clerks' office to rolls, by under clerks to have parchment allowed. *Id.* 68.

Then to be returned, &c. *Id.* 69.

How writs to execute decrees shall be drawn. *Id.* 76.

Decrees made by a judge to be signed by him before entered. *Id.* 106.

Decrees to be delivered to six clerk within a term after cause determined. *Id.* 112.

To have six clerk's hand before presented to the Lord Chancellor, &c. for his signature. *Id.* 112. 206.

If defendant do not appear at hearing, decree to be made nisi. *Id.* 197.

Defendant not admitted to shew cause without producing a certificate that costs are paid. *Id.* 198.

Within what time decrees to be signed and enrolled. *Id.* 205.

Notwithstanding, caveat decrees may be signed if caveat be not prosecuted within a month. *Id.* 309.

## 2. Form and construction of.

The common decree in foreclosure does not direct the delivery up of the title deeds by the mortgagor to the mortgagee in case of foreclosure, but merely that the mortgagor shall be absolutely barred and foreclosed of all right and equity of redemption; and it is only where there is a covenant to deliver them in case of default in payment of the principal, money, and interest, that the court makes such a decree. *Wiseman v. Westland*, 1 Y. & J. 117. FORECLOSURE OF MORTGAGE; DELIVERY UP OF DEEDS.

Where defence failed in consequence of unsatisfactory and incomplete evidence having been tendered, the court, at the request of the defendants, ordered the decree to be qualified by the introduction of a provision, that it should not prejudice the right of the defendant to question any future claim of the like subject-matter by the complainants. *Wolley v. Brownhill*, 13 Price, 500. S. C. 1 M'Clell. 317.

A decree for reference of title on a bill for specific performance should contain a declaration that the contract ought to be specifically performed. *Mole v. Smith*, 1 Jac. 495. SPEC. PERF.; REFERENCE AS TO TITLE.

It is not necessarily a substantive part of decree directing issue at law to order it shall be tried by special jury. *Stuart v. Greenall*, 9 Price, 480. ISSUE AT LAW.

Form of decree of conditional redemption, where a second mortgage by another person has been given to secure the first. *Bechet v. Mickelthwait*, 6 Mad. 199. FORM.

On bill for partition and account of rents and profits, a decree for that purpose will be made, and relief will not be confined merely to partition. *Lorimer v. Lorimer*, 5 Mad. 363. PARTITION; ACCOUNT.

A decree for payment of the debt of one creditor, under a deed of trust, which provides for the payment of other creditors, is erroneous. So, if the bill, stating A to have been the survivor of the trustees named in the deed, makes the heir of A party to the suit, as such supposed survivor, and that allegation proves to be false, the decree made upon such state of the pleadings is erroneous. A bill to carry such a decree into execution, notwithstanding long acquiescence, cannot be sustained. The original decree may be examined, impeached, and varied in a suit to carry that decree into execution. It is not conclusive until reversed by original bill, or bill of review, for error apparent on the face of the decree, and the court may refuse to carry it into execution. *Hamilton v. Haughton*, 2 Bli. 169.

Where a trust is created by deed for the payment of debts, if a bill is filed by one of the creditors to enforce the payment of his debt, that purpose can only be effected by the general execution of the trust. The decree ought to direct such execution, and an inquiry as to all the debts owing and payable under the trust, and that they should be paid according to their priorities. *Id. ib.* TRUST TO PAY DEBTS.

Interest ought not to be computed from the date of the decree for payment, but from the day when pay-

ment is by the decree directed to be made. *Id.* 170. INTEREST, WHEN PAYABLE.

The term "rent," used in a decree under stat. 37 H. 8. c. 12., relating to tithes in London, means rent actually and *bona fide* received without fraud or covin; and not the annual value of the premises let. Fines to whatever amount, paid on the renewal of leases of dwelling houses, are not to be considered as increase of rent, or to be taken into calculation in estimating the amount of tithes due, provided the rent reserved is equal to that which the houses have been at any time before let. *Minor Canons of St. Paul's v. Crickett*, 5 Price, 14. RENT; WORDS, C. OF.

The use of inserting in a decree dismissing a bill for a specific execution, "without prejudice to the plaintiff's remedy at law," is to prevent an unfavourable impression against the plaintiff on the trial at law. *McNamara v. Arthur*, 2 Ball & B. 353.

Foreclosure against an infant, the decree absolute should repeat the clause nisi, as in the original decree, giving six months after age to shew cause. *Williamson v. Gordon*, 19 Ves. 114. FORECLOSURE OF MORTGAGE; INFANT; DAY TO SHEW CAUSE.

Sale of real estate decreed provisionally without waiting the account of the personal estate previously applicable. *Curtis v. Price*, 12 Ves. 195. REAL ESTATE, SALE OF; PR. MASTER'S REPORT.

Executor directed by will, not to derive any advantage from keeping money in his hands without accounting for legal interest, and to accumulate for the *cestuique* trust, infants. Decree, directing a computation of interest at 5 per cent, on all sums received by him, while in his hands; "and that the master do in such computation make half yearly rests." The object of that decree is to charge compound interest, and the decree, though perhaps going further than usual, was held, under the circumstances, properly executed by a computation of interest upon each receipt, from the day it was received; the balance of receipts with the interest so calculated, and payments being struck at the end of the half year, and that balance is composed of principal and interest, being carried forward as an item in the account, producing interest. *Raphael v. Boehm*, 11 Ves. 92. Affid. 13 Ves. 407. EXECUTOR; ACCOUNT; ANNUAL RESTS.

It is not now the practice in chancery to insert direction in decree, that master is at liberty to examine witnesses, but master may certify that a commission is necessary, which then issues of course. *Sandford v. Biddulph*, 9 Ves. 36. PR. COMMISSION TO EXAMINE WITNESSES; PR. EXAMINATION IN MASTER'S OFFICE.

The decrees in the exchequer always express, that the officer is to be armed with a commission to examine witnesses, and power to direct the same to the country: so formerly in chancery. *Parkinson v. Ingram*, 3 Ves. 607. PR. EXAMINATION OF WITNESSES.

Interest computed on various sums reported due, and also on all arrears of interest (on other sums) and on costs. *Bickham v. Cross*, Ves. 471. S. P. *Neal v. Att. Gen.*, Mos. 246. INTEREST.

As to the rate of interest under a decree, which fluctuated in Lord Hardwicke's time; according to the nature of the fund, but which is now generally 4 per cent. See *Derton v. Shellard*, 2 Ves. 239. *Id.*

Where bill is filed to set aside a conveyance for fraud, imposition, and want of consideration, and for other relief, and the court dismisses the bill, so far as relates to the conveyance, but gives plaintiff liberty to proceed at law as to the other matters; and in the mean time retains the bill as to those matters, if the plaintiff neglects to proceed at law within a reasonable

time, and suffers his bill to be absolutely dismissed from such neglect, he cannot afterwards complain of decree by way of appeal. *Rotheram v. Brown*, 8 Bro. P. C. 297. PR. APPEAL; LACHES.

The words "all just allowances" in a decree for an account, do not empower the master to allow for improvements, unless the decree particularly mentions them, which is never the case, without the party makes proof of there being some. *Knowles v. Spence*, Mos. 225. PR. ACCOUNT BEFORE MASTER.

### 3. General Effect of.

After a decree in one of two suits, commenced in the name of an infant, it is not usual to refer it to the master, to inquire which suit is most beneficial. *Taylor v. Oldham*, 1 Jac. 527. INFANT; PR. REV. TO MASTER.

Legatees are not precluded from claim by non-appearance, pursuant to advertisement to come in under decree, or to be excluded from benefit of it. *Anon.* 9 Price, 210. LEGATEES; PR. ADVERTISEMENT TO APPEAR.

Purchaser under decree, bound to see directions of decree observed. *Coleclough v. Sterum*, 2 Bligh, 131. VENDOR AND PURCHASER; APPLICATION OF PURCHASE MONEY.

Lands in strict settlement, with power to grant leases, being subject to prior incumbrances, are by decree in a suit instituted by incumbrances directed to be sold, subject to charges prior to deed of settlement. Pending suit tenant for life under settlement, grants leases not authorized by power, and raises money upon annuities for his life, which he charges upon the lands, and they are sold subject to those charges: held, (reversing decree in court below, on suit by remainderman in tail), that the sale subject to charges not warranted by decree, is void. *Id. ib.* SALE, PEND. LITE.

Trustees for creditors after decree for execution of trusts, restrained from proceeding in a suit in court of chancery in Ireland, having same objects. *Harrison v. Gurney*, 2 J. & W. 563. IRELAND.

A decree for redemption and general account, &c. having been made in the original and revived causes in favour of the supposed devisee, it cannot be restricted in the supplemental suit to an account to be taken as between the executors and mortgagees, &c. to the time of the death of the deviser, dismissing the bill as it regards the interest of the devisee; for the devisee is a necessary party to the account. *Rylands v. Latouche*, 2 Bligh, 567. DEVISEE; PR. PARTY; ACCOUNT.

Decree for tithes declared to be without prejudice to the right, where the party appears to have failed in establishing a modus by mismanaging the suit. *Lake v. Skinner*, 1 Jac. & W. 9. MISMANAGEMENT OF SUIT.

Decree in former suit cannot be pleaded to bill, for tithes of any subsequent year. *Minor Cmons of St. Paul's v. Crickett*, Wightw. 30. PL. PLA.

Decree upon the answer, admitting a contract and a letter, offering to sell at a valuation, for a conveyance, on payment of the purchase money into the bank; the plaintiff, on a certain day; in default of payment by the bill to be dismissed with costs. No binding contract until payment. The estate therefore did not pass by a previous devise, but descended to the heir. *Gasarth v. Lowther*, 12 Ves. 107. WILL, C. OF, WHAT PASSES; CONDITION, PRECEDENT; CONTRACT TO PURCHASE.

After an account taken under a decree, a party shall not be allowed to overhawl the account, by bringing an action at law on the same subject-matter. *Bell v. O'Reilly*, 2 Sch. & L. 430. ACCOUNT, OPENING.

In such a case, the defendant at law ought not to appear to the action, but ought to apply to this court from attachment; but having suffered the action to proceed, and then filed this bill, the defendant at law was held liable to the costs of the action. The proceedings in this cause were stayed, with liberty for all parties to apply in the original cause. *Id. ib.*

A decree taken *ex parte*, is taken at the peril of the party obtaining it, and is the act not of the court, but of the party conceiving what the judgment of the court would be, if the other party had appeared. *Carew v. Johnston*, 2 Scho. & L. 300.

After decree, the bill cannot be dismissed by consent, but an arrangement for disposing of the fund in court, may have effect by consent on further direction. *Lushley v. Hogg*, 11 Ves. 602. PR. BILL, DISMISSAL OF.

After decree, suit may be revived by defendant, or by his representatives, if dead. *Williams v. Cooke*, 10 Ves. 406. PARTY DEFENDANT; ABATEMENT & REVIVOR.

A decree in equity for a sum certain, is equal to a judgment at law, and shall be paid *pari passu* therewith; but if the decree be for an account, it is only equal to a judgment *quod computet*, till the account be settled. *Searle v. Lane*, 2 Freem. 104. ADMINISTRATION OF ASSETS.

After a decree, for a specific performance of an agreement for a lease, and the lease had been executed in pursuance of such decree, the plaintiff brought an action at law to recover from defendant damages for the delay in the performance of that agreement. Although the defendant would have been clearly entitled to an injunction in a new suit, yet the decree having been wholly executed, the court cannot make such an order in the original cause. *Ford v. Compton*, 1 Cor, 296. PR. INJUNCTION.

Plaintiff cannot move to dismiss bill after decree. *Gartside v. Isherwood*, Dick. 612.

Bill by creditors in the court of exchequer, and decree; other creditors brought a bill in chancery for the same purpose, and the court decreed the account, &c. saying that the decrees in the exchequer was not complete. *Coyne v. Jones*, Amb. 613. JURISDICTION; CREDITORS' SUIT.

Where a feme covert was entitled to one-sixth of the residue of a testator's estate, upon a bill filed by another residuary legatee, to which she and her husband were defendants, a decree was made for a sale of the estate and payment: held, that her share vested absolutely in her husband by the decree; and though the defendants were creditors of the wife, yet that the court would interpose to take the money out of their hands. *Forbes v. Phipps*, 1 Eden, 503. HUSBAND & WIFE; CHOSE IN ACTION; REDUCTION INTO POSSESSION.

After a decree in a cause, another original bill cannot be brought between the same parties, and for the same matters. *Wortley v. Birkhead*, 2 Ves. 371. 3 Atk. 809.

A decree having been made for a general account, and payment of the balance against a party who dies; and his personal representative having delivered certain goods, part of the effects, to her own solicitor to be delivered over, she is not answerable in the event of his being robbed of them. Tender of the goods not incumbent on her; she would not have been answerable, if they had remained in her own possession till the accident. *Jones v. Lewis*, 2 Ves. 240. EXORS. LIABILITY OF.

Decree not equal to judgment to affect lands, though it is in course of administration. *Attley v. Powis*, 1 Ves. 496.

Decree in a former cause between the same parties read as evidence, though not conclusive. So also of depositions in a cause which had settled the rights of

all, as under a decree for performance of trusts. *Adams v. Paulter's Comp.*, 2 Ves. 89. *PR. EVID.*; *FORMER CAUSE.*

A quod computat makes no variation as to an account for before a final decree he may confess a judgment. It does not at all alter the nature of the demand. *Smith v. Eyles*, 2 Atk. 385.

Decree quod computat does not pass in rem judicata till the final decree. *S. C.* *Id.*

No stress is to be laid on the words, that each party do pay in a decree quod computat; till the account be taken it is impossible to pronounce which will be the debtor or creditor. *Id.*

Seemeth that defendant after decree, before execution, may, by alienation, prevent sequestration. *Cook v. Cook*, 2 Com. 712. *PR. SEQUESTRATION; ALIENATION PEND. LIT.*

In a bill for tithes in the exchequer, the court decrees payment of tithes to the time of the filing the bill, but in chancery to the time of the decree. *Carlton v. Brightwell*, 2 P. W. 463. *ACCOUNT.*

A decree was made in the court of exchequer against tenant for life, to hinder him from committing waste, which decree was founded on a deed of settlement; and upon a bill now brought to set that deed aside, the defendant pleaded the decree in the exchequer, which was overruled. *Wing v. Wing*, 9 Mod. 109. *PL. PLEA.*

A cause may be referred for irregularity in the setting down after a decree. *Page v. Page*, Mos. 44. *PR. REFERENCE FOR IRREGULARITY IN SETTING DOWN CAUSE FOR HEARING.*

The portion of a lunatic was ordered to be paid to the master, and the husband was to have it on making a settlement. He made no settlement, but assigned it to his creditors, and died without issue; then the wife died. Decreed the creditors of the husband have this portion. *Nightingale v. Lockman*, Mos. 231. *Fitzg. 148. HUSB. & WIFE, SETTLEMENT BY COURT; HUSB. & WIFE, CHOSE IN ACTION.*

A decree in chancery against an executor, preferred to a judgment at law against him, being prior in time. *Joseph v. Mott*, Prec. Chan. 79. *EXOR.; JUDGMENT; PRIORITY OF SECURITY.*

Upon a decree for payment of money after a writ of execution, and an attachment returned, court refuses to give leave to defendant to be examined, unless he gives security to abide the decree. *Roper v. Roper*, 2 Vern. 91. *PR. CONTEMPT; PR. EXAM. OF DEFENDANT ON INTERROGATORIES.*

A decree in equity is like a judgment for debt or damages at common law. *Nanney v. Martin*, 1 C. R. 233. *Bishop v. Godfrey*, Prec. Ch. 179.

A decree in chancery is as effectual to charge the person as an execution at law. *Elcard v. Warren*, 2 C. R. 192.

The plaintiff cannot move to dismiss his bill after decree. *Gulbert v. Hawles*, 2 Fre. 158. 1 C. C. 40. *PR. BILL DISMISSAL.*

Escape lieth not against the warden of the Fleet for escape of one in execution for breach of a decree. *Anon.* 2 Freem. 146. *JURISDICT.; PR. OFFICERS OF COURT.*

#### 4. To account.

Executor or administrator, after suit for account, may pay simple or specially debts. *Mulhby v. Russell*, 2 S. & S. 227. *EXOR. PAYMENT BY.*

Creditor proceeding at law against executor, after decree to account, allowed his costs at law previous to the notice of decree; but not those of motion to restrain their proceedings. *Anon.* 2 S. & S. 424. *PR. CREDITORS' SUIT; COSTS.*

the decree for account, or for actual payment of legacy,

due to wife, on suit, in joint names of husband and wife, is not a sufficient reduction into possession to bar wife's right of survivorship. *Admus v. Javender*, 1 McCle. & Y. 41. *HUSB. & WIFE, CHOSE IN ACTION.*

Injunction to stay proceedings at law was granted, a decree of reference to take an account having been obtained on a creditor's bill, against executors, before action brought; but defendant not having notice of decree, or of this application, it was ordered that all his costs should be first paid. *Farlow v. Wilson*, 11 Price, 95. *PR. INJUNC. TO STAY PROCEEDINGS AT LAW; PR. NOTICE; PR. COSTS.*

Creditor proceeding against executor at law, after notice of decree to account, is so far committing contempt, that upon application for injunction, court will refuse him costs of further proceedings at law, and costs of application. *Curry v. Bowyer*, 3 Mad. 456. *DEBTOR & CRED.; PR. CONTEMPT.*

After a decree to account, an injunction granted, on the application of the defendant, to restrain the plaintiff from proceeding at law in an action commenced by him pending the suit in equity. *Wilson v. Weatherhead*, 2 Mer. 406. *INJUNC. AGAINST PROCEEDINGS AT LAW.*

Injunction after a decree to account, to restrain a creditor from proceeding at law upon a verdict, which would entitle him to a judgment *de bonis propriis* against an executor, refused. In cases where the injunction is granted, it may be obtained on the application of the plaintiff in equity, as well as of the executor. See note. *Perrevelt v. Southerby*, 2 Mer. 480. *INJUNC. AGAINST PROCEEDINGS AT LAW; EXECUTOR.*

Executors having personal estate of the testator, given to them by the will, upon trust to lay out upon good and sufficient security, for an infant, to be paid on his coming of age, after a decree to account, and after notice by the next friend of the infant plaintiff, lending a part of such personal estate upon mortgage; ordered to pay the same into court; but the motion asking, in the alternative, that the executors might be ordered to replace the amount by so much stock as the same would have purchased at the time of investment, was to that extent refused. *Widdowson v. Duck*, 2 Mer. 494. *EXORS., LIAB. OF.*

Under a decree, for account of proceeds of a joint adventure, on bill by one party on behalf of himself and the others, and inquiry who are concerned with the plaintiff, the master having by advertisement as usual, declared those who should not come, excluded, reported several persons who had not come in to claim entitled to shares, further advertisements directed; but payment into court of those shares refused, and the decree, not to be executed, as to those who should not come in. *Good v. Blawitt*, 19 Ves. 336. *PR. PAYMENT INTO COURT; PR. MASTER'S REPORT.*

On abatement by bankruptcy of defendant, an executor, after decree to account, supplemental bill in nature of revivor, is necessary. *Russell v. Sharp*, 1 V. & B. 500. *EXECUTOR; PL. SUPPLEMENTAL BILL; PR. ABATEMENT & REVIVOR.*

Statute of limitations cannot be pleaded in bar to a bill of revivor, after decree to account. *Egremont v. Hamilton*, 1 Ball & B. 531. *LIMIT., STAT. OF; BILL OF REVIVOR; PL. PLEA OF STAT. OF LIMIT.*

Injunction granted against an action commenced by plaintiff, while proceeding under a decree to account for the same matter; it being a contempt to proceed at law, after the subject of the cause had been attached in court. *Mocher v. Reed*, 1 Ball & B. 318. *INJUNC. TO STAY PROCEEDINGS AT LAW.*

Upon further directions, under the usual decree for an account against an administratrix, an inquiry as to balances in her hands from time to time, with a com-



putation of interest thereon, prayed by petition upon affidavits of her conduct, before the master, by attempting to support her discharge by forgery, &c., was granted. *Parriett v. Price*, 14 Ves. 502.

The examination of an executor, under the usual decree for an account, ought to contain an interrogatory, whether he is indebted to the testator, the debt from himself being assets; liberty was therefore given, upon the suggestion of co-defendants, legatees, without affidavit, to exhibit an interrogatory for that purpose, not to go into an account, which must be the subject of a distinct bill. *Simmons v. Gutteridge*, 13 Ves. 262. EXECUTOR; PR. EXAMINATION OF PARTY DEFENDANT.

A final decree upon a sum ascertained, is equal to a judgment; but a mere decree for an account of plaintiff's demand, and of the personal estate come to the hands of defendant with mere direction for payment out of the result of that account, does not prevent the executor paying a judgment. *Perry v. Philips*, 10 Ves. 33. EXOR.

If a creditor coming in under a decree, requires relief, which cannot be had by re-hearing the original cause, he ought to file a cross-bill. *Lutouche v. Id. Dunsany*, 1 Sch. & L. 149. DEBTOR & CRED.; PR. CROSS-BILL.

Administratrix not allowed for debts paid after a decree to account, but shall stand in the place of the creditors paid. *James v. Jukes*, Ves. J. 517. ADMORS.

A decree for an account may be made, without declaring the will well proved, where one of the witnesses is abroad. *Fitzherbert v. Fitzherbert*, 4 Bro. C. C. 231.

Where a bill has been filed, and a decree made for an account, and a creditor comes before the master, but afterwards brings an action, the court will enjoin. But where the defendant has not applied in the first instance, it shall be without costs. *Hurdeastle v. Chettle*, id. 163. INJUNC. AGAINST PROCEEDING AT LAW; COSTS.

A defendant after a decree to account, though called an actor in the suit, yet is not prevented becoming plaintiff in another suit for the same matter. *Bayley v. Edwards*, 3 Swan. 703.

After a general decree against an executor to account, &c., a creditor shall be restrained by injunction from proceeding at law, not staying execution, but from going to trial. *Gault v. Fryer*, 2 Cox, 201. S. C. 3 Bro. C. C. 23. INJUNC. TO STAY PROCEEDINGS AT LAW.

Where single creditor files a bill for the payment of his own debt only, the court does not direct a general account of the testator's debts, but only an account of the personal estate, and that particular debt which is ordered to be paid in a course of administration. *Att. Gen. v. Cornthwaite*, 2 Cox, 44. DEBTOR & CRED.

Under a decree for an account, and applying personal estate in payment of debts and funeral expences, and directing the clear surplus to be paid over, making to the parties all just allowances, the master ought to allow payment in discharge of legacies. *Nightingale v. Lawson*, 1 Cox, 23. PR. ACCOUNT BEFORE MASTER.

A third mortgagee cannot take in a prior security, to displace a second mortgagee, after a decree to account, and before the master has made his report. *Wortley v. Birkhead*, 3 Atk. 811. See also where a third mortgagee buys in the first mortgage, *pendente lite*. *Robinson v. Davidson*, 1 Bro. C. C. 63. MORTGAGE; TAKING SECURITIES; LIS PENDENS.

Injunction against creditors suing at law after a decree to account. *Martin v. Martin*, 1 Ves. 211. INJUNC.

In decrees against a mortgagee on a bill for redemption, or against an executor to account, it is the course

of the court to direct (without further words) and yet if the executor is decreed to account, receive any sums subsequent to the decree, they must bring such sums into the court before the master. *Bulstrode v. Bradley*, 3 Atk. 582.

If after a decree to account, an executor or administrator does not revive within six years, this is not within the statute of limitations. *Hollingshead's Case*, 1 P. W. 742. ABATEMENT & REVIVOR; LIMIT. STAT. OF.

After a decree to account, and abatement of the suit by the defendant's death, his representative may revive. *Kent v. Kent*, Prec. Chan. 197. PR. ABATEMENT & REVIVOR.

After creditors have joined in a bill, and obtained a decree for payment of their debts out of legal and equitable assets, none of them shall be permitted to obtain a preference of the others, by obtaining judgment against the executors. *Sheppard v. Kent*, 2 Vern. 435. Prec. Chan. 190. S. C.

Where there is a decree for a mutual account, plaintiff on his own bill may be decreed to pay the balance of the account. *Storell v. Cole*, 2 Vern. 297. For the defendant in case of abatement, may revive, or by his death, his representative. S. C. Id. 219. *Kent v. Kent*, Prec. Ch. 197. PR. ABATEMENT & REVIVOR.

Administrator, durante minoritate, obtains a decree to account, the infant marries, and a new administration, during her minority, is granted to the husband. *Coke v. Hodges*, 1 Vern. 25. ADMOR. DURAN. MINOR.; ABATEMENT.

##### 5. For administration and distribution of effects.

See also PR. CREDITOR'S SUIT.

In a creditor's suit for administering the assets of B, a joint creditor of A and B was permitted to prove; A having become bankrupt, and it appearing that there were no joint assets of A and B. *Cowell v. Sikes*, 2 Russ. 191. DEBTOR & CRED.; PR. PROOF UNDER DECREE.

In a suit for the administration of a testator's assets, after the decree on further directions had sanctioned payments made by the executor in discharge of legacies, and had directed the fund in court to be apportioned among the other legatees, a creditor obtained permission to prove his debt; the master subsequently reported a debt to be due to him; but, in the mean time, the fund had been apportioned, and part of it had been paid over, while the remainder had been carried to the account of particular legatees. Held, that the creditor was entitled to receive out of the hands of the legatees, remaining in court, not the whole of the debt, but only a part of it, bearing the same proportion to the whole as the legacies given to those legatees bore to the whole amount of the legacies given by the will. *Gillespie v. Alexander*, 3 Russ. 130.

Administrator may retain his debt, though decree has been made for administration of assets in suit by other creditors, and though assets out of which he seeks to retain came to his hands since decree. *Munn v. Barlow*, 1 S. & S. 588. EXORS. & ADMORS.; RIGHT TO RETAIN.

Legacy assigned under certain trusts; trustee, notwithstanding notice of former decree for administration of assets, files bill for payment of legacy. Court refused legacy to be assigned to him, he having acted imprudently, or to give him costs. And executors refused costs, because they should have moved to stay proceedings, instead of answering trustees' bill. *Pack-*

*Wood v. Maddison*, 1 S. & S. 232. TRUSTEE; COSTS; EXECUTORS.

After decree for administration of assets in amicable suit, creditor having filed another bill praying usual accounts, (which had been directed by former decree) and also to have assets marshalled, (which was not prayed for or decreed in first suit), court made decree in second suit, directing usual accounts and assets to be marshalled, with liberty to master to use accounts taken under former decree. *Pott v. Gallini*, 1 S. & S. 206.

If the second suit had been merely for same object as the first, the decree in the first suit would have been a bar to it, and the court, on motion before answer, would have ordered all proceedings in it to be stayed. *Id. ib.*

When, under order made in creditor's suit, leave is given to file supplemental bill by creditor, not party to original suit, on behalf of himself and other creditors, to have benefit of decree in that suit, plaintiff is entitled to the same decree, to have benefit of former proceedings, as representatives of the original plaintiffs would have been entitled on bill of revivor. *Houlditch v. Marq. Donegall*, 1 S. & S. 491. BILL OF REVIVOR; BILL OF SUPPLEMENT.

After a decree for administration of a testator's estate in England and Ireland, an incumbrancer upon the Irish estate having come in and proved his debt, restrained from proceeding in a creditor's suit instituted by him in the court of chancery in Ireland, receiving the costs up to the time of his having notice of the decree, and paying the costs of the application. *Beauchamp v. Marq. Huntley*, 1 Jac. 546.

After a decree for the administration of a trust, the court will stay proceedings in a second suit for the same objects, but not if the second suit has a further purpose, as removing the trustees for default. *Anson v. Tuogood*, 6 Mad. 374.

After decree for administration of assets, executors pleaded false plea to action brought against him by creditors of testator, in order to have an opportunity of applying for injunction to restrain action, court granted injunction, and held creditor not entitled to judgment against executor, *de bonis propriis*. *Fielden v. Fielden*, 1 S. & S. 255. INJUNC.; EXOR.; PL. FALSE PLEA.

Where creditors are proceeding at law after a decree, the executor should move to restrain them, or he may be responsible. *Clarke v. El. Ormonde*, 1 Jac. 122. EXORS., DUTIES OF.

Creditors obtaining judgment against the executor after notice of a decree, and buying in the testator's property, would be obliged to restore it; *semble*. *Id. ib.*

After a decree for the administration of a testator's estate, creditors suing at law restrained, on the application of a legatee. *Id. ib.* LEGATEE; INJUNC. TO STAY PROCS. AT LAW.

A legatee agreeing, after a decree for the administration of the estate obtained in chancery by another legatee, to stop proceedings in a suit previously instituted by him in the exchequer, allowed his costs up to the time of his having notice of the decree. *Jackson v. Leaf*, 1 Jac. & W. 229. PR. COSTS; LEGATEE.

Whether, after a decree for administration of assets, a legatee will be restrained, on motion, from suing for his legacy, *quære*? *Id. ib.* PR. STAYING PROCS.; PR. MOTION.

Whether, on a bill filed for the administration of assets, the court will restrain the legal proceedings of a creditor who had previously obtained a right of execution against the personal representative, *quære*? *Drewry v. Thacker*, 3 Swan. 529. PR. INJUNC. TO STAY PROCS.

No injunction, after a decree for the administration

of assets, without information of their state. *Id.* 546. *Id.*

If the order for an injunction on payment of costs of action is in the usual form of injunctions after decree for administration, it will be improper, if the parties entitled to injunction having to pay costs as a preliminary, might, from the situation of the estate, be unable to obtain it in time. *Id.* 541. PR. INJUNC., FORM OF.

To an action by a creditor, the executor pleaded *non assumpsit*, a set off, and a *plene administravit præter*, and the verdict was against him on all these pleas. A decree for administration of the estate having been pronounced pending the action, an injunction was granted against the creditor, on payment of his costs at law. *Lord v. Wormleighton*, 1 Jac. 148. INJUNC. TO STAY PROCS. AT LAW.

Creditor having been restrained from proceeding at law, on account of decree obtained, allowed to prosecute such where proceeding on decree delayed for some years. *Powell v. Wallworth*, 2 Mad. 183. LENGTH OF TIME; CREDITOR'S SUIT.

Creditor allowed, on motion, to prove his debt under decree in creditor's suit, though money apportioned and transferred to accountant-general, on payment of costs of motion, and of re-apportioning funds. *Angell v. Haddon*, 1 Mad. 529. CREDITOR'S SUIT.

A judgment creditor not deprived of his lien on the estate in the hands of a purchaser under a decree, by not proving his debt before the master, in pursuance of advertisements for that purpose, his legal right to enforce payment of the judgment not being in the least affected by the decree. *Barrett v. Blake*, 2 Ball & B. 354. LIEN; JUDGMENT CREDITOR.

The only inconvenience to a judgment creditor not proving before the master under a decree, is, that he loses the benefit of having his debt discharged out of the produce of the sale under the decree. *Id.* 357.

After a distribution of assets under a decree ascertaining rights of legatees, advertisements for all persons interested to prove their claims before the master being previously published, a bill by a legatee against the representative of the executor dismissed. *Farrell v. Smith*, 2 Ball & B. 337.

Effect of a decree against administrator, entitling him to an injunction against the suit of a creditor, qualified by requiring an account of the assets either by the answer or affidavit. *Gilpin v. Id. Southampton*, 18 Ves. 469. ADMON.; ACCOUNT.

When a decree has been obtained by a creditor on behalf of himself and other creditors, a prior creditor, who has obtained judgment at law in ejectment, grounded on an elegit, shall not be allowed to get into possession. *Sumner v. Kelly*, 2 Scho. & L. 398. JUDGMENT CRED.

A decree against an executor is in nature of a judgment at law: after that, he may, on motion, without filing a bill for an injunction, restrain a creditor suing at law. The executor must pay the costs till notice of the decree, but not after notice; and he must make an affidavit as to the funds in his hands. *Parton v. Douglas*, 8 Ves. 520. COSTS; INJUNC. TO STAY PROCS. AT LAW.

Decree for execution of trust to pay debts made against one trustee only, the other defendant not appearing, though process of sequestration had issued against him. *Downes v. Thomas*, 7 Ves. 206. PR. SEQUESTRATION.

There being a decree for payment of debts, &c., on the suit of the trustees, though the parties have not proceeded under that decree, a creditor restrained by injunction, by bill filed for the purpose, from proceeding at law against the executor. *Brooks v. Reynolds*, 1 Bro. C. C. 183. S. C. 2 Dick. 603. INJUNC. AGAINST PROCS. AT LAW.

The general direction in a decree to apply the assets in a course of administration, applies to equitable as well as legal assets. *Hartwell v. Chitters*, Amb. 309.

After decree for satisfaction of creditors, the court will enjoin single creditor from proceeding at law for debt. *Dodgias v. Clay*, Dick. 393. *Id. Kenyon v. Worthington*, Dick. 668.

Decree for sale: directions are to pay creditors whole demands according to nature and priority. *Rover v. Bone*, Dick. 151.

When the representative of an intestate is seeking to give preference by confessing judgments, the court will give the plaintiff leave to proceed at law to recover judgment with a *cesset executio*, and in the court of equity for a discovery and account of assets. *Barker v. Dumaresque*, 2 Atk. 119.

Where creditor after decree (in obedience of which executor pays away assets) obtains judgment to which decree is not pleadable, equity will relieve executor. *Bank of England v. Morice*, 2 Bro. P. C. 465. Affirming *S. C. Forbes*. 218. JUDGMENT ATS. CREDITOR; EXOR.

If a bill be brought by a simple contract creditor, on behalf of himself and the rest of the creditors of J, to be paid their debts, and there is a decree that the plaintiff and the rest of the creditors shall come before the master, and prove their debts, and creditors coming in under the decree shall be paid no more than a proportion with the simple contract creditors. *Cox's case*, 3 P. W. 343.

Also, if a bond creditor lies by until the executor has paid away all the assets under the decree, he shall, it seems, be bound to take *pro rata* with the simple contract creditors. *Id. ib.*

The priority of creditors, by decree over subsequent judgment creditors, established. *Morrice v. Bank of England*, 3 Swan. 573. PRIORITY OF SECURITY.

Creditors under successive decrees are entitled to payment according to their priorities. *Abbis v. Winter*, 3 Swan. 578. *Id.*

In a creditor's suit against the administrators, and account decreed, the master reported that defendant had assets sufficient to satisfy plaintiff's demand, costs were decreed generally against the administrators. *Davy v. Seys*, Mos. 204. PR. COSTS; PR. MASTER'S REPORT OF SUFFICIENCY OF ASSETS.

#### 6. Of foreclosure or redemption of mortgages.

See also MORTGAGE, V. VI.

On bill of foreclosure an order being obtained for enlarging time for payment of principal money on condition of interest being paid; the defendant neglecting to pay the interest, plaintiff obtained the usual decree absolute on motion, as of course. A petition to discharge this decree as obtained by surprise was dismissed with costs. *Jones v. Roberts*, 1 McClel. & Y. 567. FRAUD; SURPRISE.

Dismissal, on default of payment under decree upon bill for redemption operates as a foreclosure. *Bp. Winchester v. Paine*, 11 Ves. 199. PR. DISMISSAL OF BILL.

Decree of foreclosure against a tenant for life, the tenant in tail being abroad. *Fishwick v. Love*, 1 Cox, 411. TENANT FOR LIFE, & IN TAIL.

On motion by mortgagor for further time to redeem, and that mortgage should stand as security only for what was *bond fide* advanced, but forfeited as to what was won at play. Held, that as mortgagor in a former cause, where he might have done it, did not insist on a redemption, the foreclosures could not regularly be kept open, but on the whole circumstances three

months were allowed. *Fleetwood v. Jansen*, 2 Atk. 467.

Upon *scire facias* taken out on a judgment, defendant shall insist only on what he might have done at the hearing of the original cause. The rule in equity is the same, with this difference only, that if anything new have happened since the hearing, defendant may avail himself of it. *S. C. id.* 468.

The equity of redemption of a mortgage comes to a feme covert, against whom and her husband a bill is brought to foreclose; the feme covert shall be foreclosed absolutely, and shall have no time to shew cause after the death of her husband. *Mullack v. Galton*, 3 P. W. 352. HUSB. & WIFE.

Decree against a mortgagee in possession to redeem, but before the account taken, a church becoming void, mortgagee presents: yet on petition ordered to revoke his presentation. *Jory v. Cox*, Proc. Chan. 71. PRESENTATION TO BENEFICE; MORTGAGE.

An infant having a day to shew cause against a decree of foreclosure after he attained twenty-one, attained that age, and left the kingdom before he was served to avoid his creditors; application to serve his clerk in court with the subpoena; Ld. Thurlow thought it must be personal service, but it being again moved upon strong affidavit, it was granted. *Elecock v. Glegg*, Dick. 764. PR. SERVICE SUBSTITUTED; INFANT.

#### 7. Who bound by.

See further INFANT, II. 3.

In a suit to establish a will, and for the administration of real and personal assets, if the heir at law of the testator be abroad, it seems the court does not, as in other cases, declare the will well proved or establish the same, but merely directs the trusts of the will to be carried into execution. *Thompson v. Topham*, 1 Y. & J. 556. HEIR AT LAW.

Tenant in tail coming into esse before decree is as much bound by all complete proceedings as he would be after decree. *Westmeath v. Westmeath*, 3 Mad. 436. TENANT IN TAIL.

A decree pronounced in 1670 in a suit against the trustees of a charity, impropriate rectors, and persons interested in the due application of the funds, to which the Attorney-general was not a party, having directed the trustees, under the indemnity of the court, to perform an agreement with the plaintiff in that suit, for granting a lease of tithes for 980 years at a fixed pecuniary rent, and an exchange of lands, and the conveyances having been accordingly executed, and the rent constantly paid, and the lands enjoyed in conformity to the decree, an information by the Attorney-general, at the relation of the present trustees, against the person claiming under the plaintiff in the former suit for an account of tithes, not stating the decree of 1670, which was set forth in the answer, was dismissed. *Att. Gen. v. Warren*, 2 Swan. 291. INFORMATION; ATT. GEN.; PL. PARTY.

An infant defendant entitled to amend his answer after decree, and going into a new defence; but in order to prevent him from again having the opportunity of availing himself of that privilege, and from having a day to shew cause against the second decree, he is to be considered as plaintiff in the further proceedings in the cause, by which he will be as much bound by the decree as if adult. *Savage v. Carroll*, 2 Ball & B. 444. INFANT.

Where a decree of foreclosure has been made against a tenant for life of an equity of redemption who afterwards executed the conveyance to a purchaser under the decree; a remainder-man, whose title did not, until many years after, vest in possession,

filing a bill immediately on the death of the tenant for life, not bound by the decree or sale. *Blake v. Foster*, 2 B. & B. 574. MORTGAGE FORECLOSURE; TEN. FOR LIFE & REM.-MAN.

Purchaser of estate charged with debts, *pendente lite* by creditors, is bound by decree. *Metcalf v. Pubertoft*, id. 207. VEND. & PURCH.; ASSIGNMENT, PENDENTE LITE.

Assignee of equity of redemption pending suit for redemption, is subject to decree. *Id. ib.* EQUITY OF REDEMPTION; ASSIGNMENT, PEND. LITE.

A decree made between co-defendants upon evidence arising from pleadings and proofs between plaintiffs and defendants. *Cowry v. Caulfield*, 2 Ball & B. 255. PL. PARTY; CO-DEFENDANTS.

A minor is bound by a decree. *Lightburne v. Swift*, id. 213. INFANT.

A feme covert is as much bound by a decree as a feme sole. *Burke v. Crosbie*, 1 Ball & B. 502. FEME COVERT.

A decree always guards the rights of persons not parties to the suit, for it gives relief on the terms that such persons be not prejudiced. *Shine v. Gough*, id. 447. PL. PARTY.

Equity will not permit a decree to be made use of to evict the interests of persons not parties, and who were tacitly protected by it. *Foley v. Gough*, id. 448. *Id.*

Feme covert not entitled to a day to shew cause against a decretal order as an infant, but it is binding till reversed. *Burke v. Crosbie*, id. 503. FEME COVERT; PR. DAY TO SHOW CAUSE.

Decree omitting to give an infant six months to shew cause against it, is erroneous. *Savage v. Carroll*, id. 551. INFANT; PR. DAY TO SHOW CAUSE.

A purchaser, under a decree, is not affected by irregularities and defects in the decree by which the application of the money may not have been properly secured. *Curtis v. Price*, 2 Ves. 89. VEND. & PURCH.

Subsequent mortgagees of equity of redemption are bound by decree of foreclosure. *Rp. Winchester v. Paine*, 11 Ves. 194. MORTGAGE, FORECLOSURE OF.

Infants are bound by a decree taken by consent, although no reference to a master to enquire whether it was to their benefit. *Wall v. Bushby*, 1 Bro. C. C. 484. INFANTS.

A debt due by decree in equity, though but a personal demand, will bind the heir or devisee having assets, and such heir or devisee refusing to perform a decree against him, will be subject to an attachment. *Conner v. Browne*, 1 Ridg. P. C. 139. HEIR AT LAW.

Where sale before master is directed to take place by decree, a contract for private sale by trustees will not be enforced. *Raymond v. Webb*, 10ff. 66. VEND. & PURCH.; TRUSTEE; SPEC. PERF.

Bill of foreclosure against tenant for life and the first remainder in tail. The usual decree made, the time for redemption being elapsed, tenant in tail released the equity of redemption, so that the decree was never made absolute: Held, binding on those in remainder. *Reynoldson v. Perkins*, Amb. 564. S. C. 1 Dick. 427. TEN. FOR LIFE & REM.-MAN.

A decree having been made for sale of an estate, and that a trustee should join in the conveyance; that trustee dying, his infant heir bound to execute a conveyance under the stat. 7 Ann. c. 19. Such a decree against the ancestor would obviate any doubt as to whether his infant heir were or not a trustee within the act. *Harkins v. Obeem*, 2 Ves. 559. PR. REF. TO MASTER AS TO INFANT TRUSTEE; INFANT TRUSTEE.

An infant is bound by a decree in a cause where he is plaintiff as much as a person of full age. *Gregory v. Moleworth*, 3 Atk. 626. INFANT.

A decree against the lord of a manor will not bind

copyholders in fee or freeholders for life, where they are not parties. *Poole v. Clarke*, 2 Atk. 516.

In a foreclosure against an infant, though the infant has six months after he comes of age to shew cause, &c.; yet he cannot ravel into the account, nor even redeem, but only show an error in the decree. *Mallack v. Galton*, 3 P. W. 352. INFANT; MORTGAGE, FORECLOSURE OF.

Decree of court of chancery determining matter of right, is good evidence of that right as to all persons claiming under party against whom decree was made, though at ever so great a distance of time. *Borough v. Whitecole*, 3 Bro. P. C. 595. EVIDENCE.

Upon a decree against an infant, unless cause, within six months after he comes of age, the infant may answer anew. *Napier v. Effingham*, 2 P. W. 401. S. C. 4 Bro. P. C. 340. INFANT.

Bill to execute articles for the sale of lands against the devisee for life, and the infant heir of the vendor. Decreed, to be executed, and that plaintiff should be let into possession, and hold against the infant, who should convey, when of age, unless cause shewn six months after. *Sikes v. Jister*, 5 Vin. 541. pl. 28. *Id.*

A decree for confirming or avoiding a will, where an infant is heir or devisee, is final. *Whitechurch v. Whitechurch*, 9 Mod. 128. INFANT.

A mortgagee of part of estate in Ireland files his bill of foreclosure in court of chancery in England, and obtains the usual decree. A mortgagee of other part of same estate, files bill of foreclosure in Ireland, and on hearing of cause desired that decree of English chancery might be read, to intent that decree in Irish chancery might be made agreeable thereto. But refused, because present plaintiff, though defendant in former cause, was not brought to hearing in that cause, and consequently was no party to that decree. *Errard v. Ashton*, 3 Bro. P. C. 561. PR. PARTIES.

A decree against tenant in tail who had agreed to sell his estate, he stands out all process of contempt for not obeying it, yet his issue not bound by it. *Powell v. Powell*, Prec. Chan. 278. ISSUE; TEN. IN TAIL.

How far tenants of manor, who are not parties to decrees against other tenants, shall be bound by it. *Brown v. Howard*, 1 Eq. Ab. 163.

Tenant in tail sells for a full value, receives the money, and covenants to levy a fine, and was afterwards decreed to do it, yet dying, (though in prison, for not performing the decree) his issue could not be bound. *Fox v. Crane*, 2 Vern. 306. TEN. IN TAIL & REM.-MAN.

The defendant having notice of a decree to which he was no party, pays money contrary to that decree. Ordered that he should pay the money over again. *Harvey v. Montague*, 1 Vern. 57. NOTICE.

Purchasers, *pendente lite*, are bound by the decree. *Yearely v. Yearely*, 3 C. R. 48. *Gaskell v. Durdin*, 2 Ball & B. 169. REVERSIONER.

All original parties to the suit, or those that are made parties thereto, or to the decree, of full age, and such as claim under them *pendente lite*, are regularly bound by the decree. *Style v. Martin*, 1 C. C. 152. *Id.*

A decree against the lessor, and all claiming under him; he surrenders to him in reversion, who was held to be bound by the decree for so long time as the lease would have continued. *Chapman v. Bissou*, Toth. 61. *Id.*

A decree for the execution of an agreement to inclose a common, parties having an interest in the common, but not parties to the agreement, shall not be bound. *Thirston v. Collier*, 1 C. C. 48. S. C. Anon. 3 C. R. 13. Nel. 79. *Id.*

A decree by consent of a personal estate binds a

purchaser for valuable consideration. *Wyndham v. Wyndham*, 3 C. R. 22. 2 Freem. 127. *Id.*

If an infant is plaintiff in the original cause, and defendant in the cross cause, and has six months after he comes of age to shew cause against the decree, he may amend his answer, or put in a new one, but cannot put in a new bill or amend his former. *Anon. Mos. 606*. *LANT.*

The court enlarged the time for a defendant to show cause after he came of age, why the decree should not be made absolute till the plaintiffs in the first answer had put in an answer to a bill of discovery he filed against them after he came of age. *Trefusis v. Cotton*, Mos. 203. *Id.*

A decree nisi against an infant is an absolute decree, and when he comes of age he cannot set it aside by original bill, unless for fraud and collusion between the plaintiff and his guardian; but he may amend his answer, and file a bill of discovery to that end. *Id.* 306. *Id.*

It is a good cause why a decree should not be made absolute against an infant after he comes of age that he has put in a new answer. *Id.* 313. *Id.*

#### 8. Obtaining generally.

A court of equity has discretion to neuter its decree in any manner that suits the real and substantial justice of the case, and in a suit for tithes, if a defendant set up distinct farm moduses, there may be a separate decree establishing or overruling each modus separately; and the whole costs may be decreed according to the justice of the case, against each defendant. *Wolley v. Brounhill*, 1 M'Clell. 324. S. C. 13 Price, 500. *JURISDICTION.*

If the defendant has a good defence against one of the plaintiffs, who held a joint office, though not against the others, the court cannot make a decree in that suit for the plaintiffs. *Hunter v. Richardson*, 6 Mad. 89. *PARTNERS.*

If the plaintiff in a suit has, by the course of the court, a right to a decree for an account, he does not forfeit such a right by refusing an account which is offered by the defendant or the court at the hearing. It is the duty of the court to decree an account *ex officio*; and if such decree is not made, it is a valid ground of appeal, notwithstanding the refusal of the plaintiff. *McNeill v. Cahill*, 2 Bligh, 229. *ACCOUNT.*

A plaintiff in an interpleading bill having done all in his power to bring the parties before the court, may obtain a decree, although one of the defendants has not answered, and is present at the hearing, if he (having appeared to the process) has been duly brought into contempt for want of answer. *Fairbrother v. Prattent*, 3 Price, 303. *PR. INTERPLEADER.*

Where defendant ought to have demurred to jurisdiction, the court will not make a decree. *Barker v. Dacie*, 6 Ves. 686. *Sed quare*; for by cross bill that objection is waived. *PL. DEMURRER TO JURISDICTION.*

A decree obtained without making parties those whose rights are affected thereby, is fraudulent and void as to those parties; and a purchaser under it, with notice of the defect, is not protected by it. *Giffard v. Hott*, 1 Scho. & L. 386. *PL. PARTIES.*

A final decree cannot be made upon an interlocutory order, without consent. *Allan v. Bower*, 3 Bro. C. C. 149. *PR. INTERLOCUTORY ORDER.*

Day given to shew cause against decree obtained by surprise. *Price v. Solly*, Dick. 21.

Decree grounded on two verdicts at law, reversed by the house of lords. *Stribblehill v. Brett*, 2 Vern. 445. *PR. Ch.* 165. S. C.

Decree for fold course and common of pasture. *Fielding v. Wren*, Cary. 46.

Spoilation of marriage articles made good by decree. *Bates v. Heard*, Dick. 4.

Bond having been cancelled by obligor, lands settled according to bond by decree. *Arnold v. Barrington*, *id.* 5.

Deeds destroyed, plaintiff decreed to enjoy lands, &c. *Gurland v. Radcliffe*, *id.* 11.

Same in case of a will destroyed. *Hayne v. Hayne*, *id.* 18.

#### 9. Obtaining by Fraud.

Where the enrolment of a decree is gained by surprise, the court will vacate it. *Stevens v. Guppy*, 1 Turn. & R. 178. *PR. DECREE, ENROLMENT OF.*

Mortgagee resisting the right to redemption, on the ground of a decree of foreclosure collusively obtained, decreed to pay so much of the costs as was occasioned by his resistance. *Harvey v. Tebbutt*, 1 Jac. & W. 197. *COSTS; MORTGAGE.*

A decree in equity is no protection to a purchase effected by management of vendor, tenant for life, and purchaser himself, to the prejudice of the remainderman entitled to the inheritance under colour of decree in equity, the remainderman though a party to suit being an infant at the time. *Colclough v. Bolger*, 4 Dow, 62.

Purchase of estate under decree fraudulently obtained, set aside after a great length of time. *Gore v. Stackpole*, 1 Dow, 18. *VEND. & PURCH.*

*Quere*, whether purchaser for valuable consideration, under decree fraudulently obtained, though ignorant of fraud, can protect himself when fraud appears on face of proceedings? *Id.* 30. *NOTICE; VEND. & PURCH.*

A decree of foreclosure had on sequestration in 1777, in pursuance of 7 Geo. 2. c. 14. against an absent mortgagor, known by the plaintiff to be incompetent from mental imbecility to conduct his affairs, and advantage having been taken in the account of the state of the defendant, and of his absence, and of his having nobody to manage his defence, and a sale had in 1780, in pursuance of such decree to the person conducting the suit, set aside as fraudulent, and an inquiry directed into the circumstances, upon the ground of which the decree and former proceedings were impeached on original bill filed in 1785 by the heir of the mortgagor. *Carew v. Johnston*, 2 Scho. & L. 280. *MORTGAGE, FORECLOSURE OF.*

A decree, though obtained by fraud, cannot be set aside by petition. *Musell v. Morgan*, 3 Bro. C. C. 74. *PR. DECREE, SETTING ASIDE; PR. PETITION.*

R seized in fee of lands, devised the same in 1696 to T; a papist, for lives; T died in 1727, when W, his eldest son, also a papist, became seized as special occupant; in 1741 he conveyed all his interest to M, in consideration of 500*l.*; M died in 1750, leaving C, respondent's wife, his heir at law, and F, who obtained administration; W died in 1751, leaving an infant daughter A, and B his widow, who entered and received the rents. Appellants intermarried in 1770, during the minority of A, who became of age in 1772, and in 1778 appellants filed their bill, charging that W was almost an idiot; and was imposed upon by K, for whom M was only a trustee; that no consideration was paid; that the consideration pretended was made up of false accounts by K, who, being an attorney, had alarmed W, by telling him that his interest was discoverable under the popery laws, and that therefore he must convey to some protestant to protect it, though K knew that the original devise in 1696 was prior to the popery acts. That in 1741 K filed a bill in the name of D, as a protestant discoverer, against W, praying to be decreed the benefits of the devise in 1696, and of the renewals on an allegation that X, the father of W, had, by his will in 1727, devised his

interest to papists. K proceeded in the cause, prepared the answers of all the defendants, and in 1742 the court decreed in favour of D, the protestant discoverer, which decree was drawn up by K, who caused it to be inserted; that depositions were read at the hearing, though by the registrar's minutes it appeared that none were taken in the cause. In 1742, D assigned the decree to M in trust for K, who purchased the inheritance of the lands. Appellants, after adducing many evidences of fraud and inadequacy of consideration, prayed that the decree in 1742 might be set aside for fraud, and a renewal of the original lease of 1696. Respondents, by their answer, insisted on the fairness of the transaction, which they explained, and insisted on the statute of limitations as to matters of account, and on length of time since the original purchase. Whereupon the court dismissed the bill, and their decree of dismissal was on appeal affirmed by the lords. *Mulcahy v. Kennedy*, 1 Ridg. P. C. 331. PAPISTS.

A bill of review, with matter come to the party's knowledge since the hearing, lies. Where the plaintiff in the bill has since the hearing discovered matter which would vary the decree; and where, if such matter was known to the other party, he was not in conscience obliged to have discovered it to the court; for if the matter was known to the other party, and such as in conscience he ought to have discovered, he obtains the decree by fraud, and it ought to be set aside by original bill. *Manaton v. Molesworth*, 1 Eden, 25. **BILL OF REVIEW.**

Probate obtained by fraud relieved against here, and the deed importing a consent thereto, set aside here, not in ecclesiastical court, and the defendant decreed to consent to a revocation of the probate. *Barnesly v. Pavel*, 1 Ves. 287. **WILL, PROBATE OF; JURISDICTION.**

A decree gained by fraud may be set aside by petition, as well as a judgment at law by motion; *a fortiori* may such decree be set aside by will. *Sheldon v. Aland*, 3 P. W. 111.

On suggestion of a gross fraud, the court will upon an original bill overrule a plea of a decree, and report made and confirmed thereon, if the suggestion of fraud be not denied. *Lloyd v. Mansell*, 2 P. W. 73. **PLEA OF FORMER DECREE.**

On a bill to set aside a decree against an infant for fraud, if the same be not fraudulent, though in every respect not so equitable, the court will not set it aside. *Richmond v. Tayleur*, 1 P. W. 734. **FRAUD, DECREE BY.**

Enrolment of a decree may be opened if the enrolment was gained by surprise, or there is some irregularity in it. *Anon.* 1 Vern. 131. **PR. DECREE, OPENING.**

A decree obtained by surprise, and enrolled, vacated. *Packer v. Dee*, 3 Swan. 534.

### 10. Obtaining by consent.

See PR. APPEAL, 2.

The lords will not (upon appeal) reverse a decree in equity, founded on an order made by consent. *Blundell v. Macartney*, 2 Ridgw. P. C. 557. **PR. APPEAL.**

Decree by consent, not set aside. *Harrison v. Ramsey*, 2 Ves. 488.

A decree or order made by consent, cannot be annulled from. *Bradish v. Gee*, Amb. 229. S. C. he is pl. 73. *Allanson v. Doulsen*, Colles, P. C. 299. *gory v. Mo. Sansum*, 1 Bro. P. C. 468. *Blundell v. A decree*, 2 Ridgw. P. C. 557, 591. **PR. APPEAL.** Judgment in a cause, heard by consent; re-

versed on appeal. *Butterfield v. Butterfield*, 1 Ves. 133. **Id.**

And in *Wood v. Griffith*, 1 Mer. 36. 38. Ld. Ch. said, he should have great difficulty in holding, that by consenting to an order consequential on a decree, the party had precluded himself from appeal.

It is a rule, that whenever a decree is assented by consent, the merits shall never after be brought into, unless there be an objection, that the assent be struck out of the order. *Norcott v. Norcott*, 2 Vin. Ab. 398. S. C. nom. *Northcote v. Northcote*, Colles, P. C. 287. *Blundell v. Macartney*, 2 Ridgw. P. C. 557, 591.

An appeal brought, suggesting that decree was said to be made by consent, when it was not, was dismissed. *Downing v. Cuge*, 1 Eq. Ab. 165. **PR. APPEAL.**

Copyhold fines were ascertained at two years value, and a commission was issued, to ascertain the value of the tenements under a decree by consent, the principle of which was disapproved. *Ld. Holles v. Hutchinson*, 3 Swan. 665.

A decree by consent, as to a personal estate, binds a purchaser for a valuable consideration. *Wyndham v. Wyndham*, 3 Rep. Ch. 22. 2 Freem. 127. All the parties in a suit, except one who was not present, but whose solicitor consented on his behalf, agreed in court to refer the matter in dispute to the final determination of an arbitrator. On a bill of review, brought by the absent party: Held, that solicitor's assent to interlocutorys may bind; it cannot bind to a reference finally to determine. The court refused to give costs against the solicitor who assented, for that the assent he gave was in court, and it was the folly of the other party to proceed on it. *Colvel v. Child*, 1 Ch. Ca. 86. 1 Cl. R. 195.

Allowed to be a good error in a bill of review, that the decree was made by the consent of the plaintiff's counsel, by which he ought not to be concluded. *Smith v. Turner*, 1 Vern. 274. See vide *Harrison v. Runsey*, 2 Ves. 488.

### 11. Pro confesso, and by default.

See also PR. BILL, PRO CONFESSO.

Persons out of the realm, affected by decree *pro confesso*; if they return within seven years, to be served with a copy, or in case of death, his heir, &c. 5 G. 2. c. 25. s. 4.

If persons served with copies of such decree *pro confesso*, shall not petition a rehearing of the cause within six months, the decree to be absolutely confirmed, and bar all claiming by them. 5 Geo. 2. c. 25. s. 5.

Decree on bill *pro confesso* is absolute, and no day given to show cause against it. *Landon v. Ready*, 1 S. & S. 44. **PR. BILL, PRO CONFESSO; DAY TO SHOW CAUSE.**

But where defendant is served to hear judgment, and does not appear, he has a day given to show cause against decree. *Id. ib.*

Under a decree to account, made upon taking the bill *pro confesso*, against a defendant who has appeared, but not answered, he cannot attend the master without the leave of the court, but leave to attend given, and the sequestration discharged upon payment of the costs of the contempt of the suit. *Heyn v. Heyn*, 1 Jac. 49. **PR. CONTEMPT; PR. ATTENDANCE BEFORE MASTER.**

A decree taken *pro confesso*, is the decree of the plaintiff who takes it, and it is his duty to see that it is right. A decree taken *pro confesso*, against one of the defendants in a suit, may be impeached for error by a party claiming under that defendant; and the

party claiming under the plaintiff in the suit, can have no benefit of that decree, if erroneous. *Hamilton v. Houghton*, 2 Bligh, 170.

A bill taken *pro confesso*, is conclusive against the defendant only, as to the facts within his knowledge; not as to facts which the plaintiff has the same opportunity of knowing as the defendant, e.g. as to the survivorship of a trustee, which was alleged in the bill, but proved to be contrary to the fact. *Id. ib.*

Decree by default made upon service of a subpoena, not entered upon judgment, is irregular, and will be discharged on motion. *Powell v. Martin*, 1 Jac. & W. 293. SUBPENA, INDORSEMENT OF.

To shew cause against a decree on default by defendant at the hearing, the order must be set down the cause on some day immediately, not after the causes already set down. *Margr. Anspach v. Noel*, 19 Ves. 573. PR. SETTING DOWN CAUSE.

Decree *pro confesso*, not opened without strong ground; therefore not upon a general affidavit by party himself of derangement. Evidence more satisfactory, and extending to the whole period, being required. *Knight v. Young*, 2 V. & B. 184.

The process to obtain a decree *pro confesso*, not applied to a prisoner in Newgate under a criminal sentence; who if brought up by habeas corpus, must be remanded immediately; and cannot as a general case, be turned over to the Fleet *ex caris*, subject to the further process by *alias habeas corpus*, &c. *Moss v. Brown*, 1 V. & B. 306. PR. PROCESS; PR. PRISONER.

A decree by default having been made absolute, the proper course to set it aside, is by presenting a petition for a rehearing. A motion to discharge the order to make absolute, and for a day to shew cause, refused accordingly. *Att. Gen. v. Browle*, 3 Mer. 698.

Upon decree taken by default of defendant at hearing, the evidence is not entered as read. *Stubbs v. —*, 10 Ves. 30. EVIDENCE, ENTRY OF.

To prevent decree *pro confesso*, defendant should have not only the answer on file, but also a receipt for costs. The answer being actually filed, without payment or tender of costs, the defendant was remanded to give an opportunity of moving to take it off the file for irregularity, but plaintiff having taken an office copy of answer, that course failed. *Sedgier v. Tyte*, 11 Ves. 202. PR. ANSWER; PR. COSTS; WAIVER.

Decree upon a bill taken *pro confesso*, is to be pronounced by the court, not to be drawn up by the plaintiff. *Geary v. Sheridan*, 8 Ves. 192.

Decree in a suit of interpleader against a defendant, who did not appear. *Hodges v. Smith*, 1 Cox, 357. PR. INTERPLEADER.

Where a defendant is out of the jurisdiction, and cannot be made to appear, it amounts to the same thing as if process had been taken out for want of an appearance, and carried on to a sequestration. *Darwent v. Walton*, 3 Atk. 510.

Defendant appears and cause goes off till a future day, when defendant makes default, there may be an absolute decree against him. *Halsey v. Smith*, Mos. 186. *Venemore v. Venemore*, 1 Dick. 93.

Defendant by consent to appear at hearing gratis, and pray no day over, making default, decree was pronounced. *Dean v. Abel*, Dick. 287.

## 12. Service of.

See also PR. DECREE, 15.

Decree served on peer requires no letter missive. *Mackenzie v. Powis*, 2 Com. 675. LETTER MISSIVE; PEE.

By practice in Ireland the draft of decree ought to be delivered to adverse party, or his attorney, who, in eight days, is to return the same signed by counsel on that side, or make objections to the draft before it can be regularly enrolled. *Cheveril v. Geoghegan*, 6 Bro. P. C. 18. IRELAND.

Not having been served with a copy of a decree for a sale is a good cause against an attachment, for not executing the conveyance to a purchaser. *Keogh v. Wood*, Vern. & Scriv. 113.

In order to set aside a sale under a decree, there must be an affidavit of a greater sum having been offered. S. C. PR. ATTACHMENT, CAUSE AGAINST.

## 13. Adding to, altering, rectifying, and varying minutes of.

Clerical mistakes in decrees, or decretal orders, may be corrected on petition. 45 Gen. Order, 3 April 1828.

Where the court directed an issue to be tried at the next assizes, and the decree was not drawn up or entered in sufficient time, the minutes were varied by directing the trial of the issue at the subsequent assizes. *Grange v. Cass*, 2 V. & J. 241.

Correction of a clerical error in a decree passed and entered. *Tomlins v. Palk*, 1 Russ. 475.

Mistake in decree, unless a mere numerical error apparent on the decree itself, cannot be rectified but by rehearing. *Brookfield v. Bradley*, 2 S. & S. 64. MISTAKE.

Where, by mistake, balances reported due from defendant were included in sums paid into court under decree; and decree, on further directions, ordered those balances to be paid into court; held that mistake could not be rectified without rehearing cause on latter decree. *Brookfield v. Bradley*, 2 S. & S. 64.

An application to rectify a decree on suggestion, aid of the decree, which would have been embodied in it almost as of course, as if it had been an omission, may be made by motion, without the formality of petition. *Ducies v. Morris*, 13 Price, 766.

A decree will not be altered on motion; where a decree *nisi* had been altered materially against a party without his appearing at showing cause, the court will refuse to alter the decree absolute on motion. *Williams v. Jones*, 1 M'Clel. 96. S. C. 13 Price, 265.

Where decree directs issues to try the validity of *modus*, and the plaintiff wishes to have them tried in different county from that wherein lands lie, an order for that purpose cannot be inserted in decree, but must be obtained by petition. *Sparke v. Itatt*, 1 S. & S. 366. PETITION; ISSUE AT LAW; VENUE.

Minutes of decree cannot be varied on motion. It can only be done on petition. *Brown v. Sansome*, 9 Price, 479. See also 7 Price, 661. 8 Price, 606. PR. MOTION.

Where minutes were drawn up, omitting to direct issue at law to be tried by special jury, and decree in consequence contained no such order, court refused to amend minute by insertion thereof. *Stuart v. Greenall*, 9 Price, 480. PR. ISSUE AT LAW.

Decree being, amongst other things, that "the parties should produce, before the master, all books, papers, &c." the words "as the master shall direct" were added, on motion for that purpose. *Punderson v. Dixon*, 5 Mad. 121.

An erroneous decree, directing payment of interest cannot give a right to interest, but interest may be due

under circumstances. *Hamilton v. Haughton*, 2 Bli. 170. INTEREST.

After decree to bill for delivery up of deeds, directing ejectment to be brought, an order, to restrain setting up of outstanding terms, cannot be made on motion. *Brackenbury v. Brackenbury*, 2 J. & W. 391. PR. MOTION: OUTSTANDING TERMS.

All applications to rectify decree must be made by petition. *Grey v. Dickenson*, 4 Mad. 464. PR. PETITION.

Court will order minutes of decree, declaring stock "not to be part of personal estate of intestate;" on general claim by some of next of kin against a particular claim by others, to be varied by adding the words "together with the dividends which have accrued due thereon," on a special motion without a rehearing, where the amount is small, and the alteration is reasonable and consonant with the tenor of original decree. *George v. Howard*, 7 Price, 661.

Directions omitted in decree by mistake, introduced on motion by consent of all parties. *Skrymsher v. Northcote*, 1 Swan. 572.

No substantial addition can be made to a decree on motion, without consent. *Willis v. Parkinson*, 3 Swan. 233.

In a charity case, an omission in the original decree not declaring the nature of the charity, corrected on further directions without rehearing. *Att. Gen. v. Whiteley*, 11 Ves. 241. CHARITY.

After enrolment of a decree, errors appearing upon the face of schedules permitted to be corrected upon motion without a bill of review; but the court would not permit an affidavit, introducing a new fact, to be used for that purpose. *Weston v. Haggerston*, Coop. 134.

Costs at law and in equity, between the same parties, set off, after decree omitting such a provision. *Shine v. Gough*, 2 Ball & B. 33. PR. COSTS; SET-OFF.

A purchaser under a decree shall not be affected by error in the decree, e.g. in its not having given a day to an infant defendant to shew cause, or in decreeing a sale of lands to satisfy judgment debts, without an account of the personal estate. *Bennett v. Hamill*, 2 Scho. & L. 566. VEND. & PURCH.; SALE, JUDICIAL.

A purchaser has a right to presume that the court has taken the steps necessary to investigate the rights of the parties, and that, on that investigation, it has properly decreed a sale, but he ought to see that all proper parties to be bound are before the court, and that he does not take a title which can be impeached *alimude*. *Id. ib.*

Order on motion, with consent, to rectify a clear mistake in a decree. *Newhouse v. Mitford*, 12 Ves. 456. S. P. *Lane v. Hobbs*, *id.* 458.

After decree merely directing inquiries, such an order as could be had on further directions may, by consent, be made on motion, as in this instance, to dismiss bill with costs. *Awm.* 11 Ves. 169. PR. MOTION.

Omission in decree, if perfectly of course, supplied on motion with notice. In this instance the common direction to examine all parties upon interrogatories being omitted, an order was made, that master should be at liberty to examine, &c. *Wallis v. Thomas*, 7 Ves. 292. *Id.*

So also in the usual decree upon creditor's bill, against executors, the direction for account of personal estate. *Pickard v. Mattheson*, *id.* 293. *Id.*

Upon farther directions, the court may add to the decree, and may therefore give interest, though the question of interest was not reserved. *Crease v. Hunter*, 2 Ves. J. 164. 4 Bro. C. C. 157. PR. FURTHER DIRECTIONS; INTEREST.

Administrator not brought before the master by

motion, after a decree passed and entered: If there is any thing in it affecting him by way of order to pay; otherwise, if only for him to witness what is done. *Habergham v. Vincent*, 1 Ves. J. 68. PR. ANSWERMENT; PR. PARTIES.

Upon a bill against an administrator for a distribution, the house of lords having reversed part of the Ch.'s decree appealed from by the defendant as to the particular point, and affirmed it in all others, the decree having given no direction as to finding the distributive shares, the court of chancery was precluded from giving, upon a rehearing, any directions respecting it, down to the time of the decree and affirmation, and the decree having been drawn up without any direction touching such interest, according to a draft settled and brought into court by plaintiff's own counsel, he is thereby precluded from setting up any claim of interest. *Stewart v. Noble*, Vern. & Scriv. 528. 539. INTEREST.

Generally speaking, to warrant a reservation of interest on further directions, it should have been directed on the original decree. The case, however, of a direction for a trial at law, is an exception, and there may be others founded on the peculiar nature of a case. *Champ v. Moody*, 2 Ves. 470. INTEREST; PR. FURTHER DIRECTIONS.

Court cannot give interest unless reserved in decree, but cause reheard for the purpose. *Herle v. Greenbank*, Dick. 370.

A trust estate was decreed to be sold for payment of debts and legacies, and to be sold to the best purchaser. Articles to buy the estate of the trustees, and brings a bill to compel them to perform the contract. The trustees, by their answer, disclose the matter. The court will make no new decree, but leave the former decree to be pursued. *Annesley v. Ashurst*, 3 P. W. 282. PR. ANSWER, ADMISSION IN.

Such defects in a decree as the court will rectify upon motion, are not sufficient grounds for an appeal. *Bunbury v. Bolton*, 1 Bro. P. C. 434. PR. APPEAL.

Decree cannot be varied by original bill. *Davis v. Larnier*, Dick. 42.

Liberty given to amend materially enrolment of decree. *Eyles v. Ward*, *id.* 58.

Part of the matters being omitted in drawing up the decree, and after the decree signed and enrolled, the defendant dies; a bill of revivor lies to revive the matters omitted. *Williams v. Arthur*, 1 C. C. 37. 2 Free. 177. PR. ABATEMENT & REVIVOR.

After decree signed and enrolled, and several proceedings had respecting costs, the suit abated by death of the plaintiff; held a bill of revivor was the proper mode of reviving the decree. *Cruster v. Wister*, 2 C. R. 67. *Id.*

#### 14. Entry, drawing up, and enrolment of.

As to entry of decree see Beame's Ord. 106. 1 Newl. Pr. 498. Hind. 430, 431. Gilb. For. Rom. 162.

All decrees and orders made in Michaelmas and Hilary terms are to be entered before first day of Michaelmas terms following, and all of Easter and Trinity terms to be entered before first day of Easter term following, or else parties must obtain order to enter them *nunc pro tunc*. Gilb. For. Rom. 163. 1 Newl. Pr. 499.

Where the enrolment of a decree is gained by surprise, the court will vacate it. *Stevens v. Guppy*, 1 Turn. & R. 178. FRAUD.

Decree pronounced twenty-three years ago having been lost, ordered, on motion, to be re-drawn according to the minutes entered *nunc pro tunc*. *Laurence v. Richmond*, 1 Jac. & W. 241.

When a pauper plaintiff obtains a decree for payment of money it is to be drawn up on stamps as in



a decree. *Hansard v. Kemys*, 1 Jac. & W. 189. *LAURENCE STAMP.*

Where a caveat has been entered against the enrolment of a decree, it stays the signing for twenty-eight days after notice given of the docket having been presented for signature; and the twenty-eight days are twenty-eight clear days. In strict practice the docket ought not to be presented until after the order to enrol *pro tunc* has been obtained and actually passed and entered. Upon both these grounds the enrolment of a decree made under contrary circumstances, was vacated. Leave given to the other party to prosecute the appeal. *Robinson v. Newdick*, 3 Mer. 13.

Service on the clerk in court of notice of docket of caveat against decree, having been presented for signature, is sufficient service. *Id.* 15.

Plaintiff is allowed the vacation of the term in which decree is pronounced, and the following term to draw up the decree, but not the second vacation. *Calvert v. Dignum*, 4 Price, 133.

Motion to open the enrolment of a decree, and to stay proceedings under it to give an opportunity of appeal, refused, the decree being made upon the merits, as at law; a judgment by default is vacated on motion; not a judgment on the merits. *Charman v. Charman*, 16 Ves. 115. *PR. STAYING PROCEEDINGS; PR. APPEAL.*

A decree drawn up in a manner not warranted by the minutes on the hearing, set aside with costs upon motion. *Loftus v. Swift*, 2 Scho. & L. 642.

Original decree not to be found, but having been acted upon by report, and recited in an order on farther directions was allowed to be drawn up from an office copy and entered *nunc pro tunc*. *Donne v. Lewis*, 11 Ves. 601. *DECREE.*

By the present practice of the court a decree may be enrolled without special order, though more than a year has elapsed since it was pronounced. *Tisdall v. Ly. Charleville*, 2 Scho. & L. 392.

The court refused to vacate the enrolment of a decree dismissing the bill with costs by default, and afterwards, upon a new bill for the same purpose, granted a motion for time to answer, until a month after payment of the costs of the other cause adopting the practice at law. *Pickett v. Laggon*, 5 Ves. 702. *COSTS; PR. TIME TO ANSWER.*

A decree cannot be pleaded in bar of the suit, unless it has been signed and enrolled. *Kinsey v. Kinsey*, 2 Ves. 577. S. C. 2 Atk. 809. *PL. PLEA.*

An appeal will not lie from the rolls to the house of lords until the decree is signed and enrolled. *Cuningham v. Cunningham*, Amb. 91. S. C. Dick. 145. *PR. APPEAL; ROLLS COURT.*

Enrolment of decree vacated being done too quick, though strictly regular. *Anon.* 1 Ves. 326.

The court never suffer a decree to account to be signed or enrolled, because it ties up their hands from relieving if there should have been any defect in the directions of the decree. *Staunton v. Oldham*, 2 Atk. 383.

After a decree has been signed and enrolled, it is too late to apply for a rehearing of the cause. *Chetwynd v. Fleetwood*, 1 Bro. P. C. 306. *PR. REHEARING.*

Defendants enrolled decree after abatement; and held regular. *De. Berks v. Sheffield*, Amb. 586. *PR. ABATEMENT & REVIVOR.*

No appeal lies to house of lords against decree before signed by chancellor. *Barlow v. Bateman*, 2 Bro. P. C. 275. *PR. APPEAL.*

If after a decree a caveat be entered to stay the signing and enrolling, it stays the signing twenty-eight days, not only after pronouncing the decree, but twenty-eight days from the presenting it to Ld. Ch. to be enrolled, and notice given by Ld. Ch's. secre-

tory to the clerk of the other side. *Burnet v. Theobald*, 1 P. W. 609.

Bill of review lies though decree not signed and enrolled. *Davis v. Lerner*, Dick. 42.

Suit cannot be revived for costs only though taxed, unless decree is enrolled. *Glenham v. Stutwell*, Dick. 14.

Decree to account enrolled, several answers omitted, irregular. *Holmden v. Tilly*, Dick. 20.

Liberty to amend materially enrolment of decree. *Eyles v. Ward*, Dick. 58.

Decree made, defendant dies, suit must be revived, and decree then drawn up *nunc pro tunc*. *Bertie v. Ld. Falkland*, Dick. 25.

When a decree is to foreclose, the court, in cases of necessity, will enlarge the time for the performance in paying the money, though the decree be signed and enrolled. *Cocker v. Beris*, 1 C. C. 64.

And although the mortgagor, upon the second enlargement of the time for redeeming, signed the register's books, agreeing not to ask a further enlargement, yet the court enlarged the time for a further period, but upon condition that such last time should be peremptory. *Anon.* Barn. 221.

Ancient manner of entering decrees. *Dean of Lincoln v. Bevore*, Cary, 34.

Entered at large in register book. *Cary*, 43.

The plaintiff, an administrator, died after a decree pronounced, but before entry of the order; and the entry is suspended by the administrator *de bonis non*. *Pew v. Cadmore*, 3 C. R. 33. *ADMIN. DE BONIS.*

Enrolment of a decree may be opened if the enrolment was gained by surprise, or there is some irregularity in it. *Anon.* 1 Vern. 131. *FRAUD.*

Decrees of this court take effect from the time they are pronounced, and the death of the parties shall not hinder the enrolment in convenient time. *Clapham v. Phillips*, Rep. T. Finch. 169. *ABATEMENT.*

A decree may be enrolled after the party's death, by order. *Anon.* 2 C. C. 227. *Id.*

Secus if the party was administrator only. *Warren v. —*, 2 C. C. 247. *Id.*

Bill to reverse a decree for that it was signed and enrolled after the party's death, dismissed. *Yeaveley v. Yeaveley*, 3 C. R. 44. 73. *Id.*

Liberty was given to amend the enrolment of a decree, although the amendment was material. *Eyles v. Ward*, 1 Dick. 58. *MOS. 255.*

A cause reheard after thirty years, the enrolment being lost. *Deering v. Cooper*, 3 C. R. 27. *LENGTH OF TIME; PR. REHEARING.*

A decree made and ordered, that if the defendant died before Easter, yet that the plaintiff might afterward enrol it. *Labyne v. Alley*, 3 C. R. 27.

A decree of dismissal may be pleaded in bar to a new bill, though it is not signed and enrolled. *Prettyman v. Prettyman*, 1 Vern. 310. *PL. PLEA.*

#### 15. Of the suspension, prosecution of, and carrying into execution of decrees.

Breach of a decree. *Beame's Ord.* 6.

Writ of execution after decree. *Id.*

Course of process subsequent to decree in Ld. Bacon's time. *Id.*

Rules for drawing writ of execution of decree. *Id.* 76.

As to service of writ of execution, see 1 Newl. Ch. Pr. 682.

When party having the prosecution of a decree or order, does not proceed with due diligence, the master may transfer the prosecution of it to any person applying for it. 56th Gen. Ord. 3d April, 1828.

If decree or order of reference to master is not brought into his office within two months, any person

interested may apply to court to expedite the prosecution of it. 48th Gen. Ord. 3d April, 1828.

At the time appointed, the master shall regulate the time, &c. of taking the several steps to carry the decree into effect. 51st Gen. Ord. 3d April, 1828.

Where one of the terms of staying decree till after trial of appeal in House of Lords was, that defendant should give security for the amount of certain rents and profits decreed to be paid by them to plaintiff, held, that it lay upon defendant to verify that amount by affidavit, and to propose and perfect security to master's satisfaction, without any previous steps to be taken by plaintiff; otherwise the decree to be carried into execution. *Edwards v. Morgan*, 1 M'Clel. & Y. 258. PR. ORDER ON APPEAL.

Bill having been filed by one of several mortgagees, against mortgagor and other incumbrancers, although the primary object of plaintiff to suit be satisfied, and he has no further claim, still any of defendants may bring cause on for further directions, for purpose of enforcing against the other defendants, equities subsisting *inter se*. *Archdeacon v. Bowes*, 13 Price, 353. S. C. 1 M'Clel. 149.

Where decree orders defendant to retain his costs when taxed, out of the balance in his hands, and pay the residue into court, if the defendant delay to get costs taxed, plaintiff must move that he may bring his bill of costs to be taxed within limited time, and not that he may pay in the whole balance. *Nevins v. Shearman*, 2 S. & S. 95. PR. COSTS, TAXATION OF.

A party who files a bill in a court of equity to have the benefit of a former decree, must show, (if the case requires it,) that such former decree was right. If a decree appears to be erroneous, it cannot be carried into execution. *Hamilton v. Houghton*, 2 Bli. 170.

Creditor having come in under decree, cannot institute a fresh suit: but on account of delay he was permitted to prosecute that decree, though only interested in the first part thereof. *Edmunds v. Acland*, 5 Mad. 31. DEBTOR & CRED.; LACHES.

On account of great delay in prosecution of suit, creditor was, on petition, allowed to prosecute. *Fleming v. Prior*, 5 Mad. 423. LACHES; DEBTOR AND CREDITOR.

Bill filed by feme covert, stating her to be a spinster, her solicitor being ignorant of the marriage, and the husband of the suit, till after the decree; on motion by consent, the husband was permitted to prosecute the decree under terms. *Farrer v. Wyatt*, 5 Mad. 440. PL. PARTY; HUSB. & WIFE; PR. MISNOMER.

A suit having been instituted by a deviser, and revived by a party as devisee, whose supposed right is displaced by the discovery of a later will, the cause cannot be continued for the benefit of the effective devisee, by agreement between that devisee and the plaintiff in the suit, so as to enable the devisee under the second will (not being a party to the suit,) to appeal against the decree; and an appeal cause cannot be heard before the court of appeal until he is made a party in the suit below. In such a case, where the suit had been originally instituted by the deviser, and upon his death revived by the party claiming under the first will, semble, that the proper course to be adopted by the devisee under the second, is not (as in this case,) to file a supplemental bill, praying to have the benefit of the proceedings in the revived suit, but to revive, *de novo*, the suit as abated off the death of the deviser. *Rylands v. Latmiche*, 2 Bli. 566. PR. APPEAL; DEVISEE; PL. PARTY.

The case is different where a decree is defective only because incidental parties are not before the court; as in the case of an assignment in trust for payment of debts, reserving the surplus if the assignee obtains a decree, and afterwards it appears that he had assigned his interest before the decree, his assign-

ees may, by supplemental bill, have the benefit of that decree. *Binks v. Binks*, Md. 593. PR. PARTY; PR. APPEAL; DEVISEE.

In case of unreasonable delay in prosecuting a decree in a suit by next of kin against an administrator, the court will give leave to a creditor to bring a decree which has been so neglected. 3 Mer. 458. LACHES.

Decree not suspended by an appeal, until a special ground, the subject of discussion, is shown, therefore paid out of court upon security, and then an appeal. *Way v. Foy*, 18 Ves. 458. PR. APPEAL.

Decree, setting aside a sale, not carried into execution from the length of time that had elapsed, and from the change of circumstances by the rise in land, and proportionate depreciation of money. *Egremont v. Hamilton*, 1 Ball & B. 516. LENGTH OF TIME.

Equitable mortgages by deposit of deed. The court refused to suspend the execution of a decree obtained by a mortgagee, until six months after hearing an appeal, but gave six months on bringing the money into court, consenting to a receiver, and paying interest and costs, on plaintiff's undertaking to repay, if the decree should be reversed. *Moukhouse v. Corp. of Bedford*, 17 Ves. 380. MORTGAGE & MORTGEE.

Decree establishing a charge, carried into execution, though not proceeded on for forty years, there being an acknowledgment within twenty years of the subsistence of the charge. *Barrington v. O'Brien*, 1 Ball & B. 173. LENGTH OF TIME.

A defendant by decree confirming the master's report, entitled to balance reported due to him with interest, though no offer, by bill praying an account, to pay it. Defendant may enforce a decree confirming a report in his favour. *Bodkin v. Clancy*, 1 Ball & B. 216, 217. PARTY DEFENDANT.

The court refused, upon petition or motion to prosecute an inquiry directed by a decree many years ago, but never pursued, the party applying being born some years after the decree, only two months old at the date of the general report, and made a party some years afterwards, but several years before the application. *Jal. Shipbrooke v. J. J. Hinchinbrooke*, 13 Ves. 387. LACHES.

Any creditor may obtain an order for prosecuting a decree for an account. *Creuze v. Hunter*, 2 Ves. J. 165. 4 Bro. C. C. 157. ACCOUNT; PARTIES.

On bill brought to set aside a will on the ground of the testator's being a Papist, the bill was retained for a year, with liberty for plaintiff to go to law to decide the question. The plaintiff having neglected to bring his action within the time limited by the decree, the court dismissed the bill with costs. *O'Grady v. Kinale*, 5 Bro. P. C. 456. LACHES.

One defendant may prosecute decree against another; as where co-obligor pays for principal. *Walker v. Preswick*, 2 Ves. 622.

Defendant becoming insane after decree, guardian appointed. *Gason v. Garnier*, Dick. 286. LUNATIC.

Original bill in nature of revivor only, does not open first decree. *Farr v. Wordall*, 1 Eq. Ab. 83. PL. BILL ORIGINAL, IN NATURE OF REVIVOR.

If after bill for that purpose, plaintiff neglects to revive decree, defendant may, and carry on decree under plaintiff's bill. *Whitecar v. Hughes*, Dick. 283.

Devisee can only revive decree by supplemental bill in nature of revivor. *Id. ib.*

And in that case, on neglect of plaintiff, defendant may set down cause to be heard at his own instance. *Id. ib.* 284.

In a bill brought to have the benefit of a former decree, plaintiff cannot examine witnesses, much less the same witnesses to the matter in issue in the former cause; but on such a bill, the court may examine

the justice of the former decree; but then it must be upon the facts taken in the cause wherein that decree was made. *Johnson v. Northey*, 2 Vern. 409. **PR. DECREE.**

A decree who referred to law, and it was ordered that the plaintiff do not insist on a title set aside by the decree, but does insist on it, whereupon the plaintiff reversed the decree, but was nevertheless non-suited, and employed the court of chancery for a consummation of the defendant, and establishment of the decree which was ordered. *Anon.* 1 C. C. 247. **FOR OPINION OF COURT OF LAW.**

While conditional orders for attachments are depending against plaintiff and defendant for not executing the deeds of conveyance to the purchaser, the creditors who came in under the decree cannot be paid out of the purchase money, though the purchaser has gone into possession, but the court will give them leave to proceed on their security. *Ormsby v. Nicholson*, Vern. & Scriv. 115. **DEBT. & CRED.; SALE BEFORE MASTER.**

The Ld. Chancellor for the time being will enforce the execution of decrees, though made by a prior Ld. Chancellor, and though they are alleged to be unreasonable, yet will assist them with the utmost process of the court, till they come regularly before him to be reversed. *Laurence v. Birney*, 2 C. C. 137.

Where a party claiming under a decree neglects to apply to the court for an injunction, but suffers a trial at law, by which he loses the possession, he cannot sue out the ordinary process for the execution of the decree, but must file a new bill. *Id. ib.*

#### 16. Impeachment, discharge, and reversal of.

See also **PR. DECREE**, 9.

A decree, to carry into execution an erroneous decree, being reversed; the cause was remitted, with leave to amend the bill, by adding parties and making a better case as to the original claim, notwithstanding the lapse of sixty years from the date of the deed by which the debt was secured, and of forty years from the date of the erroneous decree; as between the plaintiff the creditor, and the debtor, there is no presumption from lapse of time in such a case, and upon such state of the pleadings that the debt has been paid. But other creditors, whose debts ought to have been provided for by the decree, might have a right to raise that question. *Hamilton v. Houghton*, 3 Bligh, 169. **DEBTOR & CREDITOR; LENGTH OF TIME.**

After a decree, referring it to the master to inquire whether an annuity had been properly enrolled, the master having reported against the enrolment, it was objected by the defendant (the annuitant) on a rehearing, that the decree had been obtained after two several orders made in this court in another cause, for the payment of the annuity, and after a rule to show cause in favour of the annuity in the court of K. B. had been discharged: Held not a sufficient ground for setting aside the decree, the former cause in which those orders had been obtained, not having been instituted for the purpose of setting aside the annuities, and this court having jurisdiction, after the failure of the attempt to set aside the annuity at common law. *Angell v. Hadden*, 2 Mer. 164. **JURISDIC.**

To impeach a decree, directing a distribution of assets by an executor as erroneous, the parties interested must come in due time. *O'Brien v. Grierson*, 2 Ball & B. 336. **LACHES.**

A remote remainder-man of an equity of redemption, filing a bill to redeem immediately after his title vested in possession, Held not too late to set aside a title founded on a decree made upwards of twenty

years, which was fraudulent and void as against him and the other persons claiming remainders under the will, and length of time no bar. *Blake v. Foster*, 2 Ball & B. 387. **REDEMPTION OF MORTGAGE; LENGTH OF TIME; TENANT FOR LIFE AND REMAINDER-MAN.**

A decree taken *pro confesso* in the ordinary course after appearance, not under the statute 5 Geo. 2. c. 25., can be impeached as any other decree only by a bill of review, or a bill to set it aside for fraud, collaterally by original suit seeking decree inconsistent with it; such a bill therefore, dismissed with costs. *Ogilvie v. Herne*, 13 Ves. 563. **PR. DECREE, PRO CONFESSO.**

A rehearing is the proper mode of impeaching a decree not signed and enrolled for error. *Bolger v. Mackell*, 5 Ves. 510. **PR. REHEARING.**

Executor pays debts with money received under a decree which is reversed, he must refund; otherwise if the appeal is delayed. *Pickering v. Ld. Stamford*, 2 Ves. J. 582. **EXOR. REFUNDING.**

A decree, though obtained by fraud, cannot be set aside by petition. *Musell v. Morgan*, 3 Bro. C. C. 74. **FRAUD; PR. PETITION.**

A decree, on motion under 7 Geo. 2. c. 20., cannot be discharged on motion. *Cutler v. Fowler*, 1 Bro. C. C. 515. **MORTGAGE, FORECLOSURE OF.**

Party suffering decree, which debarred his right to estate, to be enrolled, &c., stayed by perpetual injunction from bringing ejectment, till decree reversed. *Selby v. Selby*, Dick. 670.

Enrolment of decree set aside under circumstances; not however if made upon the merits. *Kemp v. Squire*, 1 Ves. 205.

An infant, unless there is new matter, or fraud, or collusion, is bound by a decree made for his benefit; and with respect to personal estate, unless for such causes, the parol never demurs: so where there is a decree for the benefit of an infant and he dies, his executor shall never dispute the decree, though it may be to his advantage to do so. *Sheffield v. Ds. Bucks*, 1 Atk. 631. **INFANT; EXECUTOR.**

An infant aggrieved by a decree, not bound to stay till he is of age, but may apply as soon as he thinks fit to reverse it, and may do this either by bill of review, rehearing, or by original bill, alleging specifically the errors in the former decree. *Richmond v. Tayleur*, 1 P. W. 737. **INFANT.**

An injunction is awarded by a decree, to put the plaintiff into possession of the premises in question; and at the same time the parties are directed to try the title at law; this decree is repugnant, and must be reversed, as to the injunction. *Ld. Lanesborough v. Elwood*, 4 Bro. P. C. 385. **PR. INJUNC.**

Bill to establish a right of common, and to set aside former decrees. Demurrer, for that if there had been error, a bill of review should have been brought. Demurrer allowed. *Ld. Granville v. Ramsden*, Bunb. 56. **PL. DEMURRER.**

Error in decree must appear in the body of it. *Grice v. Goodwin*, 1 Eq. Ab. 165.

A stranger if he be bound by a decree, may falsify it. *Styke v. Martin*, 1 C. C. 152.

Where a parish is sued, four moved to defend, and a decree against them, one who claims under none of the four, may contest the decree. *Brown v. Vermaden*, 1 C. C. 272.

Feme marries pending suit, no ground to reverse decree. *Cranbourne v. Dalmahoy*, Dick. 8.

A decree, whereby the defendant was concluded by the plaintiff's own oath, reversed. *Plampin v. Betts*, 1 Vern. 272. **PR. EVIDENCE.**

The decree avoided by original bill upon matter subsequent to the decree. *Cocker v. Revis*, 1 C. C. 61. And see *Venables v. Foyle*, 1 C. C. 3.

## 17. Lost.

See also PR. DECREE, 14.

Original decree not to be found, but having been acted upon by reports, and recited in an order on further directions, was allowed to be drawn up from an office copy, and entered *nunc pro tunc*. *Donne v. Lewis*, 11 Ves. 601. PR. ENTERING DECREE NUNC PRO TUNC.

A docket and enrolment of a decree lost and ordered to be new enrolled. *Detu v. Dickenson*, 3 C. R. 20.

And where after thirty years, the enrolment of a decree was lost, the cause was directed to be reheard. *Devering v. Cooper*, 3 C. R. 27.

Decree and pleadings lost. Old paper writing ordered to be entered and enrolled as decree *nunc pro tunc*. *Jesson v. Brewer*, Dick. 370.

DEDINUS POTESTATEM. See PR. WRIT, 7.

DEFENDANT. See PR. PARTY, &c. 2.

## XXXV. DELIVERY UP OF DEEDS BY PARTIES, AND OUT OF COURT.

See also PR. PRODUCTION OF DEEDS.

The common decree in foreclosure does not direct the delivery up of the title deeds by the mortgagor to the mortgagee, in case of foreclosure, but merely that the mortgagor shall be absolutely barred and foreclosed of all right and equity of redemption; and it is only where there is a covenant to deliver them, in case of default in payment of the principal money and interest, that the court makes such a decree. *Wiseman v. Westland*, 1 Y. & J. 117. PR. DECREE; FORECLOSURE OF MORTGAGE.

Where deeds had been brought into master's office, under an order of reference in a suit for specific performance of two contracts relating to different parts of lands of the parties, one for exchange, the other for purchase, referring it to master to settle a conveyance from the defendant to a purchaser, (a third person), of the exchanged lands, upon whose report so much of the bill as related to that contract was ordered to be dismissed with costs: Held that plaintiff could not take his deeds out of court, the defendant shewing that they were still of service there, and necessary to him in defending the same suit as to the other contract. *Bowyer v. Green*, 13 Price, 250.

Court never orders clerk in court with whom exhibits have been deposited under usual order, to deliver them up to any other person for the purpose of their being produced in court, or at the assizes, without consent of all parties, and payment of clerk in court's fees. *Harris v. Bodenham*, 1 S. & S. 283. PR. CLERK IN COURT; PR. EXHIBITS.

Person not party in cause may petition to have deeds belonging to him, and which had been brought into master's office under decree, delivered out to him. *Marriott v. White*, 1 S. & S. 17. PARTY.

To warrant an application to produce, on the trial of a civil action, a record of the court, the court may require sufficient ground to be laid, particularly as the office copy might be evidence. *Stratford v. Greene*, 1 Hall & B. 296. EVID. AT LAW.

Equity has jurisdiction to order an instrument to be delivered up, though void at law, as if against policy.

*Id. St. John v. Ly. St. John*, 11 Ves. 536. JURISDICT.

Bill to have deeds, assigning stock, delivered up, as obtained by undue influence by a servant over her master, and an account. The evidence of direct influence considerably subsequent to the deeds. The defendant a married woman; her separate property, stock; and not liable, therefore, without a lien. An issue being declined, bill was dismissed. *Nantes v. Corrock*, 9 Ves. 182. FRAUD; SERVANT.

Where an answer is required as to a bill upon a trial, the court, except in a criminal case, does not permit the record itself to go; but an office copy, unless proof of the signature is necessary; not granted, where the action is by a stranger unconnected with the suit in equity. *Juris v. White*, 8 Ves. 313. PR. EVID.; ANSWER; STRANGER.

Title deed delivered out of court, upon the application of the trustees and the tenant for life. *Duncombe v. Mayer*, 8 Ves. 320.

Court will not order delivery up of voluntary instruments, which are revocable. *Bromley v. Holland*, 7 Ves. 28.

Equitable jurisdiction to grant an injunction, or order for delivery up of instrument, though it might be subject of action. *Jervis v. White*, 7 Ves. 413. See however *Hodgson v. Dand*, 3 Bro. C. C. 475. JURISDICT.

Court will not determine in whom is the right to appoint a steward, on petition for delivery of deeds, &c. to the appointee of one of the parties. *Mott v. Burton*, 7 Ves. 201. PR. PETITION; TITLE.

Plaintiff being entitled, upon coming of age, to the produce of a W. T. estate, bills of lading of consignments previously made, were decreed to be delivered up to him. *Hoccy v. Blakeman*, 4 Ves. 609.

Action on bills of exchange: bill to have them delivered up, as being given on a gaming transaction; a demurrer was overruled. *Newman v. Franco*, 2 Anst. 519. PR. DEMURRER; PL. DISCOVERY TENDING TO CRIMINATE.

Plaintiff prayed a discovery, injunction, and delivery of a bill of exchange; upon the answers and evidence, the right being clear the court refused an opportunity of trying it at law, and decreed an immediate delivery. *Newman v. Milner*, 2 Ves. J. 493. TITLE; ISSUE AT LAW.

Will ordered to be delivered out of ecclesiastical court to the solicitor, on security to return it. *Forder v. Wade*, 4 Bro. C. C. 476.

Defendant stating himself trustee for mortgagees, decreed to deliver up deeds, because he did not name them; so that plaintiff could amend. *El. of Scarborough v. Parker*, 1 Ves. J. 267.

Order on the register of an ecclesiastical court, to deliver an original will, to be produced here, on security given to return it. *Luke v. Causfield*, 3 Bro. C. C. 263. PR. EVID.

Motion that securities be delivered to the executor, to receive the money, granted. *Jones v. Jones*, 3 Bro. C. C. 80. EXECUTOR.

Deeds not delivered out of court to a devisee, unless the heir is before the court. *Anon.* 1 Ves. J. 29. DEVISEE; PL. PARTY; HEIR AT LAW.

Title deeds delivered out of court to tenant for life, except when brought into court under an order for safe custody. *Webb v. Id. Eymington*, 1 Eden, 8.

Where a man is sole devisee of the real estate, and one of the witnesses to the will resides abroad, upon a commission to examine such witness, the court will make an order, that the original will be delivered out of the prerogative office to a person named by the party praying the commission, in order that it may be carried out of the kingdom, he first giving security to return the same to the approbation of the judge of the

prerogative court. *Frederick v. Aynscombe*, 1 Atk. 627. *J. v. J.*

The court of chancery, where necessary, will make an order upon the prerogative office, to deliver a will to the register's office, in Symond's Inn, and lie there till the court of chancery has no further occasion for it. *Id.* 628.

The prerogative office was ordered to deliver a will to be proved in Gloucestershire, under a commission from chancery, and an officer of the prerogative office was not to attend the execution of the commission. *Id.*

Will proved from prerogative court on approved security. *Forrester v. Roach*, Dick. 65.

If a conveyance is made with a power of revocation, and afterwards is revoked, he to whom the inheritance belongs may compel the deed to be delivered up to him to be cancelled, because the deed of revocation may be lost, and then it is unreasonable the other deed should be standing out. *Anon.* Gilb. Eq. Rep. 1.

Forged deeds or writing not to be ordered *per cur.* to be torn or defaced, but kept so that the king may proceed thereon against the criminal. *Frankland v. Hampden*, 1 Vern. 66. *FORGIVEN.*

Equity will oblige tenant for life to deliver up deeds to heir, confirming life estate; but if there are any mesne remainders in tail, as long as there is a possibility of issue, the court will not order them to be taken out of the hands of the tenant for life. *Joy v. Joy*, 2 Eq. Ab. 284. *HEIR AT LAW.*

### XXXVI. DEMURRER.

1. General orders.
2. Generally.
3. Time of filing, entry, and enrolment of.
4. Amendment of.
5. Argument, setting down for, and withdrawing of.
6. Allowing, effect of.
7. Overruling, effect of.
8. *Ore tenus*.

#### 1. General orders.

Demurrers touching jurisdiction of court not to be referred, but to be heard in court. *Beame's Order*, 22.

So where a demurrer is grounded upon the substance and body of the matter. *Id.* 77.

Those tending to discharge suit to be first heard on days of orders. *Id.* 26.

Definition of demurrer. *Id.* 26.

As to certain grounds of dismissal they are to be set forth by demurrer. *Id.* 27.

No demurrer to be overruled on petition. *Id.* 36.

Every demurrer shall contain the causes of demurrer. *Id.* 77. 173.

And be determined in open court. *Id.* 173.

To be put in paper of cause on defendant's application without fee. *Id.* 77.

But if defendant applies not for such purpose within eight days, it shall be disallowed without motion, and defendant pay costs. *Id.* 77.

Only two demurrers in paper of same day, unless specially ordered. *Id.* 77.

Demurrer, grounded on slip, &c. in bill, not to be referred for a week. *Id.* 78.

Plaintiff in meantime at liberty to amend, paying costs. *Id.* 78.

Plaintiff neglecting to amend, and defendant doing nothing, demurrer to be disallowed, &c. *Id.* 78.

Plaintiff to pay costs, if on reference demurrer is allowed. *Id.* 78.

Demurrer not to be entered in paper by register,

unless the order is carried to him two days before hearing. *Id.* 121.

Demurrer under counsel's hand to be filed, though not delivered by defendant in person, or by commission. *Id.* 172.

If defendant pray a commission, and thereby return a demurrer, he shall pay costs. *Id.* 173.

And though such demurrer be allowed, defendant shall have no costs. *Id.* 173.

Defendant demurring *ore tenus*, to pay costs if demurrer on record be overruled. *Id.* 174.

Demurrer not to be admitted, party being in contempt, but on motion and affidavit. *Id.* 178.

Costs on allowing, or overruling, or re-arguing a demurrer, 5*l.* *Id.* 320. 456.

But the parties liable to such further costs as court shall think fit. *Id.* 457.

#### 2. Generally.

Bill demurred to, allowed to be dismissed on paying costs 5*l.* on demurrer. *Edwards v. Edwards*, 6 Mad. 255. *Pr. Costs*; *Pr. Dismissal of Bill*.

Full costs on a demurrer allowed to a third bill for the same cause, under the General Order, 1794, upon a subsequent application. *Griffith v. Wood*, 1 V. & B. 307. *Pr. Costs*; *REGULA GENERALIS*, C. 61.

On argument of demurrer, allegations in bill are taken as true. *Atkinson v. Henshaw*, 2 V. & B. 95.

The effect of taking exceptions pending on demurrer to discovery, is to admit the demurrer. Plaintiff permitted to withdraw the exceptions, paying the costs without prejudice. *Boyd v. Mills*, 13 Ves. 85. *Pr. Exceptions*.

Injunction pending a demurrer irregular. *Cousin v. Smith*, *id.* 164. *Pr. Injunction*.

A defendant having filed a general demurrer to a bill, cannot move to dismiss the bill for want of prosecution, but should set down the demurrer for argument. *Simpson v. Denshaw*, 2 Cox, 377. *Pr. Motion to dismiss*.

General demurrer put in, but never argued, and no proceedings afterwards, the defendant cannot have the bill dismissed for want of prosecution, as he had an equal power to move. *Anon.* 2 Ves. J. 287. *Pr. Dismissal of Bill*.

Questions even of title, constructions of wills, &c., determined on demurrer, if quite clear on the face of the bill that the determination must be on the same matters in the more protracted way at last. Question as to an equitable estate tail. *Brownswood v. Edwards*, 2 Ves. 243.

Though defendant has not demurred to a bill as being too trifling for the court to entertain, yet he may take advantage of the objection at the hearing, for a bill may have been so drawn as to have prevented a demurrer. *Bruce v. Taylor*, 2 Atk. 253.

Defendant may take advantage of a defect in form by demurrer: it is too late to object after he has answered. *Archbp. York v. Stapleton*, 2 Atk. 136.

In what cases bills of discovery may be amended after demurrer by waiver of penalties. *Mason v. Lake*, 2 Bro. P. C. 495. *AMENDMENT*.

#### 3. Time of filing, entry, and enrolment of.

The day of filing every demurrer shall be set down on the same, and to be signed by the clerk in court, who files it. *Ord. Exch.* 1 Fowl. Exch. *Pr.* 358.

Defendant is to enter his demurrer with the register within eight days after the filing, or in default thereof, the same shall be disallowed of course, as put in for delay, and the defendant shall pay the ordinary costs.

Beame's Ord. 69. 173, 174. But before entry, a certificate must be produced of the filing of the demurrer. *Id.* 287. But according to Hinde's Pr. 222, such a certificate is not required by the present practice. Defendant, however, need not set down the demurrer, if plaintiff submits to it, and pays 40s. costs. Wy. Pr. Reg. 165. Where plea or demurrer is put in, defendant must set it down by Wednesday se'night following, or it will stand overruled. And if overruled, defendant must pay 40s. costs, and after answer, rejoin gratis; if demurrer be allowed, defendant must pay 30s. costs, and if demurrer be to whole bill, and allowed or submitted to, defendant to stand dismissed with costs. Ord. Exch. 1 Fowl. 361. All demurrers to be set down to be argued on every Wednesday in term; and whenever a term begins on Wednesday, all demurrers filed on or previous to the preceding sitting of the court, to be argued on such Wednesday, and all demurrers filed on any Wednesday in term time to be set down to be argued on that day se'night, if within the term. Ord. Exch. 1 Fowl. 39. The costs of allowing or overruling any plea or demurrer in future to be 5*l*. Beame's Ord. 320. And in case this sum be inadequate to the costs incurred, there shall be paid such further costs as the court shall direct. *Id.* 456. Vide *Griffith v. Wood*, 1 Ves. & B. 307, and the cases cited from the Reg. Book. Beame's Ord. 457. n.

No reference on a demurrer or question touching the jurisdiction of the court, shall be made to the masters, but such demurrers shall be heard and ordered into court, or by the chancellor himself. Beame's Ord. 22. So, by *Ld. Clarendon's Ord.* *Id.* 173, every demurrer shall be determined in open court.

The eight days, within which a demurrer must be entered with the registrar, are eight office days. *Ballock v. Edington*, 1 Sim. 481.

Where a demurrer, tendered at the office to a bill, was refused on a mis-statement, that an attachment had issued for want of answer; an attachment issued subsequently was set aside, and leave given to demur. *Feelyn v. Griffith*, 1 M'Clel. 265. PR. ATTACHMENT.

If demurrer is not filed in sufficient time, though laches cannot be taken advantage of after it had been set down for argument, it should be in such case moved to be taken off the file. *Baker v. Booker*, 6 Price, 379. LACHES.

A defendant having filed an answer and demurrer after a *repi corpus*, returned on an attachment for not answering, an order for a messenger obtained before the demurrer, and answer (of which the plaintiffs had bespoken an office copy) had been taken off the file, discharged with costs. *Curzon v. De La Zouch*, 1 Swan. 189.

After time obtained to answer only, a motion will not be granted for leave to demur, unless under special circumstances, such as surprise. *Bruce v. Allen*, 1 Mad. 556. TIME TO ANSWER.

After order for time to answer demurrer may be taken off the file. *Dyson v. Benson*, Cooper, 110. PR. TIME TO ANSWER.

Demurrer and answer after a preperatory order for three weeks' further time to answer, following an order for a month to plead answer or demur, not demurring alone, ordered to be taken off the file. *Mann v. King*, 18 Ves. 297. *Id.*

Admission of single fact, besides denial of combination, is a compliance with the terms not to demur alone. *Baker v. Mellish*, 11 Ves. 73. *Id.*

A demurrer may be filed after the time before answering expired, if the party be not affected by process of contempt. *E. I. Comp. v. Henckman*, 3 Bro. C. C. 372.

A demurrer may be put in after the time for answering is out, provided a process of contempt has

not issued against the defendant. *Sowerby v. Warder*, 2 Cox, 268. PR. PROCESS OF CONTEMPT.

Defendant having answered the original bill, plaintiff amended it; and the same defendant then put in a general demurrer to the whole amended bill. *Quere*. Whether this is a ground for taking the demurrer off the file, or for overruling it on argument. *Atkinson v. Hanway*, 1 Cox, 360.

Defendant cannot demur after obtaining time to answer only. *Kenrick v. Clayton*, Dick. 286.

Defendant cannot demur after obtaining time to answer only. *Penn v. Ld. Baltimore*, 1 Ves. 273.

After defendant had stood out all the bills of contempt, demurrer allowed to stand. *Haring v. Mathew*, Dick. 30.

Where a demurrer to a bill of revivor is allowed it may be enrolled; otherwise, if the demurrer is disallowed. *Wools v. Tucker*, 2 Vern. 120. PR. BILL OF REVIVOR.

After time to answer defendant demurs, attachment. *Farmer v. Far, Cary*, 200.

Defendant, taking out commission to answer, cannot demur. *Stukly v. Lutterell*, Cary, 53. *Pain v. Currew*, Cary, 100.

#### 4. Amendment of.

Amendment of demurrer allowed under special circumstances and mistake. *Holmes v. Waring*, 8 Price, 604.

Demurrer too extensive, allowed to be amended. *Glegg v. Legh*, 4 Mad. 207.

After demurrer to whole bill overruled, the defendant may put in a demurrer less extended, but not without leave of court. *Baker v. Mellish*, 11 Ves. 68.

#### 5. Argument, setting down for, and withdrawing of.

Day of filing every demurrer shall be set down on the same, and to be signed by clerk in court, who files it. Ord. Exch. 1 Fowl. 358.

Defendant is to enter his demurrer with the register within eight days after the filing, or in default thereof, the same shall be disallowed of course, as put in for delay, and defendant shall pay the ordinary costs. Beame's Ord. 69. *Id.* 173, 174. But before entry, certificate must be produced of filing of demurrer. *Id.* 287. But according to Hinde's Pr. 222, such a certificate is not required by the present practice. Defendant, however, need not set down the demurrer, if plaintiff submits to it, and pays 40s. costs. Wy. Pr. Reg. 165. Where a plea or demurrer is put in, defendant must set it down by the Wednesday se'night following, or it will stand overruled. And if it be overruled, defendant must pay 40s. costs, and after his answer, rejoin gratis; if the demurrer be allowed, defendant must pay 30s. costs; and if the demurrer be to the whole bill, and allowed or submitted to, defendant to stand dismissed with costs. Ord. Exch. Kirby's Ed. 6. 1 Fowl. 361. All demurrers to be set down to be argued on every Wednesday in term, and whenever a term begins on Wednesday, all demurrers filed on or previous to the preceding sitting of the court, to be argued on such Wednesday, and all demurrers filed on any Wednesday in term time to be set down to be argued on that day se'night, if within the term. Ord. Exch. 1 Fowl. 39. The costs of allowing or overruling any plea or demurrer in future to be 5*l*. Beame's Ord. 320. And in case this sum be inadequate to costs incurred, there shall be paid such further costs as court shall direct. *Id.* 456. Vide *Griffith v. Wood*, 1 V. & B. 307., and the cases cited from the Reg. Book, in Beame's Ord. 457.

No reference on demurrer or question touching

jurisdiction of the court, shall be made to masters; but such demurrers shall be heard and ordered into court, or by chancellor himself. Beame's Ord. 22. So, by Ld. Clarendon's Ord. *Id.* 173. every demurrer shall be determined in open court.

Demurrer struck out of paper for want of appearance, cannot be set down again without order to be made on motion or petition. *Tolson v. Ld. Fitzwilliam*, 4 Mod. 203.

According to strict practice, if defendant does not appear on the hearing of a demurrer, if plaintiff has not an affidavit of service of subpoena to hear judgment, the cause may be struck out of the paper; if an affidavit of service is produced, the court hears plaintiff in defendant's absence, but does not overrule the demurrer. *Pegfold v. Ransbottom*, 1 Swan. 552.

Demurrer in V. C.'s paper cannot be directed by him to be heard at an earlier day than the paper mentions, but may be advanced to the head of the paper of that day. *Anon.* 1 Mad. 557. PR. ADVANCING CAUSE.

Order to set down demurrer in the petty bag for argument, made upon motion in court. *Rea v. Knox*, Coop. 98.

Where a demurrer was overruled for defect in form, which was good in substance, it was ordered to be taken off the file, with leave to defendant to demur again, as he should be advised on payment of costs. *Devonsher v. Nereuham*, 2 Sch. & Lef. 199.

Demurrer set down for argument being submitted to, and the bill amended, 5*l.* costs were allowed. *Anon.* 9 Ves. 221. PR. COSTS.

Order made for defendants to be at liberty to withdraw demurrer, set down to be argued, on payment of costs to be taxed. *Downes v. E. I. Comp.*, 6 Ves. 586.

A bill of review was brought impeaching the judgment of Camden, C. respecting the estates given by Sir G. Downing's will, to found a college at Cambridge; defendant demurred, and the demurrer was set down to be heard. It seeming, however, to be agreed by both parties that the hearing and determining the demurrer would take the whole term; and each side being determined to carry it into the house of lords, the court allowed the demurrer, without giving any opinion. *Whittington v. Att. Gen.* 2 Dick. 616.

Demurrer in petty bag made *concilium*, and ordered to be argued, and afterwards overruled. *Bulard v. Hobbs*, *id.* 333.

On arguing demurrer to a bill of review, what appears on the face of the decree can be read only; but after a demurrer overruled, a plaintiff may read any evidence at a rehearing. *Cutterall v. Purchase*, 1 Atk. 290. PR. BILL OF REVIEW; PR. EVIDENCE.

If a demurrer be to part of the plaintiff's bill, and an insufficient answer to the residue, yet the plaintiff cannot except until the demurrer is argued. *London Assur. Comp. v. E. I. Comp.*, 3 P. W. 326. PR. EXCEPTIONS TO ANSWER.

Answer may be read in support of demurrer. *Heath v. Lake*, Dick. 24.

Demurrer to a bill, but not set down, bill cannot be dismissed for want of prosecution till demurrer disposed of. *Dove v. Allen*, *id.* 55.

#### 6. Allowing effect of.

See also PR. COSTS, 10. (p)

An injunction is not dissolved in exchequer court, as a consequence of course, on allowing a demurrer to the bill on the equity of which it was obtained: it

must be moved that the injunction be dissolved on that ground. *Barelay v. Curtis*, 9 Price, 661. PR. IN EXCHEQUER; INJUNCT. DISSOLUTION OF.

In a suit to perpetuate testimony, motion for a further examination of witnesses as to facts lately discovered, refused, on the ground that a demurrer to a supplemental bill for the same purpose had been allowed. *Knight v. Knight*, 1 Jac. & W. 165. PR. EXAMINATION OF WITNESSES; PR. BILL TO PERPETUATE.

Full costs may be given under Lord Rosslyn's General Order, 6 February, 1794, (Beame's Ord. 466) though application not made for three weeks after allowance of demurrer. *Wool v. Dyneley*, 1 Mad. 32. GEN. ORDER, C. OF; COSTS.

Though, by demurrer to whole bill allowed, the bill is strictly out of court, yet even after bill dismissed by order, the cause has been set on foot again. *Baker v. Mellish*, 11 Ves. 72. PR. REVIVING CAUSE.

On demurrer to the whole bill being allowed, the bill shall be dismissed, and costs shall be taxed as upon a dismissal, except the costs on the demurrer, which shall be allowed as heretofore. General Rule, Feb. 13, 1 Scho. & L. 304. PR. BILL DISMISSAL; PR. COSTS.

After demurrer allowed, bill out of court, and no amendment possible. *Hatkins v. Bush*, Dick. 701.

After demurrer to whole bill, allowed no amendment, bill out of court. *Smith v. Barnes*, Dick. 67.

Demurrer overruled, and costs paid. On re-argument, demurrer allowed; costs to be refunded. *Oats v. Chapman*, Dick. 148. S. C. 1 Ves. 542. 2 Ves. 100. COSTS.

On a demurrer to a bill, if the demurrer be allowed, the plaintiff may amend his bill. *Qu. Coningsbury v. Jekyll*, 2 P. W. 300.

A bill of review lies not after a demurrer to a former bill of review allowed. *Dunne v. Filmore*, 1 Vern. 135. S. C. 2 Ch. Ca. 133. S. P. Pitt v. Arglass, *id.* 441. PR. BILL OF REVIEW.

#### 7. Overruling, effect of.

See also PR. COSTS, 10. (p)

After demurrer overruled, time to answer merely can only be obtained on special application. *Trim v. Baker*, 1 S. & S. 469; and see note, *id.* 470. S. C. 1 T. & R. 253. PR. TIME TO ANSWER; PR. MOTION OF COURSE.

Where a demurrer is overruled, the defendant, at the time of its being overruled, may move for time to answer. S. C. 1 T. & R. 254. PR. TIME TO ANSWER.

Plea and answer cannot be filed until demurrer actually taken off file, after order for that purpose. *Cust v. Hoode*, 1 S. & S. 21. PR. PLEA; PR. ANSWER; PR. FILING PLEADINGS; PR. ORDER TO TAKE PLEADINGS OFF FILE.

Upon demurrer being overruled, the plaintiff must, out of term time, wait for the next seal day to move for an injunction. *Cloughton v. Hadwell*, 6 Mad. 299. PR. INJUNCT. WHEN TO BE MOVED FOR.

Where demurrer has been overruled, and the time allowed by court for defendant to plead has, meanwhile, expired, court will allow defendant to plead, and give further time. *Duncan v. Manchester Waterworks Company*, 8 Price, 698. PR. TIME TO PLEAD.

Taxed costs are given in exchequer, on allowing a demurrer to the whole bill. *Jones v. Jones*, 7 Price, 663. PR. COSTS.

The defendant not appearing in support of a demurrer, the court, on production of an affidavit of service of the order for setting down the demurrer, will not overrule the demurrer, but hear the plaintiff.

*Pembold v. Ramsbottom*, 1 Swan. 552. PR. APPEAL.

After a demurrer overruled, time to answer can be obtained only on a special application. *James v. Saxby*, 1 Swan. 194. PR. TIME TO ANSWER.

After demurrer overruled, order is of course for month to plead or answer. *Griffith v. Wood*, 1 V. & B. 541. PR. ORDER FOR TIME TO ANSWER, &c.

A demurrer overruled for informality, not good in substance, taken off the file, with liberty for the defendant to demur again, as he shall be advised on payment of costs. *Devonsher v. Newenham*, 2 Scho. & L. 199. PR. TAKING PLEADINGS OFF FILE.

After demurrer overruled, defendant cannot plead without leave of court. *Routley v. Eccles*, 1 S. & S. 611. PLEA.

Bills of review classed. After a demurrer to a bill of review for error overruled, the decree is reversed without further hearing. *Cook v. Bamfield*, 3 Swan. 607. PR. BILL OF REVIEW.

If a plea or demurrer be overruled, the defendant must answer the whole bill, and the ordinary process of contempt issues to compel an answer, as in other cases; but if an answer was filed with the plea or demurrer, the defendant, upon his plea or demurrer being overruled, need not put in an answer till the plaintiff has taken exceptions. *Cotes v. Turner*, Bunb. 123. PR. PLEA, OVERRULING.

Injunction granted, of course, on demurrer to bill overruled. *Rashleigh v. Butler*, Dick. 153. PR. INJUNCTION.

#### 8. Ore tenus.

In case of a demurrer *ore tenus* at the hearing, defendant shall pay the ordinary costs of overruling a demurrer, if the causes particularly alleged be disallowed, although the bill in respect of that particular, so newly alleged, should be dismissed. Beame's Ord. 174. This rule was acted upon in *Durdant v. Redman*, 1 Vern. 78. But in *Tunton v. Flower*, 3 P.W. 371, it was said not to be the practice now to pay costs on a new demurrer, insisted on at the bar *ore tenus*; and this last case was followed in the exchequer, in *Broderip v. Phillips*, 1 Vern. 78, Raithby's n., where demurrer in writing for want of parties would have been overruled, but was waived on argument, and then demurrer at bar *ore tenus*, for want of equity, allowed. However, in *Att. Gen. v. Brown*, 1 Swan. 288, Ld. Ch. said, that if defendant cannot sustain demurrer on record, he is entitled to demur *ore tenus*; but, availing himself of that right, he must pay costs of demurrer on record.

A demurrer *ore tenus* cannot be offered to part of a bill. *Shepherd v. Lloyd*, 2 Y. & J. 490.

Defendant, who has pleaded to bill, cannot demur to it *ore tenus* on his plea being overruled, because there is no demurrer on the record. *Hook v. Dorman*, 1 S. & S. 227. PR. PLEADING, &c. ORE TENUS; PR. PLEA.

To a bill by an heir against a claim under a devise for a discovery, and that the witnesses may be examined *de bene esse*, and their testimony recorded, a general demurrer for want of equity being allowed, the defendant was not permitted to demur *ore tenus* as to the examination of witnesses not being made the subject of demurrer on the record. *Pitts v. Short*, 17 Ves. 213.

Demurrer *ore tenus* only allowed on new ground, not where demurrer in paper on same point already overruled. *Bowman v. Lygon*, 1 Anst. 1.

Demurrer on record, that no title is shown for discovery, is not waived by another *ore tenus*, that the charge might be subject of criminal prosecution. *Dummer v. Corp. of Chippenham*, 14 Ves. 256.

DISCOVERY TENDING TO CRIMINATE; OVERRULING DEMURRER.

Demurrer filed bad; demurrer at bar good; defendant does not have costs. *Wood v. Tompson*, Dick. 619.

One may demur anew at the bar *ore tenus*, but then on its being allowed he cannot have his costs. *Fourton v. Fowler*, 3 P.W. 371, *Colman v. Warr*, 2 Ch. Rep. 361.

Where a defendant has demurred, he may assign another cause of demurrer at the bar, for costs; and if such cause of demurrer is overruled, he ought to pay double costs. But when a defendant has pleaded, and there is no demurrer in court, he cannot demur at the bar, though he would pay costs. *Durdant v. Redman*, 1 Vern. 78. PR. COSTS.

DEPOSIT. See PR. SALES JUDICIAL, 7. (b). PR. APPEAL, 1. 8.

DEPOSITIONS. See PR. EVIDENCE, 29.

#### XXXVII. ELECTION TO SUE AT LAW OR IN EQUITY.

If party sue for same cause at common law and in chancery, he is to have day given to make his election. Beame's Order, 11. 117. PR. REG. 179. 180. Mitford, pl. 203.

Plaintiff in suit for tithes, having commenced action at law for treble value, ordered on motion to elect law or equity within six days, with costs on either course abandoned, and of the motion. *Tunton v. Glyde*, 10 Price, 129. TITHES.

Where the plaintiff in equity is also proceeding at law, and it clearly appears, or is admitted, that the object of the two proceedings is substantially the same, the defendant, on putting in his answer, may at the same time move for an order that the plaintiff may elect, and an injunction to stay proceedings at law, until election. *Hague v. Curtis*, 1 Jac. & W. 449.

After order to elect law or equity, plaintiff cannot move of course, for leave to file exceptions *nunc pro tunc*, but ought to make special application for that purpose, and for an order to suspend election till exceptions are answered. *Copland v. Braddock*, 5 Mad. 14. PR. EXCEPTIONS, NUNC PRO TUNC.

After a bill filed for a specific performance of an agreement to take a lease from plaintiff, plaintiff brought an action for use and occupation (defendant having been let into possession.) On a reference to see whether the suit and action were for the same matter, the master reported in the affirmative; an exception to his report was overruled, for the action was for the rent only, and if this court decreed a specific performance of the agreement, it would also decree an account of the rent due under it. *Curriek v. Young*, 4 Mad. 437.

A reference to the master to inquire whether proceedings at law and in equity are for the same matter, stays all proceedings, without the special order of the court; but the court will give or withhold leave to proceed according to the particular circumstances of the case. S. C. 2 Swan. 259.

If answer put in and exceptions to, defendant cannot move on answer that plaintiff elect law or equity. *Browne v. Poynts*, 3 Mad. 24. PR. ANSWER, EXCEPTIONS TO.

Upon order being made on plaintiff to elect whether he will proceed at law or equity, and on motion to discharge that order, court will, if there are facts before it sufficient, decide whether election is necessary, with-



and a reference to master. *Anon.* 2 Mad. 395. PR. REFERENCE IF SUIT AND ACTION ARE FOR SAME MATTER.

Defendant having pleaded in bar to part of the relief sought by the bill, and answered as to the remainder, is not obliged to an order to put the plaintiff suing at law to election. A plea cannot be considered as an answer to such a purpose. *Fisher v. Mee*, 3 Mer. 47. PR. PLEA.

Plaintiff is not for equitable relief, part of which only could be obtained at law, not compelled to elect, but can proceed at law only by leave of the court. A receiver appointed at his instance, who, though his officer ought, as indifferently, to restrain him, not aided by an order for liberty to distrain, without his undertaking to proceed no farther at law. *Mills v. Fry*, 19 Ves. 277. S. C. 3 V. & B. 9. PR. RECEIVER.

An order by consent can only be got rid of by consent. *Bernal v. Marquis of Donegal*, 3 Dow. 146. S. C. 1 Bli. N. S. 594.

A party cannot proceed at law and on an account in equity relative to same matter, but must make his election. *Id.* 147.

Plaintiff put to his election where suing in this court, and in a foreign court of law. *Peters v. Thompson*, Coop. 294.

Order to compel election to proceed at law or in equity of course; but if upon a false suggestion, that the suits are for the same matter, discharged; and that question, if of any difficulty, referred to the master; and all proceedings stayed in the meantime. *Mills v. Fry*, 3 V. & B. 9. REFERENCE TO MASTER.

Suggestion that the defendant is doubly vexed by suits in equity and at law for the same matter, ascertained by reference to the master. *Boyd v. Heinselman*, 1 V. & B. 381. REFERENCE TO MASTER.

In *Young v. Lucas*, 1 V. & B. 383. (n.) the lord chancellor said, that a reference to the master was the course where the representation that the suit and action were for the same matter was disputed; but where that representation was not controverted, the court might decide without that reference. See the order in *Mouseley v. Basnett*, *id.* (n.)

After a decree to account obtained, plaintiff commenced an action at law. Injunction granted; for having got the relief he prayed, his election is made; besides, to allow him to proceed at the same time in law and equity, for the same matter, would occasion a clashing of jurisdiction inconsistent with the ends of justice. *Mocher v. Reed*, 1 Ball & B. 318.

Plaintiff elected to proceed in equity, having at that time undertaken peremptorily to try the action commenced by him at law. Defendant moved for judgment as in case of a nonsuit, and the court held, that the plaintiff must abide by the consequence of his election. *Anderson v. Tombs*, 2 Anst. 569.

To put party to election to sue at law or in equity, is motion of course. *Anon.* 1 Ves. J. 91. PR. MOTION OF COURSE.

An application was made to discharge an order putting plaintiff to his election, on the ground that the matters for which he was proceeding here and at law were quite distinct, and a reference to the master, to see if the proceedings at law and in equity were for the same matter, was prayed. The lord chancellor thought, that if the matters were distinct, the order did not restrain him, and he had only to prove it when complaint was made of the breach of the order; and therefore denied the motion, plaintiff not being able to produce any instances of such a reference. *Bulsen v. Butcher*, Dick. 558.

When an order to elect was obtained; the time for excepting to the answer had not expired; plaintiff shewed for cause that he had filed exceptions to the answer; allowed as cause, and order for putting party

to his election, discharged. *Benson v. Parsons*, 2 Fowl. 403. *Brown v. Poyntz*, 3 Mad. 24. S. P.

Plaintiff was ordered to shew cause why he should not make his election either to proceed in the Exchequer or in the Consistory court at Northampton. On electing to proceed in former, proceedings in the other court stayed. *Shirwin v. Dunmore*, 2 Fowl. 403.

Leave obtained to proceed in this court (Exch.) to falsify the pleas put in by defendant to the bill, and also to proceed at law against the defendants to recover possession of the premises in question. *Gardner v. Jordan*, *id.* 404.

So, on reading the answer and hearing counsel for defendant, plaintiff was permitted to proceed at law for the recovery of a certain sum mentioned in the bill, and in equity as to all the other matters. *Romeilly v. Gibert*, *id.* 404.

A creditor, by coming in under a decree, and praying a commission to prove his debt, was held to have made his election to proceed in this court; and was therefore restrained from proceeding at law. *Farnham v. Burroughs*, Dick. 63.

On application to put plaintiff to his election, leave was given to make a special election to proceed in this court for the two years rent in question, accrued due before defendant came into possession; and at law for the rent accrued due in defendant's own time. *Joyce v. Barker*, *id.* 182.

In this case plaintiff was an executor of a creditor, and after having proved his debt under a decree, brought an action at law. He was then ordered to elect, and elected to proceed at law, but on his application, his election was dismissed, and leave given him to come in under the decree. *Dennet v. Coker*, *id.* 144.

Though, in ordinary cases, a plaintiff shall not proceed at law and in equity for the same demand against executors or administrators, yet a representative of the intestate seeking to give preference to others by confessing judgment, distinguishes the case; and therefore the court gave plaintiff leave to make a special election, viz. to proceed at law to recover judgment with a stay of execution, and in equity for a discovery, and an account of assets. *Barker v. Dumaresque*, 2 Atk. 119. S. C. Barn. 277.

Where there is a bill here to foreclose a mortgage, and an ejectment brought at law, an order for election will not be granted, or if obtained, will be discharged, as a court of equity cannot, on a foreclosure bill, decree possession. *Wood v. Hodges*, 2 Fowl. 405.

If the plaintiff elect to proceed at law on coming in of the answer, the suit in the court of equity must be dismissed, but on dropping that part of the bill which prays relief, the plaintiff is allowed to proceed at law. *Fitzgerald v. Sucomb*, 2 Atk. 85.

A plaintiff may make either a general election to proceed here or at law, or a special election, as to proceed for part here and the other part at law; but the court will judge of the reasonableness of that special election. *Anon.* Gilb. 183.

If plaintiff makes a special election to proceed at law as to part, and in equity as to other part, with regard to what plaintiff elects to proceed at law, his bill ought to be dismissed with costs. *Anon.* 3 P. W. 90. (n.)

A dismissal upon an election to proceed at law is not peremptory, but the plaintiff may, after he has failed at law, bring a new bill. *Cs. of Plymouth v. Bladon*, 2 Vern. 32. PR. DISMISSAL OF BILL.

Plaintiff is not bound to make his election till defendant has answered. Order discharged for irregularity, as being obtained before. *Tillotson v. Ganson*, 1 Vern. 103. S. P. *Jones v. Stafford*, 3 P. W. 90. The order provides, that plaintiff, his clerk in court, and attorney, within eight days, do make his election in which court he will proceed; if he elect to proceed

in this court, the proceedings at law are stayed by injunction; if at law, the bill is to be dismissed with costs. *Anon.* 3 P. W. 90. (n.)

Special election to proceed at law, in an ejectment for the land, and in equity for an account of profits. *Anon.* 1 Vern. 105. But see observations on this case, *Dormer v. Fortescue*, 3 Atk. 129. EJECTMENT: ACCOUNT.

If the defendant pleads in bar, the plaintiff is not obliged to elect till the plea is argued, for the plea denies the right to sue in equity. *Anon.* Mos. 304. *Vaughan v. Welsh*, Mos. 210. PR. PLEA, ARGUMENT OF.

ENLARGEMENT OF TIME, see MORTGAGE.—TIME, V. 7.

### XXXVIII. EVIDENCE.

See also BANKRY. VI. 14. (c). X. 9. (a); MARRIAGE, II.—PR. APPEAL, 5.—TIMES, VI.; X. 2.—WILL, X.

1. Generally.
2. What sufficient generally.
3. Of what facts necessary or admissible generally.
4. Parol, where admitted.
5. *Onus probandi*.
6. Entry of, as real.
7. Further evidence, when admitted, and on appeal, re-hearing, &c.
8. Before master.
9. At law.
10. Exhibits.
11. Affidavits.
  - (a) General orders concerning.
  - (b) Their incidents generally.
  - (c) Filing and swearing generally.
  - (d) Form of.
  - (e) In support of injunction.
  - (f) In support of bills of interpleader.
  - (g) In support of motions.
  - (h) On application to sue in *forma pauperis*.
  - (i) Of service.
  - (j) On application for substituted service.
  - (k) On obtaining writ *ne exeat regno*.
  - (l) On commission to examine witnesses.
  - (m) When necessary.
  - (n) When read against answer.
  - (o) When received and read as evidence generally.
  - (p) Affidavits in reply.
12. Answer.
  - (a) Where answer may be read as evidence.
  - (b) What good against.
  - (c) Effect of reading.
13. Bills generally, and where taken *pro confesso*.
14. Taken on bill to perpetuate. See also MARRIAGE, II.—PR. COSTS, 10. (f).
15. Copies.
16. Taken in other courts.
17. Decisions of other courts.
18. Evidence of one defendant read against the other.
19. Decree in former cause.
20. Taken in another cause, &c. or matter.
21. Deeds, proof of, and loss of deeds.
22. Where admitted to expound deeds.
23. Hand-writing.
24. In title causes.
25. Will, proof of.
26. When admitted to expound wills.

### 27. Witness.

- (a) Generally, his rights, duties, and liabilities, and of subpoena to testify.
- (b) Competency of.
- (c) Examination as to credit.
- (d) *Demurrer to Interrogatories*, and who and on what matters examinable.
- (e) Attesting witnesses.

### 28. Examination.

- (a) Generally.
- (b) When and how taken.
- (c) Examination *viva voce*.
- (d) Before master.
- (e) Examiner.
- (f) *De bene esse*.
- (g) *Pro interesse suo*.
- (h) Cross-examination.
- (i) Further or re-examination.
- (j) Of parties to cause.
- (k) Of defendant on interrogatories.
- (l) Commission to examine.
  - (1) General orders.
  - (2) Effect of.
  - (3) When and how granted and obtained.
  - (4) *Secundum commissionem*.
  - (5) How discharged or abated.
  - (6) Execution of, and of the commissioners thereto.
  - (7) Return of.
  - (8) When lost.

### 29. Depositions.

- (a) Generally and general orders.
- (b) Taken *de bene esse*.
- (c) Amendment of.
- (d) Suppression of.

### 30. Publication.

- (a) Generally.
- (b) Enlarging publication.

#### 1. Generally.

Costs of documentary evidence not read, nor entered as read, were disallowed. *Stuart v. Greenall*, 1 M'Clel. 705. S. C. 13 Price, 755. PR. COSTS.

Owners and occupiers of houses in London subject to tithe; defendants ats. tithe owner ordered to permit witnesses to inspect them preparatory to examination on interrogatories for proving their value. *Kynaston v. E. J. Comp.* 3 Swan. 248. See this on appeal, 3 Bligh, 153. PR. ORDER FOR INSPECTION.

Where defendant in title cause examines many witnesses whose testimony is inadmissible to any extent, the court will give plaintiff his costs of the rejected depositions, independently of the result of the cause. *Petch v. Dalton*, 6 Price, 232. PR. COSTS.

Defendant ordered to deposit books in hands of deputy remembrancer, for inspection of other party, and afterwards ordered to account, in doing which, he must refer to these books, is not obliged to pay fees of the office in taking copies. *Gabbitt v. Cavendish*, 2 Anst. 547. COSTS OF OFFICE COPIES.

The rules as to evidence are the same in equity as at law. *Manning v. Lechmere*, 1 Atk. 453. *Glynn v. Bank of England*, 2 Ves. 41.

#### 2. What is sufficient generally.

Payment of money, though evidence against the payer, of the title of the party receiving it, is not evidence against the receiver, that the payer was the party bound to pay it. The suppression of some of a series of documents relating to the title, which are admitted to be in the possession of a party, is evidence that the documents withheld afford inferences unfavourable to the party withholding them.

favorable to the title of the party. *James v. Biou*, 2 S. & S. 600. PAYMENT.

The production by a plaintiff suing as administrator to A, of the letters of administration, is not *prima facie* evidence of A's death. *Moons v. De Bernales*, 1 Russ. 301.

At the hearing, liberty given to a plaintiff suing as administrator to exhibit interrogatories to prove the death of the person whose administrator he claimed to be, and the cause permitted to stand over for that purpose.

Evidence of reputation of exemption of a district from tithes *ad bene esse*. *Donnison v. Elstey*, 1 M'Cle. & Y. 24. TITHES; EVIDENCE.

The court rolls of a manor, taken by themselves, are evidence only against the tenants of the manor, and the lord of the manor. *Att. Gen. v. Ld. Hotham*, 1 Turn. & R. 217. LANDL. & TEN.

Where purchaser of equity of redemption had the legal estate conveyed to him by deed, dated the 24th August 1796, in which it was recited, that the purchaser had some time since paid to the mortgagee the money due on the mortgage, &c.; bill to redeem was filed on the 29th January 1816: Held that the recital was an acknowledgement of the mortgage title within twenty years from the filing of the bill. *Price v. Copner*, 1 S. & S. 347. TIME; MORTGAGE; EXEMPTION; ACKNOWLEDGEMENT OF TITLE.

The mere fact of the delivery of an account without evidence of contemporaneous or subsequent conduct, does not afford presumption of settlement. *Irvin v. Young*, 1 S. & S. 333. SETTLEMENT OF ACCOUNT.

Bill founded on a letter not stamped; decree made, but directed not to be delivered out, till letters were produced stamped to registrar. *Chervet v. Jones*, 6 Mad. 267. STAMP.

An entry by deceased person, who had knowledge of a fact, whereby he charges himself or discharges another, upon whom he would otherwise have a claim, is admissible in evidence, even though the party could not have been examined as to the fact in his lifetime. *Short v. Lee*, 2 J. & W. 489.

Judge's notes not evidence of facts, which transpired at trial. *Exp. Learmouth*, 6 Mad. 113. JUDGE'S NOTES.

A document which is stated in the bill, and which the answer admits and refers to, cannot be read from the bill at the hearing, but must be produced. *Cor v. Allingham*, 1 Jac. 339. PR. PRODUCTION OF DEEDS.

Upon lease of tithes by lay impropriator, if the tithes of the particular lands are excepted, it might admit of construction, that lessor is entitled to that which he excepts. But if former owner of tithes upon a lease, has made a parol declaration, that he is not entitled to the tithes of those lands, that declaration is in itself important evidence, and gives a construction to the exception in the lease. *Norbury v. Meade*, 3 Bli. 212. TITHES; TITLE.

Entry of birth of a dissenter's child in a register kept for the purpose, at a public library, not evidence. *Exp. Taylor*, 1 Jac. & W. 339.

A bill of sale having been executed by a testator, and subsequently delivered to A, on a question, whether it was intended as a gift, an entry in the testator's book, made between the periods of the execution and the delivery, is admissible evidence. *Ityle v. Haggie*, 1 Jac. & W. 234.

Money ordered to be paid under a power of attorney executed in North America, attested by a notary public, and verified by the secretary of state of the country. Affidavit of the execution of an instrument made before the mayor of a foreign town, not received without evidence of his holding that situation. *Garvey*

*v. Hibbert*, 1 Jac. & W. 180. DEEDS, EXECUTION OF; POWER OF ATTORNEY.

An office copy is the only evidence the court will admit of the filing of the affidavit. *Exp. North, Buck*, 396.

Transfer of stock of an intestate into the name of himself jointly with that of the husband of one of his two nieces, accompanied with proof of his having said, in his lifetime, that it was his intention to give the husband the stock at his death, in consideration of affection, &c. and that he had transferred it for that purpose, (if not repelled by counter testimony); held to be sufficient proof of gift of such stock, and court will not continue injunction granted to restrain the husband, who had administered, from disposing of it. *George v. Howard*, 7 Price, 646. GIFT; TRUST.

An old grant from the crown, "of grain, hay, and herbage," not shewn to have been acted upon, and under which no enjoyment or perception of the specific tithe claimed (agistment) was proved; held not to be sufficient proof of title, in persons claiming under the grantee, to the tithe of agistment. *Scott v. Lawson*, 7 Price, 267. TITLE.

The assignment of the petitioning creditor's bond by the lord chancellor is conclusive evidence of malice. *Holmes v. Wainwright*, 1 Swan. 23. BANKCY. ASSIGNMENT OF PETITIONING CREDITOR'S BOND.

A mortgagee having advanced to the mortgagor a further sum upon his bond, held that the bond, though obscurely worded, was evidence of an agreement for a further charge upon the mortgaged premises. *Exp. Heurn*, 1 Buck, 165. FURTHER SECURITY; BOND; MORTGAGE; & MORTGEE.

Document produced by a party, as evidence in his behalf, must be accompanied with proof of the custody whence he derived it, to satisfy court of its authenticity, otherwise it will not be permitted to be read. *Randolph v. Gordon*, 5 Price, 312.

Bill, by assignor and assignee of debt, for recovery of it, stating assignment, is sufficient evidence of it, without further proof, though defendant states he is ignorant thereof. *Ryan v. Anderson*, 3 Mad. 174. ASSIGNMENT.

Evidence, as to value, of witnesses stating opinions formed upon a loose recollection of circumstances, at a distant period, not to be put in competition with that of surveyors actually employed at the time to ascertain the value, and where no bad motive can be ascribed, so as to affect a lease sought to be set aside for under value. *Att. Gen. v. Cross*, 3 Mer. 542.

As to the evidence necessary to be produced of debt and its nature, and how far bond, or other security, is alone sufficient on re-opening a settled account between solicitor and client, before Dep. Rememb. *Lewis v. Morgan*, 5 Price, 42. ACCOUNT.

Answer to a bill, by a rector, for an account of tithes, setting up a simoniacal contract, supported by evidence of the contents of a letter alleged to have been written by the witness (one of the patrons of the living) to the plaintiff, previous to his admission to the living, containing the terms of the agreement, which were afterwards accepted, and the letter containing such acceptance had been subsequently returned to the plaintiff, and destroyed by him. On an objection to the admissibility of evidence of the letter containing the proposal, on the ground of want of notice to the plaintiff to produce the original, held that the evidence was admissible, the depositions being sufficient notice. At law such evidence would not be admissible without notice, because it not being known till the time of trial, what evidence will be offered on either side, *non constat*, otherwise, that the original might not be produced. But even at law, notice is not necessary, where, from the nature of the proceeding, the party must know that the contents of a written instrument

in his possession will come into question. *Wood v. Strickland*, 2 Mer. 461.

In conveyances by lease and release, it seems not to be the practice in Ireland to make lease for year; but recital in release is evidence of lease. *Daly v. Kelly*, 4 Dow. 435. CONVEYANCE; PRACTICE IN IRELAND.

Where the subject of a devise is described by reference to some extrinsic fact, extrinsic evidence must be admitted to ascertain the fact, and to ascertain the subject of the devise. Different from the cases of reference to a paper which is to form part of the will, where the will itself must specify the paper to be incorporated with it. *Sanford v. Raikes*, 1 Mer. 653. WILL, C. OF.

Bill for the redemption of a mortgage after twenty years, upon the evidence of a conversation, proved by one witness only, dismissed. His honor, however, of opinion, that parol evidence was admissible in such cases. *Reeks v. Postlethwaite*, Coop. 161. LENGTH OF TIME; MORTGAGE, REd. OF.

Affidavit with interpleading bill is conclusive of fact. *Sterenson v. Anderson*, 2 V. & B. 410. INTERPLEADER.

Effect of wilful misrepresentation as to credit, giving a remedy by way of damages, on ground of fraud. In bankruptcy, where evidence of party is received, it must be in all particulars consistent, clear, and unambiguous. *Exp. Carr*, 3 V. & B. 108. BANKCY. FRAUD.

An article of agreement to demise lands executed upwards of thirty years, and produced out of the proper custody, held to be admissible in evidence as an ancient instrument, by proving (not by the subscribing witnesses) the signatures of the parties, that it was in defendant's hand-writing, and an indorsement, explaining why possession did not accompany it, its authenticity being thereby established. *Alyward v. Kearney*, 2 Ball & B. 463.

Comparison of hand-writing, though lately admitted as evidence, if confirmed by the contents of correspondence, refused in the instance of a single letter for the purpose of commitment. *Wade v. Broughton*, 3 V. & B. 172. COMMITMENT; HAND-WRITING.

When an account furnished by a party before any suit instituted, is produced to charge him with the items, on the debit side, he is entitled to resort to the credit side in support of his discharge. *Boardman v. Jackson*, 2 Ball & B. 382. ACCOUNT.

Special covenants as to cultivation, not implied from the mere act of holding over; as they may be from payment of rent at the same period, as evidence of agreement to hold, not only on the same terms, but subject to the same covenants. *Kimpton v. Eve*, 2 V. & B. 349. COVENANTS; LANDL. & TEN.

Supplemental answer permitted to correct mistake, but held strictly to mistake, clearly sworn to, and probable in itself; the solicitor who put in the former answer being dead, whose letter, admitting the fact, contrary to that answer, would not be evidence in a prosecution for perjury, against the defendant; which ought not to be influenced by the admission or refusal of the application. *Strange v. Collins*, 2 V. & B. 163. PR. SUPPLEMENTAL ANSWER; MISTAKE.

If the entire of a correspondence be not produced, no reliance ought to be placed upon detached parts of it. *Blennerhasset v. Day*, 2 Ball & B. 120.

The circumstance that one residuary devisee was the attorney who drew the will, not decisive evidence of fraud. *Paine v. Hall*, 18 Ves. 475. FRAUD; WILL.

The presumption of payment of a bond after twenty years may be repelled by evidence, that obligor had no opportunity or means of paying. *Madong v. Winter*, 19 Ves. 196. PRESUMPTION OF PAYMENT; LENGTH OF TIME.

As to admitting in evidence a parish register not kept according to the canon, requiring weekly entries,

or a copy, without proof, that the original is not to be found; *quære?* Parish register admissible evidence, notwithstanding the loss of a leaf not destroying the series of entries. Declarations of relations, evidence of pedigree, but inconclusive without shewing on what occasion, what led to them, &c. Whether a physician or servant who attended the family can be admitted as one of the family, *quære*. Object of making evidence in secret to prevent attempts to support defective evidence already given: but farther inquiry when necessary, not refused. *Walker v. Wingfield*, 18 Ves. 443.

Petition to stay a bankrupt's certificate upon allegation of concealment, and sworn to only upon information and belief, dismissed with costs. *Exp. Joseph*, 18 Ves. 340. BANKCY. PETITION TO STAY CERTIFICATE.

On a bill for specific execution relying on part performance, the agreement must be proved as stated. *Savage v. Carrol*, 1 Ball & B. 551. SPEC. PERF.

Parol agreement proved by one witness, corroborated by others, and not denied by answer, enforced upon the ground of part performance. *Toole v. Mellicott*, 1 Ball & B. 393. PAROL AGREEMENT; PART PERFORMANCE.

The Fleet register, evidence not as a register, but a declaration upon the fact. *Lloyd v. Passingham*, 16 Ves. 59.

The registry of a ship is conclusive evidence of the property, upon the policy of the registry acts; even against the claim of creditors, upon a joint purchase and various acts of apparent ownership, within the bankrupt act, 21 James I. c. 19. s. 11. *Exp. Yallop*, 15 Ves. 60. BANKCY. REPUTED OWNERSHIP; SHIPS' REGISTRY ACTS.

Qualification as to evidence; tradition, even upon pedigree, must be from persons having such a connection with the party, that it is natural and likely from their domestic habits, that they are speaking the truth and could not be mistaken; upon that principle, description in wills, monuments, bibles, &c., are admitted. *Whitelocke v. Baker*, 13 Ves. 511.

In the case of pedigree, hearsay evidence of declaration by the husband as to his wife's legitimacy, admissible, as well as those of relations by blood. *Forbes v. Young*, 13 Ves. 140. PEDIGREE.

Depositions of a witness read, though he had died before cross-examination; the cross-interrogatories not going to any point to which the witness had been examined in chief, nor to his credit, but to matters capable of proof by other witnesses. *O'Callaghan v. Murphy*, 2 Scho. & L. 158.

Letter by an agent, is not evidence against the principal of a pre-existing agreement, though it may be of an agreement contained in that letter. *Fairlee v. Hastings*, 10 Ves. 128. PR. & AGENT.

The rule of evidence in the accountant general's office ought to be the same as in the court; therefore upon marriage of woman entitled to interest of fund for separate use, an affidavit was required beyond that of the marriage, and indemnity that there was no settlement, or agreement for settlement, without prejudice to future cases. *Clayton v. Gresham*, 10 Ves. 288. PR. ACCOUNTANT GENERAL'S OFFICE; PAYMT. OUT OF COURT.

To obtain payment to representatives, mere production of probate is not sufficient; proof of death is now required, and that testator was the party in the cause. *Id.* 289. EXORS. & ADMORS.; PAYMENT OUT OF COURT.

A notary-public has credit everywhere, but the certificate of a magistrate of a colony abroad, requires evidence of his character. *Hutcheon v. Mannington*, 6 Ves. 823. NOTARY PUBLIC.

Bill alleging a written agreement, may be sustained

by evidence of a parol agreement. *Spurrier v. Fitzgerald*, 6 Ves. 548. AGREEMENT.

Debt discharged by entry in the testator's hand, that the debtor pays no interest, nor should he (the testator) take the principal, unless greatly distressed, and upon evidence of his circumstances. *Eden v. Smyth*, 4 Ves. 360. DEBTOR & CRED.

A partnership cannot be established by the evidence of the partners, and their private communications. The fact must be proved *aliunde*; for want of such proof a commission against the ostensible partners was sustained. *Exp. Benfield*, 5 Ves. 424. PARTNERSHIP.

Fifteen years' possession of a benefice is *prima facie* evidence of a regular induction, and of reading the thirty-nine articles. *Chapman v. Beard*, 3 Aust. 942. LENGTH OF TIME; INDUCTION.

Evidence of the declarations of a man since dead, as to a fact done by himself, is not admissible. *Garmans v. Barnard*, 1 Aust. 289.

Upon a bill to redeem, a *prima facie* title is sufficient; and an issue shall not be directed, though the title is complicated, if uncontradicted. *Pym v. Bowerman*, 3 Swan. 241. MORTGAGE REDEMPTION; TITLE.

A plaintiff claiming under a deed, not stated particularly by him, and not particularly and explicitly admitted by the defendant, cannot be entitled to a judgment or decree founded upon such deed against such defendant, without producing and proving such deed. *Berney v. Moore*, 2 Ridgw. P. C. 323. PRODUCTION OF DEEDS.

Upon a question of legitimacy, A produced witnesses, who swore to a marriage in fact between his parents, and he obtained a verdict. On a second trial he declined to produce those witnesses, and rested solely upon a reputation of the marriage. Although he again obtained a verdict, yet this is not sufficient to satisfy the conscience of a court of equity. *Sherborne v. Napier*, 2 Ridgw. P. C. 224.

On questions of legitimacy, declarations of parents after the birth of the child can have but little weight. *Id.* 234.

If the terms of a contract are reduced into writing, the paper must be stamped in order to be read in evidence, though collaterally. *Hearne v. James*, 2 Bro. C. C. 309. STAMP.

In courts of equity, the plaintiff may select a particular admission, and when that is read, defendant is obliged to prove the other facts stated in his answer by other evidence. Thus, where to a bill by creditors against an executor for an account, the executor answered that 1100*l.* was deposited in his hands by the testator, and that afterwards he gave testator a bond for 1000*l.*, by whom 100*l.* was presented to him for his trouble in making up the accounts, and in testator's general concerns, no other evidence appeared that testator had deposited 1100*l.* in his executor's hands, and it was held, that what was confessed by the answer, when it was put in issue, need not be proved by plaintiff, but that defendant should make out by proofs, what he insisted on by way of avoidance. This was held, however, under this distinction, that when defendant admitted a fact, and insisted on a distinct fact by way of avoidance, then he ought to prove the matter in his defence, because he may have admitted it from apprehension that it might have been proved, and therefore such admission ought not to profit him; but if it had been one fact, as if defendant had said the testator had given him 100*l.*, it ought to be allowed unless disproved, for nothing of the fact charged is admitted, and plaintiff may disprove the whole fact, as sworn, if he can, and upon its being urged that the probability was on defendant's side, Ld. Gwyer said there was some presumption in that, but not enough to carry so large a

sum, without better attestation. *Anon.* Gilb. Evid. 52. But see *Peake's Evid.* 56., notes.

A copy of a register of baptism in the island of Guernsey is not sufficient evidence here of a party being of age. *Huet v. Le Mesurier*, 1 Cox, 275. FOREIGN REGISTERS.

An original letter stamped, after production, to make it evidence. *Ford v. Compton*, 2 Bro. C. C. 32. STAMP.

Circumstances forming pieces of evidence, which, taken separately, are not conclusive, cannot become so by being united. *Hume v. Burton*, 1 Ridgw. P. C. 210.

Probate of a will is conclusive evidence of the sanity of the testator to dispose of his personal estate; but it is by no means conclusive evidence of his capacity to dispose of his real estate. *S. C.* id. 277. WILL, PROBATE OF.

In what case an old map of an estate is good evidence to ascertain the quantities and boundaries of particular lands. *Wilkinson v. Allott*, 3 Bro. P. C. 684. BOUNDARIES.

Opinion of counsel read as evidence. *Brown v. Garroway*, Dick. 353.

A pedigree made by a testator's direction, and found among his papers, not admitted to explain a will, equivocal but not unintelligible. *Crosley v. Clare*, 3 Swan. 322. See *S. C.* Ambl. 397. WILL, C. OF.

Entries of presentments in the books of a manor are not evidence of acts of ownership. *Ircin v. Simpson*, 7 Bro. P. C. 317.

Probate of testator's will proof of his death. *French v. French*, Dick. 263. Contra 10 Ves. 289.

Public books, as of a manor, ordered to be produced, but not books in private hands. *Anon.* 2 Ves. 578.

Witnesses examined *de bene esse* in Sweden: council of Sweden refused to let a commission be executed for examining them in chief. The depositions *de bene esse* may be read. *Gasson v. Wordsworth*, Ambl. 108. *S. C.* 2 Ves. 325. 336. PR. EXAMINATION, DE BENE ESSE.

Testator manifesting an intention to dispose of the residue, but leaving it inchoate, inasmuch as he did not name the residuary legatee, it was held that the executors were not entitled to the surplus. Where parol evidence can be read to shew no resulting trust, like evidence may be read contra to disprove the implication from the former; legacy to one alone of two (or more) executors, will not exclude either; legacy to the daughter, &c. of an executor, is not to be deemed a legacy to him so as to prevent his taking the surplus merely for that reason. *Rp. Cloyne v. Young*, 2 Ves. 91. WILL, C. OF; EXECUTORS BENEFICIALLY INTERESTED.

Husband receiving proceeds of a sale of wife's estate, and promising, by a note or receipt, to lay it out pursuant to trusts relative to other property, this note held evidence of the agreement antecedent to the sale, and estates purchased afterwards by the husband, were held to be bound. *Att. Gen. v. Whorwood*, 1 Ves. 534. HUSB. & WIFE; AGREEMENT, SATISFACTION OF.

Bill by executors on loss of notes mentioned in a list written by the testator. Such a list not of itself evidence of the property, but left to be tried at law. *Glynn v. Bank of England*, 2 Ves. 38.

Shop books in testator's hand not evidence; entries by servants, after their death, allowed. *Id.* 43.

Parson's receipts for tithes evidence for successor. *Id.* *ib.*

A person's own entry in books of account, allowed on enquiries before the master as evidence of a claim made in his lifetime, but not as original or positive

evidence of the fact. *Lefebure v. Worden*, 2 Ves. 54.

Entry by servant or agent usually employed in such matters, allowed as good evidence upon proof of his death. *Id. ib.*

In cases relating to clandestine marriage, hearsay evidence and declaration are no defective proof, but has weight with the court, especially when contradicted by any thing on the other side. *Beard v. Travers*, 1 Ves. 313. WARD OF COURT.

Payment of interest for a legacy by an executor from time to time, shall be evidence of assets, not so of a single instance of payment of interest. *Clergyman's Sons v. Stainson*, 1 Ves. 75. EXOR. ADMISTRATION OF ASSETS.

Though contemptuous words were spoken of a subpoena, and the person serving is severely beaten, yet as these facts were proved by the oath of a single person only, the court would not, in the first instance, order the party to stand committed, but made a rule upon him to shew cause why he should not stand committed. *Anon.* 3 Atk. 219. PR. CONTEMPT.

Where a person is examined as a witness, and after death of plaintiff files a bill of revivor and becomes a party interested, he is not disqualified from being evidence. *Hues v. Hand*, 2 Atk. 615.

A merchant's copy-book of letters has been allowed to be read where the person who has the original letters refuses to produce them. *Sturt v. Mellish*, 2 Atk. 611.

An inquisition of lunacy is always admitted to be read, but is not conclusive evidence, for you may traverse it. *Sergison v. Sealey*, 2 Atk. 412. S. C. 9 Mod. 370.

The evidence of a neighbouring manor shall not in general be admitted to shew the custom of another manor. *Dean and Chapter of Ely v. Warren*, 2 Atk. 189.

Courts of law have admitted evidence with regard to profits of mines out of other manors where they are similar, to explain the custom of the manor in question. *Ib.*

It is too late, at the hearing of the cause, to object to depositions taken *de bene esse*, as irregular. The court should have been moved to discharge the order for publication. *Ib.*

The court of equity will not put persons to set forth a custom with the exactness which is requisite at law, or which the exchequer expects. *Ib.*

Parol evidence of declarations of the wife respecting her advancement made during coverture with first husband, admissible against the second. *Fawcner v. Watts*, 1 Atk. 407.

So also proofs of declarations by a husband, because against his interest; secus, as to declarations by the father. *Ib.*

Papers in the hands of a party to a former cause, after publication had passed, through not produced, these may be read upon a bill of review. *Standish v. Radley*, 2 Atk. 179. BILL OF REVIEW.

In what cases equity will allow letters to be read as evidence. *Montgomerie v. Att. Gen.* 9 Mod. 365. LETTERS.

Witness swearing he never heard of an agreement at or before a certain time, is a negative pregnant that he heard of it after. *Walker v. Walker*, 2 Atk. 100.

A counterpart may be read if an original deed be lost; and if no counterpart, a copy; and if no copy, parol evidence of the manner of its being lost; if destroyed by fire, or lost by any unforeseen accident, they are of themselves sufficient excuses. *Villiers v. Villiers*, 2 Atk. 71.

Bill for quit rent and account produced, it must be proved to have been a steward or bailiff's, or it is not evidence here any more than at law. *Franks v. Curry*, id. 140.

Copy of admittance may be read, though not signed, where it is of thirty years' standing. *Dean, &c. of Ely v. Stewart*, 2 Atk. 44. S. C. Barn. 170. COPIES.

Bill brought by wife for maintenance, on suggestion of cruel usage by the husband; and on the part of the defendant, as an excuse for his ill usage, depositions were offered to prove a criminal conversation, unless it is expressly charged by the answer, the court will not suffer such depositions to be read. *Watkins v. Watkins*, 2 Atk. 96. HUSB. & WIFE.

Answer, charging the wife had behaved in an indecent manner, will entitle the husband to read evidence against her of criminal conversation. *Id. ib.*

Where a witness against the conduct of others is under the necessity of first exculpating her own behaviour, no regard ought to be paid to her evidence. *Id. ib.*

Evidence admitted to prove testator's intention not to give next of kin residue, so as to let in executors, though they have legacies by will. *Brusbridge v. Woodroffe*, 2 Atk. 69. WILL, C. or.

Parol evidence admitted to shew a trust from the mean circumstances of the pretended owner of the real estate. *Willis v. Willis*, 2 Atk. 71. RESULTING TRUST.

To shew a title in lessor, receipts for rent are *per se* insufficient, especially when he who signed them is living, and has not been examined. *Manning v. Lechmere*, 1 Atk. 453.

In dispute between lord of manor and his tenants as to a custom, deeds between lords and tenants of neighbouring manors are admissible evidence as to custom. *Lawther v. Raw*, 2 Bro. P. C. 451.

A bond or mortgage is *prima facie* a good evidence for a debt; but in case fraud appears, the obligee, &c. ought to prove actual payment. *Piddock v. Broen*, 3 P. W. 289.

A bond for performance of articles, though cancelled, was made an exhibit, and allowed as evidence to prove the execution of the articles, the limitation being inserted and recited in the condition of the bond. *Anon.* Gilb. Eq. Rep. 183.

The entry of names and titles of persons in a church book, either for marriages or births, cannot be positive evidence of the marriage or birth of any person, unless the identity of person named in such entries is fully proved and strengthened also with circumstances of cohabitation, and the allowance of parties. *Draycott v. Tulbot*, 3 Bro. P. C. 564. MARRIAGE.

Where churchwardens, by order of the parish, commence a suit, the consent of the parish shall bind it, and the vestry-book shall be allowed as evidence of the consent. *Case of Radnor Parish*, 4 Vin. 529. pl. 10.

Old rent rolls admitted as evidence to prove fee-farm rents, there having been an unity of possession far above 300 years, and being so ancient, it could not be imagined they were fabricated to serve the present purpose. But an inquisition *post mortem* is not evidence, unless it is proved that a commission was ever issued to support it. *Newburgh v. Newburgh*, 3 Bro. P. C. 553.

A draft of articles of partnership, together with stated account, and the payment of money by the acting partner to the others: held sufficient evidence of partnership to ground decree for account. *Worts v. Pern*, id. 548. PARTNERSHIP.

An entry in the book of the steward of a manor, and a parol proof by the foreman of the jury, allowed as good evidence against an entry on the roll, and an admission thereon. *Hill v. Wiggett*, 2 Vern. 547.

R married N's widow, who was executrix of her husband, and kept a book of accounts relating to his

estate: after she married R, the same book was continued. Afterwards R went governor to Barbadoes with his wife and the servant who kept the book; they all died there. It was proved in the cause, that the book was made up from vouchers, and that great part of the money was paid; and the witness believed the whole was paid. Upon exceptions to the master's report, the court adjudged the book should be allowed as a discharge, as well as a charge. *Darston v. El. Oxford*, Colles' P. C. 299. Prec. Ch. 188. S. C. differently stated. CHARGE & DISCHARGE.

Exemplification of part of a patent not suffered to be read in evidence, notwithstanding the statutes of 3 and 4 Edw. 6. and 13 Eliz., where the other side have notice to consult the patent roll, and so may be surprised by an imperfect exemplification. *Att. Gen. v. Taylor*, Prec. Chan. 59. EXEMPLIFICATION OF PATENT.

As to all equity proceedings, it is a general rule, that in order to give any interlocutory matter in evidence, a foundation must be laid by proving all its former stages. *Rock v. Rir*, Gilb. Ev. 56. As the bill to make way for the answer, the bill and answer, or the defendant's contempt for the depositions, &c. *Piercy v. —*, T. Jones, 164. Gilb. Ev. 65., otherwise the whole bearing of the evidence would not appear, neither would the court see that the proceeding was regular; in which case the answer and depositions would have only the effect of a mere voluntary affidavit, and which, if made by a stranger, could not be received in evidence, as the party would be deprived of his cross-examination, and if made by the party himself, then as before-mentioned. *Anon.* Sty. 446. Further, if plaintiff's bill be dismissed for irregularity, as where a devise revives the suit of his devisor, and several depositions are taken, and then the cause of hearing is dismissed, because a devisee claiming as a purchaser, and not by representation, cannot revive, then the depositions cannot be read in any other cause, for there was no cause regularly before the court. *Backhouse v. Middleton*, 1 Ch. Ca. 173. But if a cause was once regularly before the court, though the bill be dismissed by reason that the remedy was at law, then the depositions will be evidence. *Smith v. Yeule*, 1 Ld. Raym. 735.

Bill to have jointure made up 400l. per annum. according to the parol agreement on the marriage. The defendant pleads a jointure made and accepted 18 years since: Held, the jointure deed is evidence that all the precedent treaties and agreements were resolved into that. *Bellasis v. Benson*, 1 Vera. 369.

Settlement being alleged to be made in pursuance of a marriage agreement, a trial was directed to try what was the marriage agreement, but ordered the settlement should not be given in evidence. On a bill of review, the last part of the order reversed. *Beachinall v. Beachinall*, 1 Vern. 246. PR. ISSUE AT LAW.

In *odium spoliatoris*, the oath of the injured party sufficient to charge the wrong doer. *Childrens v. Saxby*, id. 207.

One witness sufficient to prove a contempt. *Sands v. Knighton*, Toth. 41. *Id.* *Anon.* 3 Atk. 219. CONTEMPT.

Upon an ordinary contempt a commission was had by the plaintiff, who proved the contempt positively by one witness. The defendant alleged the process was by mistake served on a wrong person, and prayed a commission to examine to it, and it was granted. *Hammond v. Shelley*, 3 Ch. Ca. 100. PR. CONTEMPT, PROOF OF.

A peer of the realm is to put in his affidavit upon honour, but his answer to interrogatories and examinations as a witness must be upon oath. *Steers v. Stourton*, 1 P. W. 146. 1 Dick. 21. PEE.

Where the account was of 20 years standing, the defendant was allowed to prove his account upon his own oath for what he could not prove by books or cancelled bond. *Peyton v. Green*, 1 C. R. 146. ACCOUNT; LENGTH OF TIME.

And where the account had been delivered 14 years, and no objection taken, and defendant had lost his books by seizure in a foreign country, held, that defendant should not be charged beyond his own oath. *Holtcomb v. Rivers*, 1 C. C. 127. ACCOUNT; LENGTH OF TIME.

Witness examined for the plaintiff, and was to be cross-examined by the defendant, but before he could be cross-examined he died, yet this court ordered his depositions to stand. *Arundel v. Arundel*, 1 C. R. 90.

Feme sole sues out a commission to examine witnesses; before they are examined she marries. Their depositions ordered to stand. *Winter v. Daniel*, Toth. 99. PR. COMMISSION TO EXAMINE; PR. ABATEMENT.

### 3. Of what facts necessary or admissible generally.

On a bill filed to set aside the sale of an estate on the ground of fraud practised by the defendant on the plaintiff, the plaintiff is not at liberty to give evidence of the defendant's having stood in the relation of his attorney at the time of the sale, with the view of raising an inference that he had acted fraudulently by taking advantage of that character, the fact of his having been such an attorney not being stated, or put in issue by the bill. *Williams v. Llewellyn*, 2 Y. & J. 68. FRAUD, FID. SIV.

Not necessary for plaintiff who claims an estate as tenant in tail, under settlement of parents, to prove their marriage by affidavit, before he shows cause against dissolving an injunction to restrain an ejectment brought against him to recover the estate. *Hodgson v. Dean*, 2 S. & S. 221. AFFIDAVIT OF MARRIAGE.

The inspection of documents set forth in the schedule to the answer in an injunction cause may be obtained before the dissolution of the injunction, and used to oppose the motion to dissolve it. Hence, when the injunction has been dissolved, and the plaintiff afterwards by inspecting the documents referred to by the answer, discovers new matter, he cannot move to revive the injunction upon an amended bill containing the new matter, and verified by affidavit. *Powell v. Lassalette*, 1 Jac. 549. PR. INJUNCTION, DISSOLUTION OF.

Upon the hearing of an interpleading bill, evidence is admissible to show that the plaintiff has retained possession of the subject of the suit, under an indemnity from some of the defendants. *Statham v. Hall*, 1 Turn. & R. 30. PR. INTERPLEADER; MAINTENANCE OF SUIT.

Where letters are stated in bill as agreement, no evidence *aliunde* is admissible; otherwise, where stated as evidence only of agreement. *Birce v. Ditchley*, 6 Mad. 17. PL. BILL; AGREEMENT.

Power of attorney to sue in plaintiff's name, need not be stated in bill, but if stated, proof will be directed of it before master in taking the accounts. *Edney v. Jewell*, 6 Mad. 165. PL. BILL; POWER OF ATTORNEY.

On a bill to impeach an award, evidence of the merits only to be received so far as it throws light on the conduct of the arbitrators. *Goodman v. Sayers*, 2 Jac. & W. 259. ARB. & AWARD.

In establishing a will, the attestation of all witnesses must be proved, and if not personally, either that they are abroad or dead, and the proof must be positive. In proving a will for certain purposes only, such proof as will satisfy the court is sufficient, and in such case, leave will be given to exhibit an interro-

gatory for further proof of will for the former purpose. *Wood v. Stane*, 8 Price, 613. WILL, PROOF OF.

Though bill states defendant out of jurisdiction, and infant defendant admits fact, proof is still requisite. *Wilkinson v. Beal*, 4 Mad. 408. INFANT; PL. ANSWER, ADMISSION BY.

On a question of pedigree, witnesses cannot be received to prove the declarations of a relative whose deposition is read. *Gordon v. Gordon*, 3 Swan. 465.

Evidence not admitted of facts not alleged in the pleadings. *Id.* 472. PL. BILL, CHARGES.

What charge of misbehaviour is sufficient to introduce evidence of particular facts. *Wheeler v. Prother*, 3 Swan. 174. *Ib.*

A gift by a husband to his wife, either as a *donatio mortis causâ*, or as a *donatio inter vivos*, to her separate use, must be established by evidence beyond suspicion; a claim of that nature negatived. A defendant by her answer having claimed a gift from her husband, as an absolute *donatio inter vivos* to her separate use, whether evidence can be received to establish it as a *donatio mortis causâ*, *quære?* *Walter v. Lodge*, 2 Swan. 92. HUSB. & WIFE; GIFT.

The court, on application for *ne exeat regno*, acts on evidence of intention to go abroad, without regard to denial. *Whitehouse v. Partridge*, 3 Swan. 375. PR. WRIT, NE EXEAT REGNO.

On the trial of an issue *devisavit vel non*, all the subscribing witnesses must be examined, except in cases of necessity, as death, insanity, or absence abroad, or the heir waives his right, and the rule is not merely technical. *Bootle v. Blundell*, 19 Ves. 494. 500. S. C. Coop. 136. ISSUE DEVISAVIT VEL NON.

Infant defendants are not precluded as to question of bankruptcy, by production of commission, though no notice of intention to dispute has been given. *Bell v. Tinney*, 4 Mad. 372. INFANTS; BANKCY. WHO BOUND BY; PR. NOTICE.

A foreign law must be proved as a fact. *Eap. Criddland*, 3 V. & B. 99. FOREIGN LAWS.

The evidence of facts not put in issue on the record, is inadmissible. *Blake v. Murnell*, 2 Ball & B. 47. Affd. 4 Dow, 248.

Agent or bailiff, confounding his principal's property with his own, charged with the whole, except what he can prove to be his own; and, in this instance, the case of a breach of the terms upon which the court dissolved an injunction, the inquiry was directed with costs. The court refused in such a case a prospective direction to admit books, not legal evidence; usual in a fair case, as where from want of notice of an adverse claim, a strict account cannot be given, merely giving liberty to apply upon any question of evidence. *Lapton v. White*, 15 Ves. 432. AGENT, LIABILITY OF; ACCOUNT.

Evidence of a distinct substantive fact, without an allegation on the record, not received. *Smith v. Clarke*, 12 Ves. 477.

Depositions to a fact not put in issue, not permitted to be read. *Clarke v. Turlon*, 11 Ves. 240.

Though an agent may, within the scope of his authority bind his principal by his agreement, and in many cases by his acts, evidence of his declarations is confined to what is either by the statement itself, or as tending to determine the quality of cotemporary acts, the foundation of, or inducement to the agreement. *Fairlie v. Hastings*, 10 Ves. 123. PRIN. & AGENT.

A reference under the statute 7 G. 2. c. 20. must be made to the principal and interest upon the mortgage, and the master cannot admit evidence. *Newson v. Newson*, 4 Ves. 105. MORTGAGE, CLOSURE OF; STAT. C. OF.

When letters are to raise a trust, there must be de-

monstration that they relate to the subject. *Forster v. Hale*, 3 Ves. 708. TRUST.

A will admitted in answer under which defendant claims, and where nothing turns on it, may be read from the bill, although the answer refers to the will for certainty. *Owen v. Jones*, 2 Anst. 505. WILL.

Wife barred from her right, to be exonerated out of the assets of her husband, in respect of money raised by mortgage of her estate, and received by him by telling executor she would not raise her claim; and no difference, whether legacies were paid before or after. Parol evidence of her declarations, admissible to prove that it was not applied for the husband's use, not to prove the transaction itself different from what it appears to be by the instrument, and the other evidence, as that it was intended as a gift to him. *Clinton v. Hooper*, 1 Ves. J. 173. HUSB. & WIFE, SEPARATE ESTATE.

On a bill filed by a surety against his co-surety and the principal, for a contribution from the co-surety, in respect of money actually paid by the plaintiff for the principal, it is not necessary to prove the insolvency of the principal; otherwise, where the principal is not a party to the suit. *Lawson v. Wright*, 1 Cox, 275. CONTRIBUTION; PL. PARTY; PRINC. & SURETY.

An order had been obtained to read *inter alia*, the examinations of A taken before commissioners under C's bankruptcy; they cannot be read unless proved in the cause that there were such examinations so taken. *Fade v. Lingood*, 1 Atk. 203. BANKCY. EXAMINATIONS BEFORE COMMISSIONERS.

Parties resting their defence in an issue at law upon instruments ascertained at the trial to be forged, will not be allowed to enter into any other evidence, or to say the forged instruments were immaterial. *Kemp v. Mackrell*, 2 Ves. 579. ISSUE AT LAW.

Where the plaintiff is charged by an answer, he he must discharge himself by proof, and cannot do it by reading the whole answer as he may at law. *Parteriche v. Poulet*, 2 Atk. 383. PL. ANSWER.

Not only contrary to the statute of frauds, but to the common law before the statute, to add anything to an agreement in writing by parol evidence. *Ib.*

It is sufficient to put in issue a general charge of lewdness, and under this you may give particular evidence, but then it must be pointed and applied to the general charge. *Clark v. Periam*, 2 Atk. 333. & 337. S. C. 9 Mod. 340. PL. BILL.

That a wife has misbehaved herself, does not imply she is an adulteress, and a deposition in that case to prove her one, ought not to be read. *Ib.*

Saying that a wife did not behave with that duty as became a virtuous woman, will not entitle the husband to enter into proof of her committing adultery, unless there is an express charge of this kind; for the virtue of a woman does not consist merely in her chastity. *Ib.*

Where in a criminal prosecution, the prisoner, to strengthen his character, enters into particular facts to support it, the prosecutor may likewise examine to particular facts. *Ib.* CRIMINAL PROCEEDINGS.

In an indictment for keeping a common bawdy-house or gaming-house, though the charge is general, yet you may give particular facts in evidence. *Ib.*

In an issue on *non compos mentis*, you may give particular acts of madness in evidence, and not general only that he is insane. *Ib.* LUNACY.

Where the general life or conversation is in issue, the person must be prepared to invalidate that evidence, otherwise where it comes in collaterally. *Ib.*

Where defendant disclaims all right, plaintiff cannot read his evidence as proof of plaintiff's own title to prejudice of another defendant. *Hill v. Adams*, 2 Atk. 39.

Where attesting witness to deed has lived abroad,



a strict proof of his death is required; otherwise where constantly residing in England. *Heuley v. Philips*, 2 Atk. 48. DEATH.

Where two leases are set up, you cannot read one of them till you have proved possession under it. *Munning v. Lechmere*, 1 Atk. 453.

A brought bill against B, for specific performance of covenants in a lease, and particularly a covenant to leave a certain quantity of alum on the premises at end of term; B, by answer insisted covenant was not intended to be performed, but at hearing produced a paper, purporting to be a receipt for the alum from the lessor: court held, that no regard ought to be paid to this paper, not only because it had a suspicious appearance in itself, but because it was not insisted on in the pleadings. *Ward v. Dk. Buckingham*, 3 Bro. P. C. 581. PL. ANSWER.

After a decree of foreclosure made absolute, and an acquiescence of eleven years in mortgagee's possession under it, no parol evidence of his promising to account and reconvey on payment of his money, can be admitted. *Wichalse v. Short*, 3 Bro. P. C. 558. AGREEMENT.

Circumstances allowed to be proved by evidence by defendant, which he had not put in issue by his answer. *Hodgson v. Thornton*, 1 Eq. Ab. 228. PL. ANSWER.

By a proviso in a marriage settlement, that the deed was to be void if the marriage was not had in ten months. The heir cannot set up this settlement to defeat a mortgage made by his father after his father had sworn that he was not married within the ten months. *Jones v. Purefoy*, 1 Vern. 45.

#### 4. *Parol, where admitted.*

A tenant for life of an estate, settled in strict settlement, buys up some of the charges on the estate, and has them assigned to a trustee; he next purchases the ultimate remainder, and has it conveyed to him subsequent to the subsisting charges; he then devises the estate subject to the charges that might be thereon at his decease; the intermediate remainders fail at his death. The charges so purchased are merged, and parol evidence is admissible to prove that the testator so intended. *Astley v. Miles*, 1 Sim. 298. MERGER OF CHARGE; WILL, C. OF.

Claiming the residue as executor, is sufficient to let in parol evidence in support of the legal title, without alleging a title by the effect of the parol evidence. *Lynn v. Beaver*, 1 Turn. & R. 66. EXECUTORS BENEFICIALLY INTERESTED; PL. BILL.

Parol evidence is admissible to show that instrument is not the will of testator as to particular estate, but not to set up the disappointed intention of the testator. *El. Newburgh v. Cs. Newburgh*, 5 Mad. 304. WILL.

A direction in will "to keep accounts," held to afford a presumption, that the executrix was not meant to take beneficially; but parol evidence is admissible to explain away this uncertainty. *Gladding v. Yapp*, 5 Mad. 56. EXECUTOR BENEFICIALLY INTERESTED; WILL, C. OF.

Parol evidence is not admissible to contradict an express declaration in will; but if there be no express declaration, and only circumstances which afford reference or presumption, there parol evidence is admissible to answer that inference or presumption. *Id.* 59. WILL, C. OF.

Where testator gives stock "standing in his name," but he has no such stock, but it is in the name of a trustee, parol evidence admissible of the mistake. *Hewson v. Reed*, 5 Mad. 451. WILL, C. OF; MISTAKE.

If a creditor execute a deed of compromise with the principal debtor, he thereby discharges the surety;

not so if it be stipulated in the deed of composition, that the remedies against the sureties shall be reserved. Parol evidence of the understanding of the parties to the deed, that the remedies against the sureties should be reserved; cannot be admitted. *Exp. Glendinning*, Buck, 517. "See *Exp. Carstairs*, id. 560." PRINCIPAL & SURETY, DISCHARGE; DEED OF COMPROMISE;

Parol evidence is not admissible to show the inadequacy of the personal estate of the testatrix to satisfy the purposes of the will; but with regard to real estate, parol evidence would be admissible for that purpose, if an intention to pass really appeared on the will. *Jones v. Curry*, 1 Swan. 66. WILL, C. OF.

Parol evidence, admitted on part of defendant, to shew that agreement was intended to be, that several persons should give a joint and not several bonds. *Gordon v. Hertford*, 2 Mad. 106. AGREEMENT.

Legacy to "R C my nephew, the son of Joseph C;" other clauses describing "my nephew, R C," generally, and one legacy to "my nephew R C, the son of John C." The testator had only two brothers, John and T C, each having a son named R C. Parol evidence admitted to resolve this latent ambiguity, shewing intimacy with the son of John C, very slight knowledge of the other C; the legacy was decreed to the former. *Careless v. Careless*, 19 Ves. 601. S. C. 1 Mer. 384. WILL, C. OF.

Distinction between admission of parol evidence to support or resist specific performance of contract for land; admissible for latter purpose on mistake and surprise, as well as fraud, but not to vary, add to, or explain the written contract. *Cloves v. Higginson*, 1 V. & B. 524. SPECIFIC PERF.

Parol evidence of declarations of auctioneers at sale, warranting quantity received as defence to bill for specific performance on ground of fraud, though not for purpose of enforcing of specific performance. *Winch v. Winchester*, 1 V. & B. 375. SPECIFIC PERF.

A rent charge till a debt paid, granted by a tenant for life, having a power to raise by sale or mortgage, a certain sum for payment of his debts; a good execution of the power, though referable to his interest, as well as to his power. Parol evidence to shew that the deed was not intended to be in execution of his power, inadmissible, as going to contradict it. *Blake v. Murrell*, 2 Ball & B. 35. affirmed, 4 Dow, P. Rep. 248. POWER, EXECUTION OF.

Where a deed is in writing, it cannot be altered by parol evidence. *Id.* 47. DEED, ALTERATION OF.

Fraud in procuring a deed under the circumstances attending it, may be proved by parol evidence. *Id.* FRAUD.

The acts and declarations of a testator at the time of his will, to shew what he meant by a particular expression admissible in evidence. *Id.* 48. WILL, C. OF.

Parol evidence admissible on the part of a defendant resisting the specific performance of an agreement to prove fraud, mistake, or omission in the article, and also to shew the situation of the parties as connected with it. *Flood v. Finlay*, 2 Ball & B. 16. SPEC. PERF.

Where possession delivered under an agreement, and money expended in permanent improvements, parol evidence admitted to prove the agreement. *Toole v. Medlicott*, 1 Ball & B. 401. AGREEMENT; PART PERFORMANCE.

Parol evidence admissible to shew the presumption of a legacy being adeemed. *Monck v. Dr. Monck*, 1 Ball & B. 298. LEGACY, ADEEMPTION OF.

Possession taken referable only to a contract of sale is part performance, and parol evidence may be given

of the terms of such contract. *Savage v. Carroll*, 1 Ball & B. 282. CONTRACT; PART PERF.

Parol evidence is admissible to shew under what circumstances deed or bond is executed. *Stratford v. Powell*, 1 Ball & B. 14.

Parol evidence admitted in favour of the legal title of the executor to the residue, unless plainly and unequivocally declared a trustee; so for a devisee for a particular purpose against an implied trust for the heir. *Walton v. Walton*, 14 Ves. 322. EXECUTOR BENEFICIALLY INTERESTED.

Evidence in writing not admitted, as an agreement unstamped, does not prevent parol evidence, if otherwise admissible. *Hiers v. Mill*, 13 Ves. 114.

Parol evidence admitted, and prevailed against the presumption, that a debt is satisfied by a legacy of a greater amount; the will also affording an inference in favour of that presumption. *Wallace v. Panfret*, 11 Ves. 542. DEBT, SATISFACTION OF.

Where a testatrix made her will disposing of real and personal property, and signed and sealed it, and a clause of attestation in the common form was subjoined, but to which there was no subscription of witnesses, and where the will was found at her death wrapped in an envelope, on which was written, "I signed and sealed my will to have it ready to be witnessed the first opportunity I could get proper persons:" Held, that the instrument appearing to be incomplete (something more having been intended) was not a good will as to the personal property. But parol evidence admitted as to the circumstances of the papers, and as to the testatrix's intention. *Walker v. Walker*, 1 Mer. 503. WILL, WHAT A SUFFICIENT.

One executor having a legacy for his trouble, parol evidence was admitted on behalf of his co-executrix, an infant, to rebut the presumption for next of kin, and she was held entitled to the residue undisposed of. *Williams v. Jones*, -10 Ves. 77. EXOR. BENEFICIALLY INTERESTED.

Parol evidence is not to be admitted on the ground of part performance, unless the agreement stated appears clearly to be the very same with that which was partly performed. *Lindsay v. Lynch*, 2 Scho. & L. 8. PART PERF.

A, by public advertisement, offers lands to be let for three lives or thirty-one years, and proposals having been made by bond, accepted, an agreement is executed between B and the agent of A, authorized to contract for him, for a lease of the lands, in which agreement the term for which the lease is to be made, is not mentioned. A is not bound to perform this contract, there being no evidence in writing of the term to be demised. There being no reference in the agreement to the advertisement, parol evidence cannot be received to connect the one with the other so as to ascertain the term. *Clinan v. Cooke*, 1 Scho. & L. 22. SPEC. PERF.; AGREEMENT, UNCERTAINTY.

If one written instrument refers to another written instrument, parol evidence may be admitted to shew what was the thing so referred to. *Id.* 33. AGREEMENT.

Parol evidence not admissible to shew the intention of the testator against the construction upon the face of the will. *Cambridge v. Rous*, 8 Ves. 22. WILL, C. OF.

Parol evidence admissible in opposition to specific performance of written agreement upon heads of mistake or surprise, as well as of fraud, and upon such evidence the bill was dismissed. Another bill for specific performance of agreement corrected according to same evidence, contradicted by answer, was also dismissed. *Marg. Townsend v. Stangroom*, 6 Ves. 328. SPEC. PERF.

Parol evidence admissible upon a latent, but not upon a patent ambiguity; to rebut equities grounded

upon presumption, and perhaps to support presumption, to oust an implication, and to explain what is parcel of the premises granted or conveyed. *Druce v. Denton*, 6 Ves. 397.

Provision, by will, increased upon evidence of the testator's request to the executor and residuary legatee, and his promise, upon which the testator refused to make a new will, and said he would leave it to the generosity of the executor. *Barrow v. Greenough*, 3 Ves. 152. TRUST.

Legacy "to Mrs. G." Evidence admitted to prove who was intended. *Abbot v. Masie*, 3 Ves. 148. WILL, C. OF, AMBIGUITY.

Parol evidence not admissible (in support of a bill for specific performance) to prove from conversations before and at the time of signing an agreement for a lease, that the intent of the parties was apparent from the memorandum, though the same was written by the lessee, and the words "clear of all taxes" (which was the purport of the conversation) were omitted in the memorandum. *Rich v. Jackson*, 4 Bro. C. C. 514. Vide judgment in this case fully, 6 Ves. 334. note. SPEC. PERF.

Bill to redeem, after twenty years, upon parol evidence of conversation with the mortgagee, dismissed. *Whiting v. White*, Coop. 1. LENGTH OF TIME; MORTGAGE, REDEMPTION OF.

Latent ambiguity propounded and dissolved by parol, but parol never admitted on patent ambiguity. Bequest to the "son and daughter" of one who has several sons is a latent ambiguity. *Delmare v. Robello*, 1 Ves. J. 415. WILL, C. OF.

Parol evidence not admissible to raise an equity, that a pension granted by the crown to the defendant was in trust for the plaintiff against the oath of the defendant in his answer. *Fordyce v. Willis*, 3 Bro. C. C. 577. TRUST.

Agreement for a lease of a farm referring to a paper containing the terms. Bill for specific performance according to such clauses as had been read to the plaintiff, parol evidence to prove that was refused, and the bill dismissed. Bill being dismissed without costs as a hard case: parties made trustees without their knowledge, and as such being necessary parties to the bill, cannot have costs against plaintiff, but left to their remedy against their principal; otherwise, perhaps, if plaintiff had prevailed, because then those costs might have been given over against other defendants. *Brodie v. St. Paul*, 1 Ves. J. 326. SPEC. PERF.; COSTS.

Gift, by will, of pictures to Lady —, absolutely void, and shall not go to the master, or be supported by parol evidence. *Hunt v. Hart*, 3 Bro. C. C. 311. WILL, MISTAKE.

Parol evidence not admitted to prove an agreement made upon the purchase of an annuity that it should be redeemable. *Hare v. Shearwood*, 1 Ves. J. 241. S. C. 3 Bro. C. C. 168.

On a written agreement, parol evidence admissible in equity in cases of fraud, and where party will admit there was some agreement. *Id.* 243.

Where testator, by his will and codicils, has clearly shewn his intent to exempt his personal estate from his judgment and specialty debts, they shall be a charge on the lands descended in exoneration of those devised; but parol evidence to shew that testator intended to exempt his personal estate, is not admissible. *Reeves v. Newenham*, 2 Ridg. P. C. 11. Vern. & Scriv. 482. WILL, C. OF; EXEMPTION OF PERSONAL ESTATE.

Parol evidence that it was part of the agreement for an annuity that it should be redeemable, although not made part of the contract in writing, refused to be admitted. *Portmore v. Morris*, 2 Bro. C. C. 219. AGREEMENT.

In what manner a written agreement may be af-

sected by parol evidence; and upon what grounds the court proceeds in admitting or rejecting such evidence. It cannot be admitted for the purpose of varying the agreement, although it may for the purpose of raising an equity founded on the agreement, by proof of collateral circumstances. *Davis v. Symonds*, 1 Cox, 402. CONTRACT.

On a question between the real and personal representatives of A (who died testate), whether A had actually agreed in his lifetime for the purchase of an estate, the parol declarations of A in his lifetime are not admissible evidence. *Perchard v. Benson*, 1 Cox, 214.

Parol evidence is admissible to explain the terms of an ambiguous written agreement, but not to extend it. *Stokes v. Moore*, 1 Cox, 219. AGREEMENT.

Parol evidence of the attorney admitted to prove a party to a settlement had notice of a prior incumbrance. *Shelburne v. Inchiquin*, 1 Bro. C. C. 340.

Grant of an annuity; a bill filed to redeem, suggesting that it was part of the agreement that it should be redeemable, but the agreement left out of the deed on the idea that if inserted the transaction would be usurious. Parol evidence offered to this, but not admitted to contradict the deed, not being charged to have been omitted by fraud. *Irisham v. Child*, 1 Bro. C. C. 92. S. C. 2 Dick. 554. See per Lord Eldon, C. on this case, &c. in *M. Town bond v. S. Agroom*, 6 Ves. 332, 3. upon the points in this case. ANNUITY, REDEMPTION OF; DEED, C. OF.

Legacy to a person dead in the lifetime of the testator, lapsed, although the words are to M, his executors, administrators and assigns, and parol evidence inadmissible that the testator knew at the time of making the will that the legatee was dead. *Maybank v. Brooks*, 1 Bro. C. C. 84. LEGACY LAPSED; WILL, C. OF.

Parol evidence admitted to prove mistake of solicitor in settlement. *Rogers v. Felt*, Dick. 291.

Parol evidence may be read in support of legal operation of will. *Lake v. Lake*, id. 236.

Parol evidence admitted to shew that testator intended his wife executrix to take the residue. *Id.* S. C. Amb. 126. WILL, C. OF; WIDOW.

Where a resulting trust is insisted on in opposition to the legal operation of a will, parol evidence may be admitted to rebut the equity. *Id.* 127. WILL, C. OF; RESULTING TRUST.

Parol evidence admitted at law, that though a bond on mortgage was for 150*l.* per annum, yet the agreement was for 100*l.* The bill dismissed as founded on a private agreement, calculated to deceive a material party. It was dismissed, however, without costs. *Pitcairn v. Ogbourne*, 2 Ves. 375.

Parol evidence admitted to prevent fraud. *Id. ib.*

In all mercantile contracts and adventures, parol evidence of usage in such cases allowed. Parol evidence in the above case as to usage and custom on the written articles taken on behalf of the plaintiffs, but not being read by them at the hearing, allowed to be called for and used by the defendants. Parol evidence on one side called for by the other. So at law, though to prove matter in writing. On mercantile contracts, evidence of merchants allowed. *Blunt v. Cumyngs*, id. 331.

Parol evidence admitted to explain a will, where doubtful; not to contradict. As on a legacy to the four children of B, and afterwards another to the children of B; B having then two children by the first husband, four by second, admitted to shew the first legacy was restrained to the last four children: not so of the other legacy. *Hampshire v. Peirce*, 2 Ves. 216. WILL, C. OF.

Parol evidence to prove mistake in agreement.

*Baker v. Paine*, 1 Ves. 467. MISTAKE IN AGREEMENT.

Parol evidence not admitted of agreement between A and B, that the remainder of B (who had joined in mortgaging the estate tail as surety for A) should be resorted to in case of A's personal estate. *Robinson v. Cree*, 1 Ves. 251. TR. FOR LIFE & REM. MAN; AGREEMENT.

A agrees to settle 100*l.* per annum on intended wife; falling sick, devises 100*l.* per annum to her; recovering, marries her, and the settlement is carried into execution: she can take but 100*l.*, and parol evidence admitted to prove the intent. *Mascul v. Mascul*, id. 323. WILL, C. OF; SETTLEMENT, SATISFACTION OF.

Parol evidence may be received in case of uncertain description of a person in a will. *Edge v. Salisbury*, Amb. 71. S. C. 1 Ves. 230. WILL, C. OF.

Devise to his nearest poor relations. Parol evidence admitted to shew that testator knew he had such in Salop, but no farther; not to prove declarations or instructions whom he meant by written words of the will. *Gooding v. Gooding*, 1 Ves. 231. WILL, C. OF, WHO TAKE.

Where there is no devisee named, this is an absolute omission, and cannot be supplied by parol evidence. *Castleden v. Turner*, 3 Atk. 258. WILL, C. OF, MISTAKE IN.

B, by will, gave all his real and personal estate equally among his children, and at the conclusion of his will he directed his executors to lay out a sum not exceeding 300*l.* in putting out defendant, his son, apprentice. B, in his lifetime, laid out 200*l.* in placing his son as a clerk in the navy office, and died without revoking his will. Evidence was allowed to be read of testator's declarations, that this advancement should be an ademption of the legacy. *Rosewell v. Bennets*, id. 77. LEGACY, ADEMPITION OF.

Where, after marriage settlement was prepared but not executed, the parties agreed that the husband should supply a defect of the deed by giving a note, promising that the wife should enjoy the profits of the estate to her separate use, parol evidence cannot be admitted to explain the agreement between the parties; but as to the occasion of signing the note, it may. *Tyrrell v. Hope*, 2 Atk. 560.

A husband in his lifetime gave a bond in trust to secure to his wife 400*l.* in case she survived: parol evidence, to shew it was intended in lieu of dower, and that the wife acknowledged it to be so, cannot be allowed. *Tinney v. Tinney*, 3 Atk. 8.

Where testatrix gave her real and personal estate to plaintiffs, for life, remainder to J in tail, remainder to R in fee, with a few pecuniary legacies, and charged her real estate with the payment, if her personal estate should not be sufficient, and, by her will, declared she gave the rest and residue of her personal estate to lord C's three daughters. Held, that parol evidence of attorney, who drew the will, that he had express directions to give the personal estate to the three daughters of lord C, could not be read, though there were some things in the case which might make a judge wish to admit it. *Ulrick v. Litchfield*, 2 Atk. 372. WILL, C. OF.

Courts of law and equity admit parol evidence in two cases only, to ascertain the person, where there are two persons of the same name, or where there has been a mistake in the name; and in resulting trusts, relating to personal estate, as where an executor has a small legacy, and the next of kin claim the residue, there parol proof is admitted to ascertain who shall have it. S. C. *Id.*

Ld. H. not satisfied with Ld. Cowper's rule of admitting parol evidence in doubtful wills. Mr. Justice Tracy, who assisted Ld. Cowper in *Strode v. Russell*, was at first of same opinion with him, but, on consi-

deration, clear the evidence could not be admitted, and his alteration of judgment had weight in the H. of L. S. C. *Ib.*

In *Selwin v. Brown*, Ld. H. said he was for admitting it. Ld. Talbot, who had a remorse of judgment at the same time, rejected it, but the H. of L. refused it, and affirmed the decree. S. C. *Ib.*

In the cases of satisfaction of legacies, parol declarations have always been admitted. *Skudal v. Jekyll*, 2 Atk. 518. LEGACIES; SATISFACTION.

The court will not allow parol evidence to explain a blank in a will, but where a legatee is nicknamed, or two of the same name, parol evidence will be admitted to explain. *Baylis v. Att. Gen.* 2 Atk. 240. WILL, AMBIGUITY.

Parol evidence may be admitted on the part of the decedant, (there being no written agreement between him and the plaintiff,) to establish a fact, to rebut the equity set up by the bill, the case not being affected by the statute of frauds. *Walker v. Walker*, 2 Atk. 98. STAT. OF FRAUDS.

This court will not add a legacy to a will upon parol proof, though it concerns personal estate only. *Whitton v. Russell*, 1 Atk. 448.

Though there can be no parol declaration of a trust since 29 Car. 2, yet parol evidence is proper in avoidance of fraud. *Hutchins v. Lee*, 1 Atk. 448. TRUST.

Testator gave the residue of his estate to the poor of the parish of K, com. L, but that parish was in com. N; it was set up by the next of kin, that testator did not imagine his residuum would exceed 10*l.*, and had so declared; whereas, it amounted to near 1000*l.* The court thought that parol evidence should be admitted, to help out the description of the parish, but not as to the quantity of the thing given. *Brown v. Langley*, 2 Barn. 118. WILL, C. OF.

A presbyterian, who had three infant daughters bred up that way, and had three brothers presbyterians, makes his will, appointing his brothers, and also a clergyman of the church of England, guardians to his three infant daughters, and dies, having sent his eldest daughter to his next brother; the clergyman gets the two other daughters into his custody, and places them at a boarding school, where they were bred according to the church of England, and brought his bill to have the eldest daughter placed out with the other daughters. The three brothers, that were presbyterians, brought their bill to have the two daughters delivered to them, offering parol evidence that the testator directed and declared he would have his children bred up presbyterians; the court declared no proof out of the will ought to be admitted in the case of a devise of a guardianship, any more than in the case of a devise of land. *Storke v. Storke*, 3 P. W. 51. WILL, C. OF; TESTATORY GUARDIANSHIP.

How far parol evidence is admitted against a deed. *Fitzgerald v. Fauconberge*, Fitzgib. 213. DEED.

Parol evidence cannot be admitted to explain the written words of a will. *Stratton v. Payne*, 3 Bro. P. C. 103. WILL.

One makes a will, and an executor, and gives a legacy of 500*l.* to the executor, but makes no disposition of the surplus; parol evidence of the intention and declaration of the testator, touching the surplus, admitted. *Dk. of Rutland v. Ds. of Rutland*, 2 P. W. 209. EXOR. BENEFICIALLY INTERESTED.

Parol evidence admitted to prove which heir was intended, viz. whether the heir of the mother's mother's side, or the heir of the mother's father's side. *Harris v. Bp. of Lincoln*, 2 P. W. 136. WILL, C. OF.

A devised the residue of his real and personal estate to his executor, in trust to sell the same, or so much thereof as should be needful, for the payment of his debts and legacies. Held, that this was intended as

a beneficial devise to the executor, and parol evidence was admitted to prove such intention. *Docksey v. Docksey*, 3 Bro. P. C. 39. See S. C. 2 Eq. Ab. 506. EXEC. BENEFICIALLY INTERESTED; WILL, C. OF.

Where the executor had a legacy given him, and no disposition made of the surplus, parol evidence was admitted to prove the testator's intention, that the executor should have it. *Duckley v. Littlebury*, 3 Bro. P. C. 43. *Ib.*

An executor has a particular legacy, and yet held entitled to the surplus. *Ld. Granville v. Ds. of Beaufort*, 1 P. W. 114. 2 Vern. 648.

Where the surplus is not disposed of by the will, parol proof may be admitted to shew that the testator intended to give the surplus to his executor, it being only to rebut an equity arising by implication in favour of the next of kin. *Id. ib.* EXORS. BENEFICIALLY INTERESTED.

Collateral proof may be allowed to make certain a person or thing described in a will. *Caldicott v. Hodgson*, 2 Vern. 593. WILL, C. OF.

Parol proof allowed as to a man's intention in a will where the question was, whether a legacy should go in satisfaction of a debt due from the testator to the legatee. *Cuthbert v. Peacock*, 2 Vern. 593. *Ib.*

Parol evidence is admissible on the part of an advanced son or his heir, to rebut a claim of trust, though improper against the legal operation of a deed. *Reddington v. Reddington*, 3 Ridgw. P. C. 182. *Taylor v. Taylor*, 1 Atk. 387. *Lamplugh v. Lamplugh*, 1 P. W. 111. S. P.

Parol evidence admitted to ascertain the person the testator intended should take a legacy. *Hodgson v. Hlitch*, Prec. Chan. 229. WILL, C. OF, WHO TAKE.

One by will subjects his real estate to pay his debts, and makes his wife executrix; parol evidence admitted to prove testator's declaration, that his executrix should have his personal estate, exempt from his debts. *Gainsborough v. Gainsborough*, 2 Vern. 252. WILL, C. OF.

One by will makes A, B, and C, executors in trust, and gives them a legacy of 20*l.* a-piece for a remembrance, above their charges; parol proof admitted that this was in trust for the wife only. *Pring v. Pring*, 2 Vern. 99. *Ib.*

Devise of land not to be explained by parol proof, touching the declaration of the testator, or the instrument given by testator for the making of his will; parol proofs shall be admitted to explain a surrender of copyhold land, to shew a mistake either in the land or uses. *Towers v. Moor*, 2 Vern. 98. WILL, C. OF.

Where the testator in his will has clearly shewn his intent to exempt his personal estate from his judgment and specialty debts, the court will charge them on the lands descended, in exoneration of those devised, but parol evidence, to shew that the testator intended to exempt his personal estate, is not sufficient. *Reres v. Newenham*, 2 Ridgw. P. C. 11. WILL, C. OF; EXEMPTION OF PERSONAL ESTATE.

##### 5. Onus Probandi.

It is a presumption of law, that child born of married woman whose husband is within four seas, is legitimate, unless there is irresistible evidence against possibility of sexual intercourse having taken place. *Head v. Head*, 1 S. & S. 150. S. C. 1 T. & R. 138. HUSB. & WIFE; ACCESS; PRESUMPTION OF LAW.

On an enquiry into very remote transactions, accounts kept by a deceased party at the time, directed to be taken as *prima facie* evidence; throwing on the other side the onus of impeaching them. *Chalmer v. Bradley*, 1 Jac. & W. 66. LENGTH OF TIME; ONUS PROBANDI.

Where a vicar succeeds in establishing a general right to all tithes, except those of corn and grain,

throughout a parish, it requires very strong evidence to show that an impropiator of a particular district, who claims under a grant, limiting his title to the excepted articles, is entitled to the tithes of any other thing. *Williamson v. Ld. Emsdale*, Dan. 171. TITHES.

A bond from the owner of an estate, charged to the person entitled to the charge, who signed a receipt for the amount, is not a substitution for the charge, but merely an additional security, and the estate not thereby released; it is not incumbent on the creditor to prove, that it was not the intention of the parties to this transaction that the bond should be a substitution of the charge, but it is on the owner of the estate to make out, that the estate is discharged. *Saunders v. Leslie*, 2 Ball & B. 599. RELEASE; CHARGE ON ESTATE.

Distinction between a charge of usury in bankruptcy, and in courts of law and equity; where it must be established by legal evidence, or in equity by admission, with an offer to pay the real debt. In bankruptcy the proof is imposed upon the creditor; and if it fails, the debt is wholly expunged. *Exp. Scrivener*, 3 V. & B. 14. BANKRU.; USURY.

A plea of purchaser without notice is a bar to the discovery, as well as the relief; but not insisted on by the defendant, he must answer, and confess the notice, or the plaintiff may except to the answer, but if he does not except, the affirmative of proving notice will be on him. *Comme semble. Eyre v. Dolphin*, 1 Ball & B. 303. PL. PLA.; PL. DISCOVERY.

Where there is *prima facie* evidence of any right existing in any person, the *onus probandi* is always upon the person calling such right in question. *Bunbury Peerage*, 1 S. & S. 155.

Insanity having been once established, proof of recovery is upon the other party; otherwise the insanity must be established by proof applying to the particular date. *White v. Wilson*, 13 Ves. 88.

Where an instrument is shown to be false, it lies upon the party claiming benefit under it to support it. *Watt v. Grove*, 2 Scho. & L. 502.

General lunacy being established, the proof is thrown upon the party alleging a lucid interval, and must establish, beyond a mere cessation of violent symptoms, a restoration of mind sufficiently to enable the party soundly to judge of the act. *Hall v. Warren*, 9 Ves. 611. LUNACY, LUCID INTERVAL.

Two legacies by same instrument; to prove two were intended, *onus* is on legatee, but if by separate instruments, on heir to disprove. *Hooley v. Hatton*, Dick. 462.

After a long enjoyment of a water course running to a house and garden, through the ground of another, it shall be presumed the owner of the house has a right to the water course unless the other party can shew a special license, or an agreement to restrain it in point of time. *Finch v. Resbridge*, 2 Vern. 390. LENGTH OF POSSESSION.

#### 6. Entry of, as read.

Costs of documentary evidence not read, nor entered as read, were disallowed. *Stuart v. Greenall*, 1 M'Clel. 705. S. C. 13 Price, 755. PR. COSTS.

In a suit for an account against an executor, who admits that he has received assets, evidence tending to charge him with particular sums as items of the account, and to show that he has received more than his answer admits, cannot be used at the original hearing, nor entered as read. *Law v. Hunter*, 1 Russ. 100. PR. ACCOUNT.

Upon a bill for an account, evidence entered into by the defendant to prove items of his discharge, cannot be entered as read. *Walker v. Woodward*, 1 Russ. 107. *Id.*

Upon decree taken by default of defendant at hear-

ing the evidence, is not entered as read. *Stubbs v.*, 10 Ves. 30. PR. DECREE BY DEFAULT.

Evidence read or agreed to be considered, is entered in decrees as read at hearing, and where it does not appear by register's minutes, that any evidence was read at hearing, court ought not, upon subsequent application, to make order that evidence be entered as read. *El. Bute v. Eden*, 1 Bro. P. C. 466. See also 1 Newl. Pr. 499.

#### 7. Further evidence, when admitted after publication, or on appeal, rehearing, &c.

Master shall not receive further evidence after issuing warrant on preparing his report. 67th General Ord. 3d April, 1828. EVID. BEFORE MASTER.

New evidence admitted on a rehearing, and a petition of rehearing permitted to be amended, to state the discovery of such new evidence. *Wylde v. Ward*, 2 G. & J. 381. PR. REHEARING; PR. PETITION OF REHEARING, AMENDMENT OF.

On a rehearing, evidence in the cause may be read, which was not read at the original hearing. *Williams v. Goodchild*, 2 Russ. 91. PR. REHEARING.

After great lapse of time, and the deaths of the parties, from the residence abroad of the defendant, and upon an affidavit by him and his solicitor, that they had not discovered deeds material for his defence until after issue joined, leave was given to file a supplemental bill, put in them issue, and they were admitted in evidence upon a rehearing. *Barrington v. O'Brien*, 2 Ball & B. 140. SUPPLEMENTAL BILL IN NATURE OF REVIEW; LENGTH OF TIME; REHEARING.

In giving leave to file supplemental bills on the grounds of evidence newly discovered, diligence to discover them forms an ingredient in the mind of the court. *Id.* 142. SUPPLEMENTAL BILL IN THE NATURE OF REVIEW.

On appeals and rehearsings, additional evidence permitted in some instances. If the rule is so, it must be subject to costs. *White v. Fussell*, 1 V. & B. 153. PR. APPEAL; PR. REHEARING.

Evidence not to be received by master after he has settled his report. *Thompson v. Lambie*, 7 Ves. 587. PR. MASTER'S REPORT.

The court allowed the defendant, after publication, to prove an old paper found in the parish registry. *Clarke v. Jennings*, 1 Anst. 173. PR. PUBLICATION.

After verdict on issue directed, new trial on account of having further evidence to produce, refused; there being no fraud or surprise, but the evidence having been kept back by the party applying, though the court was much dissatisfied with the verdict. *Standen v. Edwards*, 1 Ves. J. 133.

If a defendant fail in proving a material fact at law, of which he afterwards obtains a discovery from the adverse party, in equity it is a ground for granting an injunction, though he would not be permitted to prove the fact by any other witnesses, whom he could have examined at law. *Hankey v. Vernon*, 2 Cox, 12. INJUNC.

On the hearing of all appeals, this principle universally prevails, that no evidence can be received which was not laid before the court below, nor can any evidence which was received below be objected to alone, unless the admission of improper evidence be among the points of the appeal. *Eglen v. El. Bute*, 1 Bro. P. C. 465. PR. APPEAL.

Where it does not appear by the register's minutes, that any evidence was read at the hearing of the cause, the court ought not upon a subsequent application to make an order, that the evidence should be entered as read. *Id. ib.*

On a rehearing, depositions taken on part of defendant may be read, though not read at original hearing. *Cunyngham v. Cunyngham*, Amb. 90. S. C. Dick. 145. PR. REHEARING.

On arguing demurrers to a bill of review, what appears on the face of the decree can be read only; but after a demurrer overruled, a plaintiff may read any evidence as at a rehearing. *Cotterall v. Purchase*, 1 Atk. 290. PR. BILL OF REVIEW; PR. DEMURRER.

On an appeal from the rolls to Ld. Ch. the cause is open, and the party is at liberty to read new proof, and offer what he can against the decree. *Wright v. Pilling*, Prec. Chan. 496. PR. APPEAL FROM ROLLS.

No evidence can be given on hearing of appeal in H. of L., which was not read or insisted on in court below. *Bush v. Moore*, 3 Bro. P. C. 546. PR. APPEAL.

No proofs to be read in the H. of L. which were not made use of in chancery. *Bulton v. Price*, Prec. Chan. 212. APPEAL TO LORDS.

In a bill brought to have the benefit of a former decree, plaintiff cannot examine witnesses, much less the same witnesses to the matters in issue in the former cause; but on such a bill the court may examine the justice of the former decree, but then it must be upon the proofs taken in the cause wherein that decree is made. *Johnson v. Northey*, 2 Vern. 409. Pre. Ch. 134. S. C. PR. BILL TO HAVE BENEFIT OF FORMER DECREE.

One having been ordered to prove a deed *in voce*, at the hearing not allowed to prove the witnesses hands, they being dead, but had leave to examine in the office to prove the deed, though publication was passed. *Blaxton v. Drewitt*, Prec. Chan. 64. DEEDS; PR. PUBLICATION.

#### 8. Evidence before master.

Affidavits read in court may be used before master. 65th General Ord. 3d April, 1828.

No affidavit in reply shall be read before the master, except as to new matter. 66th Id. AFFIDAVIT IN REPLY.

Master shall not receive further evidence after issuing the warrant, on preparing his report. 67th Id. FURTHER EVIDENCE.

If party in cause examine another party before master, this examination may be read by master as evidence upon matter referred to him, though the party who examined declined to use it before master. *Gilbert v. Wetherell*, 2 S. & S. 259. EXAMINATION.

On a reference of a matter in bankruptcy to the master, affidavits which might have been read at the hearing of the petition in court, may be received in evidence by him. *Exp. Jackson*, 1 Rose, 45. PR. REFERENCE TO MASTER.

Evidence in the cause, though not read at the hearing, may be received by the master. Witnesses examined in the cause, cannot be examined before master without leave of the court, but other persons may, and to the same points. *Smith v. Atkins*, 11 Ves. 564. PR. EXAMINATION BEFORE MASTER.

Plaintiff allowed to prove debt before master, though party. *Newman v. Norris*, Dick. 259.

The court will not make an order upon a master to admit depositions, taken in a former cause between the same parties to be read, as it is putting parties to an unnecessary expence, the proper course being to take exceptions to the report, if the master should be mistaken. *Anon.* 3 Atk. 524. PR. ORDER.

#### 9. At law.

Commission to examine witnesses abroad before answer, the object of the suit being merely to obtain evidence for an action. *Noble v. Garland*, 19 Ves. 372. PR. COMMISSION TO EXAMINE ABROAD.

Although a person has been improperly examined before commissioners of bankrupt, upon a subject unconnected with the interest of the bankrupt's estate, with a view to procure evidence in an action depend-

ing against him, the examination may be used as evidence by the plaintiff at the trial of the action, and the judge at *nisi prius* cannot inquire into the abuse of the authority of the great seal, by which the examination was obtained. The remedy of a party, so improperly examined, is by an application to the Ld. Ch. to have the examination taken off the file and cancelled. *Stockfleth v. De Tastet*, 4 Camp. 10. BANKCY. EXAMINATION.

Order to read, on trial directed at law, depositions of witnesses, proved by affidavit from age and infirmity incapable of attending without great danger of death, with liberty to examine them on interrogatories, and the depositions of such other persons as should be proved at the trial to be dead, or unable to attend; such order, whether to be made in equity, or left to the judge at law, depending on a sound discretion. *Corbett v. Corbett*, IV. & B. 335. PR. ISSUE AT LAW.

Witness being proved unable to attend a trial, ancillary to a suit in equity, the depositions may be read without an order, but not without producing the bill, answer, and all proceedings. *Id. ib.*

Commission of bankruptcy superseded and an action brought, the Ld. Ch. ordered the commission and proceeding to be delivered by the solicitor to the secretary, and by him to the associate, to be produced on the trial, with liberty to inspect and copy; such an order properly refused by a judge. *Exp. Warren*, 19 Ves. 162. BANKCY. PRODUCTION OF PROCEEDINGS, &c. ON TRIAL AT LAW; PR. EVIDENCE.

Proceedings in bankruptcy ordered to be deposited in the office, sometimes with a view to a criminal prosecution, as for a conspiracy; so if the bond is assigned, which remedy as being limited to the penalty, is less beneficial than an action on the cause. *Id. ib.*

To warrant an application to produce on the trial of a civil action a record of the court, the court may require sufficient ground to be laid; particularly as the office copy might be evidence. *Stratford v. Greene*, 1 Ball & B. 296. PR. RECORD OF COURT.

Order, that depositions shall be read at the trial of an issue, if the witnesses shall be then dead, or proved to be in such a state of health as not to be capable of attending. Without such order to make the depositions evidence at law, the whole record must be read. *Palmer v. Lat. Aylesbury*, 15 Ves. 176. ISSUE AT LAW; PR. ORDER AS TO READING DEPOSITIONS.

Where an answer is required as evidence upon a trial at law, the court, except in a criminal case, does not permit the record itself to go but an office copy, unless proof of the signature is necessary: not granted where the action is by a stranger unconnected with the suit in equity. *Jarvis v. White*, 8 Ves. 313. ANSWER; STRANGER.

Proceedings under a commission of bankruptcy in the secretary's office, not permitted to be used as evidence in actions by strangers unconnected with the commission. *Id.* 314. STRANGER.

On an issue from chancery, original answer not sent down to the trial, whether between same parties or not, till after refusal of the office copy as evidence. *Anon.* 1 Ves. J. 152. PR. PRODUCTION OF DEEDS.

An application to read the deposition of a witness on the trial of an issue at law, directed by the court of chancery, on the ground of the witness being so aged and infirm, as to be unable to attend in person, must be made to the judge at the trial, and not to the court which directs the issue. *Jones v. Jones*, 1 Cox, 184. DEPOSITIONS DE BENESESE; ISSUE AT LAW.

B, the master of ship, enters into a charter party on behalf of C his owner, with D. On bill by C against D for satisfaction of demurrage and other damages, B is examined as a witness; at hearing, the bill is retained, with liberty to C to bring his action at law. This action was permitted to be brought in name of B after his death, and though he was the

nominal plaintiff therein, yet his deposition in the equity suit was allowed to be read in evidence on the trial of the action. *Downes v. Nevell*, 3 Bro. P. C. 651. PR. EVID. WITNESS, COMPETENCY OF.

Where a person is sick, or otherwise not amenable to the process of a court of law, his deposition made here may be read at law between the same parties. *Fry v. Wood*, 1 Atk. 445.

Defendants answer directed to be read as evidence at a trial at law. *Horton v. Rhodes*, 2 Vern. 555. ISSUE AT LAW; PR. ANSWER.

The reason on which the rule was established, "that a copy of the whole judgment, and not a partial extract of it, must be produced to the jury," applies equally to proceedings in equity, and indeed every other written instrument. *Brockman's case*, Gilb. Ev. 51.

Depositions taken in chancery *de bene esse*, are good evidence at law where witnesses die before answer. *Howard v. Tremaine*, 1 Salk. 276.

#### 10. Exhibits.

There need be no notice of or order to prove exhibits for reading any deeds or evidence that do not require proof: and all exhibits to be proved at hearing must be inserted in the order, and no note of them to be given over. Ord. Exch. 2 Fowl. 189. As to what records or documents may be read as exhibits without order, see *id.* 188.

No copies of records or proceedings in other courts to be entered as read on hearings in chancery by the register, unless the said copies shall be first proved in open court as exhibits on such hearings, in consequence of an order made in that behalf. Ord. Ch. Irel. 27th June, 1800. O'Keefe's Ord. 89.

In all cases where defendant is required by the bill to view exhibits before he puts in his answer, if he answers in town, he must give twelve hours' notice to plaintiff's clerk of the time he intends to view the same. Ord. Ch. Irel. O'Keefe's Ord. 62.

A witness, who has been examined at the hearing, only to prove exhibits, may be examined before the master on interrogatories to prove other exhibits, without a special order. *Courtney v. Hoskins*, 2 Russ. 253.

Court never orders clerk in court, with whom exhibits have been deposited under usual order, to deliver them up to any other person, for the purpose of their being produced in court, or at the assizes, without consent of all parties, and payment of clerk in court's fees. *Harris v. Bodenham*, 1 S. & S. 283. PR. CLERK IN COURT; PR. DELIVERY OF PAPERS OUT OF COURT.

Though a cause has been set down for rehearing, the court will, on motion, give leave to exhibit interrogatories to prove exhibits not before the court on the original hearing, on an affidavit that they have come to plaintiff's knowledge since, and that he did not know of their existence when the cause was heard. *Williamson v. Hutton*, 9 Price, 194.

In a suit by rector for tithes, a book, in which the collector of a former rector had kept accounts of the receipts of tithes, cannot be proved *viva voce*, as, besides the handwriting, it would be necessary to prove that it came out of the proper custody, and that the writer was the collector of the tithes. *Lake v. Skinner*, 1 J. & W. 9.

Leave granted after publication for a commission to prove an old paper-writing material in the cause, it being in the nature of an exhibit, though not actually such. *Clarke v. Jennings*, 1 Anst. 173.

In proving exhibits *viva voce*, the rule is invariable, that the party can only examine the witnesses to the handwritings: nothing, therefore, can be used as an exhibit proved *viva voce*, in respect of which the said party would have had a right to cross-examine. *El. Pomfret v. Ld. Windsor*, 2 Ves. 472.

It seems, however, that the benefit of such instruments on the one side, and the right to controvert on the other, is a proper subject of adjustment, either in the master's office, under a commission by virtue of his certificate, or under a trial at law. *Id.* *ib.*

The court will allow the proving of exhibits *viva voce* at the hearing, but not to let in other examinations, and this only at the application of the party who is to make use of the exhibits; but no instance where it is allowed at the application of the contrary party. *Graves v. Budget*, 1 Atk. 444.

Motion by defendant for a reference to the deputy remembrancer to appoint a proper person to prove the English translations of the exhibits proved, to be true translations, ordered accordingly; defendant to prove them before a baron, giving two days' notice. *Henriques v. Henriques*, 2 Fowl. 190.

Defendant proved a deed in the cause, and referred to it in his deposition. Plaintiff cannot compel him to produce the deed at the hearing, the reference thereto not making it part of his deposition. *Hodson v. E. Warrington*, 3 P. W. 34.

Exhibits cannot be inspected before hearing. *Davers v. Davers*, 2 Stra. 764. S. C. 2 P. W. 410.

A cancelled bond for performance of articles was made an exhibit to prove the execution of the articles, the limitation being recited in the condition of the bond. *Anon.* Gilb. Eq. Rep. 183.

The court will not grant an order to prove exhibits at the hearing of exceptions, because you can offer nothing at the hearing that was not before the master. *Anon.* 1 Mcs. 191. PR. EXCEPTIONS, HEARING OF.

An order may be obtained to prove exhibits *viva voce* at the hearing, but the witnesses can be examined to the execution only. *Ward v. Fyles*, Mos. 381.

But no such order can be made for proving a will, because more than the execution must be proved. *Harris v. Ingledew*, 3 P. W. 93. *Eade v. Langood*, 1 Atk. 203. WILL, PROOF OF.

Carrier ordered to deliver exhibits, which had been examined to under a commission for the examination of witnesses in the country. *Elliott v. Williams*, 1 Dick. 325.

The refusing a party liberty to prove exhibits *viva voce* at the hearing of a cause in a court of equity, is irregular and unprecedented. *Edgworth v. Swift*, 4 Bro. P. C. 658.

Where an order was obtained to prove a deed *viva voce* at the hearing, and all the witnesses to the deed were dead, the court refused to allow a witness to prove the handwriting of the deceased witnesses, but put off the cause, and gave the party liberty to examine in the office to prove the deed. *Blaxton v. Drevit*, Pre. Ch. 64.

On a suggestion that exhibits given in before commissioners on an examination of witnesses, had been since altered and interlined, the court granted a commission to examine the point. *Richardson v. Lowther*, 1 Ch. Ca. 273.

#### 11. Affidavits.

See also BANKCY. XVI. 3. (b) (3); XVII. 4. PR. BILL, 2. (i).—PR. ATTACHMENT, 3.

- (a) General orders concerning.
- (b) Their incidents generally.
- (c) Filing and swearing generally.
- (d) Form of.
- (e) In support of injunctions.
- (f) In support of bills of interpleader.
- (g) In support of motions.
- (h) On application to sue in forma pauperis.
- (i) Of service.

- (j) *On application for substituted service.*
- (k) *On obtaining writ ne exeat regno.*
- (l) *On application for commission to examine witnesses.*
- (m) *When necessary in other matters.*
- (n) *When read against answer.*
- (o) *Where received, and read as evidence generally.*
- (p) *Affidavits in reply.*

(a) *General orders concerning.*

Not to be taken, &c., by masters touching proof of title, merits, &c. Beame's Ord. 33.

Affidavit against affidavit not allowed. *Id.* 34.

Affidavit, before used in court, to be filed and registered in affidavit office. *Id.* 56. 64. 142. 148.

Exceptions thereto. *Id.* 56. 126. 430.

No copy of to be made or subscribed but by sworn registrar of affidavits or his depositions. *Id.* 56.

Not first filed and registered, not to be used in court. *Id.* 57. 64. 142.

Nor to be the ground of any process. *Id.* 57. 64.

Not fairly registered, &c., not to be registered, nor used in court. *Id.* 65.

Taken before masters to be filed with register of affidavits before used. *Id.* 65. 149.

Fees for filing, registering, copying, signing, and certifying. *Id.* 93.

Concerning lunatics to be filed with clerk of custodians. *Id.* 126.

The master's fees for affidavits taken in their office. *Id.* 153.

What an affidavit of service of subpoena is to contain. *Id.* 169.

How affidavits are to be taken before a master. *Id.* 209.

What an affidavit of material witnesses to examine must contain. *Id.* 265.

Affidavits taken by masters are to be attested by them, and filed before the report made; otherwise, report bad. *Id.* 307.

Fees of register of affidavit according to order, 28th Nov. 1743. *Id.* 382.

All papers annexed to an affidavit are to be considered as parts thereof, and only one fee to be paid for the same, and for register's hand. *Id.* 384.

(b) *Their incidents generally.*

An affidavit made in support of a state of facts may be referred for scandal, but not for impertinence, by a party who has filed in support of a counter state of facts, an affidavit which appears to be an answer to the former. *In re Burton*, 1 Russ. 380. PR. REFERENCE FOR SCANDAL; PR. REFERENCE FOR IMPERTINENCE.

Affidavit referred for scandal. *Johnson v. Leighton*, Dick. 112.

Also for impertinence. *Philips v. Muilman*, Dick. 113.

(c) *Filing and swearing generally.*

Affidavits sworn before a solicitor in a cause will not be read. Gen. Order, 11 July, 1821. 9 Price, 478.

Affidavits to be used on special applications are to be filed on clear day before application made, and where notice of motion is necessary, the filing of the affidavits is to be mentioned at the foot of the notice. Gen. Order, 10 Feb. 1821. 9 Price, 88. PR. MOTION, NOTICE OF.

On a motion to discharge an order made by the vice chancellor, affidavit may be read, sworn after the order was made, and stating facts which were not before the vice chancellor. *Const v. Barr*, 2 Russ. 161. PR. MOTION TO DISCHARGE ORDER.

On motion for injunction, affidavits filed before answer may be read, where plaintiff, by saving notice of motion till future day, enabled defendant to file answer before motion made. *Glasington v. Thwaites*, 1 S. & S. 134. PR. ANSWER; PR. NOTICE; PR. INJUNC., MOTION FOR AFFRS. IN SUPPORT.

*Regula Generalis* as to swearing affidavits of illiterate persons. T. T. 1 G. 4. 8 Price, 501. H. T. 40 G. 3. *Id.* 504.

Affidavit, sworn before a bason of the exchequer in Scotland, admitted to be read. *Braham v. Bowes*, 1 Jac. & W. 296.

On a motion after the answer for an injunction to stay waste, affidavits filed subsequently to the answer cannot be read. *Smythe v. Smythe*, 1 Swan. 252. PR. INJUNC. AGAINST WASTE.

Affidavits in future were directed not to be sworn before the attorneys in the cause. *Smith v. Woodroffe*, 6 Price, 230.

Affidavits on petitions in bankruptcy may be filed after petition day, but petition must stand over to give time to answer them. *Exp. Sparrow*, 2 Mad. 184.

Affidavit in support of injunction bill will be ordered to be filed, (though not usual to file such affidavits) if defendant require it for the purpose of being afforded an opportunity to answer it. *Scott v. Becher*, 4 Price, Exch. 346. PR. INJUNC., AFFIDAVIT IN SUPPORT OF.

No instance of this court taking notice of an affidavit before a justice of peace in Scotland, though the courts of late have acted upon affidavits before judges of the superior courts. *Hyde v. Whitfield*, 19 Ves. 345. FOREIGN COURTS.

Where affidavits in support of a petition were sworn before the solicitor in the cause, he was ordered to pay the costs. *In re Hogan*, 3 Atk. 813. SOL. & CLIENT.

All parties to account, &c.; plaintiff residing at Amsterdam, allowed to swear affidavit before notary public there, according to law of Holland. *Chicot v. Lequesne*, Dick. 150.

If affidavit whereon attachment is founded, be filed before return thereof, held good. *Read v. Ward*, Dick. 76.

Affidavit before master extraordinary in Ireland read in court, but not affidavit from plantations, unless under seal of island. *Annesley v. El. Anglesey*, Dick. 90. *Johnson v. Smith*, Dick. 592.

Where the court directs that affidavits shall be filed on both sides by a certain day, and some of the affidavits on one side happen not to be filed on that day, it is the established rule of the court not to enlarge the order farther, that the other side may be required to give an answer to those affidavits. *Burton v. Maloon*, Barn. 401.

Affidavits taken in London, or within twenty miles thereof, must be sworn before a master; and if taken in the country, more than twenty miles from London, before a master extraordinary, who must state the town and county where he takes them. PRAC. REG. 7.

(d) *Form of.*

No office copy of affidavit is to be received or read, unless signed by some accredited person as having been examined. Gen. Ord. 23 May, 1821. 9 Pri. 298.

In affidavit in a cause, plaintiff need not state his residence. *Crockett v. Bishton*, 2 Mad. 446.

Practice formerly was to permit the amendment of an answer in case of mistake; now a supplemental answer is put in. The affidavit must state, that defendant, when he put in his answer, did not know the circumstances upon which he applies, or any other circumstances on which he ought to have stated the fact otherwise. *Wells v. Wood*, 19 Ves. 401. PR. ANSWER, AMENDMENT; PR. SUPPLEMENTAL ANSWER.



Quære, whether affidavit of notice must state positively that the person served acts as clerk in court, or whether upon information and belief only, is sufficient. *Macaulay v. Collier*, 1 Ves. J. 141.

Though defendant had been abroad more than two years, yet, on affidavit, that plaintiff believed defendant stayed away to elude justice, ordered to appear under 5 Geo. 2. c. 25. *Mason v. Pelier*, Dick. 401. *Sed quære*. See note, *Id.* Wyatt's edition.

Substance of affidavit whereon process is founded against defendant absconding under 5 Geo. 2. *Godard v. Pritchard*, Dick. 662.

The not swearing expressly to words spoken, but adding to that effect, is a proper caution in an affidavit. *Ayliffe v. Murray*, 2 Atk. 60.

(c) *In support of injunctions.*

Affidavit made in support of injunctions to stay waste are to be filed, and an office copy produced with the certificate of the bill being filed. General Ord. 10 Feb. 1821. 2 Price, 88.

Ex parte application for special injunction to stay waste, should be promptly after knowledge of such waste; and affidavit in support should state when party came first to the knowledge of such waste. *Calvert v. Grey*, before V. C. 22 Feb. 1830. (Compiler.)

A defendant of unsound mind, answering by a guardian, unable to give a full discovery on a motion to dissolve an injunction. Affidavits cannot be read by the plaintiff to prove facts that might be given in evidence at law. *Barrett v. Tickell*, 1 Jac. 155. PR. INJON. TO STAY TRIAL; LUNATIC.

Exception to the rule against reading affidavits in support of the common injunction extends only to documents of which the defendant is ignorant, not to facts and circumstances. *Id.* 157.

On motion for injunction, affidavits filed before answer may be read, where plaintiff, by saving notice of motion till future day, enabled defendant to file answer before motion read. *Glasington v. Thwaites*, 1 S. & S. 134. PR. ANSWER; PR. NOTICE.

Affidavit in support of injunction bill will be ordered to be filed (though not usual to file such affidavits), if defendant require it for the purpose of being afforded an opportunity of answering it. *Id. ib.* PR. FILING AFFIDAVIT.

If material fact be charged in injunction bill, and deposed to in affidavit in support of it, not positively, but as plaintiff has reason to know, and that he believes it to be true, and fact is one which, if true, lies only within knowledge of defendant, and who may, if not true, deny it, the court will grant injunction if not denied by him. *Scott v. Becher*, 4 Price, 340. PL. ANSWER.

In order to obtain an injunction against violation of a patent, the party must, at the time of applying, swear as to his belief that he is the original inventor. *Hill v. Thompson*, 3 Mer. 622.

Affidavit in support of injunction admitted after answer to prove an allegation in the bill as to acts of the parties, neither admitted or decided by the answer; but such affidavit not to be allowed in contradiction to the answer. *Morgan v. Goode*, 3 Mer. 10.

Letters set forth by the bill, and not admitted by the answer, allowed to be verified by affidavit in support of an injunction. *Taggart v. Hewlett*, 1 Mer. 499.

Injunction, until answer or further order, to restrain the publication of a work as the plaintiff's, upon affidavit by the plaintiff's agents (the plaintiff himself being abroad), of circumstances making it highly probable that it was not the plaintiff's work; and the defendant refusing to swear as to his belief that it was so. *Id. Byron v. Johnston*, 2 Mer. 29.

Court will not aid of motion to prevent partner receiving or creating debts, and, for appointing receiver, permit plaintiff to use affidavit made and filed after coming in of answer; though in a case analogous with irreparable waste such affidavit made, &c. before answer might be used. *Jawson v. Morgan*, 1 Price, 303. PR. AFFIDAVIT WHEN READ AGAINST ANSWER.

In injunction cases, no affidavit as to the title after answer. *Platt v. Button*, 19 Ves. 447. PR. EVID. AGAINST ANSWER; AFFIDAVIT OF TITLE.

In an injunction cause, affidavits admitted on motion against the answer not on the title, but on questions of fact, as in the instance of waste, &c., and the original affidavit, where the defendant having obtained time to file affidavits, instead of that puts in an answer. *Morphett v. Jones*, 19 Ves. 350. PR. EVID. AGAINST ANSWER.

Injunction granted to restrain an executor claiming under a will, and also by gift from testatrix, in lifetime, from selling, upon affidavit of undue influence. *Edmunds v. Bird*, 1 V. & B. 542. EXOR.; FRAUD; UNDUE INFLUENCE.

Injunction to restrain trial, on affidavit that plaintiff cannot safely defend the action without discovery, and that it will give a good and effectual defence, not discharged upon the answer of one defendant only. *White v. Steinwachs*, 19 Ves. 83. PR. INJUNCTION, DISSOLUTION OF; PR. ANSWER.

The truth of affidavit, to stay trial, that the discovery will be material, is not questionable; nor the effect of the discovery considered, unless its immateriality is clear on the face of the bill. *Id.* 84.

Affidavits admitted on motion after answer, for an injunction and receiver in the case of partnership, by analogy to waste. *Peacock v. Peacock*, 16 Ves. 49. PR. EVIDENCE AGAINST ANSWER.

Injunction extended to stay trial on affidavit that the plaintiff is advised, and believes that he cannot safely proceed to trial until the answer; but it has been since determined, that the affidavit must state his belief that the answer will give discovery material to his defence. *Partington v. Hobson*, 16 Ves. 220.

To extend an injunction to stay trial, the affidavit must state belief, not merely that plaintiff cannot safely go to trial, but that the answer will furnish discovery material to his defence in the action. *Appleyard v. Seton*, *id.* 223.

To obtain an injunction against a tenant to stay waste in cutting turf, the affidavit must state that the turf was cut for the purposes of sale, the tenant being entitled to firebote. *De Salis v. Crossan*, 1 Ball & B. 188.

In the case of waste it is not sufficient to swear to information of the intention. The affidavit must go either to an act or threat of waste. *Hannay v. M'Entire*, 11 Ves. 54.

Affidavits cannot be read in support of an injunction to restrain the negotiation of bills of exchange. *Berkeley v. Brymer*, 9 Ves. 355. PR. INJUNCTION TO STOP BILL OF EXCHANGE.

In a motion for an injunction, the plaintiff cannot read affidavits to contradict the answer. *Sommerville v. Buckler*, 3 Aust. 658. EVID. AGST. ANSWER.

In support of motion for injunction on interpleading bill, affidavits of the facts may be read, as it is exactly on the footing of waste. Collusion not to be presumed against the affidavit of the plaintiff in interpleading bill; nor can counter affidavit prevail against it. *Langston v. Boulston*, 2 Ves. J. 101. PR. INTERPLEADER.

Injunction bill charging fraud in obtaining verdict, affidavits contradicting the answer, read in support of the injunction on the merits. *Isaac v. Humpage*, 1 Ves. J. 427. S. C. 3 Bro. C. C. 463. But this

case is no authority; see 9 Ves. 356. PR. EVID.; AFFIDAVIT READ AGAINST ANSWER.

Affidavit for an injunction to stay trial need not be particular as to the discovery expected. *Farrar v. Lewis*, 2 Dick. 729.

Affidavit to the equity of an injunction bill, where the plaintiff at law is abroad, must accompany the motion for the subpoena. *Delaney v. Wallis*, 3 Bro. C. C. 12.

Affidavit of the merits must accompany motion for an injunction to stay proceedings where plaintiff at law is abroad, but need not accompany the application that service of the subpoena upon the attorney may be good service. *Burke v. Vickers*, il. 24.

On an application to extend the usual injunction to stay trial, an affidavit that the plaintiff had been advised by his counsel, and verily believed that he could not safely proceed at law without a discovery from the defendant of the several matters contained in the bill is sufficient. *Hartley v. Hobson*, 2 Cox, 117.

In order to obtain an injunction to stay waste, the affidavit must set out a particular title. *Whitelegg v. Whitelegg*, 1 Bro. C. C. 57.

In case of an injunction to stay waste, the court will, on the answer coming in, use its discretion whether it is to be continued till the hearing or not; and, in such cases, affidavits may be read. *Pater v. Chapman*, Ambl. 99. S. C. Dick. 146.

Affidavits allowed to be read for a patentee of a new invention, upon a motion to dissolve an injunction on the coming in of the answer. *Gibbs v. Cole*, 3 P. W. 255. S. C. Dick. 64.

Where an affidavit was made in order to obtain an injunction to restrain waste, the court thought the affidavit certain enough by reason of the reference it had to the bill. *Bradly v. Stracky*, Barn. 399.

(f) *In support of bills of interpleader.*

Affidavit, with interpleading bill, is conclusive of fact. *Stevenson v. Anderson*, 2 V. & B. 410. PR. EVID. WHAT IS.

As to the propriety of the affidavit to an interpleading bill, denying the knowledge of the defendants, *quære*. *Id. ib.*

To a bill of interpleader, there must be an affidavit annexed. *Errington v. Att. Gen.* Bun. 363. PRAC. REG. 79.

(g) *In support of motions.*

No affidavit is necessary to support a motion by a plaintiff in an interpleading suit for liberty to pay the money into court, and for an injunction. *Walbank v. Sparkes*, 1 Sim. 385. PR. INTERPLEADER; PR. PAYMT. INTO COURT.

*Quære*, whether it is necessary the affidavit in support of a motion for a commission to examine witnesses abroad in aid of an action at law, should state the names of the witnesses, or the points to which they are to be examined. *Mendizabel v. Machado*, 2 Russ. 540.

Where motion to amend, after answer, by adding party plaintiff, is of course, it must be on affidavit, showing the materiality of the amendment, and that fact on which it is founded came to plaintiff's knowledge after bill filed, and consent of such party to be made co-plaintiff should be produced and verified. *Governors of Lutton School v. Scarlet*, 13 Price, 54. S. C. 1 M'Clel. 17. PR. BILL, AMENDMENT AFTER ANSWER.

Motion to stay the execution of a writ of inquiry of damages, not supported by the ordinary affidavit upon a motion to stay trial, refused with costs. *Rodenhurst v. Tydman*, 1 Turn. & R. 305.

Motion to amend bill, after an order to dismiss for

want of prosecution, and replication filed so as to retain bill, cannot be made on the statement of counsel, that the proposed amendment is a material one, there must be an affidavit thereof, and which motion was refused with costs. *Phillips v. Stephenson*, 9 Pri. 205.

Affidavits admitted after answer; to be read in support of a motion to pay purchase money into court. *Bradshaw v. Bradshaw*, 2 Mer. 492. PR. PAYMENT INTO COURT.

No objection to a motion that the affidavit was filed only the day before, if it is an affidavit that cannot be answered, as that the plaintiff cannot go to trial with safety until the answer comes in. *Jones v. —*, 8 Ves. 46.

Motion to examine witnesses *de bene esse*, except in certain cases, as upon the ground of age, requires notice. The affidavit must be, either that the witness is of the age of seventy, or the only witness to the particular fact, or if upon the ground of health in a dangerous state. *Bellamy v. Jones*, 8 Ves. 31. PR. NOTICE.

(h) *On application to sue in formâ pauperis.*

Affidavit of a party convicted of perjury admissible to enable him to sue as a pauper. Misconduct in a former cause, no ground for refusing a party liberty to sue as a pauper in another, for the subject before in dispute. *Bowyer v. M'Evoy*, 1 Ball & B. 56.

Affidavit that defendant is not worth more than 5*l.* except in matters in question, of which he had possession, will not entitle him to defend in formâ pauperis. *Spencer v. Bryant*, 11 Ves. 49.

The affidavit to ground the order to sue in formâ pauperis, must be by the party, not by a third person. *Wilkinson v. Belsher*, 2 Bro. C. C. 272.

(i) *Of service.*

Undertaking to appear to hear judgment given by solicitor of either of parties in a cause which has been set down, is not sufficient to make it unnecessary for the other party to prove service of subpoena to hear judgment upon such of those persons who ought to be before court, as are absent when cause it called on. *Bishop v. Bishop*, 9 Pri. 481. PR. UNDERTAKING TO APPEAR.

In the case, however, of information against a corporate body, an affidavit of indorsement of undertaking to appear at hearing, by solicitor of defendant on the writ of *distringas*, and another affidavit stating that on service of letter missive on bishop, his solicitors thought it unnecessary to appear for him: decree nisi was made in the absence of defendants. *Att. Gen. v. Poor of Alverstoke*, 9 Pri. 482. *Ib.*

Affidavit of personal service of petition must be filed before it can be read. *Exp. North*, 4 Mad. 395.

The affidavit of service of subpoena on bill filed for obtaining an injunction to stay process at law in the exchequer, served on attorney of plaintiff at law, must state positively, that neither the plaintiff in equity nor his attorney knew where to find defendant in equity, nor where he might be served with process, or it will be considered insufficient on motion for that purpose, however full it may be in all other respects. *Jardine v. Hayes*, 7 Pri. 239. SERVICE SUBSTITUTED.

The whole petition in bankruptcy should not be recited in affidavit of service; if done, costs ordered out of attorney's own pocket. *Exp. Smith*, 1 Atk. 139. PR. COSTS.

Affidavit must be made of service of subpoena on defendant to examine witnesses in *perpet. memor.*

before they are so examined. *Hatcham v. Winshcombe*, Cary, 34. *S. P. Porter v. Baker*, id. ib.

(j) *On application for substituted service.*

On injunction to stay proceedings, where defendant is abroad, motion, that service of subpoena on attorney of plaintiff at law may be deemed good, must be accompanied with affidavit, by plaintiff in equity, as to merits, and not by his solicitor, unless he has personal knowledge of merits. *Kenworthy v. Accunor*, 3 Mad. 550. *PR. INJUNCT. TO STAY PROCS.*

It is not necessary that the affidavit for an order, that service of the subpoena upon an injunction bill on the attorney at law, shall be good service, should state a previous application to the attorney, and refusal to accept service. *French v. Roe*, 13 Ves. 593.

Upon an injunction bill to stay proceedings at law, the defendant living abroad, a motion, that service of subpoena upon the attorney may be good service, requires an affidavit of merits. *Stephen v. Cini*, 4 Ves. 359.

(k) *On obtaining writ ne exeat regno.*

*Ne exeat* cannot be obtained on affidavit made before bill filed. *Anon.* 6 Mad. 76.

Writ of *ne exeat regno* discharged, as having issued improperly, on the affidavit of a plaintiff resident out of the jurisdiction in Scotland, sworn before a justice of the peace there; not positive, to be declared intention to leave the kingdom, or circumstances amounting to it, but only to information and belief of such intention; a defect not supplied by the avowal, in the defendant's affidavit, of his intention to return to his house of business in Jamaica; where alone he has the means of settling the account. *Hyde v. Blitfield*, 19 Ves. 342.

To support a *ne exeat regno*, which issues only on an equitable debt, as at law, to hold to bail, the affidavit must be positive, except that belief of the balance of an account, is sufficient. *Id. ib.*

Writ of *ne exeat regno* on affidavit, not by the plaintiff, to information and belief of intention to quit the kingdom, according to the nature of the information, as where received from persons of the defendant's family, that they were about to go to the isle of Man. *Collinson v. —*, 18 Ves. 354.

A writ of *ne exeat regno*, upon the current jurisdiction in account, though bail might be had at law, against a positive affidavit, the defendant's affidavit or evidence of the plaintiff's admission, that no debt is due, it will not avail. The affidavit of a threat or intention to go abroad must be positive, not upon information and belief. *Jones v. Alepsin*, 16 Ves. 470. *JURISDICT.; ACCOUNT.*

To obtain *ne exeat*, an affidavit to information and belief of intention to quit kingdom, or circumstances making it necessary, as an order for military officers to join their regiments abroad, is not sufficient. *Hannay v. McIntyre*, 11 Ves. 54.

The writ *ne exeat regno*, in its application to private transactions, is confined to cases of equitable debt. The affidavit must be as positive as an affidavit to hold to bail; "information and belief" being only admitted on matters of pure account as between partners and executors. The application for it should be as prompt as possible. *Jackson v. Petrie*, 10 Ves. 164.

Affidavit for *ne exeat regno* must state intention to go abroad; that defendant will hide himself is not sufficient; it must be positive, that he is going abroad, or to some declaration by himself (not a third person) that he so intends. *Oldham v. Oldham*, 7 Ves. 410. *Etches v. Lance*, 7 Ves. 417.

It is sufficient that debt be in danger, without stating that it is to avoid the jurisdiction. *Etches v. Lance*, 7 Ves. 417.

To obtain a writ of *ne exeat regno*, it is sufficient that the affidavit states, that the debt will be endangered, without alleging that the purpose of going abroad is to avoid the demand. *Tomlinson v. Harrison*, 8 Ves. 32.

Affidavit to support a writ of *ne exeat regno* must be positive. *Roddam v. Hetherington*, 5 Ves. 91.

The writ of *ne exeat regno* issued properly, the subject being matter of account. A general affidavit of belief of the defendant's intention to quit the kingdom is sufficient, without the circumstances upon which that belief is founded. *Russell v. Ashy*, 5 Ves. 96.

Writ of *ne exeat regno* refused, the affidavit amounting to no more than suspicion of the party's intention, and no precise sum sworn to as due. *Sherman v. Sherman*, 3 Bro. C. C. 370.

The affidavit to ground a writ of *ne exeat regno* must not only state, that the defendant is equitably indebted in a specific sum, but must mention the facts on which it arises, &c. *Anon.* 2 Ves. 489.

The affidavit for *ne exeat regno* must state positively that the defendant is indebted to the plaintiff in a sum certain, except it be a bill for an account, and then belief as to the amount of the balance is sufficient. *Rico v. Gaultier*, 3 Atk. 501. And see *Roddam v. Hetherington*, 5 Ves. 92.

(l) *In support of application for commission to examine.*

A general affidavit of having a material witness is not sufficient for a new commission, but the witness must be named in the affidavit, as also the point to which he is to be examined. *Gen. Order*, 1685, 1 Vern. 334.

On a bill by underwriters, for a commission to examine abroad, to prove the circumstances under which a ship had been condemned and sold, as not worth repair, the court held an affidavit of the plaintiff's solicitor, stating his information and belief that there were several witnesses abroad, whose testimony was necessary for the plaintiffs, to be sufficient, though it did not state any grounds for his belief. *Robinson v. Sumner*, 1 Y. & J. 578.

Motion for commission to examine abroad in aid of action at law, must be supported by affidavit, stating name of witness and points of examination. *Mendezabel v. Machado*, 2 S. & S. 483.

In affidavit, in support of commission to examine witnesses abroad, it is not necessary to state that applicant would have a good defence if he could procure evidence under such commission, or that there are necessary facts within their knowledge required by plaintiff to be proved on his defence. *Woodhouse v. Boyd*, 6 Price, 101.

Affidavit of insurance-broker, the agent of underwriters, sued on a policy, will not be received in support of commission to examine abroad, it should be made by party himself or his attorney. *Bond v. Leigh*, 5 Price, 444.

Upon a petition to expunge the proofs upon certain bills of exchange, an action had been directed to be brought against the bankrupts, to try the validity of the debts. A material witness being abroad, the court of common law put off the trial: it was ordered upon petition, that the bankrupt should be at liberty to file a bill for a commission to take the examination of the witness abroad. *Exp. Coles*, Buck. 293. *Issue AT LAW.*

The affidavit of the solicitor for the defendant will be received in support of a motion for commission to examine abroad, and it will be sufficient if he swear, that he is informed of, and believes, the statement in

the bill; if he also add, that his belief is founded on documents in his possession, and that, from the nature of the defence, involving the question of what country the ship belongs to, he considers the commission necessary. *Laraguthy v. At. Gen.* 2 Price, 172.

It is not now the practice in chancery to insert direct direction in decree, that master is at liberty to examine witnesses, but master may certify that a commission is necessary, which then issues of course. *Sandford v. Biddulph*, 9 Ves. 36. PR. DECREE; PR. EXAM. IN MASTER'S OFFICE.

On a bill for an injunction, the court will not grant a commission to examine a witness in India, without a full affidavit of materiality. *Moody v. Steele*, 2 Anst. 386. INJUNCTION.

In order to obtain a commission to examine abroad, it is sufficient to state the name of the witness, that his evidence is material, and that he is abroad. *Oldham v. Carleton*, 4 Bro. C. C. 88.

Affidavit in support of commission to examine abroad, need not state that matter arose there. *Akers v. Chaney*, 2 Bro. C. C. 273.

(m) When necessary in other matters.

As a general rule the court requires, in all petitions, under acts of parliament for local improvements, &c. for payment of money out of court, that the parties applying shall, by affidavit, shortly verify their title, and state, that to their knowledge and belief, no other person has any title to, or claims any interest in, the estate. *In re Fleet Market Improvement Act. Exp. Shears*, 2 Y. & J. 493. PR. SUMMARY PROC. UNDER ACTS OF PARLIAMENT.

No affidavit is necessary to obtain an order, that child, a ward of court, shall not be taken out of the jurisdiction, even to Scotland. *De Manneville v. De Manneville*, 10 Ves. 56. WARD OF COURT.

Though against the same defendant, there must be affidavit in every cause, that he is not to be found. *Lambrogo v. White*, Dick, 150.

Motion for prohibition must be founded on affidavit, not suggestion. *Corp. of Worcester v. Bennet*, Dick, 143.

(n) When read against Answer.

On a motion for a receiver, the answer of a defendant, if a material co-defendant has not answered, must be regarded merely as an affidavit, and the plaintiff may read affidavits against it. *Kershaw v. Matthews*, 1 Russ. 361.

Affidavits in support of a motion, which the plaintiff is prevented from making, may be read, if the answer is not filed until the day for which the notice is given. *Semble, Goodman v. Whitcomb*, 1 Jac. & W. 589. PR. MOTION.

In moving for an injunction after answer, affidavits filed after the answer may be read in support of allegations in the bill, which are not noticed in the answer. *Jeffreys v. Smith*, id. 298. PR. MOTION FOR INJUNCTION.

Court will not in aid of motion, to prevent partner receiving, &c. debts, and for a receiver, permit plaintiff to use affidavit made and filed after coming in of answer; though in a case analogous to irreparable waste such affidavit made, &c. before answer, might be used. *Lawson v. Morgan*, 1 Price, Exch. 303. PR. INJUNCTION.

In injunction cases, no affidavit as to the title after answer. *Platt v. Buton*, 19 Ves. 447. PR. INJUNCTION.

In an injunction cause, affidavits admitted on motion against the answer, not on the title, but on questions of fact, as in the instance of waste, &c., and the original affidavit where the defendant having ob-

tained time to file affidavits, instead of that puts in an answer. *Morphett v. Jones*, id. 350. PR. INJUNCTION; PR. ANSWER.

Affidavits not admitted on motion against the answer, except upon waste; and in a case of partnership, those filed originally with the bill for an injunction merely, as to the mismanagement or exclusion, not in support of title. *Norway v. Rowe*, id. 114.

In a motion for an injunction, the plaintiff cannot read affidavits to contradict the answer. *Sommerville v. Buckler*, 3 Anst. 658. INJUNCTION, AFFIDAVIT IN SUPPORT.

Injunction bill charging fraud on obtaining verdict, affidavits contradicting the answer read in support of the injunction on the merits. *Isaac v. Humpage*, 1 Ves. J. 427. S. C. 3 Bro. C. C. 463. But this case is no authority. See 9 Ves. 356.

Where an injunction to stay waste has been obtained on bill filed and affidavit, the defendant may immediately, on coming in of his answer, move to dissolve the injunction, without obtaining any order nisi; but then his answer can only be received as an affidavit, and the plaintiff may read affidavits in contradiction to it, and if afterwards, upon exceptions, the answer appear insufficient, the injunction shall be revived. *Stratmore v. Bowes*, 1 Cox, 263. PR. INJUNCTION TO STAY WASTE; PR. MOTION TO DISSOLVE INJUNCTION.

Affidavits allowed to be read for a patentee of a new invention, upon a motion to dissolve an injunction on the coming in of the answer. *Gibbs v. Cole*, 3 P. W. 255. PR. INJUNC.; AFFIDAVIT AGAINST MOTION TO DISSOLVE.

(o) Where to be received and read as Evidence.

Affidavits taken before notice of motion cannot be read on motion without notice of reading them, unless they are answered subsequent, and with reference to the notice of motion. *Longman v. Tysan*, Per V. C. 10th November 1829.

Affidavit verifying proceedings at law, not evidence, and taken off the file with costs. *Exp. Barnes*, 1 Mont. & M. 9. PR. TAKING PROCEEDINGS OFF FILE.

On a reference in a petition, under stat. 52 Geo. 3. c. 101. the master may receive affidavits in evidence. *Exp. Greenhouse*, 1 Swan. 60. PR. PETITION, CHANCERY; STATUTES, C. OF.

Affidavit of insurance broker, the agent of underwriters sued on a policy, will not be received in support of commission to examine abroad, it should be made by party himself or his attorney. *Bonham v. Leigh*, 5 Price, 444. PR. COMMISSION TO EXAMINE ABROAD.

Affidavits admitted, after answer, to be read in support of a motion to pay purchase money into court. *Bradshaw v. Bradshaw*, 2 Mer. 492. PR. MOTION TO PAY MONEY INTO COURT.

Where a vessel has been seized by the officers of the customs, on charges of offences against other acts of parliament than that usually called the navigation act, if, on the trial of the information filed thereon, the question be likely to turn on the fact of the ship belonging to a foreign subject, the court will, on motion (a bill having been filed against the attorney-general, for that purpose), grant the defendant a commission to examine persons residing abroad, and make it part of the order, that their depositions shall be received in evidence on the trial. The affidavit of the solicitor for the defendant will be received in support of such a motion; and it will be sufficient if he swear that he is informed of, and believes the statements in the bill, if he also add, that his belief is founded on documents in his possession, and that, from the nature of the defence involving the question of what country the ship

belongs to, he considers the commission necessary. *Larguivy v. Att. Gen.* 2 Price, 172. PR. COMMISSION TO EXAMINE ABROAD.

Affidavits of defendant's illness and inability to put in answer, are admissible evidence on which to ground application to discharge process of contempt and receive answer, though the suit be instituted in Ireland, and the affidavits sworn in England; and though a decree has been taken *pro confesso* in consequence of contempt. *Benson v. Vernon*, 3 Bro. P.C. 626. PR. CONTEMPT.

Upon exceptions to master's report, affidavits made subsequent to it, cannot be read, notwithstanding the affidavits of the adverse party were filed but the evening before the report. *Davis v. Davis*, 2 Atk. 21. PR. EXCEPTIONS TO MASTER'S REPORT.

(p) *Affidavit in reply.*

No affidavit in reply shall be read before master, except as to new matter. 66th Gen. Ord. 3rd April, 1828. EVIDENCE BEFORE MASTER.

Affidavits in reply are only to be permitted in cases where new matter is introduced in the affidavits, answering the petition. *Epp. Shayle*, Buck, 244. BANKCY. PETITION.

12. Answer.

- (a) *When answer may be read as evidence.*
- (b) *What good against answer.*
- (c) *Effect of reading.*

(a) *When an answer may be read as evidence.*

There being no issue joined between two co-defendants, the answer of one cannot be read against the other, even as to costs other than as a suggestion, on which court may direct an inquiry before master. *Chervett v. Jones*, 6 Mad. 267. CO-DEFENDANTS; COSTS.

On interpleader, the answer of one defendant may be read against the other. *Bowyer v. Pritchard*, 11 Price, 103. PR. INTERPLEADER.

Admission in the answer of a feme covert joining with her husband in answering the bill, will not be permitted to be read against her. *Hodgson v. Merest*, 9 Pri. 563. HUSB. & WIFE.

Personal answer of defendant to libel in ecclesiastical court, preserved among the records of the register, is admissible evidence in suit for tithes in exchequer by party claiming under same title as person whose title it was. *Taylor v. Cook*, 8 Price, 664.

On motion for injunction to stay proceedings at law, answer is evidence for defendant as to all facts to which other testimony could be received. *Pott v. Birch*, 4 Mad. 255. STAYING PROCEEDINGS AT LAW.

An answer by former rector to bill filed to establish modus of certain measure of meal, as to one farm, admitting that parish is exempt in consideration of a commutation of meal, is not only admissible, but strong evidence to prove a district modus. *De W'helpdale v. Melburn*, 5 Price, 485.

An answer may be looked at as more or less deserving of credit according as it more or less meets fairly the inquiries in the bill. *Freeman v. Fairlie*, 3 Mer. 42.

Answer, though not evidence in cause, may be read as to costs. *Houell v. George*, 1 Mad. 13. PR. COSTS.

Papers referred to by an answer, read as part of it. *Marsh v. Sibbald*, 2 V. & B. 376.

At law, a party producing a letter or other document in evidence, cannot use it partially, but makes

the whole evidence. *Boardman v. Jackson*, 2 Ball & B. 386.

When the answer of a party in another cause is resorted to as evidence, the whole of it is admissible, both at law and in equity. *Id. ib.*

Answer to cross bill not allowed to be read, though the original bill and answer was read, there having been no further proceedings on cross bill and answer. *Bennet v. Neale*, Wightw. 325. PR. CROSS BILL.

Answer of one defendant not evidence against another; as to the answer of a mere trustee, against whom the plaintiff does not desire a personal decree, *Qu.?* *Merse v. Royal*, 12 Ves. 355.

Answer, purporting to be the answer of a minor by his mother and guardian, may be read against the mother in another cause where she is defendant in her own capacity. *Beasley v. Magrath*, 2 Scho. & L. 34.

Where injunction is obtained on absence of one defendant abroad, on motion to discharge the order, the answer of the other defendant cannot be read. *St. John v. Cargill*, 3 Anst. 993. PR. INJUNC. MOTION TO DISCHARGE.

The consequence arising from the answer being considered as an admission only, is, that the objection of its being *res inter alios acta* does not apply as in case of other legal proceedings; therefore in an action against B, the answer of A, his partner, to a bill filed against him by other creditors, was admitted as evidence of the facts stated in it. *Grant v. Jackson*, Peake's N.P. 203. So was the voluntary affidavit of one man who was jointly interested with another in an action brought against them both. *Vicary's case*, Gilb. Ev. 57.

On a bill for a discovery and injunction, the defendant (plaintiff at law) admitted himself to be a mere agent for the other defendants, and ignorant of the transaction; the other defendants lived abroad: an injunction was moved for as of course; but there appearing a danger of losing other material evidence by the delay, it was refused. *Faulon v. Munro*, 2 Anst. 602. PR. INJUNCTION.

Answer of one defendant not evidence against the rest. *Jones v. Turberville*, 2 Ves. J. 11. S.C. 4 Bro. C.C. 115.

If you read the confession of an agreement by answer, you must read all relative to the agreement. *Popham v. Fyfe*, Lofft. 789.

Seemle, the separate answer of a feme covert may be read against her. *Le Neve v. Le Neve*, 3 Atk. 648. And see *Wrottesley v. Bendish*, 3 P. W. 238. HUSB. & WIFE.

Answer of one defendant read as evidence to support plea of another defendant. *Bennet v. Walker*, Dick. 130.

An infant's answer cannot be given in evidence against him, because it is not the answer of the infant, but of the guardian who is sworn, and not the infant. *Wrottesley v. Bendish*, 3 P. W. 237. INFANT.

But where a defendant put in an answer to a bill brought by an infant, who did not reply to it, in such case the answer was taken to be true in regard to the defendant, for want of a replication, defendant was deprived of an opportunity of examining witnesses to prove his answer, and he ought not to suffer for such omission in the plaintiff. S.C. *id.* note, *sed quare*.

Baron and feme defendants to a bill, the feme must answer, though the answer cannot be read against the husband, but may probably be read against her if she survives. But in no case is a feme bound to answer to a bill subjecting her to forfeiture, though the husband has submitted to answer. *Id.* 238. S.P. 2 Ch. Ca. 39. 173. HUSB. & WIFE.

Answer of defendant not brought to hearing, read

as evidence against another defendant at hearing. *Pitt v. Willis*, Dick. 24.

Answer may be read in support of demurrer. *Heath v. Lake*, id. 43.

Where one defendant in answer assigns a cause for his ignorance, and refers to answer of co-defendant for truth of the matters, the latter's answer may be read against the former. *Anon.* 1 P. W. 300.

The answer of superannuated person put in by guardian shall be read against him as an answer of one of full age. *Socus*, of an infant who is to have a day to shew cause. *Lering v. Caverley*, Prec. Chan. 229. NATURAL INCAPACITY.

Upon an appeal from the rolls, it was objected to the evidence of a witness examined in the cause, and read at the former hearing, that he had since, by answer to a bill, exhibited against him, confessed, that on the day he was examined, the plaintiff gave him a bond that, if he recovered the land in question, he would convey part of it to the witness. By the opinion of the Id. Keeper, assisted by two judges, this answer was ordered to be read. *Needham v. Smith*, 2 Vern. 463.

Bill for a legacy against baron and feme who was executrix of testator; defendants answer, and witnesses are examined and publication passed. Husband dies. No abatement, and the wife shall be bound by the answer and depositions; but it might be otherwise if the wife's inheritance was in question. *Shelberry v. Briggs*, 2 Vern. 249. *Sed quare*, see *Anon.* id. 197. HUSB. & WIFE; PR. ABATEMENT & REVISION.

Nothing, in answer of guardian, can be read against the ward. *Leigh v. Ward*, 2 Vent. 72. GUARD. & WARD.

A man's answer in the spiritual court may be read against him in this court. *Mildmay v. Mildmay*, 1 Vern. 53.

Where, on a bill brought by A against B, C and D, and others, the defendants had examined some witnesses, that B being now plaintiff, may read those depositions against the plaintiff or any of the defendants in the first cause. *Barstow v. Palmes*, Prec. Chan. 233.

The defendant, by answer, accuses himself, and his co-defendants: is believed against himself, but not against his fellows. *Mitchell v. Webb*, Toth. 10.

#### (b) What good against answer.

See PR. AFFIDAVITS, 14.

A plaintiff may read evidence to disprove an allegation contained in a passage of the defendant's answer which he had read. *Price v. Lytton*, 3 Rus. 206.

On motion for injunction, affidavits filed before answer may be read; when plaintiff, by saving notice of motion till future day, enabled defendant to file his answer before motion was made. *Glassington v. Thwaites*, 1 S. & S. 134. PR. AFFIDAVITS; PR. INJUNCTION; MOTION; PR. NOTICE.

Affidavits admitted on motion after answer for an injunction and receiver, in the case of partnership by analogy to waste. *Peacock v. Peacock*, 16 Ves. 49. PR. INJUNCTION, AFFIDAVITS AFTER ANSWER.

Defendant cannot offer evidence to disprove an admission in his answer. *E. I. Comp. v. Keighley*, 4 Mad. 16.

Specific performance of a parol agreement to grant a lease, decreed on the testimony of one witness, confirmed by circumstances, against the denial in the answer, after part performance by delivery of possession. *Morphet v. Jones*, 1 Swau, 172. SPEC. PERF.

Affidavits not admitted on motion against the an-

swer except upon waste, and in case of partnership; those filed originally with the bill for an injunction, merely as to the mismanagement or exclusion, not in support of title. *Norway v. Rowe*, 19 Ves. 144. PR. AFFIDAVITS.

A single witness cannot prevail against the answer unless confirmed by circumstances. *Savage v. Brook-sopp*, 18 Ves. 336.

Answer read as evidence contrasted with the other evidence not for the purpose of discrediting it. *Id. ib.*

Single witness not corroborated, not sufficient against positive denial by the answer. *Cooke v. Clayworth*, 18 Ves. 12.

Parol evidence of one witness, unsupported by other evidence, not sufficient to found a decree. *Dawson v. Massey*, 1 Ball & B. 234.

Lease not decreed upon expenditure in repairs and improvements under an alleged agreement proved by one witness; the answer containing a positive denial of the agreement was also confirmed by circumstances. *Pilling v. Armitage*, 12 Ves. 78. LEASE; AGREEMENT.

One witness with corroborating circumstances admitted against an answer. *Biddulph v. St. John*, 2 Sch. & L. 532.

Decree made upon evidence of single witness against positive contradiction of the answer, containing circumstances giving greater credit to the depositions, the defendant declining an issue, otherwise it would not be made thereon. *E. I. Comp. v. Donald*, 9 Ves. 275. S. C. 1 Smith, 213.

Specific execution of a parol agreement for a lease for three lives proved by one witness, refused, the answer admitting an agreement for one life only, supported by the testimony of one witness, and not inconsistent with the evidence of part performance by plaintiff. *Lindsay v. Lynch*, 2 Scho. & L. 1. SPEC. PERF.

Evidence of single witness not sufficient against answer of defendant. *Feans v. Bicknell*, 6 Ves. 174.

A single witness is not sufficient against the answer of defendant, except under special circumstances. *Cooth v. Jackson*, 6 Ves. 40.

A single witness cannot prevail against a positive denial by the answer. *Ld. Cranston v. Johnston*, 3 Ves. 171.

Notwithstanding the statute and decree, 37 Hen. 8. c. 12. the court of chancery has jurisdiction upon the subject of tithes in London. An account was decreed according to the improved rent. Another defendant, setting forth his lease at a low rent and a fine, and alleging by answer, that he had never heard of any greater rent being paid, there being no evidence against it, was held liable only according to that rent. *St. Paul's, Warden, &c. of, v. Crickett*, 2 Ves. J. 563. JURISDICTION; TITHES IN LONDON.

Plaintiff cannot have a decree on the testimony of one witness contradicted by the answer of one defendant. *Mortimer v. Orchard*, 2 Ves. J. 243.

The answer to a bill for an account of tithes, having insisted upon what was equivalent to a prescription in *deuando*, and defendants' evidence going to the same point, the court will not permit the evidence to be read to support a different defence, viz. a presumption, that the tithes had been granted to the owner. *Nash v. Thom*, 2 Cox, 197.

Affidavits read against the answer in support of an injunction to stay waste. *Sratmore v. Bowes*, 2 Bro. C. C. 88. PR. INJUNCTION TO STAY WASTE.

There being but one witness against answer, court directed an issue. *Pemby v. Mathew*, Dick. 550. S. C. 1 Bro. C. C. 52.

No decree for a plaintiff in equity on the evidence only of one witness in contradiction to defendant's positive answer. *Glynn v. Bank of England*, 2 Ves. 38.

Though one witness not sufficient against a distinct

denial by answer, the latter must be precise and positive. *Arnot v. Biscoe*, 1 Vcs. 95.

Where the evidence of a single witness against a negative in defendant's answer is corroborated by a great number of circumstances, it is sufficient to support an equity. *Janson v. Rany*, 2 Atk. 140.

Single witness against defendant's answer on oath not sufficient for decree. *Speed v. Martin*, 2 Com. 587.

The rule that a decree cannot be made, where there is but one witness, applies only where the answer of the defendant is equally strong in opposition to such evidence. *Walton v. Hobbs*, 2 Atk. 19.

Where there is a single witness against the defendant's oath, this is not sufficient evidence for a decree, nor will the court direct a trial at law. *Christ's Col. Camb. v. Widdrington*, 2 Vern. 283.

One witness against the defendant's answer not sufficient to ground a decree. *Kingdome v. Boukes*, Prec. Chan. 19.

A decree, whereby the defendant was concluded by the plaintiff's own oath, reversed. *Plompin v. Betts*, 1 Vern. 272. PR. DECREE, REVERSAL OF.

There being but one witness against what was sworn in the defendant's answer, the plaintiff can have no decree. *Alum v. Jourdan*, 1 Vern. 161.

### (c) Reading answer.

Where a passage read by a plaintiff from an answer refers to another passage, that other passage is to be read only for the purpose of explaining or qualifying the thing in respect of which the reference is made, and not for the purpose of introducing new facts, which do not explain or qualify that thing, though such new facts be connected in grammatical construction with that which must be read. *Bartlett v. Gillard*, 3 Russ. 149.

The answer of a peer upon his protestation of honour may be read on the question of costs. *Dawson v. Ellis*, 1 Jac. & W. 524. PEER; COSTS.

As to how far plaintiff is concluded by reading answer of defendant. *Kempson v. Yorke*, 3 Price, 16.

Where the answer to a bill for discovery only is used as evidence, the whole must be read. *Ly. Ormond v. Hutchinson*, 13 Vcs. 47. affirmed, 16 Vcs. 94.

Where relief is prayed, and the answer replied to, the plaintiff reading admission must proceed to the completion of the immediate subject to which the defendant is answering according to the course of evidence at law; but this does not apply to distinct matter. *Id. ib.*

### 13. Bills generally, and where taken pro confesso.

Bill taken pro confesso shall be read in evidence as an answer admitting the facts. 45 Geo. 3. c. 124. s. 6. PR. BILL PRO CONFESSO.

Where a bill has been amended, the amended bill is the only one upon record: the original bill, therefore, cannot be read as evidence to prove what a plaintiff considered his right to be at the time of filing it. *Hales v. Pomfret*, Dan. 141. PR. AMENDED BILL.

Cross bill taken pro confesso ordered, on motion, to be read at hearing of original cause. *Cory v. Gertchen*, 2 Mad. 43. PR. CROSS BILL.

Bill in another cause allowed to be read at hearing, as corroborating circumstance to prove stale demand. *Hundeside v. Brown*, Dick. 236.

Bill in chancery may be read as evidence in equity. *Metcalf v. Ives*, 1 Atk. 63.

### 14. Taken on bill to perpetuate.

See also MARRIAGE, II.—PR. COSTS, 10. (ff)

Court will not order copies of depositions taken to perpetuate testimony of witnesses to be delivered out for purpose of perfecting title to an estate, even where witnesses are dead. *Teale v. Teale*, 1 S. & S. 385. PR. PUBLICATION.

Depositions on bill to perpetuate, not published in the life of the witness, except on incapacity to travel, by sickness, &c.: such orders, except in the exceptional cases, proceeding on affidavit of the death of the witness, some expressly declaring that the depositions of the other witnesses shall not be read. *Morrison v. Arnold*, 19 Vcs. 670. *Id.*

Publication of deposition of witness who is dead taken on bill to perpetuate, may be moved for as of course. *Bourne v. Bligh*, 1 Price, 307. PR. PUBLICATION; PR. MOTION OF COURSE.

### 15. Copies.

See also PR. COPIES.

Copies of the books of the bank of England are evidence; but, upon a question whether the signature to a transfer is the genuine handwriting, the book must be produced. *Auriol v. Smith*, 13 Vcs. 198.

An attested copy of the memorial of the assignment of a judgment is evidence of the fact of the assignment: so the attested copy of the memorial of the registry of a deed, is evidence of the fact of the registry; but if the memorial be used as evidence of the contents of the deed, the original must be produced. *Hobhouse v. Hamilton*, 1 Scho. & L. 207.

The defendants producing the lease for a year, and a copy of the release, the original not being forthcoming, the bill was retained, with liberty to bring an ejectment, and, in default, the bill to be dismissed with costs. *Snell v. Silcock*, 5 Vcs. 469. PR. RETAINING BILL; LEASE & RELEASE.

If the office copies of the pleadings or proofs necessary to be read for one party, on hearing of a cause, be not signed by the proper officer, the cause must stand over, on payment of 5*l.* cost for the day's attendance to the other party. *Att. Gen. v. Milward*, 1 Cox, 437. PR. COSTS.

A settlement under which plaintiffs claimed being lost, but having been proved in chancery by plaintiffs themselves thirty years ago, when they were not concerned in interest, though they were since entitled by that deed. Ordered, that a copy of the deed should be admitted to be read at law, and also that plaintiff's depositions should be read to prove the deed, although they now claim under it. *Ly. Holsely v. Sigill*, 2 Freem. 259.

Office copy of bill cannot be read as evidence, if original is not on file, though officer of court is ready to prove that the original cannot be found amongst the records. *Irwin v. Simpson*, 7 Bro. P. C. 317.

Where an original note is lost, and a copy of it is offered in evidence, you must show sufficient probability that the original note was genuine, before you will be allowed to read the copy. *Goodier v. Lake*, 1 Atk. 446. DEBTS LOST.

Plaintiff producing a copy of sequestration only, on motion to take bill pro confesso, court refused it; but sequestration not being under seal, or executed, was held no objection. *Anon.* 10 Mod. 431. PR. BILL PRO CONFESSO; PR. SEQUESTRATION.

Copies of a note, bill of sale, and stated account, if attended with concurring circumstances of undeniable credit, will be admitted as evidence. *Lloyd v. Wynne*, 2 Bro. P. C. 377.

Copy of a note taken by one who had been entrusted with the note, and was since dead, under which was written an acknowledgment that nothing was due, allowed to be read as evidence, though not proved to be a true copy, and though the defendant had sworn there was no such acknowledgment under the note, it appearing, when the note was produced, that the bottom of it was torn off. *S. C. 2 Vern. 603. FRAUD; SPOILATION OF DEEDS.*

A copy of a deed to lead the uses of a fine, and enrolled for safe custody only, allowed to be read as evidence at a trial at law. *Combes v. Spencer, 2 Vern. 471. Semble, S. C. id. 691. PR. ISSUE AT LAW.*

Abstract of deed is no evidence, and much less an attested copy of such abstract. *El. Peterborough v. Germaine, 3 Bro. P. C. 539. ABSTRACT.*

The court refused to order copies of depositions to be recorded and exemplified, where the original had had been lost, and in trials at law, subsequent to the dismissal of the suit, the witnesses had sworn contrary to their depositions. *Brabant v. Perne, 2 C. R. 36. PR. DEPOSITIONS, LOSS OF.*

#### 16. Taken in other courts.

\* Court will not, on motion, order depositions in \*the cause in exchequer, to be read in a title cause in this court, against other occupiers of land in some parishes, though objects of both suits, and the interest of parties were the same. *Goodenough v. Alway, 2 S. & S. 481.*

The court allowed an affidavit, sworn before a commissioner of the court of exchequer in Ireland, to be read. *Kilby v. Stanton, 2 Y. & J. 75.*

Examination in the admiralty court used in the court of chancery. *Watkins v. Fursland, Toth. 192.*

Examination in chancery may be used before the delegates. *Gargrave v. —, 2 C. C. 250.*

Acts of the court as a decree, or order in another cause between the same parties, may be read without an order. *Brooks v. Taylor, Mos. 188.*

Proofs in an original cause not allowed to be read on a bill of review. *Moseley v. Maynard, 2 C. R. 18. PR. BILL OF REVIEW, EVID. ON.*

The probate of a will cannot be read in case of a real estate, if the defendant admits merely that he believes there is in such a will, secus if the admission is full. *Mullins v. Pratt, Bun. G. WILL, PROBATE OF, WHERE EVIDENCE.*

Depositions taken in court of council of York, not allowable in chancery. *Rex v. Countess of Arundel, Hob. 112.*

#### 17. Decisions of other courts.

Sentence of ecclesiastical court held admissible, but not conclusive evidence on non-reconciliation between husband and wife. *Bateman v. Cs. Ross, 1 Dow. 235.*

Sentence in ecclesiastical court for fornication, &c. in a criminal way, not evidence against the issue; otherwise, if on the point of the marriage, and no collusion. *Brownsword v. Edwards, 2 Ves. 245.*

Decree at Loughorn allowed to be read as evidence. *Harron v. Jameneau, Dick. 48.*

An exemplification of a sentence in Holland under the common seal of the States, may be read in evidence in a suit in chancery. *Anon. 9 Mod. 66. FOREIGN SENTENCE.*

#### 18. Evidence of one defendant read against the other.

Depositions of one defendant not read in favour of another, where the former is at all concerned in interest, or a decree can be made against him; such objection is wholly as to his incompetency. *Dixon v. Barker, 2 Ves. 219.*

Though a plaintiff at law is not allowed to examine any defendant as a witness, one defendant may there examine a co-defendant. In equity a plaintiff may examine a defendant, and defendant a co-defendant; but then it is on a suggestion that the party is not interested, and saving all just exceptions from the nature of the suit, &c. or in case of there being any material evidence against him, &c. *Id. ib.*

Where one defendant is charged with fraud, his depositions cannot be read for another, as it may tend to excuse him with regard to his own costs. *Eade v. Lingard, 1 Atk. 204.*

Depositions of one defendant may be read for another, and for the plaintiff likewise; but if the defendant, who is offered in evidence for another defendant, may, by any possibility, be liable to costs, this is always a reason for refusing his evidence, because he is interested so far as to be swearing to excuse himself. *Barret v. Gore, 3 Atk. 402.*

#### 19. Decree in former cause.

Decree professing to establish customs of tithing, and modes of payment, some of which are obviously not legal moduses, founded on agreements not ratified by ordinary and patron, and not on *bona fide* adverse suit, to establish moduses, and pronounced in cause to which the ordinary and patron were not parties, is not conclusive on church or court. *Jenkinson v. Royston, 5 Price, 496.*

On plea, sentence in ecclesiastical court, *ex directo*, in a matter properly cognizable there, is conclusive evidence where the same matter comes in question collaterally in a court of law or equity. *Meadows v. Ds. of Kingston, Amb. 756.*

Decree in a former cause between the same parties read as evidence, though not conclusive: so also of depositions in a cause which had settled the rights of all as under a decree for performance of trusts. *Askew v. Poulterer's Comp., 2 Ves. 89.*

Decree of court of chancery determining matter of right, is good evidence of that right, as to all persons claiming under party against whom decree was made, though at the distance of 100 years afterwards. *Borough v. Whichcote, 3 Bro. P. C. 595.*

#### 20. Taken in another cause, &c. or matter.

Office copies of depositions by living persons in a title suit in the exchequer, may be read in a similar suit in this court, against another defendant, who makes the same defence, on production of office copies of the bill and answer in the former suit, without any order of this court for that purpose. *Williams v. Broadhead, 1 Sim. 151.*

If a bill is amended, by adding parties, after witnesses have been examined, their depositions cannot be read against the new parties. *Pratt v. Barker, 1 Sim. 1. PR. BILL AMENDMENT.*

Court cannot direct a new trial of issue, on ground of evidence adduced on former trial, where that evidence was a surprise on the other party, and tended to defeat the intention of the court in directing the former issue. *Carrington v. Jones, 2 S. & S. 135. NEW TRIAL; PR. ISSUE AT LAW.*

After witnesses examined upon original bill, amended bill was filed against new parties, some infants; court will not allow evidence taken on the original bill, to be read against new defendants, the infants. *Quantock v. Bullen, 5 Mad. 81. INFANT.*

On petition to expunge debt of C, examination of witness on former occasion as to a debt sought to be proved by A, cannot be read. *Exp. Coles, 3 Mad. 315. Buck, 242. S. C. BANKCY. EXPUNGING PROOF.*

Depositions in cross cause taken after publication of



those in principal cause, not admissible in evidence on hearing of the latter. *Taylor v. Obee*, 3 Price, 83. **PR. CROSS CAUSE.**

The commission and proceedings are inadmissible evidence of an act of bankruptcy, for the purpose of defeating a conveyance. *Whitworth v. Graham*, 2 Rose, 364.

A decree between co-defendants, grounded on pleadings and proofs, between plaintiff and defendant, is regular. *Chumley v. Ld. Dunsany*, 2 Scho. & L. 718.

The proceedings under a commission of bankruptcy, superseded, ordered to be produced at the hearing of a cause, in the court of chancery in Ireland, with a view to evidence, from the bankrupt's examination; but not of course. *Exp. Bernal*, 11 Ves. 557.

Semble on bill for relief; the evidence taken may be read as evidence of reputation against persons not parties to suit; but secus on bill to perpetuate only. *Bidleford v. Partridge*, 3 Anst. 646.

Where a fact is put in issue by the original cause, and evidence examined to it, no evidence can be adduced upon that fact upon a supplemental bill; neither will equity assist a party to make out a different case upon a second trial at law, upon that which he made upon the first. *Cockburn v. Hussey*, 2 Ridgw. P. C. 504. **PR. SUPPLEMENTAL BILL.**

Depositions in cross cause allowed on motion to be read on the account directed in original cause, though the cross bill was dismissed. *Lubiere v. Genon*, 2 Ves. 379.

An order made to read the proceedings taken in one cause, in another, must be between the same parties. *Fade v. Lingood*, 1 Atk. 204.

Evidence in the cross cause concerning the matters in issue in the original cause, not allowed to be read after a decree in that cause; otherwise, as to the depositions in the cross cause, not relating to the matters put in issue in the original. *Walford v. Beuseley*, 3 Atk. 501. **PR. CROSS CAUSE.**

Depositions in former cause between different parties cannot be used as to credit of witness. *Muckworth v. Penrose*, Dick. 50.

Affidavit before master extraordinary in Ireland read in court, but affidavit from plantations not, unless under seal of the island. *Annesley v. El. of Anglesey*, id. 90.

Where a party in a first cause has examined a great number of witnesses to establish a particular point, the court will never suffer him in a second to contradict what he attempted to prove in the first. *Bennet v. Ler*, 2 Atk. 531.

Depositions taken in a former cause, where neither plaintiff nor defendant were parties, cannot be read as evidence, but where either plaintiff or defendant was a party in the former cause, the depositions in that cause may be read against such of them as was a party. *El. Peterborough v. Germaine*, 3 Bro. P. C. 539.

Depositions of witnesses taken in former causes, relating to same matter for which new suit is instituted against another party, ought to be permitted to be read as evidence upon the hearing of such new cause, although the witnesses themselves are not proved to be dead. *City of London v. Perkins*, 3 Bro. P. C. 602.

A witness examined at a former trial of an issue between the same parties, and who has been examined in the cause, in case he dies, not only his depositions may be read, but what he swore at the former trial, may be given in evidence. *Coker v. Farewell*, 2 P. W. 563.

The creditors of L obtain a decree for payment of their debts, and to set aside some conveyances gained by fraud, and S and the legatees are made defendants.

The legatees having brought their bill against S, the question was, if the depositions in the former cause, touching the fraud, could not be read in this: Held, the question being the same in both causes, and S's defence the same, the depositions ought to be read. *Nevil v. Johnson*, 2 Vern. 447.

Depositions taken in a cause wherein tenant in tail, or the father, is only tenant for life; remainder to the son, cannot be read against the son. *Peterborough v. Norfolk*, Prec. Chan. 212. **REM.-MAN.**

Depositions taken in a former cause cannot be read in another cause against one who does not claim under the party against whom those depositions were taken. But if a legatee brings a bill against the executor, and proves assets, another legatee, though no party, may have the benefit of those depositions. *Coke v. Fountain*, 1 Vern. 413. **PRIVITY OF TITLE.**

If the cause is brought into a hearing, and stands over, with liberty to add a party, if he is a material defendant, and concerned in interest, the depositions taken before cannot be read against him. *Nebbet v. Daniel*, Bun. 310.

Depositions taken on a bill of revivor afterwards dismissed upon the ground that the party had no title to revive, cannot be read; otherwise, if the bill had been dismissed for want of equity merely. *Backhouse v. Middleton*, 1 C. C. 173. 3 C. R. 39. 2 Freem. 132.

Depositions in a former cause in chancery admitted to be read upon motion, the same matter being then under examination as now, though neither the plaintiff nor any under whom he claimed, was privy to the former suit. *Terwit v. Gresham*, 1 C. C. 73.

Depositions of a witness made in another cause, or another court, may be read for the purpose of confronting his evidence, and without any order of court. *Anon.* Mos. 118.

Depositions in the original cause not permitted to be read in the cross cause, because the point in issue in the cross cause, was not in issue in the original cause. *Christian v. Wrenn*, Bun. 321.

Depositions taken in court of council of York not allowable in chancery. *Rex v. Cs. of Arundel*, Hob. 112.

Depositions taken without bill or answer, not allowable in chancery. *Id. ib.*

## 21. Deeds, proof of, and loss of deeds.

Permission to exhibit an interrogatory, as to the loss of a deed omitted to be proved by mistake, given to the plaintiff at the hearing under the circumstances. *Cox v. Attingham*, 1 Jac. 337. **PR. PUBLICATION.**

After thirty years, handwriting of letter need not necessarily be proved, where letter affords intrinsic evidence of its authenticity; where there was no direction to such letter *prima facie*, it must be intended to have been written to the party among whose papers it was found. *Fenwick v. Read*, 6 Mad. 7. **LENGTH OF TIME; HANDWRITING.**

Exception to the rule, against reading affidavits in support of the common injunction, extends only to documents of which the defendant is ignorant, not to facts and circumstances. *Barrett v. Tickell*, 1 Jac. 157. **INJUNC. AFFIDAVIT IN SUPPORT.**

When secondary evidence of the contents of a deed is admissible. *Puckhurst v. Lowton*, 2 Swan. 213.

A recital in a deed, executed in 1739, that by a separate deed in 1703, A declared he was seized of the freehold of lands in trust for B, to whom he had on the same day granted a lease of the same lands for one thousand years, is not evidence of the contents of the deed declaring the trust, neither is the receipt of a master, acknowledging such deed to have been lodged with him, evidence of its contents, though it may of its existence. *Kelly v. Power*, 2 Ball & B. 236.

The production of a paper, purporting to be an attested copy, may, with other evidence, have considerable weight. *Ward v. Garbons*, 17 Ves. 140.

Decree for raising money under deed of appointment, though the only copy produced appeared not executed; upon recitals of it in two settlements as a subsisting effectual deed, and evidence from books of a deceased solicitor, of charges for the preparation and execution of it. *Skipwith v. Shirley*, 11 Ves. 64. **POWER, EXECUTION OF.**

Where deed is wilfully destroyed, every thing is to be presumed against the party in *odium spoliatoris*, and therefore, parol evidence of the person who prepared the draft, though at the distance of several years, is admissible to prove the general contents of it. *Delany v. Tenison*, 3 Bro. P. C. 659. **SPOILIATION.**

The contents of a deed destroyed, and the destruction of it admitted to be proved. *Saltern v. Melhuish*, Amb. 247.

Where deed is destroyed, in order to have benefit of it, the contents of it must be proved. *Id. ib.*

Acknowledgment of sealing and delivery, not sufficient evidence thereof. *Grayson v. Wilkinson*, Dick. 158.

But otherwise of signature. *Id. ib.*

The best evidence to be given the nature of the thing admits. *Cole v. Gibson*, 1 Ves. 505.

All deeds, &c. must be proved, unless in the hands of adverse party, or destroyed, then parol evidence of contents allowed. *Id. ib.*

On loss of a deed, &c. the same rule of evidence here as at law. Loss of a deed can only be made out by circumstances. The destruction of a deed, &c. by affidavit. *Askew v. Poultner's Comp.* 2 Ves. 89.

Evidence the same here as at law on a casual destruction of deeds; but otherwise where a spoliation. *Cookes v. Heltier*, 1 Ves. 235. **SPOILIATION.**

A deed lost may be proved by circumstances, first shewing that it once existed, and next that it is lost or cannot be come at. *Whitfield v. Fausett*, 1 Ves. 389.

Evidence may be given at law of a lost deed; *sed secus* of a bond lost for a *profect* in *curia* must be made. *Snellgrove v. Pailley*, 3 Atk. 214.

Evidence necessary as to finding deeds after a decree, is such only as court thinks reasonable. *Lewellen v. Macewanth*, 2 Atk. 40. S. C. Barn. 445.

The abstract of a deed is no evidence, and much less an attested copy of such abstract. *El. Peterborough v. Germaine*, 3 Bro. P. C. 539. **ABSTRACT; COPY.**

Where the deed creating a rent was lost, so that it could not appear what sort of rent it was, a bill was sustained for payment of twelve years' arrears, upon proof that it had been constantly paid before that time. *Collet v. Jaques*, 1 Ch. Ca. 120.

Deed lost; person swearing he saw the deed, not sufficient, he must swear he saw it sealed and delivered. *Cary*, 31.

## 22. Where admitted to expound deeds.

In ascertaining the meaning and effect of a charter, contemporaneous documents, proceedings in causes relating to it, and parol testimony may be resorted to, in order to explain and give to the charter a construction, but not to contradict it. *Pierrepont v. Scarlet*, 2 Y. & J. 330. **CHARTER, C. OF.**

A grant of an annuity to the grantor's sister, though expressed to be made for natural love and affection, may be proved to have been made in consideration of her marriage, and will entitle her to rank as a specialty creditor of the grantor. *Tanner v. Byne*, 1 Sim. 160. **CONSIDERATION.**

Construction of a contract; that a reference of the expenses was confined to expence of the conveyance;

but the evidence of the attorney was admitted for the defendant to prove the intention of both parties, according to verbal instructions that the plaintiff, the purchaser, should also pay the expence of making out the defendant's title. *Ramsbottom v. Goslen*, 1 V. & B. 165. **VEND. & PURCH.**

Whatever is wanting to shew the consideration, and from whom it moves, may be supplied by evidence *dehors* the deed, where such evidence does not contradict the deed. *Hartopp v. Hartopp*, 17 Ves. 192. **DEED, C. OF.**

Parol evidence, in aid of a specific performance upon the sale of the estate by auction, to explain by declarations of the auctioneer, an ambiguity on the face of the particular, by a general claim for a separate valuation of the timber, and also special provisions as to the timber upon certain lots, the agreement, signed on the back of the particular, binding the purchaser, defendant, "to a strict fulfilment of this article, and to abide by the condition and declarations made at the sale," rejected: distinction, where evidence is to resist a specific performance. *Higginson v. Clowes*, 15 Ves. 516. **SPEC. PERF.**

Though a paper, as the particular upon a sale by auction, may by reference be engrafted into a contract within the statute of frauds, that will not authorise the introduction of parol evidence to shew what part was read. *Id. 522.*

Though defendant resisting specific performance, may go into evidence to show that by fraud the true terms were not expressed in the written agreement, yet plaintiff cannot do so for the purpose of obtaining specific performance with a variation of the contract. *Woolam v. Hearn*, 7 Ves. 211. **SPEC. PERF.**

Under a power to appoint among several subjects, each must have a share, and by the rule in equity, as to illusory appointment, a substantial share, unless a good reason appears as another provision, by the person executing the power; not from any other quarter. Under such a power, an appointment of a fund, nearly 1900*l.* among three children, the objects, 10*l.* to one, 50*l.* to another, and the remainder to the third, all having other provisions *alimunde*, was set aside as illusory. Evidence, that an appointment was improperly obtained, being executed by a will regularly proved, was rejected. *Kemp v. Kemp*, 5 Ves. 849. **POWER, ILLUSORY EXECUTION OF.**

Declaration of a party to a deed, previous to the execution, admitted in support of the deed, against imputations of fraud. Declarations subsequent, impeaching the deed, were rejected. *Conolly v. Lal. Howe*, 5 Ves. 700. **FRAUD.**

Testator by codicil, in 1796, reciting that he had devised his real estate by his last will, dated 25th November, 1752, charged his real estates with his debts and legacies given by the codicil, and appointed executors; bill was by devisees of the real estate, under another will, 1756, one of whom was a legatee in the codicil, stating that the will of 1756 was executed in pursuance of an agreement to make mutual wills; that the testator by the death of the other party, was bound, if not in law, in honour, and did not mean to revoke the will of 1756, and revive that of 1752, and praying that the will of 1756, and the codicil might be established, the trusts carried into execution, and the legacy paid. Upon an issue directed, the will of 1752 was established, evidence of mistake being rejected. On further directions, the plaintiffs relied on the agreement, and offered evidence in support of it; bill was dismissed; Ld. Ch. being of opinion, that the relief sought was inconsistent with the frame of the bill, and therefore could not be given under the general prayer; that the evidence ought not to be received; and that upon the evidence, the agreement was uncertain and unfair, and therefore not to

be executed. *Ld. Walpole v. Ld. Orford*, 3 Ves. 402. SPEC. PERF.; PL. UNCERTAINTY.

Evidence to prove the intention of the parties to a settlement, refused. *Brydges v. Dr. Chandos*, 2 Ves. J. 417.

Settlement, on marriage, of stock belonging to the wife in trust, after death of the wife, if the husband survived, for him for life; if no issue, the whole to revert in the wife with power of appointment, if none, to her next of kin; the wife eloped and lived in adultery. On the bill of the husband to have the dividends paid to him during their joint lives, evidence of such intent, or that they should be to the separate use of the wife, refused; but held to belong to the husband for the mutual support of both: decreed that the costs, and also the expenses of the husband in a groundless suit instituted against him by the wife in the ecclesiastical court, should be paid out of the accumulation, and the only surviving trustee appearing not to be indifferent, that the future dividends should be paid into court. *Bull v. Montgomery*, 2 Ves. J. 191. 4 Bro. C. C. 339. ADULTERY; HUSB. & WIFE; PR. COSTS.

Under certain circumstances parol evidence is admissible to explain the nature of an agreement in writing, and to shew the conduct of the parties concerning it. *Eden v. El. Bute*, 3 Bro. P. C. 670. AC. SETTLEMENT.

Purchase by A, and receipt in his name, evidence admitted to prove trust for B. *Knight v. Pechy*, Dick. 327.

Estate settled on marriage upon the husband and wife for their lives, remainder to such child or children as the husband with the consent of the trustees should appoint, and in default of appointment to the first and other sons in tail; the father, with the consent of the surviving trustee, appointed to his youngest son. Bill by the eldest son to set aside the appointment for misrepresentation and imposition on the trustee; the trustee's evidence was read to prove the imposition; but the father's evidence to prove no misrepresentation or imposition, was rejected. *Scroggs v. Scroggs*, Amb. 272. FRAUD; WITNESS, COMPETENCY OF.

Where any consideration is mentioned in a deed, and not said for other considerations, proof of any other cannot be given; otherwise where no consideration at all in the deed. *Peacock v. Monk*, 1 Ves. 128. CONSON.

Plaintiff having prevented the fulfilment of an agreement in favour of the defendant, M, for purchasing the assignment of a mortgage, by obtaining himself an advance after notice, not allowed to take advantage of it, being *mala fides*; evidence therefore of a parol agreement, read against him under these circumstances. *Scott v. Merry*, 1 Ves. 2. FRAUD.

Articles previous to settlement cannot, in general, be read to construe the settlement, unless the bill is brought to rectify the settlement, or the settlement refers to them. *Pritchard v. Quinchant*, Amb. 147.

Mortgage in fee; 700*l.* paid by A, but half of the money was plaintiff's, yet for want of a declaration in writing, B was not admitted to read to the proof of it, so as to create a trust for him, being against the statute of frauds. *Newton v. Preston*, Prec. Chan. 103. But see next case post. TRUST, DECLARATION OF.

A, purchases in the name of B, and pays the purchase-money, B claims the estate, there being no declaration of trust. A may be admitted to read proofs that he paid the purchase-money, but then those proofs must be very clear to make it a trust, arising by implication at law. *Gascoigne v. Thwing*, 1 Vern. 366. But see case preceding. *Id.*

A mortgagee, in an agreement for a mortgage, omits to insert a covenant for redemption, the mortgagor shall be permitted to read evidence to shew the omission.

So a mortgage drawn on two deeds, one an absolute conveyance, and the other a defeasance, which the mortgagee omits to execute, the mortgagor shall be admitted to shew the mistake. *Johnes v. Sleitham*, 3 Atk. 389. Vide *Walker v. Walker*, 2 Atk. 99. MORTGAGE, REDEMPTION OF.

### 23. Handwriting.

Proof of the handwriting of an attesting witness to a will, received under particular circumstances, in order to found a decree establishing the will. *James v. Parnell*, 1 Turn. & R. 417. WILL, ATTESTING WITNESS.

After thirty years, handwriting of letter need not necessarily be proved when letter affords intrinsic evidence of its authenticity. Where there is no direction to such letter, *prima facie* it must be intended to have been written to the party among whose papers it was found. *Fenwick v. Read*, 6 Mad. 7. LENGTH OF TIME.

Evidence to rectify handwriting to receipts by comparison of his signature in register's book (the entries in which it was his duty to sign), held sufficient. *Taylor v. Cook*, 8 Price, 650.

As to the necessary proof of a party's handwriting. *Bandolph v. Gordon*, 5 Price, 312.

Mortgage bequeathed to wife of subscribing witness; proof of his handwriting held sufficient proof of execution of mortgage between mortgagee and mortgagor. *Niman v. Parsons*, 4 Mad. 171. HUSB. & WIFE; MORTGAGE.

Comparison of handwriting, though lately admitted as evidence, if confirmed by the contents of correspondence, refused in the instance of a single letter for the purpose of commitment. *Wade v. Broughton*, 3 V. & B. 172. COMMITMENT.

Handwriting of a relation deceased, rejected as evidence of pedigree. *Edwards v. Harvey*, Cooper, 39.

Rule as to proof of handwriting, the witness must have seen the party write, and swear to his belief that the writing produced is his. *Eagleton v. Kingston*, 8 Ves. 473.

If the witness will not swear to his belief of the handwriting, but says that he thinks it like, the 1*st.* Chancellor of opinion this is not evidence. *Id.* 476.

One subscribing witness dead, and another out of jurisdiction, proof of handwriting allowed. *Banks v. Carquharson*, Dick. 167.

### 24. In tithe causes.

Upon a bill for tithes by a vicar against the occupiers of an estate, which had belonged to the knights hospitallers of St. John of Jerusalem, and after the dissolution of the monasteries, being vested in king Henry the Eighth, had been granted by him to the Archbishop of York and his successors, under whom the defendants occupied; the defendants pleaded that the lands were held by the hospital exempt from tithes; that they were so held and granted by the king; and they proved that no tithes had within memory been paid for the lands. On the part of the vicar was produced an inquisitum of an inquisition, made under the authority of the Archbishop of York in 1314, by which it was found, after specifying certain tithes, "that the vicar ought to receive all other tithes to the said church belonging (except corn and hay), which the master and brethren of the hospital of St. John of Jerusalem received, as rectors, but that all the vicars had, ever since the time of the ordination of the vicarage, received all other tithes, and peaceably, and did so at that time, but they were bound to give their tithe of corn and hay." Held, upon the evidence of this

document, that the vicar was entitled to the tithes claimed by his bill. *Elday v. Donnison*, 2 Bli. N. S. 94. S. C. 1 M'Clel. & Y. 1. *TITLE*.

On a vicar's bill for tithe of agistment, no endowment being extant, the plaintiff produced a series of terriers, commencing from the year 1685, describing the several rights of the rector and vicar, and enumerating, among the rights of the former, a sum of 2*l.* in lieu of the tithe hay, and among the rights of the vicar, tithe calf, and all small and petty tithes. On the part of the defendants, a number of terriers were also produced, commencing from 1749, conflicting with those produced by the vicar in some respects, but all containing the 2*l.* as payable to the rector in lieu of tithe hay cut and grassing, and gave evidence of the general reputation that the sum was payable for both. There was no evidence of perception of the tithe of agistment by either rector or vicar. The court declined to decree for the vicar, but offered him an issue. *Willis v. Farrar*, 2 Y. & J. 217.

The minister's accounts and the royal grants are, when they so state, usually considered as sufficient evidence that certain premises were part of a dissolved monastery. *Pierrepont v. Scarlet*, 2 Y. & J. 330.

A lay-impropriator, who is in possession of a rectory, and in perception of the tithes, subject to charges by way of mortgage, and for raising portions (inasmuch as such mortgages, &c. having permitted the possession, cannot claim the by-gone rents), has a title sufficient to sustain a suit against occupiers for an account of tithes. *Cherry v. Leigh*, 1 Bli. N. S. 306. *TITLE*.

Upon a bill filed by such a lay-impropriator against an occupier, who had taken a lease from the rector of the tithes of corn and grain, but expressly without prejudice to any question as to the tithes of hay, and who by his answer set up, but did not prove, a modus as to the small tithes: Held, that proof of the perception of some tithes by a lay-impropriator, without evidence of a grant from the crown, gives a title to other tithes of the perception of which there is no actual proof. *Id. ib.*

If the occupier shows a colour of title to the tithes not rendered, a court of equity will not interfere, but leave the plaintiff to his remedy at law. *Id. ib.*

Where it appears in evidence that quakers have been convicted for non-payment of their tithes or prescriptive payments, it is strong evidence that a township modus, in respect of those tithes, does not exist. *Jackson v. Benson*, 2 Y. & J. 45.

An exemption from tithes, on the ground of the land having belonged to a monastery of a privileged order, does not rest on prescription, but the owner must shew satisfactorily that the monastery was seised of the lands before the council of Lateran, and also at the time of the dissolution. In order to support a general exemption in *non decimando*, it must be shewn that the lands were part of the possessions of a monastery before the time of legal memory; but it is seldom that such fact can be distinctly proved, and therefore it must usually depend upon presumptive evidence. *Norton v. Hammond*, 1 Y. & J. 94.

Vicar's books were admitted in evidence, though they contained private entries and memorandums of the vicar not relating to the parish, and though one of the books had remained for many years in the hands of a representative of a deceased vicar, instead of having been delivered to the succeeding incumbent. *Miller v. Jackson*, 1 Y. & J. 65.

An incumbent of one parish is capable of tithes in another as a portionist, or in nature of a portionist, but it is incumbent on him, as claiming against a common right, to prove his title strictly, either by

producing an actual grant, or evidence of usage, affording by presumption legal evidence of a grant. Evidence of usage to receive certain mixed tithes by an incumbent in another parish as a portionist, or in the nature of a portionist, is not of itself evidence of a right to receive the tithes of all descriptions which lands may produce under any circumstances. *Carlisle v. Blain*, 1 Y. & J. 123. *TITLE*.

As to evidence of old persons of the nature and extent of a farm. *Brasier v. Mytton*, 1 M'Clel. & Y. 613.

Ancient receipts of a payment as a modus for hay, accompanied by rector's books, in which were contained entries of receipts for hay of persons who, from defendant's title-deeds, appeared to have been then owners of estate, good evidence of payment of a farm modus. *Id. ib.*

Modus alleged in answer to be payable in lieu of tithes, is not supported by proof of payments of a large amount. *Fisher v. Graves*, 1 M'Clel. & Y. 362. *MODUS*.

Where payment, when tithe of ancient demesne lands of a manor was proved to have been paid to and accepted by rector for time, being for upwards of a century, and from the recitals in a lease in the reign of Car. 1., there was strong ground to presume that it existed before that period, and there was no evidence of tithes in kind ever having been rendered; yet it being manifest from certain ordinances, and other ancient documents produced and proved in the cause, that the payment had its origin subsequent to time of legal memory, the court, notwithstanding the antiquity of the payment, decreed an account. *Id.* 363.

Terriers are not documents of such conclusive authority as to exclude all other evidence. *Atkyns v. Drake*, 1 M'Clel. & Y. 213.

The evidence affirmed by ecclesiastical and parliamentary surveys, either for or against a modus, is entitled to very little weight. *Id. ib.*

Modus laid to have been immemorial, and payable by every occupier growing hay, held not to be disproved by evidence of endowment in 1253, and of contributory payments by every occupier indiscriminately. *Id. ib.*

Old receipts by churchwardens to parishioners for contributions by the latter to the modus, rejected as evidence. *Id. ib.*

An entry, purporting to be a terrier, in an old book called a parish registry, produced from an old iron chest in the vicarage house, of which the only key was kept by the vicar, and accompanied by other suspicious circumstances, admitted in evidence at N. P. and left to jury to receive its due weight, found by them not to be authentic, and therefore rejected by court. *Id.* 214.

Where, in a suit for vicarial tithes of a particular district within a parish, the defendant, the lessee of the crown's grantee of the land, and his tenant pleaded that the district had formerly been parcel of the possessions of the hospitals of St. John of Jerusalem: the stat. of 32 H. 8. c. 24. and 31 H. 8. c. 31.; that the district had come to the crown, discharged, and had ever since been enjoyed by its grantees, their lessees and tenants absolutely and wholly acquitted; and proved that the district had been in possession of the order in 22 Ed. 3. A. D. 1357, and usage of non-payment, prior to a decree for an account of tithes of the same lands, eight years before, as far back as living memory went, and tendered much evidence of reputation to the same point; but the plaintiff produced an inquisition of the profits of the vicarage taken in 1314, certifying that the vicar ought to receive the tithes of wool and lambs of the whole parish, and all other tithes to the church in anywise belonging, excepting the tithes

of corn and hay; and that all the vicars had, ever since the ordination of the vicarage, received all other tithes peaceably, and did so at the then present time: Held, that this instrument afforded evidence that the small tithes had been *de facto* paid to the vicar at the time when it was made, and that the usage proved had grown up from some unexplained cause after the time of memory; and that it therefore overturned the defendants *prima facie* case; and an account of tithes demanded by bill was decreed. *Donnison v. Elstey*, 1 M'Clel. & Y. 1.

Evidence of reputation of exemption of district from tithes read *de bene esse*. *Id.* 24. PR. READING EVIDENCE *DE BENE ESSE*.

An original ancient book, containing, amongst other matters concerning a particular see, the entry of the endowment of a vicarage by a former bishop, to whom the rectory was granted by the crown, with licence to appropriate, and coming from the registry of the diocese, is evidence of the endowment. But regularly a copy of an entry is not admissible. *Wolley v. Brownhill*, 1 M'Clel. 321. S. P. 13 Price, 500.

Depositions of defendant, who set up a farm modus, allowed to be read *de bene esse* in favour of co-defendant, who set up other farm moduses. Deposition of witness, who states himself to have been interested in cause, but duly relevated, cannot be read until court has, by inspection of documents creating such interest and release, satisfied itself thereon. *Id.* 324.

Plaintiffs, having read a passage from answer ending thus, "but have not set forth an account of such titheable matters, on account of the expense thereof, and for the reasons herein mentioned," the court refused to permit a distinct part of the answer, which contained the reasons referred to, to be read as evidence for the defendants. *Id.* 326.

In proving farm modus, defendant is bound first to prove distinctly that the farm was an ancient farm, and then to shew the particular payment in respect of that ancient farm. *Id.* 331.

To bill for tithes by lessees of spiritual impropiator against occupiers alone, mere non-payment, coupled with evidence of peramancy by landlord of premises for a few years, and of loose reputation of title in him as a portioner, unsupported by any document, does not constitute a defence, and the case will not be sent to law. *Wolley v. Platt*, 1 M'Clel. 468.

The title of a portioner must be either proved by showing grant under which he claims, or if it has been lost, by that species of evidence which would enable the court to presume that such a grant once existed. *Id.* 473.

Whenever a portion of tithes is claimed, actual peramancy of those tithes from a long and remote time ought to be proved. *Id.* 476.

As to how far vicar, plaintiff, in tithe cause is compellable to produce for inspection, &c. vicar's books, and those of predecessors, admitted by him in his answer to cross bill by defendant to be in his possession, and to contain entries relating to payments of sums of money as compositions, corresponding in amount with money payments set up by defendant as modus relied on. The costs of all proceedings had for obtaining the discovery by such means, must be paid by party acquiring it. *Firkins v. Lowe*, 13 Pri. 193. S. C. 1 M'Clel. 73. PR. COSTS, PR. PRODUCTION OF DEEDS.

At the trial of an issue to ascertain whether one of defendants, a layman, was entitled to tithes as a modus of certain lands, it was proved that a payment described as a tithe, or rate tithe, issuing out of the lands in question, had been conveyed by defendants' title deeds for the last 150 years, and that this pay-

ment had been received by defendant and his ancestors, and that no tithe had ever been paid to plaintiff, the rector, within living memory; and a verdict was found for defendant. Motion for new trial refused. *Williams v. Bacon*, 1 S. & S. 415. ISSUE AT LAW; NEW TRIAL.

Construction and effect of very remote documentary evidence (opposed to a case of uninterrupted non-payment) in a suit for tithes, as applied to the claim, and to a defence of prescription in *non decimando*, on ground of lands having belonged to religious house. To support such a defence lands must be shown to have belonged to a religious house before legal memory, and not merely at time of dissolution. *Markham v. Smyth*, 11 Price, 126.

On question of parochial modus referred to a trial at law, testimony offered as evidence of reputation in proof of custom on which right to the advantage of *modus decimandi* was founded, that money payments, constituting alleged modus, had been uniformly made beyond living memory, and that witnesses had heard old persons, who at that time occupied lands in the parish and were long since dead, say that it had always been the custom to make such payments, was held admissible evidence of reputation against an objection taken of interest in making such a declaration on the part of such deceased persons on whose information the evidence was founded. *Moseley v. Davies*, 11 Price, 162.

Parol evidence of payment for hay and agistment is rebutted by evidence of modus having been established at law and equity for hay. *Williamson v. Thompson*, 9 Price, 197.

A modus covering both these tithes is suspicious and requires strict proof that it is a payment in lieu of both. Evidence of payment, however, was sent to be tried by jury. S. C. *Id.* *ib.*

Producing map of lands of which the farm was stated to consist, and proving the accuracy of the description of the lands in the map as compared with them in 1803, (with reference to the time of commencing the suit) is no proof of such farm being ancient nor sufficient even to raise such a presumption, that it may be capable of further proof as to furnish ground for giving an opportunity of establishing it by issue. The omission in the earlier two or three of a series of old terriers, of any notice of money payments set up as moduses, does not destroy the evidence of the existence of the moduses, arising from the subsequent terriers which do notice them: nor even a variation in the amount of one of the sums, and a qualification of the payment of it occurring in one of them, where the payments relied on are supported by the testimony of witnesses, who prove that such payments have been in fact made accordingly. *Stuart v. Greenall*, 9 Price, 106.

A book, in handwriting of A, purporting to be an account of tithes collected by him seventy years ago, cannot be read in evidence without proof that A was collector at that time. And in a suit for tithes by lessee of an ecclesiastical corporation aggregate to which the rectory belonged, ancient documents in their possession, purporting to be accounts furnished by some of their members employed to collect tithes, and appearing to have been approved and settled, are admissible in evidence, and the statutes of the body, enjoining the appointment of collectors, together with the internal evidence of the documents and their coming out of proper custody, held sufficient proof of their being collectors. *Short v. Lee*, 2 J. & W. 464.

As to the principle on which entries in a rector's books are admitted as evidence for his successors. Entries of tithes received in books of ecclesiastical corporation aggregate entitled to a rectory, are evidence for their successor. Quare, whether entries in

books of lay impropriator in fee, of tithes received, are evidence for those claiming under him. *Id.* 478.

Where evidences in support of tithes and in support of modus were very strong and conflicting, it was sent to issue to determine question. *Taylor v. Cook*, 8 Price, 650. TITHES; ISSUE AT LAW.

Evidence of rector's handwriting to receipts, by comparison with his signature in register's books, the entries in which it was his duty to sign, held sufficient. *Id. ib.* HANDWRITING.

A money payment of 5s. yearly at Lammas by every occupier of lands or tenements within a district set up as a modus when of all tithe hay within district, although proved *prima facie* in point of fact: Held to be disproved as a modus for all the hay in the whole township by the evidence of terriers stating that "in, the district, only 5s. per year for all the hay in their (the occupiers) crofts," was payable, the parol testimony of the money payment, and the evidence of terriers being quite consistent with each other, there being nothing contradictory in the terriers so limiting and specifying the object and consideration of the sum proved to be paid generally throughout the parish in lieu of hay, to such hay as was grown in crofts. *Drake v. Smyth*, 8 Price, 692.

If modus be laid in answer to case resting on endowment as covering several titheable articles, it must be proved to be payable for all of them. A doubt from evidence as to that extent is not sufficient to direct an issue. *Kempson v. Yorke*, 8 Price, 13. MODUS; PL. ANSWER.

A defendant insisting on a modus as an outner, must prove himself to have been such at the time his lands became titheable, his being so described in the bill, not sufficient. *Lake v. Skinner*, 1 Jac. & W. 9. PL. BILL; OUTNER.

Terriers alone not sufficient to prove a modus. *Id.* 20. MODUS.

As to evidence of fraud in case of subtraction of tithe, &c. *Hall v. Maltby*, 6 Price, 240. FRAUD.

As to the preponderance of conflicting evidence as to title in tithe causes. *Petch v. Dalton*, 6 Price, 232. TITHES.

Modus of sum of money laid as payable in lieu of tithes of hay, and all small tithe, is not supported by proof of payment for hay, and non-payment of hay in kind or any small tithes either in kind or sub modo. Payments laid as moduses, and proved to have been always paid within memory, and not opposed by evidence of their origin: Held, sufficiently proved to establish them on a defence of moduses, although all the witnesses called them compositions. *Driffield v. Orrell*, 6 Price, 324. MODUS.

As to evidence to support the existence of an ecclesiastical rectory. *Bolton v. Richards*, 6 Price, 483. RECTORY.

As to evidence of money payments in tithe causes. *Drake v. Smyth*, 6 Price, 369. TITHES.

Vicar] having made out a *prima facie* title to all tithes, except corn, grain, and hay, in a suit for agistment tithe; a defence that it belonged to the lay impropriator is not proved by shewing that agistment tithe has never been paid to vicar, and that lay impropriator is entitled, under a grant from the crown of tithes of corn, grain, hay, and grass; and that title of agistment is covered by a modus payable to impropriator in lieu of tithe of hay and grass. *Wilkins v. Hutton*, 9 Price, 187.

Where a vicar succeeds in establishing a general right to all tithes, except those of corn and grain, throughout a parish, it requires very strong evidence to shew that an impropriator of a particular district, who claims under a grant, limiting his title to the excepted articles, is entitled to the tithes of any other

thing. *Williamson v. Ld. Lonsdale*, Dan. 171. EVIDENCE, ONUS PROBANDI.

To make out a defence to a bill for tithes of a composition real, it is not enough to shew that the same money payment has been constantly received in satisfaction of tithes for a considerable period before 13 Eliz., but evidence must be given of the existence of an agreement in writing, and made between all proper parties interested, nor will issue be granted on such evidence, or costs allowed to those defendants who are occupiers. *Bennett v. Shaffington*, 4 Price, 143.

Vicar, claiming tithe of hay, may establish his right by sufficient proof of perception during living memory, where none can be shewn to have been enjoyed by rector, although, his endowment actually negatives his right to that tithe expressly, and states it to belong to rector on presumption of a subsequent endowment which court is bound to adopt. *Parsons v. Bellamy*, 4 Price, 190.

Perception of tithes by means of a composition which has always been understood by parties to have been paid for tithe hay, is as strong evidence as if it had been paid in kind. And perception by vicar for considerable period where its perception cannot be shewn, and is not met by perception by rector or any other person, is a sufficient proof of usage to ground a presumption of perception long anterior; and of its having been founded on subsequent endowment, nor will court grant an issue for rector. A receipt for payment (by person sued by vicar for tithes) of plaintiff's bill of costs is evidence that suit resulted in favour of vicar. No also is an entry to that effect in a former vicar's books. *Id. ib.* PERCEPTION OF TITHES.

Vicar's books are evidence to shew that money payments received in lieu of tithes are founded on, and regulated by, a criterion not in existence beyond legal memory, e.g. the poor-rates. *Walter v. Holman*, 4 Price, 171.

Evidence relating to tithes so old as to be unintelligible, issue was directed. Evidence of reputation of certain lands having been enclosed in pursuance of agreement, not admissible. Copy of lost terrier rejected as evidence. *Leathes v. Newitt*, 4 Price 355.

Non-perception of vicarial tithes by either vicar or rector, (the latter admitting the vicar's right, except as to certain titheable articles, there being no third claimant) in certain parts of parish, throughout which vicar receives some small tithes, is negative evidence in favour of vicar's right to all other than excepted articles. *Id.* 374.

The three legitimate repositories of terriers, and vicar's books, to make them evidence, are the parish chest, the registry of the bishop, and the registry of the archdeacon. *Armstrong v. Hewett*, 4 Price 216.

It is not sufficient for vicar, who rests his case on presumption of an endowment from evidence of perception, to prove that he had received the tithes claimed from the rest of the parish generally, and even from part of the district in which defendant's lands are situate, unless he carries it to the parts for which the exemption is claimed by the defence; and the vicar not doing so, proof on part of defendants, that no tithe has ever been paid for their lands, will entitle them to an issue, nor will the ecclesiastics, survey, stating vicar to be entitled to tithe of parish generally, supply the absence of proof of perception from the particular lands. *Id. ib.* EXEMPTION FROM TITHE.

Book from registry of Lincoln containing *inter alia*, what were called copies of endowments of certain vicarages, was received as evidence of an endowment of vicarage in Northamptonshire. *Leonard v. Franklin*, 4 Price, 264. ENDOWMENT OF VICARAGE.

Old terriers, recording that tithe of hay is payable in kind, signed by rector and churchwardens, overseers and some of resident parishioners, are good evidence to rebut the presumption of a farm modus attempted to be established by proof of money payment having been uniformly rendered within living memory; and the absence of any evidence, even of reputation, that tithe had ever been taken in kind, and that though such terriers are not proved to have been signed by any persons interested in the farm. *Wood, B. dissentiente*. Nor will the court grant an issue in such case. *Mytton v. Harris*, 3 Price, 19.

An old receipt of former rector in lands of a defendant for money payment in lieu of tithes, where there was a probability of its having come to him from a predecessor in the same way, admissible in support of modus. A valuation of tithes made by surveyor, at the instance of rector, if it can be distinctly proved to have been made with reference to certain money payments in lieu, is evidence to fix rector with an acknowledgment of such payments. *Bertie v. Beaumont*, 2 Price, 303. **MODUS.**

Modus of 4d. for every cow in lieu of tithe of milk is not supported by proof of modus for every cow with calf. *Id. ib.*

The ecclesiastical surveys are admissible to prove an ancient endowment, and aided by perception of small tithes, (though not of all), will give the vicar a right to tithes of articles of modern introduction against the lessee of the rector. *Cunliffe v. Taylor*, 2 Price, 329.

As to evidence in tithe matters. *Bullen v. Nichel*, 4 Dow. 297.

A receipt, even of more than fifty years old, offered to be put in to prove a money payment, purported by it to have been received in lieu of tithes, is not admissible evidence of the fact of such customary payment having been acted on, so as to establish a defence of a modus, unless it can be proved who the parties to the receipt were, and in what character they stood; and unless proof be given of the handwriting, or death of the party giving it. *Wood, B. dissentiente*. *Manby v. Curtis*, 1 Price, 225. **TITHES.**

In a suit by rector for account of great tithes, evidence of vicar to prove payment of small tithes to himself, is admissible. *Parker v. Baker*, Wightw. 397.

It is no objection to evidence of reputation that deceased person from whom it came was liable to pay tithes. *Harwood v. Sims*, Wightw. 112.

Entry in parish register of different moduses, the sum total of which was in handwriting of deceased vicar, admitted as evidence. *Perigal v. Nicholson*, Wightw. 63.

Payment of tithes by the defendant; a parishoner is *prima facie* evidence against him of the rector's title. *Chapman v. Beard*, 3 Anst. 942.

Immemorial non-payment of any tithes from a district, cannot raise a presumption of an exemption by grant from the lay-rector, but is strong evidence to explain the extent of the grant of the rectory, if at all doubtful. *Id. Petre v. Blencoe*, 3 Anst. 945.

Mere non-payment of a particular species of tithes is no evidence against a lay rector of a conveyance of that tithe. *Negle v. Edwards*, 3 Anst. 702.

An instrument purporting to be an endowment without the seal, and another purporting to be an *inspeximus* thereof under the seal of the bishop, were rejected as coming out of private hands, unconnected with the matter in dispute. *Estlin v. Durant*, 3 Anst. 789.

A terrier found in the archdeacon's registry is admissible.

A terrier, although not signed by the impropriate rector, nor any person for him, is evidence against him as to tithes due to him in the parish. *Id. ib.*

Modus claimed for hay was described in terriers to be for all grass, "except clover, and the like." Held, this was no proof of modus being modern. *Franklin v. Spilling*, 3 Anst. 760. **TITHES, MODUS.**

A book found in the herald's office purporting to be an account of the possessions of a monastery, is not admissible evidence of that fact. *Lygon v. Strutt*, 2 Anst. 601.

A terrier cannot be received in evidence unless it comes from the proper repository; the registry of the diocese, or a copy from the parish registry, if the original cannot be found. *Atkins v. Hutton*, 2 Anst. 387.

Payment of a composition for the tithes of turnips, whether pulled or eaten off the ground, where neither party considered it as an agistment tithe. *Garnes v. Barnard*, 1 Anst. 319.

In order to establish a real composition for tithes, the evidence must be such as to distinguish it clearly from a prescriptive payment. *Haves v. Swaine*, 2 Cox, 179. **COMPOSITION REAL.**

A modus bad in law, received by the vicar, is proof of endowment of the tithe for which the modus was paid. *Ravis v. Oaon*, 1 Anst. 309. **ENDOWMENT, MODUS.**

In proving the title of a lay impropriator to tithes, it is not necessary to produce the deed of severance; it is sufficient to give evidence that there was one. *Fanshaw v. Rotheram*, 1 Eden. 297.

Evidence of an exemption depends on usage, and a posterior one is evidence of the antecedent, for no other can be had. *Archb. York v. Stapleton*, 2 Atk. 137.

An answer of impropriator admitting title of vicar, to all tithes except corn and grain, is not sufficient to establish that right against occupiers. *Barkeley v. Fox*, 3 Bro. P. C. 613. **PL. ANSWER.**

Bill for tithe of lambs; the ewes were kept by defendant, in the parish of D, (where the demand lay), all the year until Christmas; when they were ready to drop their lambs, he removed to the parish of S, (where there was only a small modus for lambs), and there kept until Lady-day for the convenience of forage; and at Lady-day they were driven back to D. Plaintiff complained of this as a fraud in the tithing. *Per curiam*, here is not a sufficient proof of fraud, and plaintiff's bill was dismissed. *Boys v. Ellis*, Bunb. 139. Title of lambs is not divisible as wool is. **S. C. TITHES, OF WHAT FRAUD.**

Bill by a vicar for tithe herbage and furze. Plaintiff proved that the vicar was entitled to all small tithes within the parish, and that the great tithes were constantly paid to the impropriator; and he gave one instance within thirty years of a compensation with the vicar for the agistment tithe of the close. Held, this was sufficient proof of the vicar's title to the small tithes. *Goole v. Jordan*, Bunb. 114. **TITHE.**

Bill by a lay impropriator for tithe; he only proved his claim under laymen, and went no further back than thirty-four years. This is sufficient. Held also, that where a general exemption is insisted upon, a partial one cannot be admitted in evidence. *Leigh v. Maudsley*, id. 296.

Bill by a vicar for tithe hay, and small tithe. Defendant admitted by his answer, that the vicar was entitled to all tithe, except corn and grain: Held, sufficient to support the vicar's right to hay. *Fox v. Bardwell*, id. 327.

## 25. Will, Proof of.

All wills to be proved, shall be produced in the custody of the proper officer and delivered to the examiner or commissioners, and by them re-delivered to the same officer after examination closed. *General Rule*, Feb. 49, 1803. 1 Scho. & L. 114.

Where the evidence proves the execution of a will,

but the witnesses have not been examined as to the sanity of the testator, the cause will be adjourned at the hearing, and liberty will be given to exhibit an interrogatory to prove his sanity. *Abrahams v. Winship*, 1 Russ. 526. **PR. ADJOURNMENT OF CAUSE.**

A will was proved in spiritual court, but executor of former will brought his bill in equity to discover by what means the latter will was obtained, and whether testator was not incapable, &c. and for account. *Demurrer to jurisdiction overruled.* *Andrews v. Powys*, 2 Bro. P.C. 604. **PL. DEMURRER TO JURISDICTION.**

The probate-act-book of the prerogative court containing an entry of a will being proved, and of probate being granted to the executors therein named, admitted as evidence of those persons being the executors without accounting for the non-production of the probate. *Car v. Attingham*, 1 Jac. 514. **EXORS. PROBATE OF WILL.**

Will of real estate not to be proved on a reference before the master. *Lechmere v. Brasier*, 2 Jac. & W. 289. **WILL; REF. TO MASTER.**

Probate of a will not evidence that copyholds pass by it. *Jervoise v. Dk. Northumberland*, 1 Jac. & W. 670. **COPYHOLD; PROBATE OF WILL.**

In establishing a will, the attestation of all witnesses must be proved, and if not personally, either that they are abroad or dead, and the proof must be positive. In proving will for certain purposes only, such proof as will satisfy the court is sufficient, and in such case leave will be given to exhibit an interrogatory for further proof of will for the former purpose. *Wood v. Stane*, 8 Price, 613.

Probate is not evidence of will of real estate. *Gibson v. Whitehead*, 4 Mad. 244. **WILL, PROBATE OF; REAL ESTATE.**

Chancery requires judgment of ecclesiastical court that an instrument is testamentary, but is not satisfied with proof in that court, but requires the witnesses to be examined again, or if no witnesses, proof of signature. *Rich v. Cockell*, 9 Ves. 376.

Witness to devise of real estate becoming insane, proof of his handwriting was allowed. *Bernett v. Taylor*, 9 Ves. 381. **INCAPACITY OF WITNESS.**

Proof of one of the witnesses of an old will, of whom no account could be given, dispensed with. *McKenire v. Fraser*, 9 Ves. 5. **PR. WITNESS ATTENDING.**

A codicil expressed to be in event of testator's death before he joins his wife, was executed after their separation in W. I. upon an intended voyage to England. The voyage being prevented by accident, he joined her, and they lived together there and in England, having returned together, and though testator, having afterwards gone to Corsica and thence to Lisbon, died there. The codicil held to be contingent, and did not take effect under circumstances. Probate is not conclusive, not being refused except in a plain case. *Sinclair v. Arne*, 6 Ves. 607. **WILL, C. OF; PROBATE OF WILL.**

Order on the register of the ecclesiastical court to deliver an original will to be produced here on security given to return it. *Luke v. Causfield*, 2 Bro. C.C. 263. **PR. DELIVERY OUT OF DEEDS.**

Probate of will in the ecclesiastical court sufficient as far as it goes; farther proof if necessary may be proceeded on in this court. *Colman v. Sarrall*, 1 Ves. J. 54.

Where a will is to be established in equity it must be proved by each of the subscribing witnesses, if living, and if dead, their death must be substantiated, &c. *Grayson v. Atkinson*, 2 Ves. 454.

One of the witnesses being beyond sea, there should have been a commission to examine him, and the court could only direct a trial at law. *Id. ib.*

Will, though proved *per testes*, not declared well

proved in absence of heir, but decreed to be established. *Stokes v. Taylor*, Dick. 349.

Answer of heir believing that a will was made will not prevent the necessity of its being proved. *Potter v. Potter*, 7 Ves. 274. **PL. ANSWER; HEIR AT LAW.**

In a suit to establish a will in equity, all the witnesses of it should be examined or proof given of their deaths. *Ogle v. Cook*, 1 Ves. 177.

Will not allowed to be proved by proof of handwriting of witness, without positive proof of his being dead. *Bishop v. Burton*, 2 Com. 614.

Though it be proper to prove a will of lands in equity, yet the same is not absolutely necessary any more than it is to prove the deed in equity. *Cotton v. Wilson*, 3 P.W. 192.

Where a bill is brought to prove a will of land, the sanity of the testator must be proved. Secus, in the case of a deed of trust to sell for payment of debts. The court never orders a will to be proved *in loco* at the hearing, as they do a deed. *Harris v. Ingledew*, 3 P.W. 93.

Executor cannot bring a bill without shewing thereby that he has proved the will in the spiritual court; if he does, this is good cause of demurrer. But it is enough to allege he has duly proved the will without saying in what court. *Humphreys v. Ingledew*, 1 P.W. 752. **EXOR.; PL. DEMURRER.**

Where original will is lost, and from the exemplification thereof under seal of prerogative court, there is reason to suspect its validity as to disposition of real estate, such exemplification cannot be admitted as evidence, but party must be left to his remedy at law. *Arthur v. Arthur*, 3 Bro. P.C. 568. **WILL, EXEMPLIFICATION OF.**

Executor proves a will of a personal estate wherein one of the legacies is forged, the executor has no remedy in equity, but ought to have proved the will with a special reservation as to that legacy. *Plume v. Beale*, 1 P.W. 388. **EXORS. LIAB. OF.**

A feme covert has power given her by her husband to make a will: probate of such will *per testes* is sufficient proof without other proof. *Bateh v. Wilson*, Prec. Chan. 84. **FEME COVERT.**

A will of a personal estate which lies in a foreign country may be proved here. *Jauncey v. Sealey*, 1 Vern. 397. **FOREIGN COUNTRY, PERSONAL ESTATE IN.**

## 26. When admitted to expound wills.

No papers, letters, &c., can be taken notice of to influence construction of will. *Bertie v. Falkland*, 1 Salk. 232.

Where a particular estate is expressly devised, a contrary intent is not to be implied by subsequent words. *Popham v. Banfield*, 1 Salk. 236. But see, as to this report of this case, 1 Ves. 26. See S.C. 1 P.W. 54.

A testator gives to some persons annuities of 500l. long annuities, and to several others legacies of 500l. long annuities, on one of which he directs interest to be paid at 5l. per cent. Evidence of the amount of his property admissible to explain the meaning of the latter bequests, and his property being insufficient to pay them in long annuities, held that sums of money to be raised out of his long annuities were intended. *Colpoys v. Colpoys*, 1 Jac. 451. **WILL, C. OF.**

Primary principle is, that evidence is not admissible to contradict a written will; but, in some cases, court will raise a presumption against it, and then admit evidence to repel the presumption. *Hurst v. Beach*, 5 Mad. 360.

Evidence of mistake admitted in name of legatee; but one of legatees who might otherwise have had a claim to that legacy being an infant, inquiry was directed as to the party entitled. *Still v. Hoste*, 6 Mad. 192. **WILL; MISTAKE; INFANT.**

Evidence not admissible that deviser did not mean



what he had expressed, but admissible to show that a particular expression was not his will. *Powell v. Mouchett*, and *Litchfield v. Mouchett*, 6 Mad. 216. **MISTAKE.**

Where there are not, nor ever were, nor can by possibility be, any persons strictly answering the description of children, it is necessary to resort to evidence *dehors* the will for the purpose of finding whether there were any who had acquired the reputation of children, and it is possible for legitimate children to acquire that reputation. *Id.* *Woodhouseles v. Delrymple*, 2 Mer. 419. **BASTARDS.**

Under bequest, by unmarried man "to my children, &c., each," parol evidence allowed to show who testator considered in character of children, and they, having obtained a name by reputation, admitted to take as a class, though illegitimate, and not named in will. *Beachcroft v. Beachcroft*, 1 Mad. 430. **BASTARDS.**

Legacy of interest then due on mortgage. After making will, testator survives eleven years, and receives interest on mortgage. Evidence admissible to prove interest was received as accruing since the making of will, and not on account of what was due before; therefore, legacy was held adclaimed. *Graves v. Hughes*, 4 Mad. 381. **LEGACY, ADEMPMENT.**

Satisfaction of a legacy by a parent to a child by a portion of the same amount, though with some circumstances of difference. When a parol evidence can be admitted originally of an intention to substitute the one provision for the other, or only where it is first offered against the presumption; it is clearly admissible to shew that the father was the author of the portion, viz., by stipulating or joining in the marriage settlement of his eldest son for a charge, and giving up interests in consideration of it. *Hartopp v. Hartopp*, 17 Ves. 184. **LEGACY, SATISFACTION; PARENT & CHILD.**

Legacy to A, if in the testator's service at the time of his decease, parol evidence admitted to shew that, though she had quitted his house, she continued, and was by him considered as in his service, and upon that evidence, the legacy was established. *Herbert v. Reid*, 16 Ves. 481.

Extrinsic evidence admitted, not to construe a will, but to shew with reference to what it was made. *Bengough v. Walker*, 15 Ves. 514.

Evidence of mistake not admissible to affect the construction of a will. *Shergold v. Boone*, 13 Ves. 376. **MISTAKE.**

On presumption of satisfaction by will, evidence admissible, first, to constitute the fact that testator was debtor; secondly, to meet or fortify the presumption. *Pole v. Ld. Somers*, 6 Ves. 321.

Statement of property written by testator, and his books of accounts, admitted as evidence that he considered as his property, and meant to dispose of, property not strictly, though in some sense, his; viz., mortgages and leases, the property of wife under will, by which he was executor with her before her marriage. *Druce v. Denison*, 6 Ves. 385. **HUSBAND & WIFE; CHOSE IN ACTION; REDUC. INTO POSSESSION.**

A legatee, son-in-law to the testator, was held entitled to his legacy discharged from debts due by him to the testator, and a debt for which the testator was his surety upon evidence, from the testator's accounts, letters, and memorandums, in his handwriting; parol evidence of declarations in conversation was produced for the same purpose: but the court appeared to rely on the evidence in writing. *Lidd v. Smith*, 5 Ves. 341. **LEGACY; DEBTOR & CRED.**

Legacy of 1000*l.* out of my real and bank annuities, held pecuniary, the court leaning against holding a legacy specific, unless clearly intended; the court would not take into consideration evidence of the value of the stock at the date of the codicil, by which

the legacy was given, nor an erasure of a legacy to the same person by the will, but decided upon the words of the codicil. *Kirby v. Potter*, 4 Ves. 718. **LEGACY SPECIFIC.**

A subsequent marriage and the birth of a child revokes a will. *Quere* as to the propriety of admitting evidence against the presumption. *Gibbons v. Gaunt*, 4 Ves. 848. **WILL, REVOC. OR.**

Distinction between a legacy and a residuary bequest as to a presumed satisfaction by the advancement of a portion. The presumption from the former does not arise from the latter, and parol evidence of an intention to satisfy cannot be admitted originally, as it may where first introduced to rebut a presumption. *Freemantle v. Bankes*, 5 Ves. 70. **LEGAT. SATISFACTION OF; RESIDUARY BEQUEST, SATISFACTION OF; PRESUMPTION.**

Portions for the children by the will of the parent presumed a satisfaction of a prior provision by settlement, unless clearly not so intended; the presumption is not rebutted by slight circumstances; accounts in the testator's handwriting were admitted as evidence of the circumstances under which he made his will, but not to explain the will. *Hinchliffe v. Hinchliffe*, 3 Ves. 516. **SETTLEMENT, SATISFACTION OF; PARENT & CHILD.**

Portions for the children by the will of the parent held a satisfaction of a provision by settlement, upon the intention: slight circumstances of difference that would repel the presumption of satisfaction between strangers are not sufficient in the case of parent and child. *Spurkes v. Cator*, 3 Ves. 530. **Id.**

Testator gave a sum, part of his four per cent. bank annuities, to his wife for life, and, after her decease, to several relatives. Evidence was admitted that he had no such stock at the date of the will, having previously sold it all, and invested the produce in long annuities, and to show the cause of the mistake, and the legacies were established. *Selwood v. Allmley*, 3 Ves. 306. **MISTAKE.**

Testator bequeathed part of his three per cent. consolidated bank annuities. Upon evidence that he had no bank stock at the date of his will, but that he had three per cent. South Sea annuities, the legacy was established out of that fund. *Id. ib.*

Bequest of stock, if the testator has it at the time of it, is specific, and any act destroying it, proves an intention to revoke; if a ring or a picture bequeathed cannot be found, that cannot be rectified. *Id. ib.*

Deviso of real estate to be sold, and the produce, with the personal estate, to testator's wife for life, with power to appoint a moiety by deed or will, with two or more witnesses: the estate was not sold: the wife, having no other real estate, by will with three witnesses, gave specific legacies, some described to have been her husband's, and all the rest, residue and remainder of her estate and effects of what nature or kind soever, and whether real or personal, and all her plate, china, linen, and other utensils, which she should be possessed of, interested in, or entitled to, at her decease: the power is executed by the residuary clause. Evidence of conversation with the person who drew the will, to shew the testatrix had no other real estate, rejected. *Standen v. Standen*, 2 Ves. J. 589.

Legacy to "James, son of Thomas A." There was no person of that description: there was a "Thomas, son of James A." The court will not receive evidence to shew that this was a mistake in the description. *Andrews v. Dobson*, 1 Cox, 425. **WILL, MISTAKE IN.**

The testator having a power over 3000*l.*, originally the property of his wife, gave several legacies, and then, after the death of his wife, the residue to the defendant: his estate was not sufficient to pay the legacies, yet held that the will was not an execution

of the power, the same not being referred to, nor any thing by which an intention appeared in testator to execute it. Evidence to shew the testator's own estate was insufficient for the purposes of his will without the 3000l., rejected. *Andrews v. Emmet*, 2 Bro. C. C. 297. POWER, EXEC. OF.

Presumed satisfaction of legacy by a portion, the evidence not being sufficient to rebut the presumption, but parol evidence admissible to rebut the presumption, without regard to the nature of it. *Trimmer v. Bayne*, 7 Ves. 508. LEGACY, SATISFACTION OF.

Where a legacy is given for a particular purpose, (as a portion) and another bounty is afterwards given for the same purpose, it is considered as implying an intention in the testator to satisfy the legacy: but this being only a presumption, may be rebutted by evidence shewing a contrary intention. *Debesse v. Mann*, 1 Cox, 346. S. C. 2 Bro. C. C. 165, and *aff. id.* 519. *Id.*

In an application for a commission to examine evidence to shew that the legacies given in two codicils were both intended for the legatee, the legatee ought to swear she believes that to have been the intention. *Cootte v. Cootte*, 1 Bro. C. C. 448. LEGACY ACCUMULATIVE; PR. COM. TO EXAMINE.

Evidence offered to prove that testator, who gave legacy to A, his executors, &c., knew A to be dead, and meant it for his representatives, rejected. *Ma-bank v. Brooks*, Dick. 577.

Parol evidence of testator's intention to give his personal estate exempt from debts, rejected. *Stephenson v. Heathcote*, 1 Eden, 37.

Parol evidence is only admitted to support legal rights against an equitable claim. *Id.* 41.

Parol evidence may be read in support of legal operation of will. *Lake v. Lake*, Dick. 236.

A will made on the eve of a journey abroad, under some words used in the will, held a contingent will, and avoided by the testator's return. And collateral proofs of his afterwards taking notice of the will cannot be admitted, unless some acts were done to republish the will. *Parson v. Lanoie*, Amb. 559. S. C. 1 Ves. 189. 1 Wils. 243.

Parol admitted of declaration of devise to prove she was only trustee. *Strule v. W'inchester*, Dick. 397.

The same circumstances ought to be proved to have happened on part of testator, to show his intent of revoking will in equity as in law, unless they were prevented by party interested. *Piggott v. Penrice*, 1 Com. 250. WILL, REVOCATION OF; FRAUD, ACTS PREVENTED BY.

One, by will, gives his executor an express legacy, and makes no disposition of the surplus. The court will admit of parol evidence to show the intention of the testator, and, if proved that the testator intended the surplus to the executor, he shall have it, notwithstanding the express legacy. *Batchellor v. Sear*, 2 Vern. 736. EXORS. BENEFICIALLY INTERESTED.

Parol evidence as to testator's intent to exempt personal estate from debts, refused. *Gale v. Croft*, Dick. 23.

There being a devise in a will of all testator's household stuff, as brass, pewter, linnen and woollens, except a trunk, the person who drew the will was examined to prove that the testator directed him to insert all his goods except the trunk, and was allowed to be read. *Pendleton v. Grant*, 2 Vern. 517. Eq. Ca. Ab. 230. pl. 2. S. C. better reported.

## 27. Witness.

See also BANKRUPTCY, VII.3.; PR. COSTS, 10. (U).

- (a) Generally, his rights, duties, and liabilities.
- (b) Competency of.

(c) Examination as to credit.

(d) Demurrer to interrogatories, and on what matters examinable.

(e) Attending witness.

(a) Generally, his rights, duties, and liabilities.

See also BANKRUPTCY, VII. 3.

Where witness is made party merely for the purpose of discovery, it is demurrable. *How v. Best*, 5 Mad. 19. PL. DISCOVERY; PL. PARTY; PL. DEMURRER.

A witness who had answered some of the interrogatories, but refused to answer the others, was ordered to answer those interrogatories within four days, or stand committed. *Austin v. Prince*, 1 Sim. 348.

Witness, attending arbitrators upon an arbitration under an order of court, protected from arrest. *Exp. Temple*, 2 V. & B. 395. PRIVILEGE FROM ARREST; ARBITRATION.

Creditor attending to prove his debt before commissioners of bankruptcy, privileged from arrest. The plaintiff in the action ordered to discharge him and all parties subjected to pay costs. *List's Case*, 2 V. & B. 373. S. C. 2 Rose, 24. BANKCY.; PRIVILEGE FROM ARREST.

A person attending commissioners of bankruptcy, without a summons, swearing that he was a material witness, and not contradicted, protected from arrest, while remaining, though having left the room by order, for the purpose of separate examination; and while returning; whether while going, *Qu.?* Ordered to be discharged immediately by the party in the first instance; if disobeyed, to be extended to the officers, with costs. Application at the bar without a petition, the proper form in such cases, and time to answer the affidavit refused. *Exp. Byne*, 1 V. & B. 316. S. C. 1 Rose, 451. BANKCY.; PRIVILEGE FROM ARREST.

Protection from arrest of persons attending commission of bankruptcy, for the purpose of aiding them in the administration of justice *eundo, morando, et redeundo*, not by having a summons, but upon principle applying to a witness or party. *Exp. Byne*, *id.* 319.

Rule, that mere witness having no interest ought not to be made a party, not without exceptions. *Whitworth v. Davis*, *id.* 550. PL. PARTY.

General rule that a mere witness is not to be made a party. Exceptions in the cases of arbitrators and attorneys, and corporations, whose officers and servants are made parties. *Dummer v. Corp. of Chippenham*, 14 Ves. 252. PL. PARTY.

A person having attended under a subpoena as a witness, but refusing to be sworn, ordered to attend to be examined or stand committed. *Hennegal v. Lounce*, 12 Ves. 201.

Bill for discovery in aid of action. Demurrer by mere witness, allowed, though discovery would be more beneficial than an examination at law, and notwithstanding a charge of interest in defendant, as to which he may be called, by plaintiff waiving the objections, and if called, may be examined on the *voir dire*. *Fenton v. Hughes*, 7 Ves. 287. PL. PARTIES.

To bill for relief mere witness cannot be party except in case of a secretary, &c. of a corporation. *Id.* 288. PL. PARTIES.

Witnesses ought not to disclose their evidence to parties. *Cooth v. Jackson*, 6 Ves. 33.

It is no answer on exception that the defendant is a mere witness, and ought not to have been made a party; for having admitted to answer, he must answer fully. *Cook v. Ellison*, 2 Bro. C. C. 252. PL. PARTY; WAIVER; PL. EXCEPTIONS TO ANSWER. Commissioner's summons for attendance of witness,

not sufficient; he must be served with subpoena. *Wardell v. Dent*, Dick. 334.

A mere witness cannot be made a defendant for discovery of what he is examinable to, unless he is interested. If the bill charges he is interested, the defendant must plead and support it by an answer denying that allegation, and cannot demur. *Plummer v. May*, 1 Ves. 426. **PL. PARTY; PL. PLEA.**

A witness examined at a commission, swears reflecting words, yet he ought not to pay costs, it being the commissioner's fault to take down such depositions. *Anon.* 2 P. W. 406. **PR. COSTS.**

Witness served to testify, pressed for soldier, attachment is stayed. *Humble v. Malhe*, Cary, 41.

Subpoena to testify, where no cause depending, discharged. *Price v. Holland*, id. 95.

Witness unable to travel, discharged of contempt. *More v. Worsham*, id. 99.

Attachment against witness served to testify. *Midleton v. Sperright*, id. 80.

Witness served to testify, entitled to costs. *Pearce v. Crawthorn*, id. 61.

Costs to witness shall be paid before he gives evidence. *Belgrave v. Fl. of Hertford*, id. 62.

*Duces tecum* for deeds, but ordered to be delivered to usher of court to plaintiff. *Wilford v. Denny*, id. 53.

Plaintiff's father seised in fee with caution to re-enter, deviseth for life; subpoena *duces tecum* for evidence. Id. 17.

On the return of a subpoena, if a witness will not appear and be examined, the party may take an attachment against him, and if he appears and deposes on the other side, his depositions may be suppressed on motion. *Dolman v. Pritman*, 3 C. R. 64. **S. C. Anon.** 2 Freem. 134. **PR. ATTACHMENT.**

#### (b) Competency of.

It is no objection to the testimony of a witness in a suit for predial tithes, that from his description in the deposition, he appears to reside in the township where the tithes arise, unless it appears that he is not an owner or occupier of lands producing predial tithes, and so interested in supporting the modus. But it seems to be otherwise, where the modus is for all tithes generally, in which case the modus for the great tithes may possibly be a discharge for the small tithes. *Jackson v. Benson*, 2 Y. & J. 45.

A witness who has been examined at the hearing, only to prove exhibits, may be examined before the master on interrogatories, to prove other exhibits, without a special order. *Courtenay v. Hoskins*, 2 Russ. 253. **EXHIBITS.**

Persons entitled under will, cannot in any respect be witnesses to prove it. *Tucker v. Sanger*, 1 M'Clel, 435. **S. C.** 13 Price, 119. **LEGATEE.**

The custody whence a document offered in evidence is taken, cannot be proved by an interested person. *Carrington v. Jones*, 2 S. & S. 135. **EVIDENCE.**

Where a sum of money came to the hands of one of two executors, who paid it over to the other executor, it was held, that the executor who first received it could not, under the usual decree for an account, examine the other executor as a witness, to prove that the money paid over was duly applied on account of the affairs of the testator, and an order obtained for that purpose was discharged. *Dines v. Scott*, 1 Turn. & R. 358. **EXORS.**

A person, who admits that he conceives himself bound in honour, though not legally bound, to contribute to the expenses of a party in a suit, is a competent witness for that party. *Whitby v. Whitby*, 1 Turn. & R. 366.

A person examined as witness for plaintiff, being afterwards made a defendant, and not being interested

in suit, his former evidence may be read. *Cope v. Parry*, 2 J. & W. 538.

Executors cannot be examined as witness to the increase of the assets. *Hurst v. Beach*, 5 Mad. 353. **EXECUTOR.**

Where bankrupt but for his bankruptcy would have the same interest with plaintiffs, he is not, though he has released the assignees, a good witness against the crown. The crown is not bound by bankrupt laws. *Craufurd v. Att. Gen.* 7 Price, 24. **BANKRUPT; CROWN.**

Inclination of the courts to convert objections to competence, into objections to credit. *Vaughan v. Worrall*, 2 Swan. 399.

Presumption, that objections to competence have been waived, where it is not clear, that at the time of the examination the objection was unknown. Id. 400. **WAIVER.**

Interest to disqualify a witness, must be interest in the event of the cause. Id. ib.

Defendant under circumstances allowed after examination, and before publication, to have commission to examine witnesses, as to whether witness for plaintiff who had been examined was not interested in suit. *S. C.* 2 Mad. 322. **PR. COMMISSION TO EXAMINE.**

Upon a petition to supersede a commission, the bankrupt's examination before the commissioners, is evidence to shew the petitioner is not a creditor, although the petitioner was not present at the examination. *Exp. Fowles*, 1 Buck, 98. **BANKCY. SUPERSEDING COMMISSION.**

Bankrupt not allowed to be witness to increase his estate; therefore where evidence of debt being usurious, rested wholly on deposition of bankrupt, an inquiry as to the fact was refused. *Exp. Burt*, 1 Mad. 46. **BANKRUPT.**

In equity, objection to the competence of a witness from interest not waived by cross-examination. *Moorhouse v. De Passon*, 19 Ves. 433. **S. C. Coop.** 300. **PR. CROSS-EXAMINATION; WAIVER.**

Tenant in common of a moiety, having obtained a decree for redemption of his moiety, afterwards takes a conveyance of the equity of redemption as to that; stating that a prior conveyance of that equity of redemption by the assignees of that tenant in common who had been a bankrupt, and in which conveyance the bankrupt had joined, was void as against the bankrupt, having been improperly made. Bill dismissed, being supported by the evidence of the bankrupt alone. *Waugh v. Land*, Coop. 129. **BANKRUPT.**

The objection to a creditor as a competent witness, to sustain a commission of bankruptcy, cannot be taken by himself to preclude his examination. *Exp. Chamberlain*, 19 Ves. 481. **S. C. In re Godie**, 2 Rose, 330.

Wife's evidence is not admitted against the husband. *Barron v. Grillard*, 2 V. & B. 166. **HUSB. & WIFE.**

Examination to credit limited to the general question, whether the witness is to be believed upon his oath. An affidavit in bankruptcy, with that view, going to particular facts, and scandalous, taken off the file, with costs. *Anon.* 3 V. & B. 93. **BANKCY.**

The examination of a bankrupt, taken, not in his own bankruptcy, but under another commission, is not, upon the death of the bankrupt, evidence upon a petition in his bankruptcy to expunge the debt of a creditor; but it may be used by the commissioners as a clue, to direct them in the investigation of the subject, upon which it has proceeded. *Exp. Campbell*, 2 Rose, 51.

Creditor held not a competent witness of act of bankruptcy, or trading. *Exp. Osborne*, 2 V. & B. 177. **S. C.** 1 Rose, 367. **BANKCY. ACT OF.**

But if proved by circumstances *alimunde*, *Ld. Ch.*

said; that objection would not supersede commission. *Id.* 179.

A creditor who has assigned his debt is a competent witness, to increase the fund, out of which the debt is to be paid. *Heath v. Hull*, 4 Taunt. 326. **BANKCY. CREDITOR.**

A creditor of the bankrupt is not a competent witness, to sustain a commission upon an issue, directed to try its validity. *Exp. Malkin*, 2 Rose, 27. **BANKCY. ISSUE AT LAW AS TO VALIDITY OF COMMISSION.**

Evidence of conversation overheard by a witness, placing himself behind wainscot, &c. received with great caution. *Savage v. Brocksopp*, 18 Ves. 336.

Executor in trust not a competent witness in equity, respecting the assets, being interested to increase the fund. Executor to increase the fund incompetent witness in equity, is competent at law. *Mulrany v. Dillon*, 1 Ball & B. 409, 414. **EXECUTOR.**

Remainder-man is an incompetent witness, to prove payment of a legacy charged on the estate. *Aldridge v. Ld. Wallscourt*, 1 Ball & B. 312. **REMAINDER-MAN.**

In equity an executor in trust, a defendant and mere formal party, is an incompetent witness for a co-defendant in a suit respecting the property, being liable to actions. *Bellew v. Russell*, 1 Ball & B. 96. **EXECUTOR.**

Upon a question whether a bond belonged to plaintiff or defendant, it was objected, that all plaintiff's witnesses were members of the corporation, and the objection was allowed. Lord Keeper said, every corporation ought to have a town clerk, and other clerks, not freemen, that they may be competent witnesses, if necessary. But defendant having in this case cross-examined some of plaintiff's witnesses, Lord Keeper said that a cross-examination of a witness on one side, in any matter tending to the merits, makes him a competent witness on the other, though otherwise liable to exception. *Sutton Coldfield Corp. v. Wilson*, 1 Vern. 264. **CORPORATION.**

Bill for relief against an award made by some members of the E. I. company. The arbitrators and some of the members were made defendants; demurrer to the whole bill allowed, for plaintiff can have no decree against them; they ought to be examined as witnesses. *Steward v. East India Company*, 2 Vern. 380.

If a corporation would examine one of their own members as a witness, they must disfranchise him, and the method to do so is by an information in nature of a *quo warranto* against him, who, confessing the information, judgment passes to disfranchise him. *Colchester Corp. v. —*, 1 P. W. 595, (n).

It is a general rule, that mere witnesses are not to be made parties to a suit, except (*inter alia*) officers and servants of corporations. *Dummer v. Chippenham Corp.*, 14 Ves. 252.

The interest of an auctioneer from his commission, does not defeat his evidence. *Buckmaster v. Harrop*, 13 Ves. 474. **AUCTIONEER.**

Husband and wife cannot give evidence for, or against each other. *Vowles v. Young*, *id.* 140. **HUSB. & WIFE.**

On the question, whether a commission of bankruptcy is or is not sustainable, (*e.g.* whether the petitioning creditor had a sufficient debt to entitle him to petition), a creditor of the bankrupt is a competent witness to prove the negative. *In re. of Codd*, 2 Scho. & L. 116. **DEBTOR & CREDITOR; BANKCY. COMMISSION OF.**

An order to examine a defendant as a witness, saving just exceptions, is an order of course, and cannot be discharged upon a suggestion, that the defendant by his answer, appears to have an interest, the objec-

tion must be reserved until the deposition be offered to be read in evidence. *Lee v. Atkinson*, 2 Cox, 413. **PR. PARTY DEFENDANT; PR. DISCHARGE OR ORDER.**

Witness to a will not interested at the execution, and death of the testator, is competent, though interested at his examination. *Brgrave v. Winder*, 2 Ves. J. 634.

In a suit against assignees tending to diminish the fund, the bankrupt may be examined as a witness, and ought not therefore to be a party. *Griffin v. Archer*, 2 Anst. 478. **BANKRUPT.**

Evidence of bond creditors of testator, not admissible to obtain a decree for payment of a legacy, as they must be preferred to legatees. *Jones v. Turberville*, 2 Ves. J. 11. **S. C. 4 Bro. C. C. 115.**

Son employed under, paid by, and accounting to his father, may be a witness, but is not accountable to his father's principal. *Cartwright v. Hatley*, 1 Ves. J. 292. **S. C. 3 Bro. C. C. 234.**

Issue ordered to discover a witness's interest. *Stokes v. McKerral*, 3 Bro. C. C. 228. **ISSUE AT LAW.**

A father coming to bastardize his own issue, is, though a legal, a very suspicious witness. *Standen v. Edwards*, 1 Ves. J. 134.

Witness good, who can recover nothing in the suit. *Craven v. Tickell*, 1 Ves. J. 61.

Evidence of the bankrupt, he having had his allowance and certificate, allowed to be read. *Russel v. Russel*, 1 Bro. C. C. 269.

The parent is not a necessary party to a suit, to set aside a deed fraudulent on marriage, but is a competent witness to prove the fraud on a bill filed by the husband and wife. *Scott v. Scott*, 1 Cox, 367. **PL. PARTY; FRAUD ON MARRIAGE.**

Bankrupt's certificate must have passed great seal, before he can be examined as a witness. *Speidel v. Fuller*, Dick. 633.

Bill by trustee, in the nature of a bill of interpleader, court gave leave to one of the defendants to examine one of the plaintiffs as a witness. *Armiter v. Swanton*, Ambl. 393. **PR. PARTY PLAINTIFF.**

Estate settled on marriage upon the husband and wife for their lives, remainder to such child or children as the husband, with the consent of the trustees should appoint, and in default of appointment, to the first and other sons in tail; the father, with the consent of the surviving trustee, appointed to his youngest son. Bill by the eldest son, to set aside the appointment for misrepresentation and imposition; to prove the imposition on the trustee, the trustee's evidence was read; but the father's evidence to prove no misrepresentation or imposition, was rejected. *Seroggs v. Seroggs*, Ambl. 272. **FRAUD; EVIDENCE.**

B, the master of ship, enters into a charter party on behalf of C, his owner, with D; on bill by C against D for satisfaction of demurrage and other damages, B is examined as a witness. At hearing, the bill is retained with liberty to C to bring his action at law. This action was permitted to be brought in name of B, after his death, and though he was the nominal plaintiff therein, yet his deposition in the equity suit was allowed to be read in evidence on the trial of the action. *Downes v. Revell*, 3 Bro. P. C. 651. **PR. EVIDENCE.**

As to objections to competency of witness. See *Downing v. Townsend*, Ambl. 692.

Depositions of one defendant not read in favour of another, where the former is at all concerned in interest, or a decree can be made against him. Such objection is wholly as to his incompetency. *Dixon v. Parker*, 2 Ves. J. 220.

Though a plaintiff at law is not allowed to examine any defendant as a witness, one defendant may there examine a co-defendant. In equity, a plaintiff may examine a defendant, and defendant a co-defendant;

but then it is on a suggestion, that the party is not interested, and saving all just exceptions from the nature of the suit, &c. or in case of there being any material evidence against him, &c. *Id. ib.*

Broker or factor not naming principal, may be examined on action in name of principal; but simply for benefit of trade. If principal is declared, action must be against him. *Id.* 221. **PRINCIPAL & BROKER.**

But such broker or factor must act for another at the very time; no subsequent consent or agreement will do. *Id. ib.*

At law, a plaintiff cannot examine a defendant as plaintiff in equity may, but co-defendants may, if there is no material evidence against the defendant, and not interested. *Id.* 222.

Evidence of persons coming to swear, they, in former instance, perjured themselves, is not to be received. *Exp. Lord*, 2 Ves. 26.

The testimony of a witness read, if he was indifferent when examined, though becoming interested afterwards. *Glynn v. Bank of England*, 2 Ves. 38.

The court will not allow articles to be exhibited against the competency of a witness after publication, because this might have been objected to, and enquired into upon the examination. *Callagan v. Rochfort*, 3 Atk. 643. **PR. PUBLICATION.**

An executor or administrator in trust cannot be examined as a witness, for an executor is answerable for *devastavit*, &c. which may give an improper bias to his mind, and the possibility of mal-administration has induced the court to reject him as a witness; but a trustee is considered as having no interest at all, and is examined by order every day. *Fotherby v. Pate*, 3 Atk. 604.

But an administrator *durante minori etate*, is in general a competent witness after administration is determined. *Id.* 603.

Though a mother takes out administration during her daughter's minority, yet as soon as the daughter attains seventeen, she is *ipso facto* administratrix, and so considered by relation from the beginning. *Id.* 604. **ACCOUNT; ADMOR. DUR. MIN.**

An administrator *durante minor.* is in general a competent witness after the administration is determined, and may be examined as such for the executor both at law and in equity, for he is very little more than a person appointed *ad colligendum bona*, or an administrator *pendente lite*, who are always admitted as witnesses, *ib.* 603. 605. But where the bill charged that an administrator *durante minor.* had not accounted and delivered over the assets to the executor, and he by his answer, instead of insisting that he had accounted, submits to pay, this rendered him an incompetent witness. *Id.* 605.

An administrator *durante minor.* cannot sue or be called to an account by any but the executor, for it is to him only that he is answerable for his administration, and where such an administrator, after he had possessed himself of effects, is brought before the court without the executor, he may demur for that cause. *Id.* 604. 606.

The depositions of a wife of a *prochain ami*, cannot be read as the husband is liable to costs. *Head v. Head*, 3 Atk. 547. **PR. P. AMI; HUSB. & WIFE.**

Plaintiff may examine defendant as witness, if there is a suggestion in the order that defendant is not interested in the cause. *Meadbury v. Isdall*, 9 Mod. 438. But see 10 Mod. 19. **PARTY DEFENDANT.**

As to the admission of evidence of heathens, &c. *Omychund v. Barker*, 1 Atk. 381. **S. C. 2 Eq. Ab. 397. Willis's Rep. 538. HEATHENS, &c.**

Trustee plaintiff cannot, as a witness, be examined as a witness. — *v. Fitzgerald*, 1 Mod. 330. **TRUSTEE.**

In a case of fraud, evidence of a person who joined in granting away her estate, was admitted, though it

invalidated her right to the estate. *Mam v. Ward*, 2 Atk. 228.

At law, when a person has granted and conveyed; the very words "grant and convey," imply a warranty on the part of the grantor, and he cannot be examined as a witness to overturn the right granted by the deed. *Id.*

At law, no defendant can be examined as a witness, but in equity a person made a defendant for form's sake, may be examined in a cause, saving just exceptions. *Id.*

A trustee, though merely nominal, cannot be examined at law, but he clearly may in equity. *Id.*

The attorney-general must enter a *non prosequi* against a defendant before he can be admitted as a witness, even in the case of the king. *Id.*

It is in particular instances only, as where fraud is charged by a bill, or in cases of trust, that a court of equity does not confine itself within such strict rules as they do at law, but in general the rules of evidence in equity and at law do not differ. *Id.*

Servant of bankrupt is a good witness for creditors, though he received his wages after bankruptcy. *Humphrey's case*, 2 Eq. Ab. 396.

Where witness, once interested, has been satisfied, the release and other acts destroying his interest must be proved. *Anon.* *ib.* 397.

Though a wife is defendant, and charged with fraud and malpractices, yet the evidence of the husband shall be admitted where the interest of a third person shall be concerned. *Cotton v. Luttrell*, 1 Atk. 451. **HUSB. & WIFE.**

If there is strong evidence against one who at law is put into the *stipel cum*, that he is *particeps criminis*, the court will exclude him from being a witness. *Id.* 452.

Witness, if interested, must produce a general release to render him competent. *Anon.* 2 Atk. 15.

Though a witness be an infant, his tender years will not invalidate his evidence. *Smith v. French*, 2 Atk. 245. **INFANT.**

A good rule at law, that where to a suit there are never so many defendants, if the plaintiff cannot give evidence against a defendant, he may be called as a witness for a co-defendant, and so it is in equity. *Piddock v. Brown*, 3 P. W. 288.

A bare trustee is a good witness for his *cestui que trust*, but not an executor in trust, as he is liable to be sued by creditors, and to answer costs. *Croft v. Pyke*, 3 P. W. 181. **TRUSTEE; EXOR.**

The court cannot make an order to examine a plaintiff *de bene esse*, saving just exceptions, though they will make such order to examine a defendant, but the defendant ought to have demurred to such immaterial plaintiff; if a corporation would make use of one of their own members as a witness, they must disfranchise him. *Mayor, &c. of Colchester v. —*, 1 P. W. 595. **PR. EXAMON. DE BENE ESSE; PARTY PLAINTIFF.**

Parishioners are not good evidence to prove a charity given to the parish: *secus*, if only a lodger, and one that does not pay to the poor: but to be intended a housekeeper, and to pay, &c. unless the contrary be made appear. *Att. Gen. v. Wyburgh*, 1 P. W. 600. *sed quare.*

Under particular circumstances, wife was admitted as evidence against husband. *Rutter v. Baldwin*, 1 Eq. Ab. 226. **HUSB. & WIFE.**

Bankrupt's wife cannot be examined against her husband to prove his bankruptcy; may by statute, touching discovering her husband's effects. *Exp. James*, 1 P. W. 611. **BANKRUPTCY.**

Case where the plaintiff himself was a witness, as where a witness is examined, who at that time is disinterested, but afterwards becomes interested, and

plaintiff in the cause, his depositions shall be read. *Goss v. Tracy*, 1 P. W. 288. 2 Vern. 699.

Surviving witness to a bond is made executor of the obligee; in an action brought by him on the bond, evidence shall be admitted to prove the plaintiff's hand, as a proof of the bond. *Id.* 289.

A plaintiff in a cause cannot be made a witness, but a defendant may, because he is forced into the suit. *Casey v. Brachfield*, Prec. Chan. 411. S. C. Gilb. Eq. Rep. 98. PR. PARTIES TO CAUSE.

Co-defendants are not deprived of the evidence of each other by being so joined in suit; but plaintiff, (except in case of trustees,) cannot examine defendant. *Gibson v. Albert*, 10 Mod. 19. But sec 9 Mod. 438. PR. PARTY DEFENDANT.

*Particeps criminis* in the case of fraud, is the most proper person to discover and prove it; especially when what he so proves, turns to his own prejudice. *May v. Harman*, 4 Bro. P. C. 156. PARTICIPES CRIMINIS.

Bankrupt having released and assigned all his estate to the assignees, may be examined as a witness for them. *Phillips v. Wilcox*, 2 Vern. 637. BANKRUPT.

A witness was examined before the hearing whilst she was interested, but after the hearing she released her interest, and was examined again before the master. Her depositions before the master allowed to be read. *Callow v. Meace*, 2 Vern. 472. Pre. Ch. 234. S. C.

After publication, you may examine to the competency, as well as the credibility of a witness. *Nedham v. Smith*, 2 Vern. 464.

If, after hearing, a witness is convicted of perjury, the party may take advantage of it upon a re-hearing. *Id.* *ib.*

A and B, claiming each of them a rent-charge out of the land, by the same deed, B can be no witness for A's title to his rent charge, being a party interested, until he has released his own rent charge. *Culpepper v. Fairfax*, 2 Vern. 375.

A child of a residuary legatee is no witness to prove a will relating to personal estate by the civil law, by which law only, such will is determinable. *Thwaites v. Smith*, 1 P. W. 10. WILL, EXECUTION OF.

Where there is a dispute touching money given to parishioners, none of the inhabitants of the parish ought to be witnesses. *Dowdeswell v. Nott*, 2 Vern. 317.

A wife not to be examined as a witness against her husband. *Cole v. Gray*, *ib.* 79. HUSB. & WIFE.

Whether a member of a corporation may be a witness for the corporation. *Corporation de Sutton Coldfield v. Wilson*, 1 Vern. 254.

Cross-examining a witness by one side, in any matter tending to the merits, makes him a good witness for the other side; otherwise, liable to an exception. *Id.* *ib.*

A co-plaintiff, though but a trustee, cannot be examined as a witness for the other plaintiff. *Phillips v. Dk. of Bucks*, 1 Vern. 230. PR. PARTY PLAINTIFF; TRUSTEE.

An executor may be admitted to prove the revocation of any legacy, though he has proved the will. *Jervais v. Duke*, *id.* 19. EXOR.

When the executor of the grantor is a competent witness to prove the trust of a term. *Cook v. Fountain*, 3 Swan. 585. *Id.*

Wife of defendant examined as witness. *Bent v. Allot*, Cary, 95.

The owner of lands in a parish, in the hands of a tenant, may be a witness in a suit for tithes in that parish. *Ayde v. Flower*, Bunb. 7.

A witness, after being examined, becomes plaintiff, interested in the subject of his deposition; it shall be suppressed. *Drury v. Drury*, 10th. 146.

A solicitor ordered to be examined against his client in a case of fraud. *Cutts v. Pickering*, 3 C. R. 68. SOL. & CLIENT.

The inhabitant of a parish where a modus issued is insisted on, *primâ facie* a bad witness, if he occupies no tithable land he must shew it. *Watson v. Lindset*, Bun. 40. INHABITANT OF PARISH.

A trustee who is ordered to account, cannot be a witness. *Smith v. Chandos*, Barn. 416. TRUSTEE.

### (c) Examination as to credit of.

There is no precise time beyond which witnesses cannot be discredited. *Piggott v. Croxhall*, 1 S. & S. 467. TIME.

Interrogatories in support of articles for purpose of discrediting witnesses, may relate to particular facts not in issue in the cause, as well as to the credit of the witnesses generally. *Id.* *ib.* PR. INTERROGATORIES TO DISCREDIT WITNESSES.

Commission to examine to credit should be executed before decree: costs given on that ground. *White v. Fussell*, 1 V. & B. 151. PR. COSTS.

Application for examination to credit regarded with great jealousy: confined to facts affecting credit and character only, and not material to what is in issue. *Id.* 153.

After publication, order for examination by general interrogatories as to the credit of a witness in the cause, and as to such particular facts only as are not material to the issue; but publication having passed five months, not to delay the hearing: the court does not previously consider whether the subject of the examination is material to the issue, but in that case will suppress the depositions. S. C. 19 Ves. 127. PR. PUBLICATION.

Examination to credit after publication where the witnesses are in the country by commission, on articles exhibited with one of the six clerks. *Id.* *ib.*

Order to examine witnesses in support of articles exhibited to discredit a witness, on notice and the six clerk's certificate, without affidavit. *Watmore v. Dickinson*, 2 V. & B. 267.

Examination to the credit of witness can only be by order upon special application with notice, whether before or after publication. *Mill v. Mill*, 12 Ves. 406.

In examination as to credit of a witness, the general question "whether he is to be believed on his oath" only, and not the circumstances leading to that belief can be asked. *Carlos v. Brook*, 10 Ves. 50. PR. EXAMINATION.

After publication passed, liberty given to exhibit articles as to the credit of a witness who has been cross-examined by general interrogatories, and as to such particular facts only as are not material to what is in issue in the cause. *Purcell v. M'Namara*, 8 Ves. 324. PR. PUBLICATION.

Depositions of witnesses examined as to credit referred for scandal and impertinence. *Bray v. Bulky*, Dick. 288.

Where a witness against the conduct of others is under the necessity of first exculpating her own behaviour, no regard ought to be paid to her evidence. *Watkins v. Watkins*, 2 Atk. 97.

### (d) Demurrer to interrogatories by witness, and on what matters he is examinable.

Demurrer to interrogatory by witness on account of its tendency to render him liable to penalty, should state particularly the objectionable parts of the interrogatories. *Jackson v. Munson*, 1 Y. & J. 32.

The court will restrain commissioners in their examinations, upon the allegation that the object of the examinations is to procure evidence against the parties examined, as to penalties incurred by gaming.

*Exp. Burton*, 1 G. & J. 30. **BANKCY. COMMISSIONERS, EXAMINATION BY; GAMING.**

A witness objecting to answer interrogatories before the examiner or the commissioners, demurs by stating his objection on oath; his demurrer may then be set down for argument, and if overruled, the witness pays the same costs as a defendant on demurrer. Demurrer to interrogatories by an attorney overruled, without prejudice to the witness's demurring on his re-examination, stating his reasons. *Parkhurst v. Lowten*, 2 Swan. 194. **PR. DEMURRER TO INTERROGATORIES.**

A witness objecting to answer interrogatories, cannot be admitted to state by affidavit what would be the effect of his answer. *Id.* 213. **Id.**

No man can be compelled to criminate himself. *Id.* 214. **PR. EXAMINATION TENDING TO CRIMINATE.**

A witness not compelled to discover matters of which he obtained knowledge in professional confidence. The privilege, not of the attorney, but of the client; its principle and limitation. *Id.* 216. **PROFESSIONAL CONFIDENCE.**

Demurrer to interrogatory by witness, being too general, overruled, but leave given to put in written demurrer on re-examination. *Morgan v. Shaw*, 4 Mad. 54.

Demurrer of a witness to interrogatories inquiring after matter defamatory to a third person, and not material in the cause, allowed. *Mulgrave v. Ed. Dunbar*, 2 Swan. 196. **PR. SCANDAL.**

Motion, that demurrer to interrogatories by witness be overruled, not being supported by affidavit, refused. *Parkhurst v. Lowten*, 3 Mad. 121.

Witness objecting to interrogatory before examiner, must demur. *Bowman v. Rodwell*, 1 Mad. 266.

Witness obliged to give testimony, though it affects his civil right. *Exp. Chamberlain*, 19 Ves. 482.

Party demurring to the discovery, or witness refusing to answer facts tending to criminate himself, no admission to the truth of the fact. *Lloyd v. Pasingham*, 16 Ves. 59. **PL. DISCOVERY TENDING TO CRIMINATE; ADMISSION.**

Witness not compelled to answer interrogatories having a direct tendency to subject him to penalties, &c. or having such a connection with them as to form a step towards it. *Patton v. Douglas*, 16 Ves. 239. **PL. DISCOVERY TENDING TO CRIMINATE.**

In examination as to credit of a witness, the general question whether he is to be believed on his oath only, and not the circumstances leading to that belief, can be asked. *Carlos v. Brook*, 1 Ves. 50. **WITNESS, CREDIT OF.**

Attorney examined as a witness, must disclose acts done in his presence by his client, as execution of a deed, &c., not private confidential conversation with him, as the reasons for making it, &c.; on motion to suppress the depositions referred to see what part came to his knowledge as confidential attorney, in order to have that suppressed. *Sanford v. Remington*, 2 Ves. Jr. 189. **ATT. & CLIENT.**

It is not considered as a species of impertinence that many witnesses are examined to the same fact, provided the fact be material; but if it be admitted by the answer, and, therefore, not in issue in the cause, any depositions to this point would be deemed impertinent. *Vaughan v. Lee*, 1 Cox. 313. **IMPERTINENCE.**

Demurrer by witness overruled, he is to pay costs. *Wardel v. Dent*, 1 Dick. 334.

Though, on a demurrer to a person being examined as a witness being overruled, a subpoena cannot be taken out against him for costs, yet the court will give

them upon an application by motion. *Vaillant v. Dodelme*, 2 Atk. 592. **COSTS.**

The satisfaction formerly for the non-appearance of a witness was by action only, but now the courts of law grant attachment against him. *S. C. ib.*

A witness cannot demur because the questions asked him are not pertinent to the matter in issue. *Ashton v. Ashton*, 1 Vern. 165.

Witness demurring to interrogatories because he claimed title to land, but did not set forth how nor under whom, nor swear that he had a title; demurrer overruled, and commission awarded to take oath of aged witness. *Herbert v. Mayne*, 2 Swan. 198.

Counsel not to be examined as to his knowledge as such. *Denens v. Codrington*, Cary, 100.

Solicitor of plaintiff to be examined, except as to things in his knowledge as solicitor. *Kelway v. Kelway*, Cary, 89.

Solicitor concerned in cause is not bound to testify, though served with process. *Bird v. Lovelace*, Cary, 62. *S. P. Austen v. Vesey*, id. 63. *Hartford v. Lee*, id. 63.

Matters examined to in the original cause, and publication passed or settled by the decree cannot be examined to in the cross cause. *Ward v. Eyles*, Mos. 377.

A witness demurred to an interrogatory because she claimed interest in the land, and disallowed because she did not answer to the interest, nor what interest she claimed. *Jefferson v. Dawson*, 2 C. C. 208.

#### (e) Attesting witness.

A witness must not only prove his own attestation, but also the execution of the deed by the person executing the deed. *Hill v. Unett*, 3 Mad. 370. **DEED, PROOF OF.**

On the trial of an issue *devisavit vel non* directed by this court, all the witnesses to the will should be examined. *Booth v. Blundell*, Coop. 136. **PR. ISSUE, DEVISAVIT VEL NON.**

The evidence of a witness, impeaching the instrument he has attested, as a witness to a will, denying the sanity of the devisor, &c. is admissible; but to be received with the most anxious jealousy. *Howard v. Brathwaite*, 1 V. & B. 202. **PRINC. & AGENT; PR. ISSUE AT LAW.**

Legacy to a subscribing witness to a will, though of personal property only, void under the stat. 25 G. 2. c. 6. extending to all wills and codicils. *Lees v. Somersgill*, 17 Ves. 508. **STAT. C. OF; LEGACY.**

Witness to deed must state the circumstances of the execution, the sealing and delivery. *Burrows v. Lock*, 10 Ves. 470. **DEED.**

Witness is not at liberty to contradict his attestation. In such a case other evidence from circumstances, is admissible, as where there is no witness, or the person does not exist: sealing and delivery may be presumed from proof of handwriting. *Id.* 474.

Proof of one of the witnesses of an old will, of whom no account could be given, dispensed with. *McKenzie v. Fraser*, 9 Ves. 5. **WILL, PROOF OF.**

A subscribing witness to a will disposing of real estate, being in Jamaica, his evidence was dispensed with. *Ed. Carrington v. Payne*, 5 Ves. 405.

One dead and other out of jurisdiction, proof of handwriting allowed. *Banks v. Parquarson*, Dick. 167.

One of three witnesses to will not to be found; but on sufficient proof will declared well executed. *Binfield v. Lambert*, id. 337.

But in *Bird v. Butler* will not declared well executed, but trusts to be performed and carried into execution. *Id.* note. See also Dick. 349.

## 28. Examination.

See also BANKRY. VII. 2. (a). (2); VIII. 2.

- (a) Generally.
- (b) When and how taken.
- (c) Examination *vidu voce*.
- (d) Before muster.
- (e) Examiner.
- (f) Examination *de bene esse*.
- (g) *Pro interesse suo*.
- (h) Cross-examination.
- (i) Further or re-examination.
- (j) Of parties to cause.
- (k) Of defendant on interrogatories.
- (l) Commission to examine. See also ante 11 (l).—  
Pr. Costs, 10 (f).

- (1) General orders.
- (2) Effect of.
- (3) When and how granted and obtained.
- (4) Second commission.
- (5) How discharged or altered.
- (6) Execution of, and of the commissioners thereof.
- (7) Return of.
- (8) When lost.

## (a) Generally.

No examination to credit, but by special order. *Beame's Order*, 32. 187.

Witnesses to be sorted, when examined by those producing them. *Id.* 71. 183.

Not to be examined by numbers on questions altogether unknown to them. *Id. ib.*

Offenders herein to pay costs, &c. *Id.* 72.

Examined in court on a schedule of interrogatories, shall not be examined on new interrogatories. *Id.* 73. 185.

But only on such interrogatories as were exhibited before the witnesses were sworn. *Id.* 73.

Not to be examined after day of publication, though sworn before; so as a copy of rule be delivered to examiner. *Id.* 73. 186.

When examined in court, are to perfect and subscribe their depositions before they depart. *Id.* 74.

Not to alter their depositions after, unless by leave of court. *Id. ib.*

Exception thereto. *Id. ib.*

To be sorted and only examined on interrogatories to which their evidence extends. *Id.* 184.

Not to be examined in court without privacy of adverse party. *Id.* 185.

To be shewn to adverse party with a note of their names and places of abode. *Id.* 185. 262.

When brought to clerk in court to be shewn, there shall be produced a note of their names, titles, parishes, &c. *Id.* 262.

In addition, if they live within bills of mortality, the street and house must be stated. *Id.* 263.

What affidavit in order to examine material witnesses must contain. *Id.* 265.

Not necessary to produce witness at seat of clerk in court for opposite party. 25th General Ord. 3d April, 1828.

Examination not to be signed by counsel. *Bonus v. Flack*, 18 Ves. 287. SIGNATURE OF COUNSEL.

The custody of an examination taken under a *delinimus* in the country, belongs to the clerk in court, who is entitled to make copies of it. If sworn in town it belongs to the master. *Drake v. Woodford*, 1 Smith, 116. PR. CUSTODY OF PROCEEDINGS.

After a decree, if the master sees cause for a commission to examine witnesses in the country, he certifies that it is necessary, and the depositions when returned are filed by the six clerks, but depositions

taken before the masters are kept in their offices. *Parkinson v. Ingram*, 3 Ves. 607.

The decrees in the exchequer always express, that the officer is to be armed with a commission to examine witnesses, and power to direct the same to the country; so formerly in chancery. *Id. ib.* PR. DECREES IN EXCHEQUER.

If plaintiff replies, defendant may rejoin gratis, and after next term may give rule to produce witnesses. *Flower v. Herbert*, Dick. 349.

Affidavit must be made of service on defendant of subpoena, to examine witnesses in *perpet. mem.* before they can be so examined. *Hutcham v. Wichcombe*, Cary, 34. S. P. *Porter v. Baker*, *id. ib.*

## (b) When, and how taken.

No witnesses to be examined after publication, except by consent, or by special order *ad informand. conscient. judicis*, and then to be brought, close sealed up to the court, to peruse or publish, as the court shall think good. *Ld. Bacon's Ord. Ch.* 1618. *Beame's Ord. 33. Ir. Ord. Ch. (O'Keeffe's Ed. 20.)* S. P. This species of examination (*ad informand.*) has of late years been disused. *Hinde*, 316.

No witness to be examined in court after publication. *Ld. Coventry's Ord.* 1637. *Beame*, 73. *Ord.* 7th Nov. 1637. *Id.* 97. *Ld. Clarendon's Ord.* 1661. *Id.* 186. 27th Feb. 1667. *Id.* 219. S. P.

On affidavit of witness's incapacity to travel, examiner ordered to attend him. *Anon.* 4 Mad. 463.

In directing an issue, the court will not order the examination of persons at the trial, who by the rules of the court of law could not be examined without order, except sometimes in cases where the facts in dispute rest only on the knowledge of the plaintiff and defendant. *Exp. Dister*, 1 Buck. 234. *ISSUE AT LAW.*

Guardian appointed for defendant to put in his examination, he being incapable. *Att. Gen. v. Waddington*, 1 Mad. 321. *GUARDIAN.*

Depositions of a defendant examined without service of the order for liberty so to do, cannot be read, being a surprise on the other party. *Mulrany v. Dillon*, 1 Ball & B. 413. PR. SERVICE OF ORDER FOR LIBERTY TO EXAMINE.

Witness cannot give as his evidence answers in writing, prepared before the examination; nor is any suggestion to him by the attorney, counsel, or any other person, during the examination, permitted; and in equity, whenever such fact is disclosed, the deposition will be suppressed. *Shaw v. Lindsey*, 15 Ves. 381.

Deposition suppressed, and a re-examination directed; the deposition being taken from the witness, using, during the examination, full minutes in writing, which she stated to have been originally her own, put into method by the attorney; and so came with some corrections by herself. *Id. ib.*

No witness ought to be examined after publication, though sworn before. *Jenkinson v. Pepys*, 3 Aust. 835. PR. PUBLICATION.

In this case the court gave leave to the relators to exhibit interrogatories to prove an old will; although the cases stood at the head of the paper for hearing, and the defendants did not consent. *Att. Gen. v. Thurnall*, 2 Cox, 2.

To plea in bar, plaintiff may reply generally and examine at large. *Ord v. Huddleston*, Dick. 510.

A cause went off for want of parties, with leave to amend, and the party being added, put in his answer, and plaintiff replied. On motion, defendant allowed to take out a commission to prove the modus as laid in his answer. *Phillips v. Gwyn*, 2 Fowl. 184.

At law a witness may refresh his memory from notes, as to dates and names, but he must not give



the whole evidence from writing. *Anon. Ambl.* 252.

Leave given to examine witness after adjournment of cause. *Bank v. Farques, Ambl.* 145. *Pr. Adjournment of Cause.*

A party cannot examine his own witness upon a voir dire. *Plummer v. May, 1 Ves.* 426.

After defendant had been examined on interrogatories directed at the hearing, and publication passed, the court refused plaintiff a commission to examine witnesses in order to falsify defendant's testimony. *Smith v. Turner, 3 P. W.* 413.

The defendant being a weak man, and to be examined on interrogatories, the master was ordered to take such defendant's examination, lest he should unwarily admit something against himself that was not true. *Piddock v. Brown, 3 P. W.* 289.

A witness examined two days after publication passed, the time having been previously appointed, without thought of the day. Defendant having cross-examined the witness, the court would not suppress the deposition. *Hamond v. —, 1 Dick.* 50.

Plaintiff had an order to prove a deed *viva voce*, at the hearing; it happened that all the witnesses to the deed were dead, and plaintiff produced a witness at the hearing to prove their hands, which he could not be admitted to do; but the court put off the cause, and gave leave to examine in the office, notwithstanding publication passed. *Blaxton v. Dewett, 1 E. Ch.* 64.

A Jew ordered to be sworn to his answer on the Pentateuch, and the plaintiff's clerk to be present. *Anon. 1 Vern.* 263.

On a motion for a commission to examine an old witness after publication, who was only just discovered, the court said the rule of not examining after publication had been strict, but the court is the judge, and the examiners here, or by commission, are ministerial to the court, so he ordered a commission. *London Corp. v. El. Dorset, 1 Ch. Ca.* 228. In *Neuland v. Horseman, 2 Ch. Ca.* 74., the court allowed a commission to issue after hearing, to examine to a point not proved in the cause, but raised by the court on the hearing.

The depositions of a witness who was examined in *perpet. rei mem.* were suppressed on a petition after his death, and the examiner discharged and committed for foul practice and irregularity in the taking of them, the plaintiff being suffered by the examiner to instruct him, and the witness being corrupted, and as he had been examined on a trial to the same points, the plaintiff might give evidence of what he swore. *Hosier v. Hart, Mos.* 321. *Pr. DEPOSITIONS SUPPRESSAL.*

Witnesses may be examined before replication, if the plaintiff doth; not else. *Anon. 2 Free.* 136.

No witnesses examined before answer. *Salisbury v. Hind, Cary, 63.* Contra, *Suffolk v. Harris, Toth.* 189. *Knivet v. Webb, id.* 190. *Molesworth v. Opie, id.* 191.

Examination after publication. *Hancorne v. Emery, Toth.* 191. *Swan v. Turberville, id.* *Meeks v. Thelwall, id.* *Anon. Cary, 83.* And after hearing, *Throckmorton v. Cromwell, Toth.* 85. *Took v. Thomas, id.* *Lenox v. Clifton, id.* 192. *Anon. Cary, 37.* But these cases are exploded.

#### (e) Examination viva voce.

Where a party has leave to examine witnesses *viva voce*, the names of the witnesses must be inserted in the order, and the order be served four days before such witnesses be examined, or the cause heard. *Ord. Ch. Irel.* 21st April, 1725. *O'Keefe's Ord.* 33.

There need be no notice of, or order to prove exhibits for reading any deeds or evidence that do not require proof: and all exhibits to be proved at the hear-

ing must be inserted in the order, and no note of them be given over. *Ord. Exch.* 20th Feb. 1745. 2 *Fowl.* 189. As to what records or documents may be read as exhibits without an order. *Id.* 188. *EXHIBITS.*

Rector's books not to be proved *viva voce*, and leave to put off the cause, in order to prove them by interrogatories, refused. *Lake v. Skinner, 1 Jac. & W.* 9.

Nothing to be proved *viva voce* that requires more than proof of handwriting, or that admits of cross-examination. *Id.* 15.

Motion on a rehearing before the *Ld. Ch.*, for leave to prove exhibits *viva voce*, which were not proved on hearing at the Rolls, granted, saving just exceptions. *Walker v. Symonds, 3 Mer.* 38. (n.)

Judge of prerogative has no authority to examine witnesses *viva voce* upon final hearing of a testamentary cause. *Goodwin v. Giesler, 1 Ridg. L. & S.* 371. *JURISDICTION.*

Jurisdiction of court of chancery to examine *viva voce*, allowed. *Moore v. Aylet, Dick.* 641.

As to proving exhibits *viva voce*, it is an established rule that you can only prove the handwriting of the person to that exhibit, or the handwriting of the witness, but cannot enter into any examination that will admit of a cross-examination. *El. Pomfret v. Ld. Winsor, 2 Ves.* 472. *Row v. Creagh, How. Pr. Ex. Ireland,* 461. But in the case of an exhibit proved at the hearing, the court would examine *viva voce* at the hearing, on the suggestion of any question. See *Turner v. Burleigh, 17 Ves.* 355.

The court will give leave to examine a witness *viva voce* during the hearing, or after the adjournment of the cause, to prove a deed, or that a witness to a deed is abroad. *Bank v. Farques, Amb.* 145.

On contradictory affidavits of same person, personal examination required. *Exp. Lord, 2 Ves.* 26.

The rules in respect to *viva voce* examinations are held extremely strict: as, for instance, in cases of wills. The court never suffers them to be proved by examinations of witnesses *viva voce*, for it is not sufficient to prove a signing and sealing, but the sanity of the person, and all other requisites under the statute must be proved; and this cannot be done by *viva voce* examinations, because defendant has a right to a cross-examination of plaintiff's witnesses. *Eade v. Lingood, 1 Atk.* 293. *Eyles v. Ward, Mos.* 379. *S. P.* So, in the Exchequer, no will of real estate can be proved as an exhibit. *Niblett v. Daniel, 2 Fowl.* 188.

Motion by defendant that certain witnesses of plaintiffs, who were to prove exhibits, might be examined *viva voce* at the hearing, refused. *Per Ld. Ch.* The constant and established proceedings of this court are on written evidence; and though there are cases of witnesses being so examined, yet they have been allowed but sparingly, and only after publication, where doubts have appeared in their depositions, and the examination has been to clear such doubts, and inform the conscience of the court. There never was a case where witnesses have been allowed to be examined at large at the hearing, and though it might be desirable to allow this, yet the fixed and settled proceedings of the court cannot be broke through for it. The utmost latitude the court have taken in this, is to allow the proving of exhibits *viva voce* at the hearing, but not to let in other examinations; and this is allowed only where the application is by the party who is to make use of the exhibits: but there never was a case where it was allowed on the application of the contrary party; if he be suspicious of frauds, he has notice, and may cross-examine the witnesses. *Graves v. Budgett, 1 Atk.* 444.

Where an infant is party, the Exchequer will not examine a witness *viva voce*, but the witness is to be examined on interrogatories in the office. *Carleton v. Brightwell, 2 P. W.* 463. *INFANT.*

Leave given to examine a witness *viva voce*, after

publication, as to a particular fact, and defendant to cross-examine him. *Cage v. Hunter*, 1 Dick. 49.

Plaintiff had an order to prove a deed *viva voce*, but at the hearing it happened that all the witnesses were dead. Plaintiff produced a witness to prove their hands, but this the court would not allow: but the case was put off, and leave given to examine, notwithstanding publication had passed. *Bloxton v. Drewitt*, Pre. Ch. 64.

Party examined *viva voce*, who had been already examined as a witness on the part both of plaintiff and defendant. *March v. Walker*, Finch, 416. In *Bishop v. Church*, 2 Ves. 105. Lord Hardwicke says, the court has sometimes directed a witness to attend personally, where they have had a doubt.

Examination of witnesses *viva voce* at the hearing, by consent. *Holles v. Carr*, 3 Swan. 639.

#### (d) Before Master.

By 4 Geo. 4. c. 70. s. 46. 47. 48., each master may, by instrument under hand and seal, appoint a person to be his clerk during his pleasure, and such instrument being enrolled, such master's clerk shall be an officer of the court; such clerk before acting as such in the examination of witnesses, taking the oath thereby prescribed: that it shall be lawful for the master, or for such his clerk in his presence to examine all witnesses who shall be produced before him, touching any matter to which such examination shall have been directed, or arising thereout, and to take down the depositions in the usual manner.

The master, at discretion, may examine any witness *viva voce*. 69th Gen. Order, 3d April, 1828.

Master may examine any creditor or person coming in to claim, on written interrogatories, or *viva voce*, or both. 72d Gen. Order, *id*.

Examination of sequestrators in master's office, does not require counsel's signature. *Keene v. Price*, 1 S. & S. 98. PR. SEQUESTRATOR; PR. SIGNATURE OF COUNSEL.

If on reference to master in bankruptcy, he finds examination of witnesses necessary, he must make a certificate thereof to court, who will grant an order. *Anon.* 4 Mad. 379. PR. REFERENCE IN BANKRUPTCY.

Where a witness had been examined before the decree, and was afterwards re-examined before the master, without an order first obtained, his deposition was, on motion, of which notice was given four days after publication, suppressed with costs. The usual order was afterwards obtained for his examination on interrogatories, to be settled by the master, to matter to which he had not been before examined. *Smith v. Graham*, 2 Swan. 264. But where under a commission for examination of witnesses, several witnesses on defendant's part were examined by plaintiff, but defendant declined to examine them at that time, and afterwards examined them in the examiner's office, without leave of the court, motion for suppressing the depositions was refused. *Pearson v. Howland*, *id.* (n.)

Master on reference, making use of affidavits instead of interrogatories, he was directed not to proceed on the affidavits; with liberty under the circumstances to apply to court, if, by death or otherwise it became impossible to obtain, under a commission, the evidence of the persons who had made the affidavits. *Tillotson v. Hargrave*, 3 Mad. 494.

Under decree directing inquiries, the master cannot without an order examine a witness who had been examined in chief in the cause. *Willan v. Willan*, 19 Ves. 592. S. C. Coop. 291.

But if a witness's deposition be rejected at the hearing on the ground of interest, and he afterwards obtained a release, he may be examined to the same matter before the master, without a special order. *Callop v. Mince*, Pre. Ch. 234.

Waiver of irregularity by examining before the master, without a previous state of facts. *Willan v. Willan*, 19 Ves. 590. S. C. Coop. 291. See 2 Dow, P. Rep. 274. WAIVER; PR. STATE OF FACTS.

Motion before publication, that witness might be examined on his affidavit, that supposing day on which he was examined to be the last day of the examination, on that account only he submitted to be examined, without having looked at papers from which afterwards he found that he might have deposed much more fully and precisely than he had done. Order made accordingly for his re-examination upon those interrogatories to which affidavit related, court being indulgent in such cases, where witness has, by accident, not deposed that which he might have done. *Kirk v. Kirk*, 13 Ves. 280.

And re-examination of witness was permitted after publication, upon his own application and affidavit, to correct mistake which had arisen from a confusion between two books, as to accuracy of one of which he had deposed, intending to depose as to the other. Court, however, would not permit an entirely new examination, or that depositions should be suppressed, but confined re-examination to matter pointed out by affidavit. *Id.* 285.

If examination on interrogatories before master, though satisfactory to him, is not so to party in cause, order may be obtained referring examination back, that master may look into it, and see if it be sufficient; and if he reports it sufficient, an exception may be taken, stating generally that master had reported examination to be sufficient, whereas he ought to have reported it insufficient. *Purcell v. M'Namara*, 12 Ves. 166. S. C. 17 Ves. 434.

Evidence in the cause, though not read at the hearing, may be received by the master. Witness examined in the cause cannot be examined before the master, without leave of the court, but other persons may, and to the same points. *Smith v. Althus*, 11 Ves. 564.

Though a witness who has been examined in chief cannot be again examined before the master without special order, and the interrogatories being settled by the master; yet if he has been merely examined as a witness to a deed, or some such matter, the interrogatories need not be settled by the master, as it is evident then that he is not to be examined to the same matter. *Birch v. Walker*, 2 Scho. & L. 418.

Plaintiffs in action, and detainers on arresting of defendant returning from examination before master, ordered to discharge him. As to deviations from straight road. *Sidgier v. Birch*, 9 Ves. 60. PRIVILEGE FROM ARREST.

It is not now the practice in chancery to insert direction in decree, that master is at liberty to examine witnesses, but master may certify that a commission is necessary, which then issues of course. *Sainford v. Bithulph*, 9 Ves. 36. PR. COMMISSION TO EXAMINE WITNESSES; PR. DECREE.

On a motion for a commission to take defendant's examination, the time is left to the master, not limited by the order. *Hairby v. Emmatt*, 5 Ves. 683.

After a decree the master may examine witnesses, but ought not to do so by his six clerk; the same subpoena issues as to bring them before the examiner, which is the same as a subpoena to answer, but the label expresses the purpose; upon an examination in the country, the body of the writ expresses that it is to testify. *Parkinson v. Ingram*, 3 Ves. 603. PR. SUBPOENA AD TEST.

An interested witness having given an insufficient release, his evidence was rejected, and a reference was directed, and the parties examined. The above witness, since the hearing, delivered an effectual release, and he was then tendered to the master. Under the circumstances he was allowed to be examined again, but the master to settle the interrogatories. *Sandford*

v. Paul, 2 Dick. 750. 1 Ves. J. 308. 3 Bro. C. C. 370. In *Callon v. Mims*, 2 Vern. 472. Pres. Chan. 234, held that witness, whose evidence was rejected at hearing, but who afterwards obtained release, might be examined again before master to same matter, without order of court. It is no objection to a witness who was disinterested at time of his examination, that he became interested afterwards. *Brown v. Greenly*, 2 Dick. 504. *Hand v. Hand*, 2 Atk. 615. And see *Baugh v. Holloway*, 1 P. W. 557.

By a decree the master was ordered to take an account of what certain articles were worth; when the parties went before him, he refused to receive interrogatories from defendant as to the real value of the goods, on the ground that the point had been in issue, and might have been examined to before; but on application to the court, he was directed to receive these interrogatories, the decree implying that he was to receive evidence as to the value. *Hough v. Williams*, 3 Bro. C. C. 190.

A master is at liberty under the usual order, to examine parties *visu voce*, after he has examined them on interrogatories, if not satisfied with the former examination. *Exp. Sunderson*, 2 Cox, 196.

On a reference to a master in bankruptcy, with liberty for him to examine parties on interrogatories, if he should think fit, it seems, that if the master should decline to examine any party when required so to do, he should state the grounds on which he declined to do so. *Exp. Charter*, 2 Cox, 168. PR. REFERENCE TO MASTER IN BANKCY.

A commission for examination of witnesses to falsify examination of party before master, will not be granted without certificate from master of necessity of such commission. *Bearcroft v. Berkeley*, 2 Cox, 108.

Witnesses examined in the cause shall not be again examined before the master, without leave of the court. *Vaughan v. Lloyd*, 1 Cox, 312.

Witness not to be re-examined before a master to the same matter to which he has been examined in chief, but by order. *Sawyer v. Rowyer*, 1 Bro. C. C. 338. PR. RE-EXAMON. BEFORE MASTER.

Witness examined in chief before hearing, cannot be examined before master without special order, and then not on any other matters he had been before examined to, or wherein interested: master to settle interrogatories. *Browning v. Barton*, Dick. 500.

Defendant who has been examined before master on account decreed, may be re-examined on new interrogatories, without order. *Cornish v. Acton*, 1 Dick. 149.

Framing of interrogatories on bill to perpetual testimony, (which had been suppressed as leading) appearing to have been inadvertent, and defendant being an infant, leave given for re-examination of same witness before master. *Arundell v. Pitt*, Amb. 585.

On bill to be relieved against bonds obtained by fraud and imposition, all parties were ordered be examined: Plaintiff being a weak man and easily prevailed on to say or admit any thing, court directed that in case interrogatories should be exhibited against him by defendant, master should take care to examine him in person, so that no advantage should be taken of his weakness. *Piddock v. Brown*, 3 P. W. 288.

The master examined one witness three times to the matter of accounts: ordered, that the depositions be suppressed. *Atton*, 2 C. C. 79.

The usual order for taxation empowers the master to examine the solicitor as to what money he had received only; but, upon proper affidavits, the court will order him to be examined as to his disbursements. *And. Mos.* 331. PR. TAXATION; SOLICITOR.

And where after an order of taxation and payment the solicitor has signed his bill to a purchaser and

absconded, the court was inclined to think that the purchaser could not stand in place of the solicitor until he had procured him to be examined under the order. *Wilson v. Williams*, Burn. 263. PR. TAXATION; SOLICITOR.

### (c) Examiner.

By 4 Geo. 4. c. 7. s. 42, 43, it is enacted, that in all cases of examinations of witnesses in chancery (other than the examinations of witnesses before the examiners), an order shall be made for referring it to a master, to approve of and appoint a proper person to act as examiner in all such cases so referred; and such persons so appointed, shall, as far as is practicable, be totally unconnected with any of the parties interested in the cause, and shall be and be considered an officer of the court, and a commission shall issue to such person, authorising him to proceed in the examination in the same manner and forms as at present established as to the examination of witnesses by commission, except in cases where the established practice is altered by the act. Every person so appointed a commissioner, before acting, shall take the oath prescribed by the act; such oath to be annexed to, and returned with the commission to the court, to be there filed and recorded. Such commissioner may, if required by the opposite party, cross-examine the witness on his behalf; the fees to be received by such commissioners to be regulated by the orders of the court. And, by s. 44, it is further provided that the chief examiners of the said court shall appoint no deputy, unless the person to be appointed shall have been approved of by the court, upon petition and affidavit; and that nothing shall be considered as a fit occasion for the appointment of such deputy, but the illness or unavoidable absence of the principal; such order to be regularly entered in the Registrar's office, and no such appointment to continue for any longer time than shall be allowed, or directed by such order, either by fixing a precise time, or by some general words, or by reference to some matter capable of being distinctly ascertained, or in such other manner as the court shall think proper; any appointment otherwise made, or for any longer period, to be deemed a contempt of court in the principal examiner, and in his deputy, if he shall act therein. And by s. 45, that every examiner, deputy examiner, and commission examiner shall take down the depositions of all witnesses on their examination with his own hand; and that no clerk shall be present at such examination; and every clerk employed before publication, so as to have access to the depositions, is first to take the oath prescribed by the act. By stat. 50 Geo. 3. c. 8, power is given to the Ld. Ch. and M. R., if the increase of the business should render it necessary, to appoint two additional examiners, and to settle the duties of the examiner and distribution of the business of the office, directing also that the business shall be equally divided, as near as may be, between the examiners; and that the witnesses on different sides shall, (if practicable) be examined by different examiners. See *Turner v. Burleigh*, 17 Ves. 354.

Examiner in chief may also cross-examine. 26 Gea. Order, 3d April, 1828.

The same examiner not to examine and cross-examine the same witness, nor to act on behalf of both parties. Gen. Rule, 1st March, 1806. 2 Scho. & L. 739. See case *supra*.

Examiners may take out subpoenas against persons unduly making copies of depositions, to examine them. *Beame's Orders*, 52. 138.

Such interrogatories, how to be executed. *Id.* 52. 134.

They must be first allowed by a master. *Id.*

Party, if found guilty, to be committed to Fleet.  
Beame's Ord. 53, 134.

If acquitted examiner to pay costs. *Id.*

Copy of rule for publication to be delivered to them, to prevent examination of witnesses after publication.  
*Id.* 73, 186.

Examiners' dispute with the six clerks. *Id.* 87.

Examiners not to examine witnesses without the privy of adverse party, to whom notice is to be given. *Id.* 185.

To be well satisfied that such notice is given. *Id.*

What they are to add to title of examination. *Id.*

Shall examine witnesses to the interrogatories *seriatim*. *Id.* 187.

Are not to permit witness to read over other interrogatories until that in hand be fully finished. *Id.*

Nor that he should pen his own depositions. *Id.*

Nor depart after he hath heard interrogatory, without finishing his examination thereto. *Id.*

Examiner not to proceed in examination of witness not so conforming himself. *Id.*

Shall not examine witnesses to invalidate credit of answer, without order, &c. *Id.* 32, 187.

Are in person to examine witnesses. *Id.* 188.

Are to hold witnesses to the point interrogated so. *Id.*

Are to employ under them persons of integrity, &c. *Id.* 189.

The oath such persons are to take. *Id.*

Such persons offending, to be expelled, &c. *Id.*

Examiners are not to use idle repetitions in examining, &c. *Id.* 190.

How an answer is to be set down when witness cannot depose. *Id.*

Orders to suspend an examining clerk. *Id.* 271.

Examiners may attend hearing to inspect depositions. *Id.* 301.

If these fraudulently made out, cause to be put off, &c. *Id.* 302.

Examiner's clerks not to act as solicitors. *Id.* 306.

If they do they are to be suspended, &c. *Id.*

Fees of examiners and their clerks according to Order, 28th November, 1743. *Id.* 384, 385.

Rules and regulations to be observed by them and their clerks. *Id.* 386.

The late Order of April, 1811, for regulating their office. *Id.* 475.

Their fees under such order. *Id.* 480.

Motion, upon an affidavit of witness's incapacity to attend an examination, that the examiner might be directed to wait upon the witness, and take his examination, granted. *Anon.* 4 Mad. 463.

Examiners of this court have no authority to examine witnesses at a greater distance from London than ten miles, unless by consent, and such consent must be express. *Pratt v. Ward*, 2 Price, 81.

They may examine witnesses brought from any part of kingdom; but *quære*, whether subpoena lies to bring them to London. *Id. ib.*

If examiner be named in commission in country to examine, he may be struck off. *Id. ib.* 84.

In *Reilly v. Reilly*, 11ow. Pr. Ex. Irel. 593. it is said, that on complaint of an irregular examination, an examiner has been ordered to answer personal interrogatories, and not admitted to have a copy of them.

Question concerning examiner's right to take depositions in the country. *Frankland v. Frankland*, Dick. 231.

Commission to examine *in perpet. mem.* granted to examiner of court. *Barantine v. Harbert, Cary*, 43.

#### (f) Examination de bene esse.

No commission *de bene esse* to be applied for until process be first taken out on the bill; and where the parties have not appeared, and are in the kingdom,

they are to have notice of the time and place of the speeding of such commission; and if the nature of the case will not permit the usual notice of speeding commissions, the court will, on application, make proper order. Ord. Ch. Ir. 12th Feb. 1726. *O'Keeffe's* Ord. 32.

Motion of course to examine *de bene esse* a witness above seventy or in a dangerous state, or the only witness. *Tomkins v. Harrison*, 6 Mad. 315.

On demurrer allowed to bill for commission to examine *de bene esse*, the plaintiff having on an *ex parte* application obtained order to examine witnesses, was ordered to pay to the defendants, besides the usual costs of demurrer, the costs of the depositions, but not those taken on cross-examination. *Devo v. Clarke*, 1 S. & S. 115. Pr. Costs.

Where witness is above seventy years old it is motion of course to examine *de bene esse*, even before appearance, and it is no objection that reference of bill for impertinence is pending. *Prichard v. Gee*, 5 Mad. 364.

After commission to examine abroad was sent, witness, before commission had reached, its destination, returned to England, and motion made to examine him *de bene esse*, but refused; and held that bill must be amended. *Atkins v. Palmer*, 5 Mad. 19. Pr. BILL, AMENDMENT OF; Pr. COMMIS. TO EXAMINE ABROAD.

Distinction between examination to perpetuate and *de bene esse*. In a suit for the former purpose, after the examination, there is an end to the issue, *Morrison v. Arnold*, 19 Ves. 671. Pr. BILL TO PERPETUATE.

Examination *de bene esse* not extended beyond the cases of a single witness, the age of seventy and dangerous illness, therefore, not to the case of a prisoner charged with a capital felony. *Anon.* 19 Ves. 321.

If the witness is proposed to be examined with a view to reading his testimony in a suit in this court, the order for his examination may be obtained on motion in that suit and affidavit; but if his testimony is wanted in an action at law, a bill must first be filed for his examination *de bene esse*, with the proper affidavits annexed; and an application is then made to the court by motion, for the order wanted; also the order may be obtained before appearance, after defendant has been served with a subpoena. *Wilson v. Wilson*, Newl. Pr. 286.

Examination *de bene esse*, granted to plaintiffs in a bill to perpetuate testimony after subpoena served, but before appearance of infant defendants, in contempt by the messenger's return that they had absconded and were not to be found, on affidavit of the materiality of the evidence and danger of its loss, and undertaking to proceed with all due diligence, to issue and examination in chief to be proved before publication of the depositions *de bene esse*. *Frere v. Green*, 19 Ves. 319.

Witnesses having been examined *de bene esse*, with the view to a trial at law, the examination of another witness is not permitted without strong circumstances; as upon a second ejectment brought after verdict for the defendant, the examination of a witness, produced at the trial, who had not been examined under a bill to perpetuate testimony, was permitted; not as to other witnesses. *Palmer v. La. Aglesbury*, 15 Ves. 299.

Upon a question of legitimacy depending upon a chain of distinct circumstances in the knowledge of different individuals, and the defendant, an infant, kept out of the way, an examination *de bene esse* would have been granted, though not within any of the three cases, *viz.* witnesses of the age of seventy, or quitting the kingdom, or a fact depending on a single witness. *Shelley v. —*, 12 Ves. 56. INFANT.

Examination *de bene esse*, where the witness is

above the age of seventy, or is the only witness to a particular fact; refused upon affidavit of the agent to his information from the witness that he can prove the fact, and belief that no other person can prove it. *Rowe v. —*, 13 Ves. 261.

There are certain cases in which this order is made of course, as on the ground of age. *Rowe v. —*, supra. But if you come on a case that you cannot arrange in that class, you must give notice. *Bellamy v. Jones*, 8 Ves. 31. The affidavit must be, either that the witness is seventy, or is the only witness to a particular fact, or is dangerously ill. *Bellamy v. Jones*, id. Or is going abroad. *Shelley v. —*, 12 Ves. 56.

Order after verdict upon an issue to examine *de bene esse*, a witness above seventy, suggesting an intent to move for a new trial. *Anon.* 6 Ves. 573.

Notice must be given to the party before an examination *de bene esse* should be proceeded on, so as to give him an opportunity of joining in the commission, or the depositions will be suppressed. *Loveden v. Ld. Milford*, 4 Bro. C. C. 540.

Two witnesses ordered to be examined *de bene esse*, being the only persons who knew material facts. *El. Chalmondeley v. El. Orford*, 4 Bro. C. C. 157.

After answer, defendants obtained order to examine *de bene esse*, but before commission could issue, plaintiffs replied, and defendants rejoined, and wishing to save expense of commission *de bene esse*, defendants moved that plaintiffs might issue a commission in a week, and give six days' notice of executing it, which defendants would consent to accept, or that in default, defendants might issue commission. But court thought time too limited, and gave plaintiffs three weeks to issue the commission. *Atwood v. Hurrit*, 2 Fowl. 126.

Motion that a witness be examined *de bene esse*, being the only witness to a material fact, granted. *Hankin v. Middleditch*, 2 Bro. C. C. 641.

Witness examined *de bene esse*, upon the sole ground of his being the only person in whose knowledge a material fact was. *Bridges v. Hatch*, 1 Cox, 423.

It is a ground for examining a witness *de bene esse*, that he is the only witness to some material fact in the court, although he be neither aged nor infirm. But the affidavit should state the particular points to which his evidence is meant to apply. *Pearson v. Ward*, 1 Cox, 177. S. C. Dick. 648.

Defendant cannot be examined after his answer is replied to. *Winter v. Kent*, Dick. 595.

Witness going to the West Indies examined, but he being in Ireland must be examined in chief. *Birt v. White*, Dick. 473.

Scotland out of jurisdiction. Witness going there may be examined *de bene esse*. *Botts v. Verelst*, Dick. 454.

Witness examined *de bene esse* becoming interested, his depositions to be taken. *Brown v. Greenby*, Dick. 504.

Where defendant prevents plaintiff rejoining from standing out processes of contempt, plaintiff is entitled to examine *de bene esse*. *Coveney v. Athill*, Dick. 355.

Witnesses examined *de bene esse* in Sweden: council of Sweden refused to let a commission be executed for examining them in chief, the depositions *de bene esse* may be read. *Gasson v. Wordsworth*, Amb. 108. S. C. 2 Ves. 325. 336. Pr. Evid.

Rule for examination of witnesses *de bene esse*, dispensed with on account of parties living in Virginia. *Fitzhugh v. Lee*, Amb. 65.

Leave given to sue out a commission to examine persons obliged to go abroad, *de bene esse*, defendants to have four days' notice of executing the commission. *Lee-Dicher v. Power*, 1 Dick. 112.

An affidavit of the death or absence beyond sea of the witness is necessary before examinations *de bene esse* can be published. *Ward v. Jones*, Ridg. 193. Pr. Publication.

Motion on behalf of plaintiffs, that two of their captains, sworn to be material witnesses who were going to India, and not likely to return in less than eight months, might be examined *de bene esse*, refused, because the witnesses were plaintiffs' servants, and they might keep them at home if they pleased, and because defendant would not, from the shortness of the time, be prepared to cross-examine. *E. I. Comp. v. Naish*, Bunb. 320. 2 Fowl. 127. S. C.

A witness ordered to be examined *de bene esse*, where the thing examined into lay only in the knowledge of the witness, and was a matter of great importance, though the witness was not proved to be old or infirm. *Shirley v. Ferrers*, 3 P. W. 77. S. C. Mos. 389.

The reason why court allows taking of depositions *de bene esse*, is either from contempt of party in not answering, and thereby preventing joining of issue, or else where party is in danger of losing his witnesses in case of death, by reason of sickness or age, so that there may be ground to apprehend their not living, to be examined in chief; but if these witnesses do live, and are examined in chief, their depositions *de bene esse* fall to the ground. *Cann v. Cann*, 1 P. W. 567, 568.

The court cannot make an order to examine a plaintiff *de bene esse*, saving just exceptions, though they will make such order to examine a defendant; but the defendant ought to have demurred to such immaterial plaintiff: if a corporation would make use of one of their own members as a witness they must disfranchise him. *Mayor, &c. of Colchester v. —*, 1 P. W. 595. PARTY PLAINTIFF; WITNESS, COMPETENCY OF.

Plaintiffs guardian may be examined *de bene esse*. *Payne v. Bosgrave*, 2 Fowl. 125. *Hockley v. Butler*, id. *Ashley v. Ashley*, id. So on behalf of defendant. *Groyner v. Gale*, Id. 463.

Although it is an order of course to examine a defendant *de bene esse*, saving such exceptions, yet when the cause is heard; and it appears such defendant is a party interested, it is proper to shew cause against such an order before the witnesses examined. *Glover v. Faulkner*, 1 Vern. 452.

Plaintiff's witnesses being old, examined before defendant's answer. *Bagnold v. Greene*, Cary, 48.

#### (g) Pro interesse suo.

No jurisdiction to compel party to be examined *pro interesse suo*. *Kaye v. Cunningham*, 5 Mad. 406. JURISDICTION.

Where the goods of a third person are seized by sequestrators, an order to examine *pro interesse suo* will be made; and if the goods taken are found to belong to the party so applying, a reference to ascertain his damages will be granted. *Copeland v. Mape*, 2 Ball & B. 66. Pr. SEQUESTRATION.

Tenants dispossessed by injunction of lands held by lease from defendant, executed prior to the institution of the suit in which they were not parties, on application, to be restored to the possession, are not to be examined *pro interesse suo*: such order set aside, and the plaintiff directed to proceed by ejectment to recover the lands. Order to examine *pro interesse suo*, only made to ascertain priority of incumbrances, or where an interest is claimed in estates in possession of receivers or sequestrators. *Dunlop v. Farrell*, 1 Ball & B. 122. LANDLORD & TENANT.

Upon sequestration, mortgagees must come in to be examined *pro interesse suo*. *Anon.* 6 Ves. 268. Pr. SEQUESTRATION; MORTGAGOR & MORTGAGEE.

No examination *pro interesse suo*, before the sequestrators have made a return. *Ld. Pelham v. Dr. Newcastle*, 3 Swan. 290. PR. SEQUESTRATION.

Examination *pro interesse suo*, is conclusive, if not replied to. *Att. Gen. v. Mayor of Coventry*, 3 Swan. 311.

Order for leave to exhibit interrogatories to falsify examination, *pro interesse suo*, obtained by motion of counsel. *Rowley v. Ridley*, 3 Swan. 308. PR. EXHIBITING INTERROGATORIES; PR. MOTION OF COURSE.

On examination of parties *pro interesse suo*, leave given to exhibit interrogatories to falsify an examination as of course. *Id.* 2 Bro. C. C. 15.

Orders made that a mortgagee and a person claiming property in goods sequestered might be examined *pro interesse suo* before the deputy remembrancer. *Mackenzie v. Powis*, 1 Fowl. 192, 193. *Marten v. Willis*, *id.* 181.

The mode of proceeding on examinations *pro interesse suo*. *Hunt v. Priest*, Dick. 540.

Court will order person to be examined *pro interesse suo* against receiver, as well as against sequestrator. *Gomme v. West*, *id.* 472.

A person having been examined *pro interesse suo*, was permitted to prosecute and make out her right in *forma pauperis*. *Juue v. Dore*, 2 Dick. 780. PR. PAUPER.

A party claiming to have a mortgage on an estate prior to plaintiff's right, was ordered to come in and be examined *pro interesse suo*; and on his neglecting to put in his examination, an order was made on him to do so, and to procure a report in a fortnight. On the report being made, his claim was allowed, and costs given him. *Cooper v. Thornton*, 3 Dick. 72. *Bowles v. Parsons*, *id.* 142. S. P.

#### (h) Cross-examination.

No examiner to examine and cross-examine the same witness; and no examiner, having been employed on behalf of one party, to act afterwards on behalf of the opposite party. Ord. Ch. Irel. 1st March, 1806. O'Keeffe's Ed. 103. By Ord. Ch. Irel. 20th May, 1816, this order is extended to the extra commissioners for the examination of witnesses in England, appointed under the statute 55 Geo. 3. c. 257. but see contra, 26th Gen. Ord. 3rd April, 1820.

Where cross-interrogatories are exhibited before commissioners, and witnesses examined thereto, the commissioners shall put the initial letters of their names to each of such cross-interrogatories. Ord. Ch. Irel. 27th Feb. 1740. *Id.* 55.

Before any cross-examination can take place, the cross-interrogatories must be first regularly entered in the register's office, and certified by counsel. Ord. Ch. Irel. 19th March, 1798. *Id.* 88.

A party who omits to cross-examine a witness under a commission at the usual period, will be allowed to exhibit interrogatories for that purpose on a subsequent day. *Carter v. Draper*, 2 Sim. 52.

The refusal of a witness to be cross-examined is no reason for suppressing his deposition, but the adverse party must at the same time enforce such right of cross-examination as he has. *Courtenay v. Hoskins*, 2 Russ. 253. PR. SUPPRESSION OF DEPOSITIONS.

Party examining witness is bound to keep him in town 48 hours after his production at seat of adverse clerk in court, and if cross-interrogatories are left with examiner within 48 hours, party must keep him in town till cross-examination is finished; and if witness departs, party must bring him back at his

own expense. Cross-examination in chief will be suppressed. *Whittuck v. Lysaght*, 1 S. & S. 446. WITNESS, PRODUCTION OF.

Commission to examine witnesses abroad executed and returned; the defendant, who had not interrogatories prepared, not having had the opportunity of cross-examining, a new commission granted for that purpose; the defendant to state whom he wishes, and undertakes to cross-examine; but the plaintiff's depositions not suppressed. *Campbell v. Scougal*, 19 Ves. 552. PR. COMMISSION TO EXAMINE ABROAD.

In equity, objection to the competence of a witness from interest not waived by cross-examination. *Moorhouse v. De Passon*, 19 Ves. 433. S. C. Coop. 300. PR. WITNESS, COMPET. OF; WAIVER.

Cross-examination as to the execution of deeds. Order in alternative, that the examiner with whom they were should cross-examine, or that they should be delivered to the examiner for the other party for that purpose. Power of the court of chancery to examine  *viva voce*. *Turner v. Burlingame*, 17 Ves. 354.

A witness died before cross-examination; but as the cross-interrogatories which the court ordered to be read *de bene esse* at the hearing, did not go to any points to which he had been examined in chief, nor to his credit, but to matters capable of proof from other witnesses, his depositions were allowed to be read. *O'Callaghan v. Murphy*, 2 Sch. & Lef. 158.

Practice, that if the defendant to a bill for discovery and a commission, examine in chief, instead of confining himself to cross-examination, he shall not have costs. *Anon.* 8 Ves. 70. COSTS; DISCOVERY.

Witness examined in chief, but before cross-examination secretes himself, unless produced a fortnight after notice, his depositions suppressed. *Flowerday v. Collet*, Dick. 288.

Defendant having examined B, his clerk in court, plaintiff exhibited interrogatories to cross-examine him, to which he demurred, for that he knew nothing but as defendant's clerk in court, or agent. Demurrer overruled, as covering too much, for it ought to conclude that he knew nothing but by the information of his client. *Vaillant v. Dodomead*, 2 Atk. 524. PROFESSIONAL SECRECY; PL. DEMURRER.

Where at law the party calls upon his attorney for a witness, the other side may cross-examine him to the point in the cause. *Id. ib.*

Counsel, solicitor, or attorney may be privileged from being examined in such cases, but not an agent. Demurrer to examination, as being counsel for the opposite party, was overruled, for that what he knew was as conveyancer only. *Id. ib.*

Where a defendant cross-examines plaintiff's witnesses, he is precluded from afterwards moving to suppress their depositions in chief. *Bland v. Archbp. of Armagh*, 3 Bro. P. C. 620.

Adverse party may cross-examine witness to same point to which he is produced, but not to new matter. *Dean, &c. of Ely v. Stewart*, 2 Atk. 44. S. C. Barn. 170.

On a similar motion *ex parte*, the court ordered the witnesses to be produced, plaintiff to give a note of what witnesses they had examined, and defendant to give a note of which of them they would have produced to be cross-examined. *Spalding v. Brugham*, 2 Fowl. 158. *Johnston v. Carruthers*, *id.* 159. S. P.

On motion to suppress plaintiff's deposition for not producing his witnesses to be cross-examined, a new commission was ordered, defendant to have the carriage of it; the depositions of such witnesses already examined by plaintiff, as he would produce for cross-

examination, to stand; the others to stand suppressed. *Charlton v. Robson*, 2 Fowl. 158.

If one of the parties, after publication passed, has an order to examine upon the usual affidavit, the other party may not only cross-examine, but examine at large. *Anon. 1 Vern.* 253.

Cross-examining witnesses, not only as to questions barely whether they were of a corporation or not, but to other questions involving the merits, makes them good witnesses for the corporation, though they were members of it. *Sutton Coldfield Corp. v. Wilson*, 1 Vern. 254. *Charit. Corp. v. Sutton*, 2 Atk. 403. S. P.

A witness examined for plaintiff died before he could be cross-examined; yet his depositions ordered to stand. *Arundel v. Arundel*, 1 Ch. R. 90.

(i) Further, or re-examination.

See also *ante*, 28. (d).

In support of a charge brought in under the decree, two witnesses, examined by the plaintiff to prove the defendant's handwriting, said that they did not believe it to be his handwriting. Leave was given to the plaintiff to examine fresh witnesses to the same point. *Greenwood v. Parsons*, 2 Sim. 229. CHARGE & DISCHARGE.

Where publication has passed, and the cause in the paper for hearing, the plaintiff, upon motion, paying the costs of the application, will be allowed to examine witnesses to the execution of a will. *Coley v. Coley*, 2 Y. & J. 44. PUBLICATION.

If, after the defendant has put in his examination to the usual interrogatories before the master, the plaintiff discovers that the defendant has received sums not mentioned in his examination, the master is at liberty to receive a new state of facts, and further interrogatories founded upon them, without order of court. *Sidden v. Forster*, 1 S. & S. 335. PR. FURTHER INTERROGATORIES; PR. STATE OF FACTS.

Where, after depositions have been suppressed for irregularity, a re-examination is permitted, all the same witnesses must be examined and cross-examined. *Perry v. Silvester*, 1 Jac. 83. PR. SUPPRESSAL OF DEPOSITIONS.

Witness cannot, under any circumstances, be re-examined, so as to adduce additional testimony. *Ashbee v. Shipley*, 5 Mad. 467.

Master may re-examine witness who had been examined before decree, as to different matters, without a fresh order: but not to the same matters without fresh order; and such order only made in case of accident or surprise. *Swinford v. Home*, 5 Mad. 379.

Where re-examination of witness would open the way to perjury, it was refused. *Bolt v. Birch*, *id.* 66.

In a suit to perpetuate testimony, motion for a further examination of witnesses, as to facts lately discovered, refused, on the ground that a demurrer to a supplemental bill for the same purpose had been allowed. *Knight v. Knight*, 1 Jac. & W. 165. DEMURRER; PR. BILL TO PERPETUATE.

Demurrer to interrogatory by witness, being too general, overruled, but leave given to put in written demurrer on re-examination. *Morgan v. Shaw*, 4 Mad. 64. PR. DEMURRER TO INTERROGATORIES BY WITNESS.

Persons who, with the knowledge of the plaintiff, had entered into a subscription to defray the costs of the suit, having been examined by the plaintiff, the defendant, on an application as soon as he obtained a knowledge of that fact, was permitted to exhibit new interrogatories to the witnesses for the purpose of

proving it; and a motion by the plaintiff to discharge that order, or obtain leave for exhibiting new interrogatories, to prove the execution of releases to the former witnesses, and for re-examining the former witnesses on the former interrogatories, was refused with costs. *Vaughan v. Wrayell*, 4 Swan. 395.

Re-examination of a witness before publication, refused, the application being for liberty to explain and correct his former evidence; and the affidavit being that he had omitted to state a material circumstance. *Ld. Abergavenny v. Powell*, 1 Mer. 330.

After examination under decree before the master concluded, or made known, further examination not permitted, without an order on surprise clearly established. *Willan v. Willan*, 19 Ves. 690. S. C. *Coop.* 291. See 2 Dow. P. Rep. 274.

After publication no further examination, without leave, not obtained without great difficulty, and generally confined to some particular facts. *Id.* 592. PR. PUBLICATION.

Re-examination not of course, but in the discretion of the court, on special application. Order after decree, on behalf of a defendant, for the examination of another defendant upon interrogatories, who had been examined and cross-examined, restrained to such of the points in the cause to which he had been examined, as the master should think reasonable. Interrogatories for examination of a party settled by the master. *Purcell v. M'Namara*, 17 Ves. 434. PR. INTERROGATORIES.

Order before publication for re-examining a witness upon his affidavit, that, through mistake as to the time, he submitted to be examined, without looking at papers, which enabled him to answer more fully and precisely. *Kirk v. Kirk*, 13 Ves. 280. PR. PUBLICATION.

Re-examination of a witness after publication, upon his own application and affidavit to correct mistake, but confined to that, the court not permitting the whole deposition to be suppressed, and an entirely new examination. *Id.* *ib.*

Witnesses examined in the cause re-examined before the master upon different interrogatories, by order. *Greenaway v. Adams*, 13 Ves. 360.

Witness examined in chief not to be examined again to the account, without special order, and the interrogatories to be settled by a master. *Birch v. Walker*, 2 Scho. & L. 518.

Examination after publication as confined to general credit, and to facts, not material to what is in issue in the cause. *Carlos v. Brook*, 10 Ves. 49. PR. PUBLICATION.

Witness examined before decree, but then accidentally and without fraud, incompetent, on motion allowed to be generally re-examined after decree, upon interrogatories, to be settled by the master; but if competent at first, second examination can be only to matter substantially different. *Sandford v. Paul*, 1 Ves. J. 398. S. C. 3 Bro. C. C. 370. *Dick.* 760.

Where a cause stands over to make or add new defendants, and on amendment, publication is open, it seems that all the parties may enter into a new examination, and that a new examination of a defendant to original bill may be read against another defendant. *Archer v. Pope*, 2 Ves. 523.

Witness examined at trial of ejectment, new ejectment brought, she was examined to perpetuate upon same interrogatories as former witnesses, and her testimony to be perpetuated. *James v. Newman*, *Dick.* 338.

Depositions of a witness being too general, he was directed to be examined upon interrogatories before a master. *Bishop v. Church*, 2 Ves. 100.

The deposition of a witness examined previously to the decree, on his re-examination before the master, without an order for that purpose, suppressed with

tion, of which notice was given four days after publication. The usual order was afterwards obtained for his re-examination on interrogatories, to be settled by the master, to matters to which he had not been before examined. *Smith v. Graham*, 2 Swan. 264. *PR. EVID. DEPOSITIONS, SUPPRESSION OF; PR. WITNESS.*

Under a commission for the examination of witnesses, several witnesses on the part of the defendant, having appeared and been examined by the plaintiff, the defendant then declining to examine them, their depositions on a subsequent examination by the defendant in the examiner's office, without leave of the court, not suppressed. *Pearson v. Rowland*, 2 Swan. 266. *Id.*

Answer of witness insufficient, examined again. *Fish v. Mountford*, Cary, 82.

Witnesses *ad informandum conscientiam*, shall never be appointed to be taken but upon hearing, (*ubi iudex dubitat*), but yet witnesses examined after publication not fit to be published, may be fit to be *ad inform. consci.* if it be thought meet on the hearing. *Id.* 27.

Witness examined after publication *ad informandum judicis*. *Id.* 58.

T, being examined as a witness, calling himself better to mind afterwards, was suffered to amend his former examinations. *Anon.* Tolh. 189.

Witness once examined shall not be called upon to be examined upon a further point. *Id.* *Scroope v. Egerton*, id. 190.

Witnesses examined upon new interrogatories, after a commission to counterprove a man's testimony at law, upon which a verdict passed. *Taitor v. Taitor*, id. 191.

Examination of witnesses after hearing, to prove a court roll. *Veizey v. Veizey*, id. 192.

Where a suit had been dismissed in the exchequer, but without prejudice either in law or equity, upon a new suit in chancery, the parties were at liberty to examine new witnesses, though to the same matter, and re-examine the former witnesses *de bene esse*. *Anon.* 1 C. C. 155.

The court is to judge where it will allow examination after publication, and it was allowed for the purpose of examining a witness eighty years old, not discovered till after the hearing. *Mayor of London v. Ek Dorset*, 1 C. C. 228.

Witness examined to the damages on breach of covenant, not re-examined on the same interrogatory, although speaking in the first uncertainly. *Ingleit v. Ingleit*, 2 C. C. 217.

A witness alleged he had mistaken himself at a commission; the commission being returned, he came to London, and made oath that he was surprised. A special commission issued to re-examine the witnesses, which was done accordingly, but this special commission was superseded by motion, by advice of the master of the rolls, with the six clerks, as contrary to the course of the court. *Randal v. Richford*, 1 C. C. 25.

### (j) *Of parties to cause.*

See also post, subdivis. (k).

Leave given to defendant after decree, on master's certifying the necessity of it to examine plaintiff as witness, he having no beneficial interest in dispute. *Hougham v. Sandys*, 2 S. & S. 221.

If party in cause examine another party before master, this examination may be read by master as evidence upon matter referred to him, though the party who examined declined to use it before master. *Chert v. Wetherill*, 2 S. & S. 269. *EVID.*

Both parties ordered to be examined upon the same issue directed upon a motion for an injunction,

supported by the plaintiff's affidavit, and opposed upon the affidavit of the defendant contradicting it; an order, directing an issue, not to be appealed from, after the trial has taken place. *Semble. De Tastes v. Bordenave*, 1 Jac. 518. *PR. ISSUE AT LAW; PR. AFFIDAVIT.*

A plaintiff cannot obtain leave to examine a co-defendant as a witness on giving security for costs. *Benson v. Chester*, 1 Jac. 577.

Plaintiff examining defendant as a witness pays his costs. *Harvey v. Tebbutt*, 1 Jac. & W. 97. *S. P. Weymouth v. Boyer*, 1 Ves. J. 417.

By the order directing a party to be examined as a witness, on the trial of an issue, no objection is waived, except that which arises from his being a party in the cause. *Rogerson v. Whittington*, 1 Swan. 39. *WAIVER.*

Plaintiff having put in an examination reported insufficient by master, defendant held entitled to reference, to tax costs in respect of it. *Hubbard v. Hewlitt*, 2 Mal. 469. *PR. COSTS.*

Order for examining a defendant by a co-defendant on the allegation of no interest in the matter to be examined to; that being the true construction of the general form, that he is not interested, or not in the matters in question in the cause; and any objection to his evidence must be taken at the hearing. *Murray v. Strodwell*, 2 V. & B. 401. *CO-DEFENDANT.*

Ground of permitting defendant to be examined for a co-defendant, that the plaintiff might unite distinct claims with the view of depriving the parties of each other's evidence. Ground of the practice requiring, for the examination of a defendant by a co-defendant, a general allegation of no interest, or none in the matters in question in the cause, that though he may have no direct interest in the subject of examination, he may in the result have an interest in that subject, the effect, perhaps, of that examination. *Id. ib.*

Examination of defendants, executors, to interrogatories exhibited by the plaintiff, (a co-executor), under a decree to account, taken by commission, and returned to the six clerks' office, being for the benefit of all parties, the other defendants, creditors and legatees, entitled to the benefit of it, and to take copies. *Dyott v. Anderton*, 3 V. & B. 176. *PR. COPIES.*

An issue directed, liberty for each party to examine the other refused, without consent. *Howard v. Braithwaite*, 1 V. & B. 374. *ISSUE AT LAW.*

Order to examine a party, saving just exceptions, of course, on the suggestion of no interest, refused where an interest appeared. *Anon.* 18 Ves. 517. *WITNESS, COMPETENCY OF.*

The depositions of a defendant, where there was no service of the order for leave to examine him, cannot be read, as it was a surprise on the other parties. *Mulvany v. Dillon*, 1 Ball & B. 413.

Order by one defendant to examine another not of course after, as before a decree. In a special case, to ascertain who actually received money, all the trustees having signed the receipt, the court refused to discharge the order made two years before, but required the examination without delay. *Franklyn v. Colquhoun*, 16 Ves. 218. *PARTY DEF.*

Order on motion of defendant, for examination of plaintiff, saving just exceptions, the plaintiff consenting to be examined. *Walker v. Wingfield*, 15 Ves. 178.

The examination of an executor under the usual decree for an account, ought to contain an interrogatory whether he is indebted to the testator, the debt from himself being assets; liberty was therefore, given, upon the suggestion of co-defendants legatees, without affidavit, to exhibit an interrogatory, for that purpose, not to go into an account which must be for the subject of distinct bill. *Simmons v. Gyle*,



ridge, 13 Ves. 262. PR. DEFENDANT TO ACCOUNT; EXECUTOR.

Where leave is given to strike out a co-plaintiff's name as next friend, his evidence, being necessary, it is on the terms that he give security for the costs incurred in his time. *Witty v. Campbell*, 12 Ves. 493.

Upon a motion for a commission to take defendant's examination, the time is left to the master; not limited by the order. *Hairby v. Emmat*, 5 Ves. 683.

An order to examine a defendant as a witness, saving just exceptions, is a motion of course, and although such orders are usually drawn up on a suggestion that the party had no interest, yet that is not essential to obtaining the order; the question how far the party was a competent witness must be raised at the hearing, and when the deposition is offered to be read in evidence. *Lee v. Atkinson*, 2 Cox, 413. *Franklyn v. Colquhoun*, 16 Ves. 218. *Murray v. Shadwell*, 2 V. & B. 401. S. P.

The original bill was filed by three partners, who afterwards became bankrupt; the assignees, under the commission, being desirous of examining one of the bankrupts as a witness, it was ordered, that they should be at liberty to amend the bill by striking out the name of the bankrupts as a plaintiff, and then to examine him as a witness. *Ewer v. Atkinson* 2 Cox, 393. AMENDMENT; BANKRUPT.

Plaintiff may examine defendant as a witness, saving just exceptions, but then plaintiff should not reply to his answer, or having replied to it, the replication may, on motion, be amended, by striking out such defendant's name. *Hardcastle v. Shafto*, 2 Fowl. 100.

But in *Crookhall v. Smith*, id. 101., a defendant was ordered to be examined as a witness to prove the execution of deeds, after his answer had been replied to, where he was an executor only, and not a defendant in his own right.

Defendant examined as a witness; bill dismissed as to him with costs. *Weymouth v. Boyer*, 1 Ves. J. 417. PARTY DEFENDANT; COSTS.

Evidence of a plaintiff being necessary, and defendant refusing to consent to his examination, the bill on motion amended by making him a defendant, and replication withdrawn on terms of costs, amending defendant's copy, and requiring no further answer. *Mottent v. Mackreth*, id. 142. PR. PARTY PLAINTIFF; PR. AMENDMENT.

Plaintiff, by examining defendant as a witness, precludes himself from obtaining any relief by decree against him; and if, from the nature of the case, that defendant would be primarily liable to plaintiff, and another defendant only in a secondary degree, the plaintiff has lost his remedy altogether. *Thompson v. Harrison*, 1 Cox, 344. PRIN. & SURETY.

Though defendant cannot in general examine plaintiff as a witness, because it is contrary to rule, and because if he were an immaterial plaintiff, he might demur; yet in this case, defendant having sworn plaintiff to be a material witness, court gave him leave to examine him. *Troughton v. Gellay*, Dick. 382. But in *Hewatson v. Tooke*, id. 799., court reprobated this case as contrary to all rule and principle.

But defendant may examine a co-plaintiff by consent of plaintiff. *Whately v. Smith*, id. 650.

A plaintiff afterwards becoming bankrupt, though he had obtained his certificate and given a release, and the suit continued by his assignees, was not allowed to be examined as a witness, because being still a plaintiff, he was liable to costs. *Hewatson v. Tooke*, id. 799.

Defendant cannot be examined after his answer is applied to. *Winter v. Kent*, id. 595.

A trustee plaintiff in a bill to have the direction of the court, may be examined on behalf of a defendant. *Armiter v. Suggett*, Amb. 392.

A party to a cause may be examined on new interrogatories, in the master's office, without a new order, the master being the proper judge. In the case of a witness it is different; for under a commission to examine, there must be a new order for new interrogatories. *Conclude v. Cornish*, 2 Ves. 270.

The depositions of one defendant cannot be read on behalf of another, where the former is at all concerned in interest, or a decree can be made against them; though in equity a plaintiff or co-defendant may examine a defendant, yet it is on a suggestion that the party is not interested, and saving all just exceptions from the nature of the suit, or in case of the evidence materially affecting him. *Dixon v. Parker*, id. 219.

Defendant's examination insufficient; plaintiff died; suit revived; master ordered to tax costs of insufficient examination. *Lyne v. Ably*, Dick. 143.

Party, in his examination, may charge and discharge himself in the same sentence, but not in different sentences. *Kirkpatrick v. Love*, Amb. 588.

You may read the deposition of one defendant not only for another, but for the plaintiff likewise. Yet if such defendant who is offered in evidence for another defendant, may not necessarily, but by possibility only, be liable to costs, it is always a reason for refusing his evidence. *Barret v. Gore*, 3 Ark. 401.

Plaintiff is entitled to the evidence of any of the defendants; but then there must be a suggestion in the order, that such defendant is not interested in the event of the cause. *Meudbury v. Isdall*, 9 Mod. 438.

There was a charge in a bill against several defendants, one of whom plaintiff wished to examine as a witness against the other. Both of the defendants had put in their answer, and plaintiff did not reply to one, but left the charge as to him standing in the bill. *Per cur.* If his case comes out to be true, he is entitled to a decree against both, and a contribution; so that they are both interested in the event, and plaintiff cannot be entitled to either of the evidence. He ought to have moved to amend, and struck out the charge against the defendant he would examine, and then he might have been admitted; as it is, he cannot. S. C.

The rule is the same in equity as at law; that if among several defendants there be one against whom plaintiff cannot give any material evidence, he may be examined as a witness for a co-defendant. *Piddock v. Brown*, 3 P. W. 287.

Motion on behalf of plaintiff for leave to examine a co-plaintiff, as a witness to prove a will, refused. *Hungate v. Fothergill*, 2 Fowl. 125.

A defendant having been examined under the usual order as a witness, plaintiff may have a decree against him upon other matters to which he was not examined. *Nightingale v. Dodd*, Amb. 583. S. C. Mos. 229. PR. PARTY DEFENDANT.

It is irregular to order a plaintiff to be examined *de bene esse*, saving just exceptions; though such an order to examine defendant may be made. *Cochran v. Corp.*, 1 P. W. 595.

A party whilst disinterested, was examined as a witness; afterwards he became interested, yet his depositions shall be read. *Cross v. Tracey*, 1 P. W. 287. 2 Ves. 699. *Drury v. Drury*, Toth. 146. So the deposition of a witness rejected at the hearing on the ground of interest, but afterwards obtaining a release, may be read. *Callow v. Mince*, Prec. Chanc. 235. RELEASE.

The reason why a plaintiff cannot be examined is,

because if the cause miscarries, he will be liable to costs, and therefore he is swearing to exempt himself, and it is his own choice that he is a plaintiff; but a defendant is forced into the cause; and therefore any defendants to a suit may be examined as witnesses, saving just exceptions to their credit. *Diet. in Casey v. Breachfield*, *Proc. Chan.* 411. *Gillb.* 98. And on the same principle a prochein ami may be examined. *Bird v. Owen*, *Mos.* 312.

If a man unnecessarily make any one a defendant, he thereby cuts himself off from the benefit of his evidence, for it is his own fault. But where several are made defendants, it will not hinder any one of the defendants from the benefit of the evidence of any others that are made so. Indeed, in case of trustees, it is necessary that they be made defendants, and therefore there the plaintiff may have the benefit of their evidence. *Gibson v. Albert*, 10 *Mod.* 19.

And the rule extends to any person made defendant for form sake, as well as to a mere trustee. *Man v. Warr*, 2 *Atk.* 228.

Although it is an order of course that defendant may be examined *de bene esse*, saving just exceptions, yet when on the hearing it appears that the defendants who had been examined were parties interested, it is proper to shew cause against such an order before the witnesses be examined. *Glover v. Faulkner*, 1 *Vern.* 451.

If one be named a defendant, who is proper to be a witness, plaintiff must be ordered to strike out his name before answer; but after answer he may, by order, examine him as a witness, though his name be not struck out of the bill, if he be otherwise competent, as if he disclaim, or have no interest, or only as a trustee. *Anon.* 2 *Ch. Ca.* 214.

Plaintiff ordered to be examined, or process to be had against him. *York v. Hailon*, *Toth.* 35. Plaintiff to be examined on interrogatories. *Lambert v. Lambert*, *id.* 145. *Kent v. Beidham*, *id.* 146. *Bristol Mayor v. Whitsun*, *id.*

Plaintiff's own proof of defendant's contempt allowed. *Nurse v. Guillem*, 2 *Freem.* 132. 3 *Rep. Chan.* 39.

Defendants ordered to be examined for discovery of a deed, or a copy thereof. *Suffolk v. Greenrill*, 3 *Rep. Chan.* 89. Defendant ordered to be examined on interrogatories at the hearing. *Guyon v. Petty*, *Toth.* 71. *Bradshaw v. Bradshaw*, *id.* S. P.

Defendant is not to be examined, except it be in some very special cases, by express order of court, to sift out some fraud or practice pregnantly appearing to the court or otherwise, on plaintiff's offer to be concluded by the answer of defendant, without any liberty to disprove such answer, or to impeach him after of perjury. *Id. Bacon's Ord.*, *Beame's Ord.* *Ch.* 31. The trial of the truth of the matter resting altogether in defendant's declaration, ordered that he be examined on interrogatories to be ministered by plaintiff; and if on his examination the matter fall not out for plaintiff, then plaintiff to pay defendant's costs, and the cause to be dismissed. *Fytch v. Wymer*, *Cary*, 64.

Defendant examined as a witness, where defendant only witness, and if no cause for plaintiff, latter pays costs. *S. C.* *Id.* 45.

Defendant, not principal, before examined in another suit on plaintiff's side, may be examined as witness in cause. *Case of Kingston upon Thames*, *Cary*, 21. 41.

Defendant was examined on interrogatories, and yet plaintiff was left to his proof. *Lee v. Band*, *Toth.* 85. Defendant on a hearing, when plaintiff's proofs served not, appointed to be examined. *Belamy v. Radcliff*, *id.*

### (h) *Of defendant on interrogatories.*

*See also ante, subdin. (j)*

Third answer reported insufficient; defendant shall be examined on interrogatories, and shall stand committed till perfect answer made. 10 *Gen. Order*, 31 April, 1828.

The plaintiff has no right to notice of the defendant's examination. *Farquharson v. Balfour*, 1 *Turn.* & *R.* 203. *Pr. Notice.*

After a fourth answer reported insufficient, it is a motion of course, that the defendant shall be examined upon interrogatories, and stand committed. The interrogatories are to be settled by the master, and must go directly to the points to which the exceptions are sustained. The defendant, instead of putting in a written examination to the interrogatories, is to be examined personally upon them by the master. *Id.* 184. *Pr. Insufficiency of Fourth Answer.*

Mode of conducting the personal examination of a defendant upon interrogatories after a fourth insufficient answer. *Id.* 200.

Semble, the proper mode of discussing the insufficiency of the defendant's examination is, upon the old exceptions, with respect to any of the original interrogatories in the bill remaining unanswered, and upon new exceptions, with respect to any new questions which the master may have introduced in settling the interrogatories. The insufficiency of the examination, however, was in this case permitted to be shewn as cause against the defendant's discharge. *Id.* 203.

An examination may be quite sufficient, though it is untrue, and inconsistent with what has been sworn by the defendant in his answers. The principle of the court is, that the plaintiff must be satisfied with what the conscience of the defendants allows him to swear. *Id.* 204.

The object of the court, in directing the defendant to be examined upon the interrogatories, is, that upon that examination, he shall not be liberated out of custody till he has given a sufficient answer, not only to the questions contained in the bill, to which he has not before answered, but to every question which the master thinks may fairly arise out of the matter which may be contained in the answers to those questions, without putting the plaintiff to the trouble of amending his bill. *Id.* 202.

On plea found false, plaintiff is entitled to decree, and, if discovery is necessary, to examine defendant on interrogatories. *Wood v. Strickland*, 2 *V. & B.* 158. *Pr. False Plea.*

Defendant, after examination before master on account, may be re-examined on new interrogatories without order. *Cornish v. Acton*, *Dick.* 149.

Notice must be given before you can move to add new interrogatories for the examination of a defendant; on the examinations before put in, being reported insufficient, such an order obtained on a motion of course is irregular, and will be discharged. *Anon.* 3 *Atk.* 511. *Pr. Notice.*

After the defendant has been examined on interrogatories, and publication passed, the plaintiff ought not to have a commission to examine witnesses, in order to falsify the defendant's examination, this tending to multiply causes, and make them endless. *Smith v. Turner*, 3 *P. W.* 413. *Pr. Commission to Examine*; *Pr. Publication.*

Application that plaintiff be examined as witness, refused. *Ly. Kilmurry v. Crew*, *Dick.* 60.

After a decree against a corporation for a sum of money, and distringas issued out against them, court refused to give them any time, or to let them be examined on interrogatories, otherwise, if it was a distringas, on meane process. *Harvey v. E. I. Comp.*, 1

2 Vern. 395. Pre. Ch. 129. S. C. CORPORATION; PR. DISTINGUAS.

If one be taken upon an attachment, either in process, or in execution after a decree, yet in both cases, on his appearing before the register, he is to be discharged, and to answer the interrogatories at large, not in custody; and if he be continued in custody, the court on motion, and appearing before the register, will discharge him. *Danby v. Lawson*, Prec. Chan. 110. PR. ATTACHMENT, DISCHARGE FROM.

Upon a decree for payment of money after a writ of execution, and an attachment returned, court refuses to give leave to defendant to be examined, unless he gives security to abide the decree. *Roper v. Roper*, 2 Vern. 91. PR. CONTEMPT; PR. DECREE.

Where a man is to perfect his answer upon interrogatories, or to be examined in four days, or stand committed; yet, if the party be in the country, he shall have a commission to take his examination. *Anon.*, 1 Vern. 187. PR. CONTEMPT.

Defendant examined where he is the only evidence, and if no cause for plaintiff, plaintiff pays costs. *Fyfield v. Vinore*, Cary, 45.

A defendant, upon putting in a fourth insufficient answer, was ordered to be examined upon interrogatories. She obtained an order on motion, that one of her counsel should attend in the next room, or where she was examined, to advise her in every matter of law that she might need, and that her counsel should see the interrogatories, but not have a copy. *Gover v. Baltinglass*, 1 C. C. 66.

After plea overruled, the plaintiff put in three insufficient answers; the court did not think fit to commit him to be examined upon interrogatories, as if he had put in four insufficient answers. *Coltworthy v. Mellish*, 1 C. C. 279. *Hawkins v. Croke*, Mos. 384.

After a decree enrolled, in which was no order to examine the defendant upon interrogatories, the court would not order him to be examined to the discovery of deeds. *Macklow v. Wilnot*, 2 C. R. 18.

A plea and three insufficient answers, defendant is not to be examined on interrogatories. *Coltworthy v. Mellish*, 1 C. C. 279.

#### (1) Commission to examine.

See also ante, 11. (1).—PR. COSTS, 10. (ff).

- (1) General orders.
- (2) Effect of.
- (3) When and how granted and obtained.
- (4) Second commission.
- (5) How discharged or abated.
- (6) Execution of, and of the commissioners thereon.
- (7) Return of.
- (8) When lost.

#### (1) General orders.

Shall be *super inter inclusis*. Beame's Ord. 30. How to be returned. *Id.*

When a new commission shall or not be granted, and upon what terms. *Id.* 30. 31. 72. 192.

Not discharged on petition. *Id.* 36.

Exception. *Id.* 36.

Anciently issued but for age, remote distance, &c. *Id.* 58.

Not to be executed in or near London. *Id.* 60.

If commission be not executed through default of party having carriage of it, he is to pay costs of the other side. *Id.* 72. 191.

And to renew commission at his own expense. *Id.* 172. 192.

If commission be executed by one party only, and

the other prayeth new commission, the latter party shall pay costs of both sides thereon. *Id.* 72. 192.

Unless the other examine any other witness of his own. *Id.* 72. 192.

Party renewing commission to examine all witnesses thereon. *Id.* 73. 193.

Commissioners' names shall be inserted in a book. *Id.* 112.

Not to be executed in London, or within ten miles thereof, without order on affidavit. *Id.* 193.

Depositions otherwise to be suppressed, and parties punished. *Id.* 194.

Not to be returned to masters. *Id.* 218.

The oath to be taken by commissioners before they act. *Id.* 328.

The oath to be taken by their clerks before they act. *Id.* 328.

Such oaths to be annexed to the commission. *Id.* 328. 329.

The commissioners are to administer the oath to each other, and to their clerks. *Id.* 329.

A certain clause to be contained in all commissions. *Id.* 330.

Commissioners or clerks violating order of 9th Feb. to be punished. *Id.* 330.

#### (2) Effect of.

Costs of discovery refused; a commission having gone out, and defendant taking the benefit of it, cannot have all the costs. *Noble v. Garland*, 19 Ves. 376. S. C. Coop. 222. PR. COSTS; PR. DISCOV.

Where the party applying for a commission to examine witnesses, appears, from the nature of his case, to be entitled to it, the granting an injunction in the mean time is no more than a necessary consequence of that right. *Nicol v. Verelst*, 4 Bro. P. C. 416. INJUNC. TO STAY PROCS.

#### (3) When and how granted and obtained.

Where, in case of libel, the party injured, instead of proceeding by indictment, brings an action for damages, and the defendant pleaded, in justification, the truth of the matters, and filed a bill for a commission to examine witnesses abroad for discovery, and for an injunction, &c.; held, on demurrer, that the fact of the libel being an indictable offence, would not repel the right to the common defences in civil actions, and that the defendant was entitled to the ordinary means of proving the truth of his pleas: but such bill must show the materiality of the evidence to support his case at law, and the bill ought therefore to show what are the pleas, or refer to them so as to make them part of the bill; and it is not necessary to allege that the witnesses were residing in England at the time of the publishing of the libel. *Maccarty v. Shackell*, 1 Bli. N. S. 96. JURISDIC. IN CRIMINAL MATTERS.

A plaintiff is entitled to move for a commission to examine witnesses abroad as soon as the defendant has obtained an order for time, though he has neither filed his answer, nor is in contempt. *Mendizabal v. Machado*, 2 Russ. 540. PR. TIME TO ANSWER.

The original bill being for an account, and an injunction to restrain an action, and the injunction being dissolved on the merits nearly ten years after the bill was filed, the plaintiff filed a supplemental bill for a discovery, and commission to examine witnesses in aid of his defence to an action substantially the same; motion for the commission refused, with costs, on the ground of delay. *Todd v. Aylwin*, 1 Sim. 271. LACHES.

It is of course that a plaintiff, even after the peremptory order to speed his cause, should have an order for a commission to examine witnesses, with liberty to execute the same in term time. *Field v.*

*Soule*, 1 Russ. 82. PR. ORDER TO SPEED CAUSE; PR. MOTION OF COURSE.

A commission to examine witnesses abroad refused, on the ground of the delay of the party who made the application. *Hart v. Strong*, 2 Russ. 559. LACHES.

*Quere*, whether the court will grant a commission to examine witnesses abroad in aid of the defence to an action at law, where it will not stay the trial of the action till the return of the commission. *Id. ib.*

Discretionary exercise of the jurisdiction of the court as to granting commissions to examine witnesses abroad. *Lousada v. Templer*, 2 Russ. 561.

It is always a question of circumstances whether, on granting commission abroad, the party obtaining it shall be required to bring the whole or any part of the money alleged to be due into court. *Marryatt v. Noble*, 1 McClell. & Y. 101. S. P. *Jackson v. Strong*, 13 Price, 309. PAYMT. INTO COURT.

Commission to examine in West Indies, on bill filed for discovery, in aid of an action at law brought by plaintiff, and for a commission, (not praying relief), ordered, on motion, although defendant's answer had not come in, time for answering having expired. *Hibberson v. Cambridge*, 13 Price, 396. PR. ANSWER; PR. MOTION.

A commission to examine abroad was granted before action was at issue, on motion for that purpose, (and for reviving an injunction dissolved as of course by order for enlarging time to show cause against dissolution of injunction being discharged), generally, on part of plaintiff necessary to his defence at law, witnesses residing at four different places in the West Indies, although his affidavit only mentioned two persons, both of whom reside at S. in the West Indies; if it appeared, by answer, that transactions took place in the West Indies generally. *Jackson v. Strong*, 13 Price, 309.

Bill for commission to examine abroad must allege that action has been brought. *Angell v. Angell*, 1 S. & S. 83. BILL.

Either party at law is entitled to assistance of court of equity to obtain commission to examine abroad. Defendant refusing from jurisdiction, service of subpoena to appear to bill for commission, on his attorney at law, ordered good service. *Devis v. Turnbull*, 6 Mad. 222. PR. SERVICE SUBPOENA, SUBSTITUTED.

Commission to examine, &c. directed to Benecolen in India, notwithstanding 13 G. 3. c. 63. s. 44. *Baskett v. Torrey*, id. 261. EAST INDIES.

Plaintiff on bill of discovery in aid of defence to action against him at law, may have, on motion at sittings after term, a commission to examine abroad, on payment of considerable part at least of plaintiff at law's demand into court, where cause at law is at issue, and was entered for trial, the term before the term immediately preceding the sittings, and a case of defence has been stated by bill; although the affidavit on which it has been moved, is in the common form; the delay in staying the trial not being a sufficient ground of opposition to such an application. *Elden v. Prince*, 8 Pri. 290. PAYMT. INTO COURT.

Commission to examine abroad, is not incidental to discovery, therefore it does not follow that where court refuses discovery, it will refuse commission. *Thorpe v. Marauley*, 5 Mad. 219. PL. DISCOVERY.

Commission to examine abroad, is so far in nature of proceeding at law, that application for it is stayed by injunction to stay proceeding at law. *Novnes v. Dorrion*, 4 Mad. 362. PR. INJUNCTION TO STAY PROCEEDINGS AT LAW, EFFECT OF.

On bill for discovery, you cannot move before answer, or unless defendant is in contempt, for commission abroad. *King v. Allen*, 4 Mad. 247. PR. ANSWER.

On a bill for discovery, and a commission to examine witnesses abroad, in aid of the defence to an

action, the plaintiff having obtained the common injunction for want of an answer, was held entitled to a commission, and to extend the injunction to stay trial. *Bowden v. Hodge*, 2 Swan. 258. PR. INJUNC. EXTENDED TO STAY TRIAL.

Defendant, under circumstances allowed after examination, but before publication, to have commission to examine witnesses, as to whether witness for plaintiff who was examined, was not interested in suit. *Vaughan v. Worrall*, 2 Mad. 322. PR. EVIDENCE; WITNESSES, COMPETENCY OF.

Commission to examine witnesses abroad, will be granted under circumstances, on coming in of answer, although not prayed by original bill, and the injunction granted will be in meantime continued. *Kensington v. White*, 3 Pri. 164.

Commission to examine abroad before time for answering expired, refused. *Chemant v. De la Cour*, 1 Mad. 208.

Commission granted to examine witnesses abroad, before answer, the object of the suit being merely to obtain evidence for an action. *Noble v. Garland*, 19 Ves. 372. S. C. Coop. 222.

It is practice of the court of exchequer, not to grant a commission to examine witnesses abroad, until after answer, as in the case of policies of insurance; the bill praying equitable relief, viz. to deliver up for fraud, &c., though not going beyond the motion to dissolve the injunction, as an action will try the question. *Id.* 375.

Commission to examine abroad, granted to defendant who had cross-examined, but not examined in chief under commission sued out by plaintiff. *Sheward v. Sheward*, 2 V. & B. 116.

Order for a commission to examine witnesses abroad, returnable without delay, pending an injunction against an action, without paying the money into court. *Cock v. Donnan*, 3 V. & B. 76. PR. INJUNCTION; PR. PAYMT. INTO COURT.

Where a vessel has been seized by the officers of the customs, on charges of offences against other acts of parliament than that usually called the Navigation Act; if, on the trial of the information filed thereon, the question be likely to turn on the fact of the ship belonging to a foreign subject, the court will, on motion, (a bill having been filed against the attorney-general for that purpose,) grant the defendant a commission to examine persons residing abroad, and make it part of the order, that their depositions shall be received in evidence on the trial. *Largoity v. Att. Gen.* 2 Pri. 172.

Order made after publication, for liberty to take out a commission, and examine witnesses by general interrogatory, as to credit of witness who had been cross-examined, and as to such particular facts only as are not material to what is in issue in the cause. *Wood v. Hamerton*, 9 Ves. 145. PR. PUBLICATION.

Commission granted to examine witnesses in an enemy's country. *Cahill v. Shepherd*, 12 Ves. 335.

To obtain a commission to examine abroad, it is not necessary to state the points to which it is intended to examine, or the names of the witnesses. *Rougemont v. Royal Exchange Comp.* 7 Ves. 304.

In aid of defence at law, court will not grant commission to examine abroad, unless on good ground shown, although no injunction moved for. *Shedden v. Baring*, 3 Anst. 880.

On bill for discovery by plaintiff at law, in aid of action, motion for commission abroad is not of course. *Anon.* 1 Anst. 201. PR. MOTION OF COURSE.

A commission for the examination of witnesses, to falsify an examination of a party before a master, cannot be had without the usual certificate from the master, of the necessity of such a commission. *Bearcroft v. Berkeley*, 2 Cox. 108. PR. MASTER'S CERTIFICATE.

In an application for a commission to examine evidence to show that the legacies given in two codicils were both intended for the legatee, the legatee ought to swear she believes that to have been the intention. *Cooté v. Cooté*, 1 Bro. C. C. 448. **LEGACY ACCUMULATIVE; EVIDENCE.**

Under what circumstances a commission to examine witnesses abroad, and an injunction to restrain proceedings at law, in the meantime, ought not to be granted. *Cajamoul v. Verelst*, 4 Bro. P. C. 407. **PR. INJUNC. TO STAY PROCEEDINGS.**

A commission granted to examine at Paris, as to the extent of jurisdiction of a particular court erected there, but not as to the original constitution of it. *Grace v. Ly. Stafford*, 2 Ves. 556. **FOREIGN COURTS, &c.**

Motion is proper proceeding to discharge order for commission to examine on master's certificate. *Chaffey v. Wills*, Dick. 377.

Commission to examine *de bene esse*, witness going abroad. See *Dicker v. Power*, Dick. 112.

Commission for examination of witnesses in the West Indies, and injunction to stay proceedings at law on a policy granted, as the voyage was at and from Carthage to Porto Bello, and the facts must necessarily arise in the West Indies. *Chitty v. Selwyn*, 2 Atk. 359. **POLICY OF INSURANCE.**

By the course of the court, where an account must necessarily be directed at the hearing, a commission before the hearing shall never be granted to examine witnesses beyond sea, when the granting such commission will delay the directing the account; and the proper time to apply for such commission is after the account is directed. *Adams v. Bohun*, Barnard. 270. 271.

After the defendant has been examined on interrogatories, and publication passed, the plaintiff ought not to have a commission to examine witnesses in order to falsify the defendant's examination, this tending to multiply causes, and make them endless. *Smith v. Turner*, 3 P. W. 413. **PR. PUBLICATION; PR. EXAM. OF DEFENDANT OR INTERROGATORIES.**

After publication in the original cause, plaintiffs in the cross cause moved for a commission to examine witnesses, which was granted, though it was urged that it would tend to cure the defects of that evidence which had been adduced in the original suit. *Scott v. Allgood*, (Exch.) Prac. Reg. 87. **PR. CROSS CAUSE.**

Commission to examine witnesses abroad upon new matter, stated at the hearing, and not in issue before, granted upon terms of not delaying an action, directed to be tried at law. *Newland v. Horseman*, 2 C. C. 74.

The course of the court is, that where an account must necessarily be directed at the hearing, a commission before the hearing shall never be granted to examine witnesses beyond sea, when the granting such commission will delay the directing the account, and the proper time to apply for such commission is after the account is directed. *Adams v. Bohun*, Barn. 270.

An attachment being taken out against the defendant in Ireland, since he could not be examined in person to the contempt, a commission was granted into Ireland to examine him. *Anon.* Mos. 85. **PR. CONTEMPT.**

Commission to examine *in perpet. memor.* on oath, that witness is impotent and sick. *Bagshawe v. —*, *Robins v. Foster*, Cary, 35.

Commission to examine witness, on oath of impotency to travel. *Wade v. Gwyne*, id. 40.

Commission to examine *in perpet. memor.* granted to examiner of court. *Barentine v. Harbert*, id. 43.

Commission to examine *in perpet. memor.* granted. *Hearing v. Fisher*, id. 110.

#### (4) Second commission.

If both parties join in commission, and on warning given, defendant brings his commissioners, but produces no witnesses, nor ministers interrogatories, but after seeks a new commission, it shall not be granted: but nevertheless on some extraordinary excuse for defendant's default, he may have liberty granted on special order to examine his witnesses in court on the former interrogatories, giving plaintiff notice, that he may examine also, if he will. *Ld. Bacon's Ord.* 1618. *Beame's Ord.* 31.

When one side produces and examines his witnesses, and the other does not, but prays a new commission, if it be granted, he shall bear all the charges of the renewed commission, both in court and in the country, for the charge and entertainment of the commissioners on both sides; and the other side shall be permitted to cross-examine the witnesses produced by him that renewed the commission; but if he will examine any other witnesses of his own, he should bear his own part of the charge. *Ld. Clarendon's Ord.* 1661. *Beame's Ord.* 198. *Ld. Coventry's Ord.* id. 72. 2 Fowl. 69. S. P.

He at whose instance a commission to examine, after a former commission executed and returned, is once renewed, and he by whose default a former commission was not executed, and thereupon it is renewed, shall, at his peril, examine all his witnesses by that renewed commission, or examine them in court, by the end of the term wherein the renewed commission is returnable. *Ld. Clarendon's Ord.* id. 198. *Ld. Coventry's Ord.* id. 73. *Ord. Each.* (23.) 2 Fowl. 69. S. P.

Where a plaintiff has executed a commission, the court will not grant a new one without affidavit, and a motion in court. *Ord. Ch. Rel.* 27th Nov. 1701. *O'Keefe's Ed.* 24.

Where witness has demurred to interrogatory as tending to subject him to a penalty, and demurrer is overruled as too general; it was ordered without costs, and that new commission should issue, plaintiff undertaking by interrogatories, to make no use of the answer for the purpose of enforcing such penalties. *Jackson v. Benson*, 1 Y. & J. 35. **WAIVER OF PENALTIES; PR. INTERROG. TO EXAM. WITNESS.**

Commission to examine witnesses abroad executed and returned; the defendant, who had not interrogatories prepared, not having had the opportunity of cross-examining, a new commission granted for that purpose; the defendant to state whom he wishes and undertakes to cross-examine; but the plaintiff's depositions not suppressed. *Campbell v. Scougall*, 19 Ves. 552. **PR. CROSS-EXAMINATION.**

Publication enlarged, and now commission to examine defendant's witnesses, issued on affidavit of ignorance of contents of former depositions. *Dingle v. Rowe*, Wightw. 99. **PR. ENLARGING PUBLICATION.**

A second commission granted on special circumstances. *Tarbot v. —*, 8 Ves. 315.

Bill to perpetuate testimony as to modus, being amended by adding an essential party, after the commission executed, but before publication, a new commission was granted. *Bildeford v. Partridge*, 3 Aust. 646. **AMENDMENT OF BILL.**

Where commissioners on one side do not attend, in order to have a new commission, the affidavit must state that the party, or his agents, have not seen, heard, or been informed of the depositions on the other side. *Yeast v. Barber*, 2 Bro. C. C. 1.

The plaintiff is first entitled to sue out a commission to examine witnesses, and if the defendant hath an opportunity to examine his witnesses, and doth not, he is not entitled to a new commission, but if the

plaintiff neglect to sue out a commission, the defendant may. *Barnesley v. Powell*, Dick. 793. 3 Atk. 593.

But when the plaintiff's commissioners closed the commission before the proper time by mistake, and without the knowledge of the defendant or his solicitor; the court, after the depositions had been seen, granted a new commission, but confined the defendant to the proving exhibits, and examining to credit, and cross-examining a witness examined under the former commission, but he was not to examine new witnesses. *Id. ib.*

Defendant present at execution of commission, though without interrogatories, cannot have new commission. *Mineve v. Row*, Dick. 18. Sed contra, *Corentry v. Coventry*, id. 25.

A general affidavit of having material witnesses beyond sea, is not sufficient for a new commission, but the witnesses must be named in the affidavit, and the point mentioned to which they can materially depose. *Anon.* 1 Vern. 334. But it is sufficient to shew a probable cause for the granting such commission. *Jessup v. Dupont*, Barn. 192.

New commission, witnesses not appearing on former. *Shepherd v. Shepherd*, Cory, 111.

New commission to defendant; publication stayed of witness examined in court by plaintiff. *Mackworth v. Swayfield*, id. 112.

Where a party hath a commissioner present at the examination, he shall not have another commission to examine as to the merits, but upon a suggestion that exhibits after being proved, before the commissioners, had been altered, a new commission was granted to examine as to that point. *Richardson v. Lourther*, 1 C. C. 273.

#### (5) How discharged or abated.

After commission to examine abroad was sent, witness, before commission had reached its destination, returned to England, and motion made to examine him *de bene esse*, but refused, and held that bill must be amended. *Atkins v. Palmer*, 5 Mad. 19. PR. BILL, AMENDT. OF; PR. EXAMINATION DE BENE ESSE.

A commission being granted to examine witnesses at Algiers, the plaintiff died, by which in strictness the suit abated, but the witnesses were examined there before notice of plaintiff's death; the examination held regular, though one of the witnesses was yet living. *Thompson's Case*, 3 P. W. 195.

Motion is proper step to discharge order for commission to examine on master's certificate. *Chaffin v. Wills*, Dick. 377.

Feme sole sues out a commission to examine witnesses; before they are examined, she marries. Their depositions ordered to stand. *Winter v. Dancie*, Toth. 99. PR. ABATEMENT.

#### (6) Execution of, and of the commissioners thereto.

On a reference to two masters, to inquire into some regulations as to the examiners' office, they reported to the following effect, and on the 22d April, 1811, their report was confirmed:—"That the business of the examiners' office should, as nearly as could, be equally divided between the examiners, and the interrogatories which should be first brought into the examiners' office in every cause in which the surname of the plaintiff, or the plaintiff first named, should begin with any letter from A to K inclusive, should be directed to be delivered to the senior examiner, and that the interrogatories brought into the office in every other cause, should be delivered to the junior examiner; and that all the witnesses on behalf of the parties exhibiting such interrogatories should be examined by the examiner to whom the interrogatories should have been so delivered; and all interrogatories in the same

cause for the adverse parties be delivered to the other examiner, and all witnesses proved on their behalf should be examined by him; and that where any interrogatories on behalf of defendants in a cause, not being all the defendants in that cause, should, in pursuance of the above regulations, have been delivered to any examiner, all interrogatories exhibited on behalf of any other defendants should be delivered to the same examiner, and he should examine the witnesses produced on behalf of such defendants; and that all interrogatories for the cross-examination of any witnesses should be delivered to the examiner who did not examine such witness in chief, and he should examine the said witness thereupon. But the masters certified that those regulations would be effectual only so long as the number of examiners was confined to two; but that if an increase in the number of examiners should be found necessary, other regulations would be requisite. They then certified what in their opinion were the proper periods and hours at which the office should open, and what days and periods were to be kept as holidays, and the office not to be open; (as to which, see the order more fully; also as to the fees and emoluments which the examiners and their clerks ought to receive, of which they formed a table annexed to their report); they also certified, that it was the duty of the examiners to examine all witnesses in any cause, upon the interrogatories delivered to them, and of the copying clerks to make copies of the depositions, and that it was also the duty of all the said persons to preserve the records of the said office, and to do all the other business for which fees were allowed them in the table of fees so annexed. And it was further ordered, that if any examiner, or clerk to any examiner, should receive any fees or emoluments whatsoever from the suitors, not warranted by the said order, such examiner or clerk, so offending, shall be liable to be removed from his said office, and be incapable of ever thereafter of holding any office in or under this court. Beame's Ord. 475.

In speeding commissions to examine witnesses, where the parties shall join in commission, the witnesses shall be examined by the commissioners alternately on the part of plaintiff or defendant, if the parties shall be respectively prepared with their witnesses for examination; but if not, the commissioners shall proceed with the examination of the witnesses of the party who shall have them ready to produce and be examined. And in all commissions to examine, the sworn clerk to the commissioner shall, at the end of each day on which the commission shall be proceeded in, at the foot of the depositions or proceedings on each day, truly state in a written memorandum, signed by him and the commissioners who attended, the number of hours during which the commission had been proceeded upon on each day; and if the same shall fall short of five hours per day, it shall be discretionary in the master, to whom the costs shall be referred to be taxed, to deduct from the commissioners' fees such sums as shall appear reasonable, taking into consideration the usual fee or compensation for the said period of five hours by the day. Ord. Ch. Irel. 27th Jan. 1815. O'Keefe's Ed. 115.

Commissioners are not to return one general deposition to several separate interrogatories, but to examine to and return a separate deposition to each interrogatory separately. Ord. Exch. 21st April, 1788. Kirkby's Ed. 43.

By Ord. Ch. Irel. 20th May, 1816, no extra commissioner (appointed under the 55 Geo. 3. c. 157.) shall appoint any time for the examination of witnesses, or continue any examination longer than within three days of the assign day of the term next ensuing such examination, unless by special order.

The examiner is to examine deponent to the inter-

rogatories *seriatim*, and not to permit him to read over any other interrogatories, until that in hand be fully finished, much less is he to suffer deponent to have the interrogatories and pen his own depositions, or depart after hearing an interrogatory read over, until he has perfected his examination thereunto. And, if any witness shall refuse so to conform himself, the examiner is thereof to give notice to the clerk of the other side, and to proceed no further in his examination without such clerk's consent or order made in court to warrant his so doing. *Ld. Clarendon's Ord. Ch. 1661. Beame's Ord. 187.* Commissioners to set down the examination of every witness at large, without referring the testimony of one to another. *Ord. Ch. Irel. 1639. O'Keefe's Ed. 9.*

The examiners are themselves in person to be diligent in examination of witnesses, and not to intrust the same to inferior clerks, and are to take care to hold the witness to the point interrogated, and not to run into matters not pertinent to the question. *Beame's Ord. 187.*

The examiners to take care that they employ under them in their office, none but persons of known integrity and ability, who shall take an oath not to deliver or make known, directly or indirectly, to the adverse party, or any other save the deponent who comes to be examined in any of the interrogatories delivered to be examined upon, any examination by him taken or remaining in the examiner's office, or extract, copy, or breviate thereof, before publication be thereof passed, and copies thereof taken. And if any such deputy, clerk or person so employed, shall be found faulty in the premises, he shall be expelled the office, and the examiner who employed him also answerable to the court for such misdemeanor, and to the party grieved, for his costs and damages sustained thereby; and such solicitor or other person who shall be discovered to have had a hand therein, shall be liable to such censure as the court shall find just to inflict. *Id. 189.*

No witness shall be examined in court by the examiner, without the privity of the adverse party, or of his clerk, who deals for the adverse party, to whom the person to be examined shall be shewed, and a note of his name and place of dwelling delivered in writing by such as shall produce him, and the examiner is to take care and be well satisfied that such notice be given, and then shall add to the title of the witness's examination the time of such notice given, and the name of the person to whom it is given, and by whom, that at the hearing of the cause the same be not delayed upon a pretence of want of notice. *Id. 185.*

Order that a party detaining the exhibits, records, and writings belonging to the examiner's office, should, at his peril, deliver the same to the examiner duly sworn in. *Ord. Ch. 21st June, 1660. Beame's Ord. 147.*

No master to receive the depositions of any witness ready drawn; nor any clerk to any master to examine any witness or witnesses that shall be brought to be examined in any cause or matter that is depending in reference before any master, but that every master himself shall examine all witnesses upon every item of any interrogatory or interrogatories as shall be exhibited before them; and that the depositions of any witnesses which shall hereafter be taken contrary to the directions aforesaid shall be invalid, and not permitted to be read or made use of as evidence in any cause. *Beame's Ord. 285.*

One of the examining clerks in an examiner's office suspended till further order, for entrusting one who was no sworn clerk of such office, to transcribe part of the depositions of a witness examined by such examining clerk, in a cause depending, before the witness had perfected his examination, or publication passed in the cause. *Id. 271.*

No clerk of any of the masters examiners to take upon him, either by himself or any person under him, the managing or soliciting any cause in this court; and if any person so related to this court, or who shall hereafter be so related, shall be found to offend against this order, they shall not be suspended, but for their contempt stand committed to the Fleet. *Id. 305.*

Where commissioners of one side certified irregularity, and both or one of the other side made affidavit, the court ordered the commissioner on the other side to make affidavit too; for the court will in such case, order what is necessary for the discovery of the fact. *Anon. Prac. alm. Cur. Canc. 19.*

In all joint commissions to examine witnesses, and other special commissions directed by the court, the name of the commissioners agreed on shall be entered in a book for that purpose, to be kept by the six clerk who has the carriage of the commission, and subscribed unto by each six clerk in the cause, or their deputies, whereby no alteration may be had of the commissioners' names but by order. *Beame's Ord. Ch. 112.*

As to the oath of the commissioners (which they are empowered to administer to each other) and of their clerks, *vide* Beame's Ord. 328. In the Exch. 2 Fowl. Ex. Pr. 65. In Ireland, see O'Keefe's Ord. 55. By this order the oaths are directed to be annexed to the commission, and to be signed by the commissioners, and their clerks, mentioning the day of the month, year, and place, where such oaths were taken, and before whom, and to be returned so signed, with the dominicals, interrogatories, commission, and depositions. By the last mentioned *Ord. Ch. (Irel.)* no clerk is to act on any commission that shall not be settled and agreed on between the clerks concerned in the cause, in the same course and manner as the commissioners are settled; and if they cannot agree, then such clerk shall be appointed by a master, who in such appointment is to consider not only the integrity and ability of such clerk, but also that he is in no way concerned as agent, solicitor, or any way in the interest of any of the parties. O'Keefe, 57. For the oath of the extraordinary commissioners appointed under the act of 55 Geo. 3. c. 157., for examining witnesses, &c. *vide* the 6th section of the same act.

When the parties are at issue, each party is to name, such commissioner as shall be indifferent, and not allied to, nor any way dependent on him that gives in the names. O'Keefe's Ed. 8. Commissioners' names must be served ten running days before the motion for a commission, *ex parte*. *Id. 61.* But six running days are to be deemed sufficient. *Id. 115.*

Service of commissioners' names shall be on the six clerk and solicitor of the party, at his registered lodgings; and on the six clerks admitting such service in the usual way, the registrar shall enter the usual rule to return commissioners in four days, or in default, a commission to issue to such commissioners as a master shall appoint; and the master may proceed on the first summons served, to strike such commissioners' names. When plaintiff shall have served commissioners' names to examine, which defendant, after striking out two in the usual way, shall have returned, and shall have returned therewith in the usual way, four names as commissioners on his part, which he must in like manner serve upon plaintiff's six clerk and solicitor at his registered lodgings, plaintiff shall at the end of eight running days from such service, return the names of the commissioners so served by defendant, to his six clerk and solicitor, at his registered lodgings, striking out two, and letting two to stand as commissioners, and the commission to examine shall be in the usual manner issued and directed to such four commissioners, and in default of plaintiff so returning the names served upon defendant's part, as commissioners, the com-

mission; whether issued by plaintiff or defendant, shall issue to the two commissioners named upon plaintiff's part, and permitted by defendant to remain, and the two first commissioners named in the list returned by defendant. And defendant may in all the aforesaid cases issue a duplicate commission to the commissioners named and struck as herein-before directed, and give notice of the speeding thereof as usual. The same rules *mutatis mutandis*, to apply to defendant's entering the general rule to examine, and serving commissioners' names, and proceeding to examine. O'Keefe's Ord. 115.

Depositions taken by commission suppressed, it appearing that the evidence had been taken by the clerk to the commissioners, and that the effect of some of the depositions had been communicated to the agent on the other side. *Lennox v. Munnings*, 2 Y. & J. 483. *PR. DEPOSITIONS, SUPPRESSION OF.*

Under special circumstances the court will permit a commissioner to be examined, even after the commission has been opened, and the examination of witnesses proceeded with. *Grubb v. Grubb*, 1 Y. & J. 36.

Rule as to costs of commission to examine abroad is, that they are to be borne by party obtaining it, but if opposite party examines under it in chief, he pays proportionate share. *Jackson v. Strong*, 13 Price, 309. *PR. COSTS.*

Court cannot extend time mentioned in a commission to examine. *Hull v. De Tastet*, 6 Mad. 269. *PR. TIME, ENLARGEMENT.*

Depositions on part of defendant, suppressed after publication, because the clerk of defendant's solicitor acted as clerk to commissioners. *Cooke v. Wilson*, 4 Mad. 380. *PR. EVIDENCE; DEPOSITIONS SUPPRESSED.*

On a bill for discovery, and a commission to examine foreign witnesses in aid of an action at law, a motion that the plaintiff might communicate to the defendant the interrogatories exhibited by him, was refused. *Butler v. Bulkeley*, 2 Swan. 373. *PR. INTERROGATORIES.*

A deposition *de bene esse* having been read at the hearing of a cause, it is of course, if any issue is directed, to order it to be read on the trial, notwithstanding an irregularity in the examination which might have been effectually objected to at the hearing. Whether the court will suppress a deposition taken before commissioners, of whom one is attorney in a cause in Scotland between the same parties, on the same question; *qu?* *Gordon v. Gordon*, 1 Swan. 166. *PR. EVIDENCE; DEPOSITIONS DE BENE ESSE.*

Where it appeared that no notice of the execution of a commission was given until after publication, depositions taken on plaintiff's part were suppressed as against some of the defendants. But on evidence that the omission arose from a mistake of the clerk to plaintiff's solicitor in giving at the examiner's office, the name of the clerk in court for others of the defendants, as the name of the clerk in court for all the defendants, in consequence of which plaintiff's witnesses were produced only at the seat of the clerk in court so named, and on the examiner's certificate that the name of that clerk in court only was delivered to him, the Ld. Ch. gave defendants the option either of permitting plaintiff to re-examine the same witnesses, or of allowing the depositions to stand, with leave to cross-examine those witnesses, and examine others. *Chalmers v. Clinton*, 2 Meriv. 81.

Commissioners for examination of witnesses are to act impartially, though to a certain extent they have under their particular care, the interest of the party appointing them. *Campbell v. Scougall*, 19 Ves. 553.

The practice in country causes is to send the commissioners from time to time with interrogatories, as

the witnesses could be presented, either for original or cross-examination, until the commissioners find the supply is exhausted. The Ch. said, the practice was formerly different, and with reference to the general practice both as to commissioners in the country and abroad, he should require the masters, to certify the practice. But his lordship said, that in this country where commissions have been executed, and even where no interrogatories have been exhibited, or are ready, the court has sometimes granted, and sometimes refused, a new commission, at the instance of such a defendant not having interrogatories ready, making it a subject of discretion in each particular case; but this discretion ought to be exercised with every deliberate attention to circumstances; and the course is not to suppress the depositions under the first commission, but (if necessary, and a regular account given) to grant defendant a new commission. *Id. ib.*

Form of separate examination of a married woman, taken by commission. *Exp. Bryant*, 1 V. & B. 507. *FEME COVERT.*

Depositions, before publication suppressed; being taken by the commissioners ready prepared: the witness being agent in the cause; and the mode, in which the court receives the information, whether from the commissioners or otherwise, is not material. The commission directed to proceed, for the purpose only of re-examining that witness; substituting another commissioner for one, who having refused to qualify, was not permitted to be present at the examination. This order not to prevent the court's opening the depositions, if a case of necessity should arise; as, if the witness could not again be examined. Depositions suppressed, the commissioners having employed the clerk of one of the parties as their clerk. *Shaw v. Lindsey*, 15 Ves. 380.

Discretion of commissioners taking depositions, not to examine each witness to all the interrogatories, and to reject what is not evidence. *Whitelock v. Baker*, 13 Ves. 511.

Where commission is executed abroad, their sending it out, and the receiving it back again, must be proved by affidavit. *Bourdillon v. Alleyne*, 4 Bro. C. C. 100.

Depositions suppressed, plaintiff's solicitor being one of commissioners. *Selwyn v. Gill*, Dick. 563.

Depositions taken in India where no proper stamps could be had, ordered on motion, of course, to be engrossed on parchment and stamped. *Chitty v. F. I. Company*, 2 Cox, 190. *STAMPS; PR. ENGROSSMENT OF PROCEEDINGS.*

Costs of solicitor attending execution of commission abroad, not allowed. *Hamond v. Wordsworth*, Dick. 381.

A plaintiff may serve any two of defendant's commissioners with notice of the execution of a commission, and is not bound to those only whom defendant might choose; otherwise, if the two commissioners, chosen by defendant should be absent or dead, the commission could not be executed, wherefore the court suffers four on each side. *Anon*, 3 Atk. 633.

If a commission be taken out in vacation, and has not a certain return, it does not expire the first day of the following term, but may be continued in execution the whole of the next term to the last return. *Barnsley v. Powell*, 3 Atk. 593.

A commission to take an answer of a person resident in a foreign country at war with us, must be executed in that very country; a commission to examine witnesses is executed at the nearest neutral port. — *v. Romney*, Amb. 62. *PR. COMMISSION TO TAKE ANSWER.*

Commissioners, on affidavits of the facts, were attached for refusing to examine a witness because he was illiterate, and the witness was afterwards ordered to be examined by an examiner. *Reilly v. Reilly*.



How. Pr. Ex. Irel. 593. And it is said, *id.* that on complaint of an irregular examination, an examiner has been ordered to answer personal interrogatories, and not admitted to have a copy of them. Before the commencement of any suit between the parties, affidavits were made by certain persons in order to attest what passed in their presence, with a view, as it appeared, of vindicating the character of the present appellant. A suit being afterwards commenced, the same persons were examined on interrogatories as witnesses in the cause, and after publication passed, their depositions appeared to be in several instances in the same words as the affidavits they had before voluntarily made. This was held no ground for suppressing these depositions. *Bland v. Archbp. of Armagh*, 3 Bro. P. C. 620.

If there be a general demand of tithes, and a general replication put in, if plaintiff on the commission gives notice that he will proceed only as to certain matters, it is as well as if the demand had been abridged in the replication.—*Sed qu. Anon.* Bunb. 22.

Commission executed after four in the afternoon, held regular. *Moreton v. Moreton*, Dick. 21.

Deposition of witnesses taken under commission, the title of which was mistaken, ordered to stand till mistake rectified. *Robert v. Millesch-emp*, 10. 21.

Depositions suppressed for misbehavior of the commissioners, and a new commission, directed to other commissioners, ordered to issue. *Delore v. Day*, 2 Fowl. 158.

Plaintiff and defendant having joined in a commission, witnesses were examined on both sides; the commissioners of one party were present while the witnesses of the other were examined, and cross-examined them, and exhibited interrogatories before the commissioners, and examined several witnesses on their part, and having thereby discovered what the witness had sworn, they exhibited other interrogatories before a baron in London, differing in many material points from the interrogatories before the commissioners. Depositions taken on those interrogatories varying from those exhibited before the commissioners, ordered to be suppressed. *Durham v. Newcastle on Tyne*, Colles' P. C. 18.

A joint commission to examine on both parts, directed to three, four, or two commissioners; three met and examined witnesses, and appointed a new day to examine more; defendant's commissioners carried away the commission, and came not at the day appointed. Plaintiff's commissioners then came and examined witnesses, without having the commission, and certified these with the former depositions taken, and the whole matter. The court ordered the depositions certified to be sealed up again, and remain in court, and awarded a *subpoena duces tecum* against the commissioners to bring in the commission, and thereupon the court would take further order. *Anon.* Prac. Reg. 126.

A commissioner ordered to be examined to prove a deed, and an interrogatory to be added for the purpose. *Maude v. Hartley*, 2 Fowl. 99. A commissioner may be examined without an order, but he must be examined before any other witness. *Id.* *Bright v. Woodward*, 1 Vern. 392.

Depositions suppressed, because the solicitor's clerk in the cause, did write as a clerk to the commissioners in the execution of the commission. *Newte v. Foot*, 2 C. R. 393.

Defendant's commissioners met at the time and place appointed, but refused to act in the execution of the commission; upon affidavit of which, the court ordered defendant to name other commissioners. The court doubted whether an attachment lay against defendant's commissioners. — *v. Fortescue*, Hardr. 170.

Solicitor in the cause cannot be a commissioner, or the depositions will be suppressed. *Fricker v. Moore*, Bun. 289.

Upon commission, notice only given to one of defendant's; new commission is granted, and defendants to have carriage. *Hollingsworth v. Lucy and others*, Cary, 91.

Commission executed before town clerk, instead of commissioners, suppressed. *Hareforth v. Gutes*, *id.*

Some of the commissioners certified partiality in one of the others. Motion for a commission to examine in whom the misdemeanour was, denied; for such collateral certificates are not required of the commissioners, but let them certify the matters committed to their charge, and if there be misdemeanour, let the party wronged make affidavit thereof, and take out his attachment. *Anon.* *Id.* 43.

The court directed a commissioner to examine witnesses abroad, to be delivered to a master to send the same by the post, and when executed, to receive it back again. *Newland v. Horseman*, 2 C. C. 76.

Witness examined on the defendant's part, after the plaintiff's commissioners were gone away with the commission. *Trevor v. Trevelman*, Toth. 189.

Where a party hath had a commissioner present upon the first examination, he must not examine upon new interrogatories by another commission as to the merits of the cause. *Richardson v. Louther*, 1 C. C. 274.

Depositions suppressed, because the solicitor's clerk in the cause did write as a clerk to the commissioners in the execution of the commission. *Newte v. Foot*, 2 C. R. 393.

Commissioners under a commission to examine witnesses, may adjourn. *Brown v. Vermuden*, 1 C. C. 282.

A special commission was granted, to examine the quantity and value of certain ore, &c. The six clerks appointed time and place; *per cur.* the time and place are only for the first meeting of the commissioners; but after, they may adjourn to another time or another place. *Thornborough v. Baker*, 1 C. C. 283.

Defendant, in bill of perjury after answer, ought to be examined on interrogatories. *Philips v. Benson*, Cary, 68.

Commissioners to be examined, on occasions of partiality and practice. *Morgan v. Boudler*, Toth. 40.

#### (7) Return of.

Under a commission for the examination of witnesses abroad, the commissioners examined the witnesses for the plaintiffs; and under an impression that the defendant had no witnesses to examine, whether he had or had not given notice of his intention to examine witnesses, was disputed; they closed the commission, and returned it to England after the commission had been sent off; the defendant examined his witnesses before some of the commissioners, and the depositions of those witnesses and the interrogatories upon which they were taken, were sealed up and forwarded to England. On motion to annex the last-mentioned depositions and interrogatories to the commission, and the depositions on the part of the plaintiff, the court expressed an inclination to grant the defendant a new commission, unless the plaintiff would consent to the motion; and upon such consent being given, the court made the order. When a commission to examine witnesses is returned, it is opened by the junior sworn clerk for the purpose of entering the names of the acting commissioners in the commission book, and the commission is then kept under lock and key until publication is passed. *Irving v. Fiane*, 1 Y. & J. 416.

Home commissions to examine, must be returned

before third return of following term, but no period fixed for foreign commissions. *Wake v. Franklin*, 1 S. & S. 95.

The party praying discovery and a commission, the defendant cannot have the costs of the discovery till the return of the commission. *Anon.* 8 Ves. 69. DISCOVERY; COERS.

Injunction obtained two years back, on granting commission to examine in India not yet returned, dissolved. *Penney v. Edgar*, 1 Anst. 276. PR. INJUNCTION; LACHES.

Under the commission for the examination of French witnesses who could not speak English, the depositions are not to be taken in French, but must be turned by the interpreter into English, and be so taken down and returned. *Id.* *Belmore v. Anderson*, 2 Cox, 288. S. C. 4 Bro. C. C. 90. FOREIGNERS.

A commission returnable without delay, must be executed before the second return of next term. *Jones v. Mitchell*, 2 Vern. 197.

### (8) When Lost.

A commission for examination of witnesses in Lisbon was executed, but the ship in which the depositions were sent to England was lost on the passage. The court ordered the commissioners to transmit the drafts of the depositions, and to certify the circumstances of the return of the commission, but would not make any order for the reading the drafts on the hearing of the cause, until after the commissioners had made their return and certificate. *Burn v. Burn*, 2 Cox, 426.

Commission executed; lost on road, and found; on affidavit by finders, that it had not been opened, received. *Smale v. Chapter*, Dick. 99.

Commission *de bene esse* lost; on return witness being dead, paper draft sealed, ordered to be sent up unopened and engrossed by six clerks, and used as original deposition. *Jones v. Demithorne*, *id.* 352.

### 29. Depositions.

#### (a) Generally.

(b) Taken *de bene esse*.

(c) Depositions, Amendment of.

(d) Suppression of depositions.

#### (a) Generally.

How to be returned. Beame's Ord. 30.

Depositions taken in other courts not to be read unless by special order. *Id.* 31.

Regularly court maketh no order for reading depositions, unless between same parties and upon same title and cause of suit. *Id.* 32.

How depositions in *perpetuum rei memoriam* are to be taken, &c. *Id.* 32.

And where they are or not to be used. *Id.* 33.

How long depositions may remain with six clerks. *Id.* 40.

Are not to be exemplified by parcel. *Id.* 45.

Nor where they want examiner's hand. *Id.*

Not to be opened or copied till returned to six clerk, and until publication. *Id.* 111, 221.

Not to be opened till delivered to six clerk. *Id.* 111, 191.

Depositions on commissions in London or within ten miles, not authorized by special order to be suppressed, &c. *Id.* 194.

Where party obtain order to use depositions in another cause, his adversary may use them unless restrained by the same order. *Id.* 194.

No motion to suppress depositions until six clerks have been attended and have certified. *Id.* 194.

When depositions are to be kept by six clerks. *Id.* 221.

As to depositions of Quakers. *Id.* 248, 249.

Depositions on interrogatories not drawn or perused and signed by counsel, to stand suppressed. *Id.* 273.

Taken on examinations by master's clerks to be suppressed. *Id.* 285.

Depositions ready drawn not to be received by masters. *Id.* 284.

Where depositions were returned on paper, the court allowed them to be engrossed on parchment, and the engrossment to be filed. *Willis v. Garbutt*, 2 Y. & J. 326.

Interrogatories and depositions not to be referred on motion of course before the hearing, for impertinence alone without scandal. *Osmond v. Tindall*, 1 Jac. 625. PR. REF. FOR IMPERTINENCE; PR. MOTION OF COURSE.

When the interval is short between the publication and the hearing, the court will grant time to examine whether the deposition was regularly taken, it being too late to object during the hearing. *Gordon v. Gordon*, 1 Swan. 171. PR. HEARING.

Interrogatories and depositions not referred for impertinence alone without scandal. *White v. Fussell*, 19 Ves. 113. PR. REF. FOR IMPERTINENCE; INTERROGATORY.

Court refused to permit depositions in French language to be delivered out for the purpose of being translated. *Fauquier v. Tynte*, 7 Ves. 292.

Depositions allowed to be read though taken during abatement. *Thompson v. Tooke*, Dick. 115.

Where a witness dies after examination, but before such examination is signed by him, the depositions cannot be made use of. But yet where the defendant after publication examined a witness, and on the usual affidavit that the defendant, his clerk or solicitor, had not seen the depositions, got an order to re-examine this witness, but the witness died before a re-examination, the court gave leave to the defendant, to make use of the former depositions of the same witness. *Copeland v. Stanton*, 1 P. W. 414.

The court refused to order copies of depositions to be recorded and exemplified where the original had been lost, and in trials at law subsequent to the dismissal of the suit, the witnesses had sworn contrary to their depositions. *Brabant v. Perne*, 2 C. R. 36. PR. COMES WHERE EVID.

#### (b) Taken *de bene esse*.

See also PR. EVID. 28. (f).

A deposition *de bene esse* having been read at the hearing of a cause, it is of course, if any issue is directed, to order it to be read on the trial, notwithstanding an irregularity in the examination, which might have been effectually taken at the hearing. Whether the court will suppress a deposition taken before commissioners, of whom one is attorney in a cause in Scotland between the same parties on the same question, Quare? *Gordon v. Gordon*, 1 Swan. 166. COMMISSIONERS.

Depositions taken *de bene esse* upon incapacity of witness to attend at trial at law, not published but on affidavit of surgeon as to the probability of his attendance; an order was made for officer to attend at trial with the original deposition to be tendered if the incapacity of the witness to attend should be proved. *Andrews v. Palmer*, 1 V. & B. 21.

An application to read the deposition of a witness on the trial of an issue at law, directed by the court of chancery, on the ground of the witness being so aged and infirm as to be enabled to attend in person

must be made to the judge at the trial, and not to the court which directs the issue. *Jones v. Jones*, 1 Cox, 184. *ISSUE AT LAW.*

Commission *de bene esse* lost on return, witness being dead, paper draft sealed ordered to be sent up unopened and engrossed by six clerks and used as original depositions. *Jones v. Donithorne*, 2 Dick. 352.

Witness going to the West Indies examined; but he being in Ireland must be examined in chief. *Birt v. White*, Dick. 473.

Witness examined *de bene esse* becoming interested, his depositions to be published. *Brown v. Greenly*, Dick. 504.

Depositions of witnesses taken *de bene esse* in 1711, and not having passed till 1743, under the circumstances, the depositions were ordered to be published, but without prejudice. *Dk. Hamilton v. Meynal*, Dick. 788.

Depositions *de bene esse* of witness dead, published to be read at law. *Price v. Bridgman*, Dick. 144.

Depositions taken *de bene esse* before the defendant had put in his answer, or issue joined admitted to be read. *Spathwell v. J. d. Limerick*, 9 Mod. 133.

Court refused to publish depositions *de bene esse* in order to compare them with the depositions in the same cause taken on an examination in chief. *Cann v. Cum*, 1 P. W. 507. *PR. PUBLICATION.*

Depositions of a witness examined *de bene esse*, he dying before he was examined in chief, ordered to be read at a trial at law. *Marsden v. Bound*, 1 Vern. 331.

#### (c) Depositions, amendment of.

Upon appeal against a decree after the case printed, and an appendix of the evidence as entered in the register's notes of proofs on the hearing, it is irregular to proceed by order upon motion in the court below to expunge any part of such evidence as entered by mistake; but the course is to apply to the house by petition for leave to proceed in the court below to rectify it. *Lopdell v. Creagh*, 1 Bli. N. S. 225. *PR. APPEAL; MISTAKE.*

The christian name of one of the defendants having been mistaken in the title to interrogatories and depositions, an order was made for correcting that error, and re-swearing the witnesses. *Curre v. Bowyer*, 3 Swan. 357.

Motion to amend depositions after publication refused. *Ingram v. Mitchell*, 5 Ves. 297. *PR. PUBLICATION.*

A deposition of a witness permitted to be amended after publication where there clearly appeared to be a mistake made by him in a material part of his evidence. *Rowley v. Ridley*, 1 Cox, 281. *S. C. Dick. 677. MISTAKE.*

A deposition of a witness amended after publication. *Griells v. Gansell*, 2 P. W. 646.

Deposition of witness rectified, he having been first examined by examiner before court. *Darling v. Staniford*, Dick. 358.

Upon an affidavit of a witness that the examiner had mistaken him, his deposition amended on examination in court. *Penderil v. Penderil*, Kel. 25.

But a similar application was subsequently refused. *Truherne v. Burdus*, id. 26.

Taking down depositions in a wrong sense suppressed, and witness re-examined. *Peacock v. Collens*, Cary, 47.

#### (d) Suppression of depositions.

Depositions taken by commission suppressed, it appearing that the evidence had been taken by the clerk

to the commissioners, and that the effect of some of the depositions had been communicated to the agent on the other side. *Lennox v. Munnings*, 2 Y. & J. 483. *PR. COMMISSION TO EXAMINE ABROAD.*

The refusal of a witness to be cross-examined is no reason for suppressing his deposition, but the adverse party must, at the time, enforce such right of cross-examination as he has. *Courtenay v. Hawkins*, 2 Russ. 253. *PR. EVID.; WITNESS, CROSS-EXAMINATION OF.*

Where, after depositions have been suppressed for irregularity, a re-examination is permitted, all the same witnesses must be examined and cross-examined. *Perry v. Silvester*, 1 Jac. 83. *PR. RE-EXAMINATION.*

Depositions on part of defendant suppressed after publication, because clerk of defendant's solicitor, acted as clerk to commissioners. *Cooke v. Wilson*, 4 Mad. 380. *PR. COMMISSION TO EXAMINE.*

A motion to suppress the depositions of witnesses examined on behalf of the defendant, after a conversation by him with one of the plaintiff's witnesses on the subject of his testimony, refused: the conversation not having been communicated to his solicitor, before the defendant's interrogatories were prepared, but without costs; communications between witnesses and parties being disapproved. *Boughton v. Pierrepont*, 3 Swan. 550.

The deposition of a witness examined previously to the decree, on his re-examination before the master without an order for that purpose, suppressed with costs, on motion of which notice was given four days after publication; the usual order was afterwards obtained for his re-examination, on interrogatories to be settled by the master, to matters to which he had not been before examined. *Smith v. Graham*, 2 Swan. 264. *PR. WITNESS; ORDER FOR RE-EXAMINATION.*

Under a commission for the examination of witnesses, several witnesses on the part of the defendant having appeared and been examined by the plaintiff, the defendant then declining to examine them, their depositions on a subsequent examination by the defendant in the examiner's office without leave of the court, not suppressed. *Pearson v. Rowland*, 2 Swan. 266. *ORDER FOR RE-EXAMINATION; PR. WITNESS.*

Depositions taken on the part of the plaintiff having been suppressed, as against some of the defendants, on the ground of no notice until after publication, upon evidence that the omission arose from a mistake committed by the clerk to the plaintiff's solicitor in giving at the examiner's office the name of the clerk in court for others of the defendants, as the name of the clerk in court for all the defendants, in consequence of which the plaintiff's witnesses were produced only at the seat of the clerk in court so named; and upon the examiner's certificate that the name of that clerk in court only was delivered to him; the Ld. Chancellor gave to the defendants the option; either of permitting the plaintiff to re-examine the same witnesses, or of allowing the depositions to stand, with liberty for them to cross-examine those witnesses, and to examine others. *Cholmondeley v. Clinton*, 2 Mer. 81. *MISTAKE.*

Motion to suppress depositions upon groundless objections, and not only after publication, but even after the cause had been called on and struck out, refused. *Whitelock v. Baker*, 13 Ves. 611.

Depositions of witnesses *de bene esse*, taken *ex parte*, and without notice of striking the names of commissioners, or of the execution of the commission, suppressed. *Lovden v. Milford*, 4 Bro. C. C. 540.

Deposition suppressed on account that the whole was written down in the exact form of it by the at-

torney before it was taken. *Anon. Amb. 282. S. C. 2 Ken. 27.*

Depositions from abroad published, though taken during abatement. *Sinclair v. James, Dick. 277.*

Witness examined in chief, but, before cross-examination, secretes himself: unless he is produced in a fortnight after notice, depositions suppressed. *Flowerday v. Collet, id. 288.*

Depositions suppressed, plaintiff's solicitor being one of commissioners. *Selwyn v. Gill, id. 563.*

The depositions of witnesses are not to be suppressed because they are made in express terms of voluntary affidavits, sworn by them at the commencement of the suit. *Blair v. Archb. of Armagh, 3 Bro. P. C. 620.*

Where defendant cross-examines plaintiff's witnesses, he cannot afterwards move to suppress their depositions in chief. *Id. ib.*

Depositions suppressed because interrogatories were leading; leave given to exhibit new interrogatories to be settled by the master. *Arundel v. Pitt, Amb. 685.*

The depositions of a witness who was examined in *perpetuum rei memoriam*, were suppressed, on a petition after his death, and the examiner discharged and committed for foul practice and irregularity in the taking of them, the plaintiff being suffered by the examiner to instruct him, and the witness being corrupted; and as he had been examined on a trial to the same points, the plaintiff might give evidence of what he swore. *Hosier v. Hart, Mos. 321. PR. EXAMINATION, HOW TAKEN.*

Witnesses examined before town clerk, instead of commissioners, suppressed. *Harejorth v. Gutes, Cary, 91.*

Setting down depositions in a wrong sense, suppressed, and witness re-examined. *Peacock v. Colens, id. 47.*

Witness examined by fraud, suppressed, and parties to fraud to be proceeded against by bill. *Walford v. Walford, id. 56.*

### 30. Publication.

(a) Generally.

(b) Enlarging publication.

(a) Generally.

No examination after publication. Beame's Ord. 33.

Exceptions. *Id.*

After day of publication no new witnesses to be examined. *Id. 73. 186.*

New interrogatories may be exhibited in court to examine new witnesses before publication. *Id. 97.*

Two rules for publication after examination in court. *Id. 190.*

One rule after examination by commission. *Id.*

Full proof to be made before publication passes. *Id. 219.*

No commission to be published but in presence of six clerk. *Id. 241.*

Publication to pass by rule only. *Id. 319. 336.*

Such rule to be entered with register and six clerk. *Id. 336.*

Cause not to be set down same term wherein publication passes. *Id. 319. 333. 335. 357.*

But if plaintiff set it not down term after, defendant may. *Id. 319. 334. 337.*

No order to contrary of three last items, but by consent. *Id. 319.*

Cause not to be set down same term after publication passes, unless it appear by affidavit that it will prejudice party to wait for publication. *Id. 333. 337.*

In an injunction cause, defendant may apply to set down cause term after publication passed. *Id. 334. 337.*

Where publication has passed, or the cause is in the paper for hearing, the plaintiff, upon motion, paying the costs of the application, will be allowed to examine witnesses to the execution of a will. *Coley v. Coley, 2 Y. & J. 44. PR. EXAMINATION OF WITNESSES.*

Practice as to the publishing depositions of witnesses examined after decree. *Handley v. Billinge, 1 Sim. 511.*

A motion by defendant for inspection of book produced by plaintiff under commission issued, since publication was refused with costs. *Forrester v. Helmer, 1 M'Clel. 558. PR. INSPECTION OF DEEDS, &c.*

Court will not order copies of depositions taken to perpetuate testimony of witnesses to be delivered out for purpose of perfecting title to an estate, even where witnesses are dead. *Teale v. Teale, 1 S. & S. 385. PR. EVID. ON BILL TO PERPETUATE.*

Cause not being set down, and fact to be proved being only a title to representation; order for enlargement granted on paying costs of application and commission. *Cutler v. Cramer, 6 Mad. 253. ENLARGEMENT OF PUBLICATION.*

Permission to exhibit an interrogatory as to the loss of a deed omitted to be proved by mistake given to the plaintiff at the hearing under the circumstances. *Cox v. Allington, 1 Jac. 337.*

Cause cannot be set down unless by consent in same term in which rule to pass publication is given. *Lord v. Genslin, 5 Mad. 83. PR. SETTING DOWN CAUSE.*

Before publication passed (plaintiff having obtained order to enlarge) plaintiff set down his cause and issued subpoena to hear judgment. Held irregular, subpoena quashed, and cause struck out of paper. *Ellis v. King, 4 Mad. 126. Id.*

Leave was given by decree to exhibit interrogatories to prove will of real estate. Examiner declining to publish the depositions, order was made for that purpose. *Rossiter v. Pitt, 2 Mad. 165. INTERROGATORIES TO PROVE WILL OF REAL ESTATE.*

Court will not make an order on motion that plaintiff in cross cause (who had not examined witnesses on his part in the original cause after having obtained an order to enlarge publication) shall be at liberty to read depositions taken on his behalf in a cross cause, after publication of the depositions taken on behalf of plaintiff, on hearing of original cause, on an application to put the cross cause into the short paper for that purpose, supported by affidavit of total ignorance on part of parties interested, and their attorneys, of the depositions published. And this, however satisfactory in point of fact, the affidavit in support of such motion may be in the particular instance. *Hidley v. Obee, 3 Price, 26. PR. CROSS CAUSE.*

After publication, no farther examination without leave; not obtained without great difficulty, and generally confined to some particular facts. *Willan v. Willan, 19 Ves. 592. PR. EXAMINATION.*

Depositions before the master not to be known by the parties until the whole examination is concluded. *Id. 593.*

Publication ordered of the depositions of a deceased witness, examined on the behalf of the defendant, under the plaintiff's commission, on a bill to per-

petuate testimony. *El. Abergavenny v. Powell*, 1 Mer. 434.

Depositions in *perpetuum rei memoriam* not published in the life of the witness, except on incapacity to travel by sickness, &c. such orders, except in the excepted cases, proceeding on affidavit of the death of the witness, some expressly declaring that the depositions of the other witnesses shall not be read. *Morrison v. Arnold*, 19 Ves. 670. PR. DEPOSITIONS TAKEN TO PERPETUATE TESTIMONY.

Publications of depositions of witness who is dead taken on bill to perpetuate may be moved for as of course. *Bourne v. Bligh*, 1 Price, 307. PR. MOTION OF COURSE; PR. EVID. DEPOSITIONS ON; BILL TO PERPETUATE.

After publication, order for examination by general interrogatories as to the credit of a witness in the cause, and as to such particular facts only as are not material to the issue; but publication having passed five months, not to delay the hearing: the court does not previously consider whether the subject of the examination is material to the issue, but in that case will suppress the depositions. *White v. Fussell*, 19 Ves. 127. PR. EXAMINATION AS TO CREDIT OF WITNESSES.

Examination to credit after publication where the witnesses are in the country by commission on articles exhibited with one of the six clerks. *Id.*

On a bill for examining witnesses in *perpetuum rei memoriam*, held that publication of the depositions should not be allowed unless in a strong case. *Harvis v. Cotterell*, 3 Mer. 678. PR. BILL TO PERPETUATE.

Order before publication for re-examining a witness upon his affidavit that through mistake at the time he submitted to be examined, without looking at papers which enabled him to answer more fully and precisely. *Kirk v. Kirk*, 13 Ves. 280. RE-EXAMINATION OF WITNESS.

Re-examination of a witness after publication upon his own application and affidavit to correct mistake, but confined to that, the court not permitting the whole deposition to be suppressed, and an entirely new examination. *Id. ib.*

Examination after publication is confined to general credit, and to facts not material to what is in issue in the cause. *Charles v. Brook*, 10 Ves. 49. PR. EXAMINATION OF WITNESS.

Order made after publication for liberty to take out a commission and examine witnesses by general interrogatories as to credit of witness who had been cross-examined, and as to such particular facts only as are not material to what is in issue in the cause. *Wood v. Hammerton*, 9 Ves. 145. PR. COMMISSION TO EXAMINE AS TO CREDIT.

After publication passed, liberty given to exhibit articles as to the credit of a witness who had been cross-examined by general interrogatories, and as to such particular facts only as are not material to what is in issue in the cause. *Purcell v. M'Namara*, 8 Ves. 324. PR. WITNESS, EXAMON. AS TO CREDIT OF.

Motion to amend depositions, after publication, refused. *Ingrin v. Mitchell*, 5 Ves. 297. PR. AMENDMENT OF DEPOSITIONS.

No witness ought to be examined after publication though sworn before. *Jenkinson v. Pepys*, 3 Anst. 836. EXAMINATION.

In a cause and cross cause, publication in the original suit stayed until after appearance to the cross-bill. *Gardiner v. Mason*, 4 Bro. C. C. 478.

The court allowed the defendant, after publication, to prove an old paper found in the parish registry. *Clarke v. Jennings*, 1 Anst. 173. FURTHER EVIDENCE.

Witness examined two days after passing publication; defendant cross examined witness; court

would not suppress deposition. *Hamond v. ———*, Dick. 50.

Defendant cannot give rules to pass publication till plaintiff has been in default one term after cause at issue. *Watnesley v. Elliot*, id. 84.

Depositions *de bene esse* of witness dead published, to be read at law. *Price v. Bridgman*, id. 144.

Bill for injunction and commission to examine, and both parties at liberty to examine; defendant examined witnesses, plaintiff cross examined them; plaintiff takes out no commission; injunction dissolved, and publication ordered. *Emmet v. Ayliffe*, id. 239.

Depositions from abroad published, though taken during abatement. *Sinclair v. James*, id. 277.

Liberty to amend answer by striking out admissions of plaintiff's pedigree after publication. *Kingscote v. Hainsley*, id. 485.

The court will allow articles to the credit of a witness after publication, because the matters examined into in such cases were not material to the merits of the cause, but not where the commission is to go to foreign parts, because this would introduce a certain method of delay, unless no person in England can swear to the person's credit. *Callaghan v. Rochfort*, 3 Atk. 643. PR. WITNESS, COMPCY. OF.

After the depositions under a former commission had been seen, the court would not suffer additional interrogatories to be exhibited under a new one, but confined the defendant to the proving exhibits, and cross examining a person already examined for the plaintiff, but not to examine any new witnesses. *Barnesley v. Powell*, 3 Atk. 593.

An affidavit of the death or absence beyond sea of the witness, is necessary before examinations *de bene esse* can be published. *Ward v. Sykes*, Ridgw. 193. EXAMON. DE BENE ESSE.

Commission having been issued, &c. to examine witnesses in *perpet. memor.* a year past publication, ordered. *Gravenor v. Brearton*, Cary, 33.

Publication of evidence to be used at court baron, granted. *Mantye v. Simcoe*, id. 35.

Witnesses examined after publication *ad informandum judicis*, id. 53.

Publication stayed after granted. *Darvall v. Stukely*, id. 66.

New interrogatories for new witnesses may be exhibited any time before publication. *Lewis v. Owen*, Dick, 6.

Plaintiff examined witnesses, defendant adds fresh interrogatories and examines, this regular before publication, not after. *Huyward v. Colley*, id. 43.

Examination of witness *viva voce*, as to particular fact after publication, defendant to cross examine, allowed. *Gage v. Hunter*, id. 49.

After the defendant has been examined on interrogatories, and publication passed, the plaintiff ought not to have a commission to examine witnesses in order to falsify the defendant's examination, this tending to multiply causes, and make them endless. *Smith v. Turner*, 3 P. W. 413. PR. COMMISSION TO EXAMINE; PR. EXAMON. OF INTERROGATORIES.

After publication and examinations known, this court will not give either side leave to examine. *Cann v. Cann*, 1 P. W. 727.

Court refused to publish depositions *de bene esse*, in order to compare them with the depositions in the same cause, taken on an examination in chief. *S. C. Id.* 567. PR. DEPOSITIONS DE BENE ESSE.

Witnesses examined in *perpet. mem.* one dead, other sick, moved to use testimony, and granted. *Senhaves v. Senhaves*, Cary, 88.

One having order to prove a deed *viva voce* at the hearing, not allowed to prove the witnesses' hands, they being dead, but had leave to examine in the

office to prove the deed, though publication was passed. *Blaxton v. Druitt*, Prec. Chan. 64. **DEEDS.**

Though the plaintiff is to examine and have publication within fourteen days after the return of the *certiorari* to prove his suggestions, and give the court jurisdiction, the defendant is not at liberty to examine or publish any thing to disprove it; and though the defendant should examine as soon as answer, yet the depositions shall not be published but in ordinary course; for after the plaintiff's first examination to affirm the jurisdiction, if the court retain the cause, both parties are to examine orderly to the merits and body of the cause, and have publication according to the ordinary rules. *Checkey v. Allen*, Toth. 145. **PR. CERTIORARI.**

### (b) Enlarging publication.

Publication not to be enlarged, except on special application. 18 Gen. Order, 3d April 1828.

Where there has been delay on both sides in proceeding on bill and cross bill, the court will grant a second order to enlarge publication in the original cause on terms, in order to give the party applying time to consider the matter furnished by the answer to the cross bill newly filed, with a view to the application of it in his defence to the original bill. Defendant was ordered to pay costs of application. *Lowe v. Firkins*, 13 Price, 21. S. C. 1 M'Clel. 10. As to the affidavit necessary, see 1 M'Clel. 10.

A third application to enlarge publication was granted, but cause was ordered to stand in the paper to prevent delay in the hearing. S. C. 1 M'Clel. 73. 13 Price, 198.

Under particular circumstances publication enlarged without prejudice to hearing, although rule to pass publication had expired above four months. *Sterens v. Solway*, 1 M'Clel. 596.

Where the cause cannot come on to be heard till after the following term, publication may be further enlarged a second time on motion, without assigning any special reason until the first day of the term. *Vinter v. Bickley*, 12 Price, 460.

Court will not enlarge publication after answer to original bill, till the answers in a cross cause come in; but they will require an affidavit verifying the facts stated in the cross bill. *Lidards v. Morgan*, 11 Price 399. **PR. CROSS BILL, AFFIDAVIT IN SUPPORT; PR. CROSS BILL, ANSWER TO.**

Cause not being set down, and fact to be proved being only a title to representation, order granted, on paying costs of application and commission. *Cutler v. Cremer*, 6 Mad. 253.

It is motion of course to enlarge publication, where no witnesses have been examined. *French v. Leusay*, 6 Mad. 50. **PR. MOTION OF COURSE.**

After publication passed, and which had been before enlarged at the instance of the defendant, he obtained an order, as of course, again to enlarge publication, and examined witnesses. Held that the latter order was informal, and on application that publication might be further enlarged, or the evidence taken under the informal order, might be read at the hearing of the cause, was dismissed with costs. *Cumethard v. Hasted*, 3 Mad. 429.

Publication, though often enlarged before, enlarged in title cause to enable defendant to search for records in Vatican, on affidavits as to probability of success there. *Barnes v. Abram*, 3 Mad. 103.

Publication enlarged, and new commission to examine defendant's witnesses, issued on affidavit of ignorance of contents of former depositions. *Dingle v. Rowe*, Wightw. 99. **PR. COMMISSION TO EXAMINE WITNESS.**

A second application to enlarge publication allowed, though cause set down, the same being so far

off in the paper, that it was improbable it would be heard before the time for enlarged publication expired. *Moody v. Leeming*, 1 Mad. 85.

After answer, not of course, to enlarge publication until answer to a cross bill. *Dalton v. Carr*, 16 Ves. 93. **MOTION OF COURSE.**

Motion to enlarge publication in the original cause, until answer to the cross bill, the original cause being set down for hearing, and the cross bill filed, after rules for passing publication, refused with costs. *Cook v. Broomhead*, 16 Ves. 133.

Publication enlarged on a special case, where farther evidence is necessary, and it can be heard without injustice or danger, not upon ignorance or negligence of an agent, nor to the prejudice of a party, even by delaying the hearing, and affidavit required, that the party, his clerk in court, and solicitor have not seen or been informed of the depositions and will not, &c. *W hitelock v. Baker*, 13 Ves. 512.

The court will not enlarge publication on the application of a party who has taken the depositions of the opposite party out of the office although by mistake. *Lawrell v. Titchborne*, 2 Cox, 289.

Plaintiff cannot enlarge publication and examine witnesses, after he has set down cause. *Yate v. Boland*, Dick. 495.

Plaintiff cannot set down cause until after publication, unless publication be enlarged at defendant's instance, with proviso that plaintiff may. *Id. ib.*

If publication passed, plaintiff may set down cause, and if no witnesses examined, may enlarge and examine. *Id. ib.*

After an original bill proceeded in, it is not a motion of course to enlarge publication on a cross bill, but notice must be given, &c. *Aylet v. Easy*, 2 Ves. 336.

Where defendant in a cross bill, but plaintiff in the original, is in contempt for not putting in an answer to the cross bill, the proper motion is not to stay proceedings in the original cause, but to enlarge publication in the original to a fortnight after the answer is come in to the cross-bill. *Creswick v. Creswick*, 1 Atk. 291. **PR. CROSS BILL.**

EXAMINATION, see PR. EVID. 28.

EXAMINER, see PR. EVID. 28. (e).

### XXXIX. EXCEPTIONS, GENERALLY.

See also ARBITRATOR & AWARD.—**PR. ANSWER**, 17.—**PR. COSTS**, 10. (f).—**PR. MASTER, REFERENCE**, &c. 2. (h).

Exceptions will not lie to the return of commissioners in a suit for partition, on the ground of inequality of value in the lots. In all cases of improper conduct in the commissioners, a motion must be made to suppress the return. *Jones v. Totty*, 1 Sim. 136. **PR. COMMISSIONER OF PARTITION.**

Exceptions irregularly entitled, ordered to be taken off file. *Williams v. Davies*, 1 S. & S. 426. **PR. INTITULING PLEADINGS, &c.**

Counsel's name must be signed to exceptions. *Chandler v. Partington*, 6 Mad. 102. **COUNSEL'S SIGNATURE.**

After order to elect law or equity, plaintiff cannot move on motion of course for leave to file exceptions *nunc pro tunc*, but ought to make special application for that purpose, and for an order to

suspend election till exceptions are answered. *Coupland v. Bradock*, 5 Mad. 14. PR. ELECTION; PR. EXCEPTIONS, NUNC PRO TUNC.

By minute 7th May, 1819, the rule of court, dated 1st February, 1792 (which directs that exceptions set down for argument are to be called on at the sitting of the court, the effect of which is, that where plaintiff does not attend to support them, they are to be struck out, and defendant may then move, as of course, that they be overruled; and where defendant does not appear, they are allowed) is ordered to be strictly adhered to. *Memorandum*. 7 Price, 208. EXCEPTIONS.

Exceptions under the circumstances allowed to be taken *nunc pro tunc* to the master's report of insufficiency of answer, though after the report was made, a plea of further answer were put in, and the plea overruled. *Noel v. Ward*, 1 Mad. 339. PR. EXCEPTIONS TO MASTER'S REPORT.

Where exceptions have been filed *nunc pro tunc*, court will not grant injunction on opening material exception, unless the plaintiff, on obtaining his order, gave a four day rule for arguing the exceptions. *Edwards v. Hogarth*, 1 Price, 147. PR. INJUNCTION.

Distinction as to exceptions in the courts of chancery and exchequer. *Rowe v. Teed* 15 Ves. 377.

Exception to the report, and in general terms, that the master had reported the examination sufficient, whereas he ought to have reported it insufficient, is regular, but not to be encouraged, and therefore being overruled, costs beyond the deposit were given. *Purcell v. McNamara*, 12 Ves. 166. PR. EXCEPTIONS TO MASTER'S REPORT; PR. COSTS.

Amendment of exceptions permitted upon mistake. *Dolder v. Bank of England*, 10 Ves. 284.

Bare filing exceptions, is not shewing cause against confirmation of report. *Hall v. Mulliner*, Dick. 604. *Abel v. Nodes*, id. 730.

A person who was summoned to appear before the commissioners, and did not appear, may except to their decree, if concerned in interest. *Raeson v. Turner*, Sel. Ch. Ca. 42.

Exceptions frivolous, exceptant to pay 20s. for every one overruled, and 10s. for every one waived. *Reul v. Ward*, Dick. 110.

Liberty given to amend exceptions after arguing them. *Northcote v. Northcote*, id. 22.

When the court on hearing refers the matter in controversy to gentlemen in the country, no exceptions lie to their certificate. *Dessy v. Currington*, 2 Vern. 79. AWARD.

#### XL. EXCEPTIONS, BILL OF.

The writ grounded on the stat. Westm. 2., commanding judges to seal a bill of exceptions, does not lie where the exception taken is to an order of a court of law amending one of its own records; nor, semble, to any order made upon motion. In cases where this writ lies, it ought to be made out by the clerk of the crown, and not by the curstior; and it should not issue without special order from the person holding the great seal. *Lalor v. Murray*, 1 Scho. & L. 75.

No matter, except such as if allowed would be on the record, can, if disallowed, be properly brought on the record by bill of exceptions. *Id.* 82.

A motion for a mandatory writ to the chief justice of king's bench to sign a bill of exceptions, denied, though such writ was issued out of chancery to a judge of an inferior court. *The Ristors' Case*, 1 Vern. 175. JURISDICT.; MANDATORY WRIT.

#### XLI. EXCHEQUER, PRACTICE IN.

The Lord Chief Baron empowered to determine suits in equity; if hindered, the king may appoint one other of the barons to sit as the Lord Chief Baron, &c. shall appoint; decrees to have full force subject to appeal to house of lords; Lord Chief Baron or Baron may on petition rehear causes, &c. 57 G. 3. c. 18. s. 1, 2, 3. JURISDICTION.

How proofs are to be folioed for the judge. Order of Court, 21st May, 1821. 9 Price, 343.

The Lord Chief Baron will hear causes and matters by petition on Mondays, Tuesdays, Wednesdays, and Thursdays, except either of them shall happen to be the first or last day of term. All causes for further directions are to be brought on at the sitting of the court on Thursdays only. Gen. Order, 28th April, 1817.

The Lord Chief Baron will hear causes on Fridays, Saturdays, after the revenue business in the outer court is disposed of, if there be time. *Id.*

The Lord Chief Baron set apart from the rest of the court in the exchequer chamber this day for the first time under the late act of parliament. Gen. Order, 28th & 29th April, 1817.

Ordered, all pleas and demurrers and exceptions to answers in suits for equitable relief, be set down to be heard before Lord Chief Baron in the inner court; and any motion in equity may be brought before his lordship in the same court; but notice of motion must express in which court the motion is to be made: exceptions to answers to bills for discovery and injunctions are to be set down for argument in the outer court as heretofore. On Mondays and Thursdays, motions, pleas, demurrers and exceptions in suits for equitable relief, exceptions to reports, and further directions, petitions. On Tuesdays and Wednesdays, original causes will be proceeded with. Fridays and Saturdays, Lord Chief Baron will sit with other barons in outer court: court will proceed with original causes on Mondays and Thursdays after other business disposed of. Gen. Order, May 1st, 1828. 2 Y. & J. 329.

In injunction bills, where the defendant resides abroad, and an application is made, that service of process on his attorney at law may be good service, the court of chancery requires the bill to be accompanied by an affidavit, by the plaintiff, of merits: in this court the affidavit is not required until the motion is made for the injunction. *Royal Exch. Assur. Comp. v. Short*, 1 Y. & J. 570. PR. AFFIDAVIT OF MERITS.

A party is not subjected to costs on the abandonment of motion after one single notice of motion. *Hurd v. Partington*, 1 M'Clel. & Y. 40. PR. COSTS.

In exchequer, in a suit for discovery and commission merely; a commission to examine abroad may issue before answer. *Ibbetson v. Richardson*, 1 M'Clel. 581.

Applications to discharge orders for irregularity must be made without delay. The court of exchequer, like chancery, is always open. *Joseph v. Simpson*, 10 Price, 25. IRREGULARITY.

An injunction is not dissolved in this court as a consequence of course, on allowing a demurrer to the bill on the equity of which it was obtained; it must be moved that the injunction be dissolved on that ground. *Barelay v. Curtis*, 9 Price, 661. PR. DEMURRER.

Application by plaintiff to withdraw replication, and amend bill, is not a motion of course, and can only be made in exchequer on affidavit of materiality and nature. *Markham v. Smyth*, 9 Price, 163. S. P. *Petre v. Wells*, id. 667.

And where application was made twelve months after defendant had refused and proceedings suffered

to be far advanced: motion was discharged with costs on opposition of defendant who had had notice of motion. *Semble, Petre v. Wells*; id. 670.

An amendment in such case, by striking out of bill certain titles to which plaintiff was stated to be entitled; but of which no account was prayed, was allowed. *Markham v. Smyth*, 9 Pri. 163. PR. MOTION.

If defendant means to except to report of impertinence, he must first move for leave, and notice of motion must be given. *Ward v. Bottalin*, 8 Price, 86. IMPERTINENCE.

In Exchequer, report of officer on reference, that answer is impertinent, must be confirmed by court on motion, of which notice must be given for that purpose. *Id. ib.*

The practice of the exchequer, permitting the plaintiff in an issue to make default once at the trial, does not prevail in chancery. *Bearblock v. Tyler*, 1 Jac. & W. 226. DEFAULT AT HEARING.

Practice of the court of exchequer holding the bankruptcy of the plaintiff, no abatement, and therefore, dismissing the bill with costs for want of prosecution. *Randell v. Mumford*, 18 Ves. 426. PR. ABATEMENT & REVIVOR; BANKCY. EFFECT OF.

Where injunction is moved in exchequer, you may move to try the cause staying execution till the merits of injunction be determined; but injunction will not be granted against a foreigner unless on affidavits of merits. *Anon. Loft*, 545. FOREIGNER.

EXHIBITS, see PR. EVID. 10.

FEEs, see PR. OFFICERS OF COURT, 1. (c).

FILING PLEADINGS, see PR. ANSWER, 6; 17. (c). — PR. DEMURRER, 3. — PR. EVID. 11. (c). — PR. PLEA, 2.

#### XLII. FUND IN COURT, AND ADVANCING PARTY THEREOUT, TO CARRY ON SUIT.

A solicitor has a lien for his costs on a fund in court produced by his exertions; and therefore where, on a bill for discovery in aid of a defence at law, an injunction was granted on the terms, one of which was the payment of money into court, and an answer was afterwards filed, and the action at law being subsequently tried, a verdict was found for the defendant; it was held that the solicitor for the defendant, in equity, had a lien on the fund for the costs of the discovery. But where the solicitor for putting in the answer was removed, and his demand paid, and another solicitor employed, it was considered that the fund was exonerated to that extent, and he had not any lien for the costs of the former solicitor, though paid by him. *Iring v. Fiana*, 2 Y. & J. 70. SOLICITOR & CLIENT; LIEN.

The court has no authority to advance part of the fund in the cause, to enable indigent parties to prosecute. *Perk v. Beechey*, 2 Sim. 40. JURISDICT.

A fund bequeathed by will was directed to accumulate till infants should attain twenty-one, deducting annually from the interest such portion as might be necessary for their education and other expenses, with benefit of survivorship in case of either dying under twenty-one; the shares to be vested at twenty-one. The court (the parties to whom the fund was given over consenting) directed an advancement for the purchase of a commission for one of the infants,

but with considerable hesitation. *Evans v. Mancey*, 1 Y. & J. 196. ADVANCEMENT; INFANT.

Fund in court detained, until the party by whom it has been paid is secured against all conflicting claims to it. *Franchlyn v. Colhoun*, 3 Swan. 309. INDEMNITY.

Motion that defendants, whose title in trust lands was in question in the cause, might have advanced to them a sum of money to answer the expense of executing a commission in America, refused. *Tillotson v. Hargreaves*, 4 Mad. 172.

Advances to a married woman, deserted by her husband, on the credit of a fund in court, her property, for her maintenance exceeding the income of that, reimbursed out of the capital. *Guy v. Pearkes*, 18 Ves. 196. REIMBURSEMENT; FEME COVERT; SEPARATE ESTATE.

Court will not keep money after the party is entitled to it, even at his request. *Isaac v. Gomperts*, 1 Ves. J. 44.

#### XLIII. FURTHER DIRECTIONS.

Where causes are set down for further directions, a copy of decree and master's report, and the mandatory part of decree, must be left at C. Baron's chambers two days before hearing. General Ord. Exch. 28 June, 1819. 7 Price, 630.

Further directions by motion, when reference to master is made on motion. *Whitcomb v. Foley*, 6 Mad. 3. PR. MOTION.

A cause cannot be set down for further directions on a separate report: an order on a separate report must be sought by petition. *Fan Kamp v. Beke*, 3 Mad. 430.

Where administratrix, under usual decree for account, attempted to support her discharge before master by forgery and fraud, court, upon petition and further directions, directed enquiry as to balances in her hands from time to time, and a computation of interest thereon. *Purnell v. Price*, 14 Ves. 502.

A cause may be set down for further directions, or upon equity reserved, before Ld. Ch. or M. R., without regard to circumstances where it was heard originally. *Pemberton v. Pemberton*, 11 Ves. 53. PR. SETTING DOWN CAUSE.

On return of certificate of commissioners appointed to ascertain lands, it is the practice in court of exchequer to set down cause for further directions, and not to move to confirm commissioners' return, nor to file exceptions. *Denn of Hereford v. Hultatt*, 6 Price, 331.

Upon further directions, a question decided by master was opened without any exception, all the circumstances appearing by report. *Adams v. Claxton*, 6 Ves. 226. PR. MASTER'S REPORT.

Plaintiff may set down cause for further directions at same time that he excepts to report. *Yeo v. Freer*, 5 Ves. 424. *Bowerbank v. Collasseau*, id.

Upon further directions, the court may add to the decree; and may therefore give interest, though the question of interest was not reserved. *Cruze v. Hunter*, 2 Ves. J. 164. S. C. 4 Bro. C. C. 157. INTEREST; DECREE.

Interest decreed under a general reservation of further directions. *Sammes v. Rhodan*, 2 Ves. J. 36. INTEREST.

Petition to set down cause for further directions, or such further order as court should think fit, dismissed, though the parties could not proceed; an inquiry before the master being rendered useless by the event of a verdict upon issue directed, and further directions having been reserved till after trial and report. *Dixon v. Olmitus*, 1 Ves. J. 153.

A special direction to the matter in settling an in-



fant's allowance, to consider the birth of a child unprovided for, refused. *Burnet v. Burnet*, 1 Bro. C.C. 179. S. C. 2 Dick. 602, *quod vide*. INFANT; MAINTENANCE.

Generally speaking, to warrant a reservation of interest on further directions, it should have been directed on the original decree: the case, however, of a direction for a trial at law is an exception, and there may be others founded on the peculiar nature of a case. *Champ v. Moody*, 2 Ves. 470. INTEREST; PR. DECREE.

The court has power to give interest upon further directions, though the question of interest is not reserved by the decree. *Goutley v. Lake*, Amb. 584. INTEREST.

A party cannot move, upon a master's report, to bring the cause on for further directions till the report is confirmed. *Smith v. Reynolds*, Mos. 71. PR. MASTER'S REPORT, CONFIRMATION OF; PR. MOTION.

#### XLIV. HABEAS CORPUS.

See also STAT. C. OF, II. 25.

A bankrupt brought up by habeas corpus is not to be discharged because the return to the writ sets forth the warrant of committal imperfectly, and in such a case the Ld. Ch. before he enters upon the question of the validity of the committal, will ascertain whether the warrant is truly set forth in the return, and if it is not so set forth, he will order the return to be amended. *In re. of Power*, 2 Russ. 583.

Where bankrupt committed by commissioner is brought up by habeas corpus, notice must be given to the assignees; and notice on Saturday afternoon for Monday, unless right to discharge is clear, is not sufficient. *Bronley's Case*, 2 J. & W. 453. BANKCY.; NOTICE.

The Ld. Ch. can issue the writ of habeas corpus at common law in vacation. *Crowley's Case*, 2 Swan. 1. S. C. Buck, 264. JURISDICTION.

The stat. 31 Car. 2. is in all its enactments to be construed with reference to applications under it. *Id.* 68. STAT. C. OF.

31 Car. 2. c. 2. s. 3. extends to persons committed during term. *Id.* 69. STAT. C. OF.

Obedience to the writ of habeas corpus may be enforced by process of contempt. *Id.* 73. PR. PROCESS OF CONTEMPT.

Writ of habeas corpus a high prerogative writ. *Id.* 48.

Defendant, in Newgate under a criminal sentence, having been brought up by habeas corpus for not putting in his answer, and remanded to Newgate, as to the farther proceeding, *quid*. *Lloyd v. Pittingham*, 15 Ves. 179. PR. ANSWER; PRISONER, CRIMINAL.

And in a similar case, the court refused to make any order, on the ground that the process of the court would not reach defendant. *Moss v. Brown*, 1 Ves. & B. 306.

Order that a person against whom a commission of lunacy was established should be delivered up to the committee; habeas corpus not necessary. *Exp. Crammer*, 12 Ves. 445. LUNACY.

The mode of reviewing the judgment of commissioners of bankruptcy committing the bankrupt for not answering satisfactorily, is by habeas corpus. *Exp. King*, 11 Ves. 425. BANKCY. REVIEWING JUDGMENT OF COMMISSIONERS.

Defendant in confinement under sentence for felony cannot be brought up by habeas corpus upon an attachment for want of an answer. *Rogers v. Kirkpatrick*, 3 Ves. 573. PR. ATTACHMENT FOR WANT OF ANSWER.

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Special return to an attachment for not appearing, that defendant was imprisoned for felony, the plaintiff must proceed in the usual way by habeas corpus. S. C. id. 471. PR. ATTACHMENT; PR. FELONY.

A habeas corpus and a certiorari differ; the latter removes the body *cum causa*, and the former declares *ergo* in the superior court. *Woodcraft v. Kingston*, 2 Atk. 317. CERTIORARI.

Motion for a habeas corpus to bring up defendant, to charge him in contempt for not answering, he being then in Newgate under a criminal sentence, refused, the application being founded on the return of the messenger, and not of the sheriff; and had it been otherwise, the motion was unnecessary, because defendant was sufficiently charged by the attachment issued to the sheriff. *J. J. v. Aylett*, 2 Dick. 658.

Habeas corpus to bring up infant, arrested for necessities, to have guardian assigned, must be by motion not petition. *Home v. Lacey*, Dick. 170.

Defendant in marshalsea for debt must be brought by habeas corpus to answer contempt. *Brandon v. Knight*, Dick. 160.

Bankrupt committed to Newgate for not answering commissioners, habeas corpus under 31 Car. 2. c. 2. directed to keeper of Newgate. *Rex v. Horne*, Dick. 67.

Habeas corpus to warden of Fleet to have defendant in court to be charged with debt on recognizance. *Ward v. Crouch*, Cary, 71.

Defendant, a prisoner in Bristol, being in contempt for disobedience of a decree, a habeas corpus *cum causa* was granted to turn him over to the Fleet, and on his persisting in his disobedience, a sequestration issued. *Elcard v. Warren*, 2 Rep. Ch. 151.

One in the Fleet for breach of a decree for not vacating a judgment, by judgment in a feigned action in K. B. gets himself turned over thither, and thereby getting liberty to go abroad, got the defendant in the judgment taken in execution. On a habeas corpus defendant in equity was brought hither, and re-committed to the Fleet, and confined to his chamber, and a habeas corpus with a long return, granted to the defendant at law. *Baker v. Beaumont*, 1 Ch. Ca. 32.

#### XLV. HEARING, AND SETTING DOWN CAUSE FOR

See also PR. ANSWER, 17. (K)—PR. CAUSE, ANSWERING, &c.—PR. REFERRING.

Where cause is set down in two courts, solicitor shall certify this to registrar of court where first set down. See 11 Ves. 53. 38th Gen. Order, 3rd April, 1828.

Short causes in the general paper are to be placed in the paper for the last cause day in each term, but no cause is to be placed as a short cause in which any question arises, or any point is to be discussed. Gen. Order, T. T. 1824. 1 Mclell. 708. *Id.* 13 Price, 744.

Exceptions standing in the paper for argument, may only be heard at the sitting of the court. *Memorandum*, 1818. 5 Price, 607. PR. EXCEPTIONS TO ANSWER.

Ordered, that the paper of causes shall be made out from general paper as they stand, and that no cause shall be omitted unless specially directed by himself, upon application to him in this court, except in cases where causes are abated, in which case cause abated is to be adjourned to the column of abated causes, and notice of such abatement given to registrar; not to apply to causes in which attorney-general is party. Gen. Order, Nov. 14, 1817, Dan. 63.

Where abated causes are restored to paper by order

for hearing, they shall be put at bottom of paper of the day. Gen. Order, 20th Nov. 1817. *Id. ib.*

When hearing is on bill and answer, the answer admitted true on all points. Beame's Orders, 29. 180.

Certificate that proceedings are filed, to be produced at hearing. *Id.* 135.

No counsel appearing for defendant at hearing, and process being served, answer to be read, and decree taken nisi. *Id.* 197.

Previous to shewing cause, he must produce certificate that costs are paid. *Id.* 198.

Note of hearing to be set up in registrar's office, two days before. *Id.* 254.

But orders for setting down to be taken in due time to registrar. *Id.* 254.

Otherwise cause, &c. to be put off. *Id. ib.*

Clerks in court, on either side, to attend hearing at Rolls. *Id.* 267.

No motion to hasten a hearing, nor cause entered with registrar for hearing, without six clerk's certificate that pleadings are filed, for which no fee to be taken. *Id.* 287.

If solicitor offers at hearing to read pleadings not duly signed, cause to be put off, and solicitor fined. *Id.* 289.

Cause to be put off, if depositions made in fraud of examiners. *Id.* 302.

Cause to be put off when parties are not ready at beginning of term. *Id.* 310.

No cause to be set down for hearing the same term publication passes. *Id.* 319. 333.

Exception thereto. *Id.* 319. 334.

If plaintiff does not set it down term after, defendant may. *Id.* 319.

No cause is to be set down, unless six clerk certifies he hath seen depositions published. *Id.* 336.

If solicitors do not come prepared with their proofs properly folio'd, so as to refer to the passage tendered to be read, the cause will be ordered to stand over on payment by the solicitor of the costs of the day. Order Exch. E. 1821, 9 Price, 343.

Each Wednesday during the sitting to be for short causes, whether hearing or re-hearing; and the registrar to make out a short list accordingly, inserting therein such causes and re-hearings only as shall be ordered on petition to be transposed from the long list to such short list to be heard before the chancellor; the party obtaining such order to serve the same on the opposite party's clerk full four days before the hearing. Ord. Ch. Irel. 7th May, 1808. O'Keeffe's Ed. 107.

When the costs of the day are ordered to be paid, they are to be considered the costs out of pocket. Ord. Ch. Irel. 13th May, 1807. *Id.* 106.

Where a cause shall be struck out of the paper by reason of the non-attendance of the attorney, no motion to restate such cause shall be entertained, till the attorney first pay to the box 13s. 4d., which sum he shall not afterwards bring in charge, nor the officer tax, against his client. Ord. Exch. Irel. 24th Feb. 1795. 1r. T. Rep. 601.

Ordered, that before any cause be called on, the solicitor deliver to each of the barons, a statement in writing containing the names and interests of the parties in the cause, together with the prayer of the bill. Ord. Exch. M. 1793. Kirkby's Ord. Exch. 46.

If defendant, having been served with subpoena, make default at the hearing, defendant's answer, and the depositions, shall be read, and thereupon be decreed or dismissed, unless the court shall see cause to give defendant a day to shew cause against a decree. Ord. Ch. Irel. O'Keeffe's Ed. 9. But when a party appears and answers, he must appear at the hearing, and not suffer a conditional decree, provided subpoena to hear judgment has been served. Ord. Ch. Irel. 27th Jan. 1792. *Id.* 84.

If defendant, being served to hear judgment, make default at the hearing, and has a day given him to shew cause against the decree, he shall not be heard therein until he first pay 5l. costs. Ord. Exch. 30. Kirkby's Ed. 17.

If a defendant appear in court in consequence of a subpoena, or an order to appear gratis, and plaintiff makes default, the bill shall be dismissed with costs. Ord. Exch. 27th June, 1788. Kirkby's Ord. 44.

All causes wherein publication shall not have passed, to be set down after the causes wherein publication shall have passed; and all causes depending on reference to the deputy remembrancer, after the causes wherein publication shall not have passed, and when reports shall have been signed in such last mentioned causes, and no exceptions taken, such causes to be at the head of the particular paper for the day, and in case exceptions be taken to reports, the same to be set down within eight days after filing. Ord. Exch. 21st May, 1778. 2 Fowl. 171.

No cause to be received by the registrar, to be put into the paper, after six in the afternoon of the day before the day for which the cause is set down. Ord. Exch. 20th June, 1729. Kirkby's Ord. Exch. 30.

No cause to be put into the paper of twelve till after the return of the subpoena to hear judgment. Ord. Exch. 1819. 7 Price, 560.

Where causes are set down for further directions, a copy of the report and the mandatory part of the decree must be left at the C. B.'s chambers two days before the hearing. *Id.* 630.

If plaintiff be not ready at the day appointed for the hearing, if the court have leisure to hear it, and defendant be ready, then defendant is to be dismissed with costs, unless the court see just cause to appoint a further day. In Order 18, O'Keeffe's Ed. 9. For the future the Ld. Ch. will strike out any cause that is set down in the paper, (unless some reasons appear by affidavit,) if the parties be not ready at the day fixed for hearing. Ord. Ch. Irel. 5th May, 1719. *Id.* 29.

Causes adjourned for compromise not to be set down among the short causes until the treaty of compromise be determined. Ord. Exch. 15th June, 1790. Kirkby's Ed. 45.

All subpoenas to hear judgment to be made returnable the first hearing day in the term after issuing the same, and all the causes to be set down for the first hearing day of such term, pursuant to the return of such subpoenas. Ord. Ch. Irel. 16th Nov. 1813. O'Keeffe's Ed. 109. Ord. 12th Nov. 1792. 23rd Feb. 1793. *Id.* 85. S. P.

Particular cause pursued on hearing of title cause. *Lowe v. Perkins*, 1 M'Clel. 596. *S. P. Drake v. Smith*, 5 Price, 375. *TITHE CAUSE.*

Cause may be regularly set down without consent in the vacation, after the term in which publication passes. *Partridge v. Carr*, 1 S. & S. 466.

Where one of several defendants sets down a cause, he is only bound to serve the plaintiff, and the plaintiff is bound to serve the other defendants with notice. *Smith v. Wells*, 6 Mad. 193. See *Clarke v. Dunne*, 5 Mad. 474. *Pr. Notice.*

A cause having been once set down for hearing, the bill cannot be afterwards dismissed on a mere motion for the purpose, though after an order to amend obtained, or in default the bill is not dismissed. The course is to set the cause down for hearing, and if plaintiff do not then attend, the bill will be dismissed. *Lyance v. Wye*, 9 Price, 166.

Court will set down cause *pro forma* and put it at the head of the paper, to enable witness, attending from public office in country to prove document, to return. *Swift v. Grace*, *id.* 146.

Subpoena to appear and rejoin is not necessary to enable plaintiff to proceed to hearing, and no instance of such subpoena known. *Johnson v. Mackenness*, *id.*

213. S. P. *Petre v. Wills*, id. 670. **PR. SUSPENSE TO APPEAR AND REJOIN.**

Cause cannot be set down unless by consent in same term in which rule to pass publication is given. *Lord v. Genslin*, 5 Mad. 83. **PR. PUBLICATION.**

The practice of the Exchequer, permitting the plaintiff in an issue to make default once at the trial, does not prevail in Chancery. *Bearblock v. Tyler*, 1 Jac. & W. 226. **PR. IN EXCHEQUER.**

Multifariousness cannot be objected to at the hearing; it should be done by demurrer. *Ward v. Cooke*, 5 Mad. 122. **PR. MULTIFARIOUSNESS.**

Before publication passed (plaintiff having obtained order to enlarge), plaintiff set down his cause, and issued subpoena to hear judgment: held irregular. Subpoena quashed, and cause struck out of paper. *Ellis v. King*, 4 Mad. 126. **PR. PUBLICATION.**

When the interval is short between the publication and the hearing, the court will grant time to examine whether the deposition was regularly taken, it being too late to object during the hearing. *Gordon v. Gordon*, 1 Swan. 171. **PR. DEPOSITION, TIME TO EXAMINE.**

On a demurrer, if plaintiff has no affidavits of service of subpoena to hear judgment, the cause may be struck out of the paper; if an affidavit of service be produced, the court will hear the plaintiff. *Peasfold v. Ramsbottom*, 1 Swan. 562.

Bill of foreclosure cannot be set down as a short cause, except by consent. *Rashleigh v. Dayman*, 2 Mad. 147. **PR. FORECLOSURE, BILL OF.**

Cause cannot be heard against some of defendants in absence of rest, although it is not intended to proceed against them. Bill must be formally dismissed as to them. *Rumney v. Morgan*, 4 Price, 266. **PR. BILL, DISMISSAL OF.**

To shew cause against a decree, on default by defendant at the hearing, the order must be to set down the cause on some day immediately, not after the causes already set down. *Marg. Aispach v. Noel*, 19 Ves. 593. **PR. SHEWING CAUSE AGAINST DECREE BY DEFAULT.**

Where defendant does not appear at hearing of cause, on usual affidavit a decree is obtained, and it is afterwards moved to set down the cause again, the court will direct a particular day on which it is to be heard. *Id.* S. C. 1 Mad. 313.

Plea set down by defendant, if he does not appear when plea called on, and on affidavit of plaintiff having been served with order to set plea down, will be overruled; and if no such affidavit made, will be struck out of paper, and will not be restored without affidavit accounting for delay. *Mazarredo v. Maitland*, 2 Mad. 38. **PR. PLEA.**

Private hearings always on the consent of both parties. *In re: Ld. Portsmouth*, Coop. 106.

No instance of a bill of interpleader brought to a hearing. *Martinius v. Helmuth*, cited in *Stevenson v. Anderson*, 2 V. & B. 412. note (i). 2nd Edit. **INTERPLEADER.**

A cause may be set down for further directions, or upon equity reserved before Ld. Ch. or M. R. without regard to circumstances where it was heard originally. *Pemberton v. Pemberton*, 11 Ves. 53. **PR. FURTHER DIRECTIONS.**

Bill to perpetuate testimony merely, ought not to be brought to a hearing, but if it prays relief, the defendant may be set down for dismissal. *Vaughan v. Fitzgerald*, 1 Sch. & L. 316. **PR. BILL TO PERPETUATE.**

Upon a decree taken by default at the hearing, the evidence is not to be entered as read. *Stubbs v. —*, 10 Ves. 30. **PR. EVID., ENTRY OF AS READ.**

Plaintiff may except to the report, and at the same time set down the cause for further directions. *Freere*, 6 Ves. 424. **PR. EXCEPTIONS TO REPORT.**

Plea of another suit depending for the same cause, referred to the master of course, without being set down. *Daniel v. Mitchell*, 1 Ves. J. 484. S. G. 3 Bro. C. C. 844. **PR. PLEA OF FORMER SUIT.**

Petition to set down cause for further directions, or such further order as the court should think fit, dismissed; though the parties could not proceed; an enquiry before the master being rendered useless by the event of a verdict on issue directed, and farther directions having been reserved till after the trial and report. *Dixon v. Olmuis*, 1 Ves. J. 153.

Bare filing exceptions is not showing cause against confirmation of report; they must be set down to argue. *Hall v. Mullinger*, Dick. 604. *Id. Abel v. Nokes*, id. 730.

Plaintiff cannot enlarge publication, and examine witnesses after he has set down cause. *Yate v. Bolland*, id. 495.

Plaintiff cannot set down cause until after publication, unless publication be enlarged at instance of defendant, with proviso that plaintiff may. *Id. ib.*

If publication passed, plaintiff may set down cause, and if no witnesses have been examined, may enlarge and examine. *Id. ib.*

A cause coming on to be heard, stood over with liberty for the plaintiff to amend. He did amend, but did not proceed further. Defendant may move to dismiss the bill for want of prosecution, and it is not necessary to set down the cause again for the purpose. *Mitchel v. Lowndes*, 2 Cox, 15. **PR. DISMISSAL OF BILL; PR. LIBERTY TO AMEND.**

A defendant in an interpleading suit not appearing at the hearing, a decree was made against him with costs. *Hodges v. Smith*, 1 Cox, 357.

A trustee not appearing at the hearing, a decree was made against him, with leave to shew cause against it. He then set down the cause again, and prayed his costs of the suit, on paying the costs of the day, which were granted; the M. R. saying that his having paid the costs of the day placed him *rectum in curia*. *Norris v. Norris*, id. 183.

Defendant made default at the hearing, but it appearing from the opening of the bill, that plaintiff had no equity against him, the court dismissed the bill, but by reason of defendant's making default, the court did not give him costs. *Speidull v. Jerbis*, Dick. 633.

A bill was brought to establish a will and execute the trusts, and upon an issue directed, a verdict was found in favour of the will, the cause coming on upon the equity reserved; it appeared the trusts were all executed; the court thought such a bill should not have been brought to a hearing, and dismissed it with costs. But this was reversed upon a rehearing. *Marlar v. Whittaker*, id. 805.

Motion to transfer exceptions set down before the Chancellor, to the M. R. on suggestion that the cause was set down to be reheard before him; said at the bar, and admitted, that exceptions ought to be set down before the Chancellor, but that on special reasons he might order them to be transferred; but his lordship denied the motion. *Fretwell v. Key*, id. 605.

Application, that a cause may be set down upon an early day, must be by petition. *Roberts v. Hartley*, 2 Bro. C. C. 56.

In equity, you may take exceptions for want of parties at the hearing of the cause or answer, but you cannot plead it in abatement at law after you have gone upon the merits. *Durcent v. Hatton*, 2 Atk. 510.

When supplemental bill is brought for new matter discovered since hearing of cause, but before decree is entered, if defendant is able to shew that there is no new matter discovered, he must take advantage of it, and cannot insist on it merely at the hearing. *Challen v. Mackworth*,

2 Atk. 40. S. C. Barnard, 445. PL. SUPPLEMENTAL BILL IN NATURE OF REVIEW, DEFERENCE TO.

When at hearing of cause objection is taken for want of parties, court should order cause to stand over, with liberty to amend bill by adding parties, plaintiff paying costs. *Green v. Poole*, 5 Bro. P. C. 604. PL. PARTIES.

The cause coming on to be heard, and the bill and answer opened, was referred to arbitrators, but nothing being done on the reference, it came on again. It was insisted and admitted by the registrar, that a decree *ex parte*, on defendant's default, is made on affidavits of service, and reading a piece of the answer. But if a cause is heard, and the bill and answer opened, and then is adjourned, though defendant make default at the next hearing, the decree shall be absolute; for the second hearing is to be considered a continuation of the former when he did appear. *Halsey v. Smyth*, Mos. 186. *Venemore v. Venemore*, Dick. 93.

Defendant by consent to appear *gratis* at the hearing, and pray no day over, making default, decree was pronounced. *Dean v. Abel*, Dick. 287.

Suit is dismissed with costs, plaintiff not appearing at hearing. *Fincham v. Backwood*, Cary, 45.

Decree by default, and a petition for a rehearing: the person in possession of the decree did not attend at the rehearing. Bill dismissed with costs as to the petition. *Wilson v. Dobbs*, Sel. Ca. Ch. 50.

A decree was for plaintiff nisi, who did not appear; the M. R. looked upon it as giving up the judgment, and dismissed the bill with costs. *Snappe v. Furden*, id. 6.

Bill to perpetuate the testimony of a will, if brought to hearing, to be dismissed with costs. *Hull v. Hodgeson*, 2 P. W. 162. PR. BILL TO PERPETUATE.

If a cause comes to a hearing on a bill of discovery, it must be struck out of the paper; but the bill cannot be dismissed not praying relief. *Anon.* Mos. 185. But see *Gurish v. D-noran*, 2 Atk. 163. S. C. Barn. 420. PR. BILL OF DISCOVERY; PR. BILL, DISMISSAL OF.

A cause may be referred for irregularity in the setting down after a decree. *Page v. Page*, Mos. 44. PR. DECREE.

INFORMATION, see CHARITY, IV.

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#### XLVI. INJUNCTION.

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1. Generally and general orders, and form of.
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4. Special.
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16. ——— setting up legal defence and bars.

17. ——— nuisance.

18. ——— payment of money or transfer, or negotiation of security or property.

19. To quiet possession.

20. Against sailing of ship.

21. Against sale.

22. Against trespass.

23. Against waste.

24. In other cases.

#### 1. Generally, and form of, and general orders.

Injunction for breach of a decree. Beame's Orders, 5.

For possession of land after decree. Id. 6. 16.

Of any nature not granted, revived, dissolved, or stayed on petition. Id. 12. 35. 214.

Exception. Id. 215.

To stay suits at law not to be granted on priority of suit only. Id. 13.

Nor on surmise of plaintiff's bill. Id.

But on matter confessed in answer. Id.

Or matter of record. Id.

Or writing plainly appearing. Id.

Or when defendant is in contempt for not answering. Id.

Or that debt is sold, &c. Id.

Divers other cases. Id.

Is dissolved, of course, after answer put in, if no motion made to keep it alive. Id.

For stay of suits when the suit is in chancery. Id.

14. For stay of suits, is dissolved if no prosecution for three terms. Id.

Injunction not after arrest at common law, without bringing money into court. Id. 15.

Exceptions thereto. Id.

For possession not to be granted before decree, unless possession hath continued for three years on same title. Id.

Granted according to circumstances. Id. 16.

Exceptions thereto. Id.

For possession to be presented to court with the orders. Id. 21.

For stay of suits after verdict the like. Id.

Must be enrolled or transcript-filed. Id. 41.

No reference to master whether injunction shall be granted or not. Id. 80.

Except as to a mere point of information. Id. 80.

Granted by a judge, to be signed by him before entered. Id. 106.

To have six clerk's hand before presented to chancellor for his signature. Id. 112.

To stay suits at law to issue of course, without motion, when defendant prays a *dedimus potestatem*. Id. 117.

In an injunction cause, a defendant may apply for setting down cause after publication. Id. 334.

Bank having notice of bill, refused to permit transfer of stock, though no injunction. Ordered, that they should permit transfer on a certain day,

unless plaintiff obtained injunction in meantime. *Ross v. Sherer*, 6 Mad. 1. **BANK TRANSFER.**

Plaintiff having filed bill praying injunction, served defendant with subpoena and notice not to permit transfer. Answers put in, and no injunction moved for. On motion, party was ordered to permit the transfer, unless before a given day plaintiff should move for injunction to restrain him. *S. C.* 5 Mad. 458.

If the order for an injunction on payment of costs of the action, in the usual form of injunctions after decree for administration, it will be improper if the parties entitled to injunction, having to pay costs as a preliminary, might, from the situation of the estate, be enabled to obtain it in time. *Drewry v. Thacker*, 3 Swan: 541. **PR. DECREE FOR ADMINISTRATION.**

A writ of injunction issued after execution, is in the same form with the common writ before execution. *Hawkshaw v. Parkins*, 2 Swan. 529.

In injunction cases, the master's report on the question of impertinence must, at least, without reference to the inquiry whether there is further impertinence, have the same weight as his report on the question of insufficiency. *Raphael v. B. & Co.*, 1 Swan. 232. **REPORT OF IMPERTINENCE ON ANSWER.**

Order made to dismiss the bill for want of prosecution after three terms without replication, of course without notice, and pending an injunction staying execution. *Naylor v. Taylor*, 16 Ves. 127. See *id.* note, 35. *S. P.* *Jackson v. Pownell*, *id.* 204. **PR. MOTION TO DISMISS FOR WANT OF PROSECUTION; PR. NOTICE.**

On a bill for an injunction, the court will not grant a commission to examine a witness in India without a full affidavit of materiality. *Moodley v. Steele*, 2 Anst. 386. **COMMISSION TO EXAMINE ABROAD, AFFIDAVIT IN SUPPORT.**

A conditional consent to proceed at law waives an injunction. *Grant v. Priddell*, 1 Anst. 62. **WAIVER.**

Where a defendant dies pending an injunction against him to restrain proceedings in an ejectment, the heir at law may move; the plaintiff in equity may revive within a week, or the injunction be dissolved. *Hill v. Hoare*, 2 Cox, 50. **HEIR AT LAW; PR. ABATEMENT & REVIVOR.**

Where injunction abates by death of defendant, defendant's representatives should move that plaintiff revive in a reasonable time, or injunction be dissolved. *Stuart v. Ancell*, 1 Cox, 412. *Id.*

Where bill is brought for title and injunction, practice is to dismiss bill, though defendant has answered, and insisted on matter of title. *Welby v. Dk. Rutland*, 2 Bro. P. C. 39. **PR. BILL, DISMISSAL OF; TITLE.**

Origin and cases of injunction. *Goodeson v. Galatine*, Dick. 465.

Probability of right is sufficient to sustain an injunction. *Tonson v. Walker*, 3 Swan, 679.

Injunction with clause, "si ita sit." *Christopherus v. Chomeley*, Cary, 37.

## 2. How and when obtained, and motion for.

Though that part of bill, preliminary to prayer for subpoena, asks for injunction, yet if the prayer of process omits it, it is a sufficient ground for refusing injunction. *Anon.* Urged by Mr. Knight. *K. C.* 6 Nov. 1829, and acquiesced in by V. C. (MSS. S. S.). **PL. PRAYER.**

The general prayer for relief will not extend to an injunction which will not be granted unless expressly

prayed for. *Davill v. Peacock*, Barn. 27. *Savory v. Dyer*, Amb. 70, and see *Jesus Col. v. Bloome*, 3 Atk. 262. *Id.*

Order for injunction for want of answer obtained after master has signed, but before filing of his report of insufficiency of answer: Held irregular. *Wynne v. Jackson*, 2 S. & S. 226. **PR. MASTER'S REPORT.**

Injunction on bill and affidavit, charging breaches of trust, refused to debtor to restrain trustees from acting under a trust deed executed by him for benefit of them and his other creditors, their answer not having been put in or called for. *Isard v. Colbron*, 1 M. & Cl. 181. *S. C.* 13 Price, 327. **DEBTOR & CRED.; TRUSTEE.**

Injunction to restrain setting up outstanding term in bar of ejectment will not be granted on motion. *Barney v. Lockett*, 1 S. & S. 419. *S. P.* *Northey v. Pearce*, *Id.* 420. **PR. MOTION; OUTSTANDING TERM.**

Upon demurrer being overruled, the plaintiff must, out of term time, wait for the next seal day to move for an injunction. *Claughton v. Hadwell*, 6 Mad. 299. **PR. DEMURRER OVERRULED.**

Where bill found scandalous by master, injunction not granted till matter expunged. *Davenport v. Davenport*, 6 Mad. 251. **PR. SCANDAL.**

In an interpleading suit, the injunction may be moved for before the time for answering has expired. *Warrington v. Wheatstone*, 1 Jac. 205. **PR. INTERPLEADER; PR. ANSWER.**

In moving for an injunction after answer, affidavits filed after the answer may be read in support of allegations in the bill, which are not noticed by the answer. *Jefferys v. Smith*, 1 Jac. & W. 298. **AFFIDAVIT.**

Injunction, except to stay waste, can only, out of term, be moved for on seal day, and although motions be continued on following day, it is not a seal day, and no injunction can be then moved for, which party was not prepared to move on seal day. *Rouze v. Jerrold*, 5 Mad. 45.

Under the circumstances, the vice chancellor appointed a day during petitions for showing cause against dissolving an injunction. *Felding v. Capes*, 4 Mad. 293.

On motion for injunction to stay proceedings at law, answer is evidence for defendant, as to all facts to which other testimony could be received. *Bott v. Arch*, 4 Mad. 255. **PR. EVIDENCE; ANSWER.**

An action having been commenced in 1816, the plaintiff in July 1817, obtained a verdict; and a new trial having been ordered on 21st Jan. 1818, on the 9th Feb. the defendant at law filed a bill for the production of documents, which he had given notice to the plaintiff to produce on the trial, but which were not then produced; the commission day at the assizes being the 7th March, a motion on the 3d March, to extend the common injunction to stay trial, refused. *Fild v. Beaumont*, 1 Swan, 204. **LACHES.**

The further answer of a defendant, being sworn at the house of a master, and filed in the Six Clerks' Office, on the evening of the day on which the master had reported a former answer insufficient, an order obtained at the sitting of the court on the next morning for an injunction, is irregular; *secus*, if the answer had not been filed on the day on which it was sworn. *Duckworth v. Boulcott*, 3 Swan. 266. **PR. ANSWER, FILING.**

A plaintiff is entitled to the common injunction, immediately on the attachment issued. *Bruce v. Welch*, 2 Mer. 474. **PR. ATTACHMENT.**

In charity suits the court is not bound by strict rules of practice in granting an injunction to stay proceedings at law. *Anderson v. Pearson*, 3 Mer. 396. **CHARITY.**

Jurisdiction by injunction, where the effect will be to stop a great trading concern, exercised with caution; not *ex parte*, but on notice, with the opportunity of opposing an affidavit. *Crowder v. Tinkler*, 19 Ves. 618.

Application for injunction and appointment of receiver should be made the subject of two successive motions. *Lawson v. Morgan*, 1 Pri. 303. PR. MOTION; PR. APPOINTMENT OF RECEIVER.

Service of subpoena, issued on an injunction bill, though effected at eleven o'clock on night of return day, and at so great a distance from town, as to render it impracticable for defendant to appear in time to prevent an injunction for want of appearance, is sufficient. *Nightingale v. Merryweather*, 1 Pri. 287. PR. SUBPOENA. SERVICE OF.

Court will discharge order for injunction obtained on motion of course, if it ought to have been moved for on notice. *Reed v. Bowyer*, 1 Pri. 101. PR. MOTION OF COURSE.

Motion to dismiss the bill for want of prosecution since the answer, not prevented by an injunction till answer. Notice not proper, and the production of the six clerk's certificate to the registrar sufficient without producing it in court. *Day v. Snee*, 3 V. & B. 178. PR. MOTION TO DISMISS.

Where exceptions have been filed *nunc pro tunc*, court will not grant injunction on opening a material exception, unless the plaintiff, on obtaining his order, gave a four-day rule for arguing the exceptions. *Edwards v. Hogarth*, 1 Pri. 147. PR. EXCEPTIONS *NUNC PRO TUNC*.

Pending exceptions to answer, a further answer cannot be filed in the exchequer, until those exceptions are argued and disposed of; tender of such further answer is a submission to exceptions, and injunction may be therefore moved for as of course. *Edwards v. Johnson*, 1 Pri. 203. PR. EXCEPTIONS TO ANSWER; PR. FURTHER ANSWER.

After the dismissal of a bill for the specific execution of an agreement, the plaintiff being unable to make a good title, an injunction to restrain him from proceeding on the agreement at law, was granted on motion, the defendant undertaking forthwith to file a bill. *McNamara v. Arthur*, 2 Ball & B. 349. MOTION; SPEC. PERF.; DISMISSAL OF BILL.

Injunction to stay proceedings at law, dissolved for irregularity, plaintiff having obtained the injunction as of course, for want of answer of two defendants who resided abroad, without notice to the other defendant, who was sole plaintiff at law, and had put in his answer in time. *Cooper v. Flindt*, Wightw. 409. PR. INJUNC. NOTICE OF MOTION FOR.

Injunction on motion of course to deliver possession of land decreed; as a ground for the writ of assistance, the only mode of obtaining immediate possession: a court of equity properly acting only in *personam*. *Huguenin v. Buseley*, 15 Ves. 180. *Lewes v. Morgan*, 5 Pri. 468. WRIT OF ASSISTANCE.

Injunction pending a demurrer, irregular. *Cousins v. Smith*, 13 Ves. 164. PL. DEMURRER.

Injunction granted in vacation. *Temple v. Bk. of England*, 6 Ves. 771. VACATION.

A, being sued at law on policy of insurance which he had made as agent for B, on motion for injunction, on affidavit of B's residing abroad, A must have notice. *Beauchroft v. Gordon*, 3 Anst. 686. NOTICE.

On a bill for a discovery and injunction, the defendant (plaintiff at law,) admitted himself to be a mere agent for the other defendants, and ignorant of the transaction; the other defendants lived abroad; an injunction was moved for as of course, but there appearing a danger of losing other material evidence by the delay, it was refused. *Vaughan v. Moore*, 2 Anst. 502. EVIDENCE.

Motion granted for an injunction for one partner

against another, the defendant being in contempt, and served personally, and not appearing. *Reed v. Bowers*, 4 Bro. C. C. 441. PARTNER.

Where the defendant is abroad, a motion for injunction to stay proceedings at law must be on special ground. *Revet v. Brahan*, 2 Bro. C. C. 640.

After a decree for a specific performance of an agreement for a lease, and the lease had been executed in pursuance of such decree, the plaintiff brought an action at law to recover from defendant damages for the delay in the performance of that agreement. Although the defendant would have been clearly entitled to an injunction in a new suit, yet the decree having been wholly executed, the court cannot make such an order in the original cause. *Ford v. Compton*, 1 Cox, 296. PR. DECREE.

The bill being referred for impertinence, the plaintiff cannot move (as of course) for an injunction for want of an answer, but is in the same situation as if the time for answering were not out, until the master has reported on the reference. *Neale v. Wadson*, 1 Cox, 104. S. C. 1 Bro. C. C. 574. PR. REFERENCE FOR IMPERTINENCE.

Where a suit was abated, and defendant would not appear to revive, an injunction was granted, notwithstanding the cause was not revived. *Dk. Hamilton v. El. Macclesfield*, 1 Eq. Ab. 285. PR. APPEARANCE; PR. ABATEMENT & REVIVOR.

Injunction granted of course, demurrer to bill being overruled. *Rushleigh v. Buller*, Dick. 153.

Where injunction was issued irregularly, held defendant had not waived objection to the irregularity, by asking for time to answer. *Travers v. Stafford*, Ambl. 105. S. C. 12 Ves. 19. PR. IRREGULARITY, WAIVER OF; PR. TIME TO ANSWER; WAIVER.

Proper injunction cannot be granted, unless expressly prayed by the bill. *Savory v. Dyer*, Ambl. 70. PL. PRAYER.

The court will only interfere in cases of necessity before answer. *Close v. Hemlyn*, Ridgw. 258.

A plea must first be removed out of the way, before a plaintiff can have an injunction to stay proceedings at law. *Anon.* 2 Atk. 113.

After a plea put in, there can be no motion for an injunction till the plea is argued. *Humphreys v. Humphreys*, 3 P. W. 396. PL. PLEA.

### 3. Obtained on amended bill.

A plaintiff who had obtained the common injunction, as of course, procured an order to amend, and then obtained an injunction upon the amended bill, as of course: held, that a special application ought to have been made. *Horne v. Watson*, 2 Sim. 86.

The injunction is not applied for on original bill; yet if bill is amended, injunction will be granted, as of course, on defendant taking time to answer amended bill. *Statham v. Hughes*, 2 S. & S. 382. TIME TO ANSWER.

Injunction, refused on merits in answer, is not of course, on filing amended bill. *Bliss v. Boscawen*, 2 V. & B. 101.

Injunction, of course, for want of answer to an amended bill; an answer having been put in to the original bill, and no injunction obtained upon that. *Nelthorpe v. Law*, 13 Ves. 323. *See Gade v. Worral*, 2 Anst. 553. PR. ANSWER.

After an injunction dissolved on the merits, the plaintiff on an amended bill cannot have another injunction without a special affidavit of merits, though the defendant be in contempt for not answering. *Lingham v. Toule*, 1 Anst. 188.

Injunction granted to amended bill on special motion without affidavit, after injunction dissolved

on the original bill. *Edwards v. Jenkins*, 3 Bro. C. C. 425.

When an injunction is dissolved on merits, and plaintiff amends his bill, or brings a supplemental bill for the same matter, he cannot, as of course move for an injunction till answer. *Travers v. Stafford*, Amb. 104. S. C. 2 Ves. 19.

Amendments made to bill after injunction, cannot be used in support of injunction. *Veray. Glynn*, Dick. 441. Therefore if injunction is obtained on original bill, and defendant answers, and plaintiff amends, proceedings to get rid of injunction are on original bill and answer to it. *Id. ib.*

#### 4. Special.

The plaintiff in bill of interpleader, may move at once for a special injunction, on payment of money into court, without first obtaining the common injunction. *Vicary v. Widger*, 1 Sim. 15. PR. INTERPLEADER.

Special injunction granted to stay proceedings, in an action in the C. P. at Lancaster. *Hine v. Fiddes*, 2 S. & S. 370. COURTS, INFERIOR.

Special injunction to restrain proceedings in ejectment between two defendants, reus'd, where the plaintiff's landlord might have made himself defendant at law. *Moses v. Lewis*, 1 Jac. 302. EJECTMENT; LANDLORD & TENANT.

Court will not restrain party from taking out execution on warrant of attorney, on affidavit of merits, and of irreparable mischief, by special injunction before answer. *Naylor v. Christie*, 8 Price, 534. EXECUTION; WARRANT OF ATTORNEY.

Injunction to restrain defendant, who was insolvent, from receiving testator's effects generally, and from prosecuting actions at law for that purpose, granted under the circumstances before answer. *Mansfield v. Shaw*, 3 Mad. 100. INSOLVENCY; EXECUTOR.

Motion refused for injunction to stay proceedings at law, on filing bill of interpleader and affidavit. *Craggon v. Symons*, 3 Mad. 130. PR. INTERPLEADER.

Although in cases in the nature of waste, an injunction will sometimes be granted *ex parte*, even after appearance; yet, if in such a case an injunction has been obtained for default of appearance, and it turns out that an appearance had in fact been entered at the time when the injunction was moved for, the order will be discharged. *Harrison v. Cockerell*, 3 Mer. 1.

Motion for a special injunction to restrain defendant (plaintiff at law) from suing out execution upon a judgment obtained by him in his action, previous to the common injunction being obtained, refused, as contrary to practice, the court only granting such special injunction in cases where the plaintiff has had no opportunity of obtaining the common injunction. *Franklyn v. Thomas*, 3 Mer. 225.

Court will grant injunction to stay proceedings before answer, even where defendant, having obtained time for return of commission sent abroad to take answer, is not in contempt for not putting it in; if it is shown, that in consequence of the necessary immediate delay, the action at law would be tried before the expiration of the time allowed for its return. *Parnley v. Night*, 2 Price, 144.

Special injunction to restrain distress will be granted before answer, if defendant is in contempt for not answering. *Heming v. Emus*, 1 Price, 386. DISTRESS FOR RENT, &c.; PR. CONTEMPT.

It is sufficient for purpose of obtaining injunction to restrain proceedings at law, that bill and affidavit state that an unsettled account subsists, and that on such account, plaintiff at law would be

debted to plaintiff in equity, though bill shows it might be set off at law. *Watkinson v. Pücher*, 2 Price, 46. EXCHANGE; ACCOUNT, SET OFF.

Injunction against proceeding at law only on some default, either of appearance or answer. *James v. Downes*, 18 Ves. 522.

Injunction before answer to prevent irreparable mischief, defendant having previously established his right at law. *Chalk v. Wyatt*, 3 Mer. 688.

Service of subpoena necessary in the case of special injunction, but the practice having been unsettled, the defendant was put to dissolve upon the merits, and the plaintiff permitted to shew cause by affidavit. *Att. Gen. v. Nichol*, 16 Ves. 338. PR. SERVICE OF SUBPOENA.

Undertaking upon sale of the goodwill of a trade not to carry on the same business, and to use the best endeavour to assist the purchaser, &c. The remedy for a breach is an action or issue *quantum damnificatus*; and an information against proceeding under a judgment for the consideration, upon affidavits before answer, was refused. *Shackle v. Baker*, 14 Ves. 468. GOODWILL; COVENANT, BREACH OF.

Motion under special circumstances upon affidavit before answer, to restrain proceeding under a judgment, refused. *Lane v. Williams*, 6 Ves. 790. JUDGMENT AT LAW.

Injunction in pressing cases upon petition and affidavit. In this instance, converting old houses in London to a purpose that made them dangerous to the public, the Ld. Ch. granted the injunction; but said the lord mayor, by his general jurisdiction, could apply a much more proper and effectual remedy. *Mayor, &c of London v. Bolt*, 5 Ves. 129. NUISANCE; PR. PETITION.

The court will grant an injunction to prevent the negotiating a note obtained at play, upon affidavit, before service of subpoena. *\_\_\_\_\_ v. Blackwood*, 3 Anst. 851. GAMING; PROMISSORY NOTE.

Court will not interfere by injunction, before answer, to stay a breach of contract, where no trespass is committed. *Longman v. Calliford*, 3 Anst. 645. CONTRACT, BREACH OF.

Injunction not granted to permit transfer of stock until defendants have appeared, or in contempt, &c., upon notice. *Doolittle v. Walton*, Dick. 442.

Injunction not before answer in a special case, on a particular right; otherwise in a plain case of waste or nuisance. *Att. Gen. v. Doughy*, 2 Ves. 453.

After appearance, no special injunction (such as the navigating of a ship) without notice. *Marasco v. Bolton*, 2 Ves. 112.

Injunction against stopping lights until trial of the right, which was directed on the motion; court will never, on motion, make an adverse order to pull down what has been done. *Ryder v. Bentham*, 2 Ves. 543. TITLE; ANCIENT LIGHTS.

Injunction before answer to restrain other ferry boats, decreed; granted to stay waste, or where the right appears of record. *Anon.* 1 Ves. 476.

Injunction, on filing of bill, to stay induction of defendant to living. *Potter v. Chapman*, Dick. 146. S. C. Amb. 98.

An injunction will never be granted upon a bill and affidavit, to stay any proceedings at law till the defendant prays a *dedimus*, or is in contempt: an injunction upon a *dedimus* must never be granted concerning the possession, but only to stay proceedings at law. *Anon.* 2 Freem. 6. PR. DEDIMUS.

The court will grant an injunction before answer for a plain apparent nuisance, on a certificate, affidavit, and petition, shewing that the defendant, by his act in court, or otherwise, has committed a nuisance, the court

expects the party to shew his right, and how he is particularly aggrieved, before the writ can be granted. *Hind's Ch. Prac.* 594. NUISANCE.

### 5. Perpetual.

After foreclosure and sale, action by the mortgagee for the balance opens the foreclosure; therefore, the mortgagee should have time to get back the estate and tender a re-conveyance, and the mortgagor to redeem: but the mortgagee having taken possession a considerable time ago, and the balance being inconsiderable, a perpetual injunction was decreed. *Perry v. Barker*, 13 Ves. 198. MORTGAGE, FORECLOSURE OF, HOW OPENED.

A right is not considered to be determined so as to be a ground for a perpetual injunction by any one trial at law, unless upon an issue sent out of this court for the purpose. *Robinson v. Ld. Byron*, 2 Cox, 4. ISSUE AT LAW.

Perpetual injunction granted against a bond for the purchase of an estate upon the public policy of the law, although the office was not within the statute. *Hannington v. Du Chatel*, 1 Bro. C. C. 124. BOND; PUBLIC POLICY.

Perpetual injunction granted against devisee, where testator had had injunction decreed against him in suit. *Lowe v. Jolliffe*, Dick. 390.

Perpetual injunction granted nisi against disputing a will in ecclesiastical court, after decree confirming it, and that decree affirmed in lords. *Buckingham v. Buckingham*, 2 Eq. Ab. 526.

Perpetual injunction granted to stay proceedings on bill of exchange void and vacated by foreign competent jurisdiction. *Burrows v. Jemino*, 2 Eq. Ab. 525. FOREIGN LAW.

Where there had been two verdicts in favour of plaintiff on trials of ejectments, a perpetual injunction was granted. *Leighton v. Leighton*, 1 Stra. 404.

After two trials at bar by direction of the court of chancery, and both verdicts the same way, equity will grant a perpetual injunction and decree upon the right found by the verdicts. S. C. 4 Bro. P. C. 378. VEXATION.

In case of a trust estate devised to be sold, or devised to S, if the will be disputed, after two trials in favour of the will, equity will grant a perpetual injunction. S. C. 1 P. W. 671. WILL.

A made an absolute conveyance of lands to B and his heirs, in consideration of 1500*l.*, which was at that time the full value; but, on the next day, B executed a defeazance, declaring, that if A or his heirs should, within sixteen years, pay B the 1500*l.*, the conveyance should be void. B entered and enjoyed the lands, and, about three years afterwards, made a settlement thereof upon his marriage, and to which settlement A was privy, but took no notice of the defeazance, or ever attempted to refute the general opinion that B was the sole and absolute owner of the lands. After B's death, A set up the defeazance, and filed a bill to redeem, to which the son and heir of B pleaded the purchase deeds and marriage settlement of his father. Held, that the intent of the conveyance being to enable B to obtain a marriage settlement and a considerable portion, such intention was fraudulent, and therefore a perpetual injunction was awarded against A, to stop all further proceedings under the defeazance. *Webber v. Farmer*, 4 Bro. P. C. 170. FRAUD ON MARRIAGE.

A and B jointly confess a judgment to C for 400*l.*, and afterwards file a bill against him to set it aside as unfairly obtained, and for an injunction: in the mean time, C having got an order for time, the injunction issued of course; but, on putting in his an-

swer, he moved to dissolve the injunction, and being told it was dissolved, he took B in execution upon the judgment; but being afterwards informed that the plaintiff, by filing exceptions to his answer, had continued the injunction, he immediately discharged B out of custody. The judgment being joint, it was insisted that the discharge of one from the execution operated at law as a discharge of both; and therefore A and B brought an *audita querela* in B. R. to be relieved against the judgment, upon the ground of such discharge; but, on a bill filed by C, the court decreed him the whole 400*l.*, with his costs both at law and in equity, and ordered a perpetual injunction to stay all proceedings on the *audita querela*. *Clerke v. Moore*, 4 Bro. P. C. 723. JUDGMENT; DEBTOR & CREDITOR, DISCHARGE; PR. INJUNC.; PR. TIME TO ANSWER.

The court of chancery will award a perpetual injunction to restrain waste, by ploughing, burning, breaking, or sowing of down land. *Worsley v. Stuart*, 4 Bro. P. C. 377. HUSBANDRY.

After five several trials at bar, and the verdicts all the same way, the court of chancery will grant a perpetual injunction to restrain all further proceedings at law by the litigant parties, or any claiming under them upon the same title. *El. Bath v. Sherwin*, 4 Bro. P. C. 373. VEXATION.

The court of chancery may grant a perpetual injunction after five trials at bar on the same point, and verdicts the same way. S. C. 10 Mod. 1. PL. BILL OF PEACE.

Chancery will not grant a perpetual injunction, though the party has had five verdicts in ejectment at law, unless there be some ingredient in the cause which gives the court jurisdiction, as trust, fraud, accident, &c. S. C. Prec. Chan. 261. S. C. Gilb. Eq. Rep. 2. EJECTMENT.

Against a writ of *ayel*, after forty-five years' possession, a perpetual injunction was granted. *Knight v. Adamson*, 2 Freem 106.

A perpetual injunction awarded against a bond of resignation, the patron making an ill use of it. *Durston v. Sandys*, 2 Vern. 411. BOND OF RESIGNATION.

A decree ought not to be made to bind the inheritance where there has been but one trial at law. *Fitton v. Macclesfield*, 1 Vern. 293.

Perpetual injunction to restrain proceedings against a Dane, for the seizure of property of English subjects in Iceland, the seizure being sanctioned by the Danish authorities. *Blad v. Bamfield*, 3 Swan. 604. FOREIGN LAWS.

Where party has been in possession fifty years, and that title is confirmed in chancery, other party is prohibited by injunction from disputing it again in court of law. *Clench v. Tomley*, Cary, 23.

### 6. Extent and effect of.

The injunction in Exchequer restrains all proceedings unless issue is or can be joined, which is unless the record be in such a state that by an act of the plaintiff issue can be joined. *Rolfe v. Burks*, 1 Y. & J. 404.

The injunction on an interpleading bill stays all proceedings. *Warington v. Wheatstone*, 1 Jac. 205. PR. INTERPLEADER.

The common injunction to stay proceedings at law does not extend to distress for rent. *Hughes v. King*, 1 Jac. & W. 392. DISTRESS.

Commission to examine abroad so far in nature of proceedings at law; that application for commission is prevented by injunction. *Novais v. Derrien*, 4 Mad. 327. COMMISSION TO EXAMINE ABROAD.

An interlocutory order for an injunction, cannot be



considered in argument as affecting the ultimate decision of a cause. *Drew v. Harman*, 5 Price, 319.

Injunction when sealed at the next seal operates from the order, not from the sealing. *Rattray v. Bishop*, 3 Mad. 220.

Seemle, that injunction restraining administrator from transferring intestate's stock into his own name, will, by equitable construction, operate to prevent his parting with any of intestate's outstanding estate, which has previously come to his hands. *Scott v. Becher*, 4 Price, 346. ADMINISTRATOR.

Injunction against proceedings at law, commenced before the suit in equity, stays execution only; but extended to stay trial on an affidavit that the discovery expected will assist the plaintiff. *Bishton v. Birch*, 2 Ves. & B. 40.

Effect of an injunction in the court of chancery before action commenced, staying all proceedings at law after action commenced, permitting the defendant to call for a plea, and proceed to judgment at law, if in a condition to do so, or if not, to do only what is necessary to enable him to sue, restraining execution. Therefore, after bail excepted to, ruling the sheriff to bring in the body, is a breach of the injunction. *Bullen v. Ovey*, 16 Ves. 141. INJUNC., BREACH OF.

Injunction stays execution only; not, as in the court of exchequer, trial also; but may afterwards be extended to stay trial upon a slight affidavit. *Nettles v. Law*, 13 Ves. 323.

Injunction in chancery stays all proceedings if before declaration; if after, it stays execution only. *Garlick v. Pearson*, 10 Ves. 452.

Injunction before action commenced, prevents the commencement; after action, stays execution only, in chancery, differing from the exchequer, without a distinct application to stay trial. *Earnshaw v. Thornhill*, 18 Ves. 488.

Injunction is not binding on a person not party in the cause. *Iveson v. Harris*, 7 Ves. 256.

An injunction against proceeding at law, extends to prevent a suit against the sheriffs, for not paying over money levied in the original suit, before the injunction issued. *Bolt v. Stanway*, 2 Anst. 556. SHERIFF.

On an injunction obtained, the court will not discharge the party out of custody, if taken on legal process. *Willis v. Daniel*, 1 Anst. 36. PR. DISCHARGE FROM CUSTODY.

Foreign attachment stayed by injunction. *Mildred v. Neate*, Dick. 279.

Common injunction does not stay proceedings in spiritual or admiralty court; but must be moved specially. *Macnamara v. Macguire*, id. 22.

In no case does the court grant injunction of course till hearing. *Petter v. Chapman*, Ambl. 99. S. C. Dick. 146.

Where bail is put in above, an injunction to stay proceedings against the principal, extends to proceedings against the bail; where bail is only put in below, such an injunction extends to proceedings on the bail bond. *Stone v. Affin*, Ambl. 32. BAIL.

An injunction does not deny, but admits the jurisdiction of the court of common law, and the ground on which it issues is, that they are making use of their jurisdiction contrary to equity. So where a trustee is suing in the ecclesiastical court for payment of *cestui-que trust's* legacy into his own hands, or in the case of a portion where the husband is suing for it there before settlement made, the court of equity will, upon the same grounds, restrain them from proceeding. *Hill v. Turner*, 1 Atk. 516.

Though the court of equity cannot, on petition, prohibit the ecclesiastical court, yet they will restrain a woman who has married a ward of court from proceeding on an excommunication either against the infant or his guardian. *Id.*, 517. WARD OF COURT.

In an injunction, the words *pro defectu placiti* are intended of an issuable plea; and the words *judicium intrare* are intended of a final judgment; therefore, if the defendant be in execution, and pleads *plene administravit*, and the plaintiff at law enters judgment *de bonis testatoris cum ucciderint*, he may proceed to a *scire facias* to enquire of assets, and enter judgment thereupon; for the meaning of the injunction is, that the defendant may proceed so far as that nothing shall remain but to take out execution after the injunction is dissolved. *Morrice v. Hankey*, 3 P. W. 146. see S. C. 2 Eq. Ab. 528.

Injunction before declaration stays action altogether; if declaration delivered, it stays only execution. *Anon.* 2 Eq. Ab. 529.

Injunction upon an attachment or *dedimus*, &c. does not stay proceedings in the spiritual court without special order. *Anon.* 1 P. W. 301. ECCLESIASTICAL COURT.

A, after judgment in ejectment and a writ of possession taken out against him, brings a bill, and has an injunction on a *dedimus*; this injunction was allowed to extend to the under-sheriff, who had refused to execute the writ, and was in contempt to an attachment in the king's bench before the bill filed. *— v. Enerton*, 1 Vern. 25.

It is said in *Tilley v. Bridge*, 2 Vern. 519., that an injunction does not prevent an entry; but see per Master of Rolls in *Curtis v. Curtis*, 2 Bro. C. C. 631. ENTRY.

### 7. Service of.

On injunction to stay proceedings where defendant resides abroad, motion that service of subpoena on his attorney at law may be deemed good, must be accompanied by personal affidavit of plaintiff in equity as to merits, and not of his solicitor, unless he has personal knowledge of merits. *Kenworthy v. Accmor*, 3 Mad. 550. PR. SERVICE OF SUBPOENA SUBSTITUTED; AFFIDAVIT OF MERITS.

Injunction upon affidavit of an intended marriage with a male infant aged eighteen, restraining communication with him until further order; and that service of the order at the house which appeared to be the last place of abode, though apparently shut up, should be good service. *Pearce v. Crutchfield*, 14 Ves. 206. WARD OF COURT, MARRIAGE.

Plaintiff, who has obtained an order for injunction, is not entitled in point of practice to serve it with the writ of execution before it be passed and entered, although usual to do so; and if he should not so serve it, and there should be an error in drawing up the order, to the prejudice of the defendant, it will be considered contempt, and so treated by court on application to punish the plaintiff for so doing; nor will plaintiff be suffered to avail himself of the excuse of its being a mistake, and all the costs incurred by defendant, arising from such an irregularity, will be ordered to be paid by plaintiff. *Scott v. Becher*, 4 Price, 346.

Defendant being in court when order for injunction is made, is bound by it from that time, and not from formal service thereof only. *Id. ib.* PR. INJUNCTION; NOTICE.

And defendant committed for breach after notice of injunction, though not served. *Vansandau v. Rose*, 2 J. & W. 264.

Exception to the rule requiring personal service of an order of injunction, where the party was present when the order was made, established by *Ld. Hardwick*; farther extended since by notice by information. *— v. —*, 1 P. W. 350.

Service of injunction at defendant's house, good. *— v. —*, 1 P. W. 350.

Where plaintiff obtained injunction for want of an

was, but suffered defendant in equity to go to trial, and obtain verdict, and did not serve injunction till defendant in equity sued out *fi. fa.* on judgment, and dissolved the injunction. *Anon.* 2 Eq. Ab. 625. LACHES.

Injunction served, and copy delivered; the party serving is not bound to deliver the injunction itself to be composed. *Woodward v. King*, 2 C. C. 203.

Injunction for want of an answer dissolved because not served for several months after answer came in. *Morice v. Bank of England*, Kel. 43.

### 8. Breach of, what constitutes, and commitment for.

Plaintiff obtained the common injunction after four proclamations had been made under an exigent issued in an action commenced against him by defendant: Held, that it was a breach of the injunction for defendant to sue out a writ to compel the sheriff to make a fifth proclamation. *Marsack v. Baillie*, 2 S. & S. 577.

Giving notice of trial is a breach of injunction to stay trial. *Birch v. Brancker*, 2 S. & S. 186. NOTICE OF TRIAL.

Taking money out of court of law, paid in there by rule of court, is breach of common injunction against proceedings at law. A motion for that purpose was refused. *Parke v. El. Shrewsbury*, 1 M'Clel. 103. S. C. 13 Price, 289. PR. PAYMENT OUT OF COURT.

Personal service of a notice of motion to commit for breach of an injunction, is necessary; and cannot be dispensed with, though counsel undertake to appear for the party. *Ellerton v. Thirsk*, 1 Jac. & W. 376. PR. NOTICE OF MOTION, SERVICE OF.

Defendant committed for breach of an injunction after notice of its having been obtained, although the order for the injunction had not been served. *Vansandau v. Rose*, 2 Jac. & W. 264. PR. NOTICE; PR. CONTEMPT.

*Quere*, whether publication of decree of court in the provincial newspaper, is sufficient notice of its contents to an agent in that neighbourhood, so as to commit him for breach of injunction? *Laves v. Morgan*, 5 Price, 618. NOTICE; AGENT.

Where defendant had been arrested on attachment for contempt in not appearing to subpoena *ad resp.*, and he has given a bail bond to sheriff, and there is an injunction restraining further proceedings in the action, plaintiff should apply for leave to be permitted to sue on the bail bond, notwithstanding the injunction, where defendant has not complied with condition, by appearing. *Birdwood v. Hart*, 6 Price, 32.

Where an injunction is obtained, even after execution executed, it is a breach of the injunction to call on the sheriff to pay over the money; but if the sheriff had voluntarily paid the money, it seems that would be no breach of the injunction. *Sed quere?* *Franklyn v. Thomas*, 3 Mer. 234.

If an injunction is obtained on bill filed after execution executed, the goods not yet being out of the hands of the sheriff, and the sheriff proceeds to sell without process, he will be ordered to pay the money into court. *Id. ib.*

Where, previous to injunction to stay proceedings after verdict in ejectment, plaintiff at law had taxed costs at law, and obtained writ of possession, it is a breach of injunction to sue out attachment for costs; but injunction being improperly obtained, Ld. Ch. would not commit for contempt. *Partington v. Booth*, 3 Mer. 148. *Woodward v. King*, 2 Ch. Ca. 203. PR. CONTEMPT.

Showing cause against a rule nisi for a new trial, is not a breach of an injunction. *Whitman v. Barton*, 3 Price, 241.

Delivery of declaration is a breach of the common injunction to stay proceedings at law, without plaintiff's acquiescence. *Mills v. Collins*, 1 Mer. 100.

Solicitor may proceed to tax his costs after a verdict at law, with a view to commence an action in his own name for the amount, after a final settlement between the parties by arbitration without his concurrence, notwithstanding an injunction to stay execution. *Brooks v. Bourne*, 1 Price, 72. PR. TAXATION OF COSTS.

Breach of injunction after notice of the order, without personal service of the injunction or order. *Kimpton v. Eve*, 2 V. & B. 349. NOTICE OF ORDER.

Injunction obtained by one co-obligor, the other not being made party, is no breach of injunction to sue out execution on a joint judgment, with notice to sheriff of injunction and directions not to take plaintiff in equity. *Chaplin v. Cooper*, 1 V. & B. 16.

After injunction obtained by principal, proceeding against bail is a breach. *Id.* 19. BARR.

One, not party to injunction, exercising an antecedent right, cannot commit a breach of it. *Booth v. Stanley*, 2 Eq. Ab. 528.

Contempt by breach of injunction by defendant present in court during the motion, though retiring before the order pronounced; but motion to commit after a considerable lapse of time, and the order not drawn up, refused with costs. *James v. Downes*, 18 Ves. 522. LACHES.

Breach of injunction by proceeding against bail. — *v. Handcock*, 17 Ves. 385.

Effect of an injunction in the court of chancery before action commenced, staying all proceedings at law after action commenced, permitting the defendant to call for a plea and proceed to judgment at law, if in a condition to do so, or if not, to do only what is necessary to enable him to sue, restraining execution. Therefore, after bail excepted to, ruling the sheriff to bring in the body, is a breach of the injunction. *Bullen v. Ovey*, 16 Ves. 141. PR. INJUNCTION, EFFECT OF.

Contempt by breach of injunction by persons who were present in court during the motion, though absent when the order was pronounced. *Hearn v. Tennant*, 14 Ves. 136. CONTEMPT.

Decree against lessee of alum works to prevent a breach of covenant, to leave stock of a certain amount at the expiration of lease. *Ward v. Dk. Buckingham*, cited 10 Ves. 161. CHATTELS SPEC.

Upon breach of injunction to restrain an act, the proper course is personal service of notice of motion that defendant shall stand committed; it is not the practice to move that he show cause why he shall not stand committed. *Angerstein v. Hunt*, 6 Ves. 488.

Where it is to do anything, the course is to move that he shall do it on a particular day, or stand committed. *Id. ib.*

An injunction for want of an answer had been obtained to restrain the defendant from all proceedings at law against the plaintiff, on award of payment of money. The award having been made a rule of the court of K. B., the defendant applied to that court for an attachment for non-performance of the awards, and obtained a rule to shew cause; this is not of itself any breach of the injunction. *Franco v. Franco*, 2 Cox, 420. ARBIT. & AWARD.

Where a party is taken after he has obtained an injunction, but before notice given of it, the detaining him after notice is no contempt. *Willis v. Daniel*, 1 Anst. 36. PR. CONTEMPT; ARREST.

Attaching and receiving money levied by sheriff, though levied before bill was filed, is breach of injunction. *Aze v. Clarke*, Dick. 549.

It does not excuse a party proceeding at law, after injunction, that it was not sealed, or where a party, or his solicitor, have been present on an order for an injunction, they will be bound, although it be not sealed. *Anon.* 3 Atk. 567. NOTICE.

Party having knowledge of injunctions being granted, and proceeding at law, he is guilty of contempt, though not sealed. *Powell v. Follett*, Dick. 116.

A and B jointly confess a judgment to C for 400*l.*, and afterwards file a bill against him to set it aside as unfairly obtained, and for an injunction; in the mean time, C having got an order for time, the injunction issued of course; but on putting in his answer, he moved to dissolve the injunction, and being told it was dissolved, he took it in execution upon the judgment, but being afterwards informed, that the plaintiff by filing exceptions to his answer had continued the injunction, he immediately discharged B out of custody. The judgment being joint, it was insisted, that the discharge of one from the execution operated at law as a discharge of both; and therefore A and B brought an *audita querela* in B. R. to be relieved against the judgment upon the ground of such discharge; but on a bill filed by C, the court decreed him the whole 400*l.* with his costs, both at law and in equity, and ordered a perpetual injunction to stay all proceedings on the *audita querela*. *Clarke v. Moore*, 4 Bro. P. C. 723. JUDGMENT; DRYTON & CRD. DISCHARGE; PR. INJUNC. PERPETUAL; PR. TIME TO ANSWER.

Though an injunction be irregularly obtained it ought to be obeyed, or the party is in contempt. *Woodward v. King*, 2 C. C. 203., but not committed. See *Partington v. Booth*, 3 Mer. 149. PR. CONTEMPT.

#### 9. Reviving, continuing, and extending.

It is not necessary for a party who seeks to continue an injunction to the hearing, to shew an indefeasible right to the decree prayed by bill: where, therefore, assignees of a bankrupt sought a specific performance of an agreement for a lease against a party who was herself a lessee, and restrained from assigning without the consent of the lessor in writing thereto obtained, the court continued the injunction to restrain proceedings at law, there being a probability of obtaining the consent of the lessor to the assignment. *Powell v. Lloyd*, 1 Y. & J. 427.

Doubts in matters of law are always sufficient ground for continuing an injunction once granted. *Maxwell v. Ward*, 11 Price, 3.

The common injunction having been dissolved upon the coming in of the answer, and the bill being subsequently amended, the injunction was revived upon special application, supported by affidavit of the facts stated by way of amendment, the defendant being in default (though not in contempt) for not answering the amended bill. *Vipan v. Mortlock*, 2 Mer. 476.

Injunction not revived pending a rehearing. Order, allowing an exception to report that answer was insufficient. *Scott v. Mackintosh*, 1 V. & B. 503. PR. REHEARING; PR. ANSWER; EXCEPTIONS.

An injunction, though not to be continued with a view to specific performance of an agreement to grant a lease, if under a clause for re-entry, the lease, when granted, would be at an end by the tenant's acts, was maintained upon undertaking to give possession, when required by the court, and paying the rent due, by waiver of the forfeiture, if incurred, viz. distraining for subsequent rent. *Gourlay v. Dk. Somerset*, 1 V. & B. 68. SPEC. PERF.; LEASE; FORFEITURE.

Whether, even without a right of re-entry, the court, seeing a gross case of waste and breach of covenant, not to be indemnified by damages, would leave the tenant to law, refusing relief; *quære*? *Id.* ib. 73.

Injunction dissolved on the answer, not revived of course, without special motion on amendments verified by affidavit. *James v. Downes*, 14 Ves. 522.

That an indictment for perjury upon the answer has been found by the grand jury, is not a ground for reviving an injunction. *Clapham v. White*, 11 Ves. 35. PERJURY.

Upon the answer to a bill by the Universities, the king's printer not joining, but being made defendant, an injunction restraining the sale, in England, of bibles, prayer-books, &c., printed by the king's printer in Scotland, was continued to the hearing. *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 689. COPYRIGHT, INFRINGEMENT OF.

Bill for specific performance of parol agreement to grant farm lease, with usual covenants of neighbourhood, and injunction to prevent ejectment, plaintiff having taken possession; upon answer, stating insolvency of plaintiff, and various breaches of agreement during five years' possession, the injunction was continued, on undertaking to give judgment in ejectment, go to commission, and set down cause for next term, paying rent into court. Defendant also insisted on covenant not to assign; that is subject of inquiry as to custom of neighbourhood. *Boardman v. Moystyn*, 6 Ves. 467. SPEC. PERF.; BREACH OF COVT.

The answer being referred for impertinence, is a good ground to continue an injunction. *Hurst v. Thomas*, 2 Anst. 591. REFERENCE FOR IMPERTINENCE.

In exchequer, after an injunction on original bill, dissolved on coming in of answer, plaintiff cannot have injunction on a supplemental bill as of course, though supported by affidavits, and time for answering is expired, unless defendant is in contempt. *Gadd v. Worral*, 2 Anst. 553. See *Nethorpe v. Law*, 13 Ves. 323.

Injunction cannot be extended to protect one who is not a party in the suit in equity. *Id.* 555. PARTIES.

Reference of answer for scandal and impertinence, is not cause for continuing injunction. *Milner v. Golding*, Dick. 672.

Not necessary to revive perpetual injunction on death of party. *Askew v. Townsend*, Dick. 471.

Where exceptions are shown for cause against dissolving an injunction, and the answer is reported sufficient, the injunction cannot be revived on the merits disclosed by that answer. *Peyto v. Hudson*, 3 Swan. 363. PR. EXCEPTIONS.

A point which materially concerns merchants in general, will induce the court to continue an injunction. *Green v. Suasso*, 2 Atk. 229.

A lessee covenants not to dig up a particular part of the demised premises for raising sand, gravel, &c., under the penalty of 100*l.* per acre. He breaks this covenant, and thereupon the lessor files a bill for an injunction; on affidavit of the waste committed, the injunction is granted till answer, and further order: after the answer put in, a motion is made to dissolve the injunction, and, upon showing cause, the defendant consented to appear and plead to an action of debt or trover, and to take short notice of trial; thereupon the injunction was dissolved. But, on an appeal, this order was discharged, and an injunction granted to continue till the hearing of the cause. *City of London v. Pugh*, 4 Bro. P. C. 395.

Injunction granted last term to stay execution; ordered that injunction shall stand in force. *Burtet v. Redman*, Cary, 47.

#### 10. Dissolving, and cause against.

The order nisi to dissolve the common injunction, may be obtained on petition. 23rd General Order, 3 April, 1828.

Where an injunction is obtained for want of an answer, defendant may dissolve it by giving the rule to dissolve, and the second rule six days after, which shall be absolute without further order, unless within the six days in the first day, or moves on the first day of motion, afterwards, notice of dissolution having been given, and all such motions shall

be listed and called on at the sitting of the court on such motion day. Gen. Order, 13 November, 1892, 1 Scho. & L. 9, 4.

A common injunction having been obtained for want of answer; on the answer coming in, exceptions were taken and allowed; the bill was then amended, to which, and the exceptions, a further answer was put in; the further answer refused for scandal and impertinence. The master reported it was neither scandalous nor impertinent, and on this report the defendant obtained the usual order to dissolve the injunction nisi. Exceptions to the answer to the amended bill were offered to be shown as cause; but the court considered the reference for scandal and impertinence a dilatory proceeding, and dissolved the injunction. *Stone v. Bettridge*, 2 Y. & J. 432. PR. REFERENCE FOR SCANDAL.

Where the plaintiff elects to shew the impertinence of the answer as cause against dissolving an injunction, and the master reports the answer to be not impertinent, the court will dissolve the injunction absolutely, and a second order nisi is not necessary. *Cu v. Horwell*, 2 Y. & J. 36.

On shewing cause on the merits against an order nisi for dissolving an injunction, the plaintiff is not entitled to the reply. *Tyrell v. L'audefille*, 1 Y. & J. 404. PRACTICE IN COURT.

Two executors were appointed; one proved, the other declined to act. An action was commenced by the acting executor against a debtor to the testator; and the rule of law requiring all the executors to join, the action was brought in the name of both executors. On a bill filed by the debtor, he obtained the common injunction for want of answer; the acting executor subsequently put in an answer; and, on an affidavit that the other executor, who resided abroad, refused to act or to put in any answer, the court granted an order nisi to dissolve the injunction. *Kithy v. Stanton*, 2 Y. & J. 75. EXOR.

A common injunction had issued against all the defendants: one of them filed his answer, and then obtained an order nisi to dissolve the injunction: suggesting that all the defendants had answered, the order was discharged for irregularity. *Todd v. Dismer*, 2 S. & S. 477.

In suit for commission abroad, a discovery and injunction if the common injunction have issued before trial against the defendant, a foreigner, in contempt for want of answer, on the usual affidavit, the defendant may be heard, on motion, to dissolve injunction before answer, so far as to show on the face of the affidavit to the merits in support of the motion. And, semble, that an application to pay into court the money sought to be recovered at law before a commission had been applied for, is premature. Motion to dissolve an injunction, or bring money into court under the circumstances stated, refused, with costs. *Keeling v. Sellick*, 1 M'Clel. & Y. 359.

Not necessary for plaintiff, who claims an estate as tenant in tail under settlement of parents, to prove by affidavit their marriage, before he shows cause against dissolving an injunction, to restrain an ejectment brought against him to recover the estate. *Hodgson v. Dean*, 2 S. & S. 221. PR. EVID.; AFFIDAVIT OF MARRIAGE.

Where exceptions to master's report, that further answer to injunction bill was not impertinent, were overruled, and the report confirmed, the court, under particular circumstances, dissolved the injunction immediately, without allowing a reference back for insufficiency, and putting defendant to a new order nisi. *Robertson v. Le Mercier*, 1 M'Clel. 343.

Master's report of impertinence must be obtained in four days: where this was not complied with, order to refer answer was discharged with costs; and where defendant had obtained order nisi to dissolve injunc-

tion, and plaintiff meanwhile had obtained a reference for impertinence, which was allowed as good cause against dissolving injunction, but plaintiff omitted to comply with the above rule, on motion to discharge order of reference, and dissolve injunction absolutely, the first part having been granted, the plaintiff was obliged to show cause instanter against the dissolution. *Hodgson v. Pritchit*, 1 M'Clel. 209. S. C. 13 Price, 451. REFERENCE FOR IMPERTINENCE; PR. MASTER'S REPORT.

An order for enlarging time to show cause against a common order nisi for dissolving injunction against proceedings at law, obtained on an undertaking to show cause on merits confessed by answer, was discharged, with costs, for irregularity; the bill having been filed for discovery merely; notwithstanding it also prayed a commission and injunction. *Jackson v. Strong*, 13 Price, 309. And plaintiff must move to revive injunction, which becomes dissolved as of course. *Id. ib.* PR. ENLARGEMENT OF TIME TO SHOW CAUSE.

If an injunction have been granted on bill filed for discovery merely, and the plaintiff omit to set down his exceptions to defendant's answer for argument, and they are therefore overruled upon usual order, the defendant may move to dissolve an injunction absolutely in the first instance, without having obtained the usual previous order. *Mellish v. Richardson*, 13 Price, 23.

Order to dissolve injunction nisi may be obtained, though the plaintiff has excepted to master's report as to sufficiency of answer. *Morant v. Coster*, 1 S. & S. 486. EXCEPTIONS TO REPORT.

Order to dissolve injunction nisi obtained, after exceptions to answer filed is irregular. *Williams v. Davies*, 1 S. & S. 262. EXCEPTIONS.

Where, from the answer of several defendants to an interpleading bill, the right is clearly shown to be in one of them, the court will dissolve the injunction instanter. *Bowyer v. Pritchard*, 11 Price, 103. PR. INTERPLEADER.

Reference of answer for impertinence is good cause against dissolving injunction. *Joseph v. Simpson*, 10 Price, 25. PR. REFERENCE OF ANSWER FOR IMPERTINENCE.

In supporting motion to dissolve injunction, the plaintiff cannot use any allegations in the bill, unless confessed by answer. *Mazwell v. Ward*, 11 Price, 14.

• The contents of documents set forth in the schedule to the answer in an injunction cause, may be obtained before the dissolution of the injunction, and used to oppose the motion to dissolve it. Hence, when the injunction has been dissolved, and the plaintiff afterwards, by inspecting the documents referred to by the answer, discovers new matter, he cannot move to revive the injunction upon an amended bill containing the new matter, and verified by affidavit. *Powell v. Lassalette*, 1 Jac. 549. PR. EVID.

Where reference of answer for impertinence is shown for cause against dissolving injunction, and report is to be obtained in four days, which is not done, injunction is dissolved; and report being afterwards obtained, will not be cause to revive it, as in case of insufficiency. *Dunsey v. Brown*, 4 Mad. 238. PR. ANSWER, REF. OF, FOR IMPERTINENCE.

Court will not dissolve injunction, (obtained to stay proceedings in ejectment) on motion, in favour of persons claiming under a child otherwise provided for by his father's will, on whom the legal estate in copyhold land intended to be devised for life or in tail to another child, by the same will, (subject to questions of law as to the operation of the devise) has descended (or want of being surrendered to the use of will, against parties claiming under the latter as remaindermen or purchasers, notwithstanding the devise

have covenanted with the heir that he shall stand seized to use of himself and heirs and assigns, in case of breach of covenants afterwards broken. *Hodgson v. Merest*, 7 Price, 658.

An order obtained, after exceptions to the answer allowed, for entering *nunc pro tunc* an order to dissolve an injunction absolutely for want of cause shewn to the contrary, is not irregular; nor is the plaintiff entitled to continue or revive the injunction. *Harcourt v. Ramsbottom*, 3 Swan, 359.

After undertaking to shew cause on the merits against dissolving an injunction, exceptions cannot be shewn for cause. *Id.* 362. **PR. EXCEPTIONS.**

The plaintiff, in equity, having been taken in execution, and discharged by a judge of the court of law, on payment into the hands of the master of that court, of the amount of the sum indorsed on the writ, with sheriff's poundage; and the common injunction having afterwards been issued; on motion to dissolve the injunction, it was ordered that the plaintiff might apply to the court of law for payment to him and to the defendants, of the sum paid into the hands of the master, that sum, when received, to be paid into the bank to abide the event of the cause. *Hawshaw v. Parkins*, 2 Swan, 539.

If plaintiff in injunction bill, filed to restrain defendant from proceeding in action at law, gives a cognovit, and undertakes in writing to dismiss his bill, and consent to a dissolution of injunction, but afterwards refuses to do so; the court on motion by defendant, and notice to plaintiff, will dissolve it, but not dismiss the bill. *Norway v. Ede*, 6 Price, 156. **AGREEMENT.**

After injunction and order for payment into court at a future time; on threat of going abroad, the court orders instant payment of money, or dissolves the injunction. *Whitehouse v. Partridge*, 3 Swan, 375. **PR. NUNC PRO TUNC REGNO; PR. ORDER FOR PAYMENT INTO COURT.**

Common injunction was obtained against two defendants, and afterwards extended to stay trial; on coming in of answer of one defendant, an order nisi must be obtained before motion can be made to dissolve injunction. *Naylor v. Middleton*, 2 Mad. 131.

Motion on last seal after Trinity term to dissolve an injunction, and that day might be appointed in vacation for making order absolute; but held, defendant was only entitled to order nisi. *Kew v. Dixon*, 2 Mad. 258.

Where order nisi is obtained to dissolve injunction on coming in of answer, and exceptions are shown for cause, and master reports answer sufficient; injunction is dissolved thereupon, and no further motion is necessary. *Hutchinson v. Markham*, 2 Mad. 355.

Motion to discharge an order for an injunction, and to set aside an attachment on which the injunction had issued, refused; the answer having been sworn on the evening before, but not filed until after the injunction issued. *Bruce v. Webb*, 2 Mer. 474. **PR. ANSWER.**

The defendant having put in his answer to the amended bill, which answer was excepted to, motion to dissolve the injunction absolutely in the first instance refused, the court being unable to judge, except upon reference to the master, whether the answer is a sufficient answer. *Vipan v. Mortlock*, 2 Mer. 476. **PR. EXCEPTIONS TO ANSWER.**

Court will set aside injunction (granted after trial and verdict), and obtained on ground that one of the defendants (a plaintiff at law) in whom the interest was averred to be, was in contempt for not having answered, and that his answer was most material to the defence at law of the plaintiffs (in equity) to the action, as it might show that property was not in him; notwithstanding strong affidavit of merits.

new trial granted nisi on same merits. *Whitmore v. Thompson*, 3 Price, 241. **JACQUES?**

Variance between affidavit in support of motion for injunction and bill, in date of bill of exchange, on which defendant had commenced proceedings at law, is a sufficient ground for dissolving the injunction obtained. *Wattleworth v. Pitcher*, 2 Price, 189. **PL. VARIANCE; PL. AFFIDAVIT.**

Exceptions to the master's report, as to impertinence, is not cause against dissolving an injunction. *Corson v. Stirling*, Coop. 93. **PR. EXCEPTIONS TO MASTER'S REPORT.**

Injunction not dissolved as of course, on one answer only coming in to interpleading bill, but plaintiff's delay to get in the other answers is a special ground for application to dissolve, or to have the money out of court. *Hyde v. Warren*, 19 Ves. 322. **PR. INTERPLEADER.**

Court will not make absolute the common order nisi to dissolve injunction (granted to restrain purchaser from proceedings at law to recover part of the purchase money paid by him in advance, the contract being impracticable on the ground of want of title and outstanding incumbrances) without master's report as to sufficiency of title, although objections are fully stated in defendant's answer. *Church v. Legeyt*, 1 Price, 301. **PR. MASTER'S REPORT ON TITLE; VENDOR & PURCHASER.**

A defendant may move to dissolve injunction for insufficient service of subpoena, although he has not appeared. *Menzies v. Rodrigues*, 1 Price, 92. **PR. SERVICE OF SUBPENA; PR. APPEARANCE.**

Ground of motion to dissolve injunction nisi, that the plaintiff may determine whether to shew cause upon the merits or by exception. *Lacy v. Hornby*, 2 V. & B. 292.

Injunction falls by amending bill, unless expressly saved. *Illiss v. Boscauen*, 2 V. & B. 102. **PR. BILL, AMENDMENT.**

Motion on answer to dissolve injunction nisi, plaintiff shewing exceptions for cause must procure the report in four days, but the time is extended by courtesy. *Bishton v. Birch*, 2 Ves. & B. 42. **PR. EXCEPTIONS TO ANSWER.**

An injunction against proceeding at law is gone by the master's report, that the answer is sufficient; and is not sustained by exceptions. The order extending it to stay trial, which in the court of chancery is a distinct order, falls also as a part of the original injunction, without a motion to dissolve. *Id.* 40. **PR. ANSWER, REPORT OF SUFFICIENCY.**

Injunction against verdict in a joint action, dissolved as to defendants who answered, but not as to others, pending exceptions to their answers. *Joseph v. Doubleday*, 1 V. & B. 497. **ANSWER.**

After order to dissolve injunction nisi on the answer, a reference for impertinence being obtained, the impertinence expunged, and afterwards exceptions disallowed; injunction dissolved on motion in the first instance, without an order nisi. *Lacy v. Hornby*, 2 V. & B. 291.

Where injunction is obtained in absence of one defendant abroad, on motion to discharge the order, the answer of other defendant cannot be read. *St. John v. Cargill*, 3 Anst. 993. **PR. EVIDENCE; ANSWER.**

The subsequent order extending an injunction against proceeding at law to stay trial, not discharged separately; but the injunction as extended, must be dissolved generally upon the answer by the usual order nisi, subject to shewing exceptions for cause, or the undertaking to shew cause on the merits. *Earnshaw v. Thornhill*, 19 Ves. 365. **PR. DISCHARGE OF ORDER.**

Injunction to restrain trial on affidavit, that plaintiff

cannot safely defend the action without discovery, and that it will give a good and effectual defence, not discharged upon the answer of one defendant only. *White v. Steinwachs*, 19 Ves. 83. PR. INJUNCTION, AFFIDAVIT IN SUPPORT OF; PR. ANSWER.

Motion to refer the answer for impertinence; allowed as cause against dissolving an injunction upon the terms of procuring the report in a week. *Goodings v. Woodham*, 14 Ves. 634. PR. MOTION TO REFER FOR IMPERTINENCE.

Exceptions filed, which may be *nunc pro tunc*, of course, upon application, within two terms after answer, and afterwards upon a special cause, will sustain an injunction. *Id.* 636. PR. EXCEPTIONS TO ANSWER NUNC PRO TUNC.

No exception can be taken to an infant's answer, in that case therefore cause against dissolving an injunction must be upon the merits according to the answer, and though it was manifestly insufficient, the injunction was dissolved. *Lucas v. Lucas*, 13 Ves. 274. PR. INFANT; PR. ANSWER, EXCEPTIONS.

A reference of the answer for impertinence, is good cause against dissolving an injunction. *Fisher v. Bayley*, 12 Ves. 18. PR. ANSWER, REFERENCE FOR IMPERTINENCE.

Injunction granted pending notice of motion for a *dedimus*, is dissolved of course, on the *dedimus* being granted. *M. Mahon v. O'Brien*, 1 Scho. & L. 237.

On motion at the last seal after Trinity term, to make absolute an order to dissolve an injunction nisi, the plaintiff cannot have time till the next day of motions upon the usual undertaking to shew cause on the merits, but was permitted to shew cause during the petitions. *Robinson v. Walcott*, 5 Ves. 552. PR. MOTION.

On an application to dissolve an injunction nisi on the coming in of the answer, the plaintiff shewed exceptions for cause, with the usual undertaking, to procure the master's report in four days; the master reported the answer to be sufficient, to which report the plaintiff excepted; the injunction is dissolved notwithstanding the plaintiff's exceptions. *Botham v. Clark*, 2 Cox, 428. PR. EXCEPTIONS TO ANSWER.

Injunction granted against infringement of patent that the validity of a patent might be tried at law: verdict for the patentee subject to the opinion of the court upon a case: the court were equally divided; the patentee must bring another action; but the court on the possession would not impose any terms upon him, nor dissolve the injunction in the mean time. *Boulton v. Pall*, 3 Ves. 140. PATENT, INFRINGEMENT OF.

If an injunction is granted for want of an answer, and the defendant afterwards demurs, and the demurrer is allowed, yet the injunction cannot be dissolved without the previous order. *Hurst v. Thomas*, 2 Anst. 585.

Where injunction is obtained for want of answer, and answer is afterwards filed, but defendant do not move to dissolve until two terms after, and when bill has been amended; yet injunction may be dissolved by motion of course. *Patton v. Panton*, 3 Anst. 651.

Injunction obtained two years back, on granting commission to examine in India, not yet returned, dissolved. *Penny v. Edgar*, 1 Anst. 276. PR. COMMISSION TO EXAMINE ABROAD; LAGUES.

Injunction obtained for want of answer; on exceptions in subsequent answer being overruled, defendant cannot move, as of course, to dissolve injunction. Secus in chancery. — *v. Debarry*, 1 Anst. 556. PR. EXCEPTIONS TO ANSWER.

Injunction cause stood over at hearing for want of parties; injunction not dissolved nor recalled on motion, without special case of want of parties.

An answer having been referred for impertinence, and reported impertinent, it is not necessary to have the impertinent matter actually expunged, before the defendant moves to dissolve an injunction upon coming in of his answer, though he cannot move it pending the reference. *Kenny v. Barnwell*, 2 Cox, 26. PR. ANSWER, IMPERTINENCE.

Replying to answer, and serving subpoena to rejoin, will not prevent defendant from moving to dissolve, unless cause; an injunction granted till answer. *Molins v. Inard*, Dick. 684.

Representatives of mortgagee after foreclosure sell the mortgaged premises, and the amount not being sufficient to pay the debt, bring an action on the bond; injunction to restrain their proceeding, dissolved. See *Perry v. Barker*, 8 Ves. 527. *Toots v. Hartley*, 2 Bro. C. C. 125. MORTGAGE, FORECLOSURE.

Where an injunction to stay waste has been obtained on bill filed and affidavit, the defendant may, immediately on coming in of his answer, move to dissolve the injunction without obtaining an order nisi; but then his answer can only be received as an affidavit, and the plaintiff may read affidavits in contradiction to it: and if afterwards upon exceptions the answer appear insufficient, the injunction shall be revived. *Strathmore v. Bozes*, 1 Cox, 263. PR. INJUNCTION TO STAY WASTE; PR. EVIDENCE.

Showing cause against dissolving an injunction, is not such a proceeding in a cause, as to prevent the bill being dismissed for want of prosecution. *El. Warwick v. Dk. Beaufort*, 1 Cox, 111. PR. DISMISSAL OF BILL.

Injunction obtained by the assignee of an author after the expiration of the two terms of years allowed by the statute of Anne, dissolved; the common law right of the author being so extremely doubtful. *Osborne v. Donaldson*, 2 Eden. 327. ASSIGNEE OF COPYRIGHT.

Injunction granted on merits, plaintiff ordered to speed cause, he replied, but proceeded no further; defendant cannot move to dissolve injunction, as he may proceed with suit. *Floer v. Herbert*, Dick. 349.

Injunction nisi not dissolved by putting in answer, until costs of contempt be paid. *Hall v. Darney*, Dick. 289.

Injunction nisi for want of answer; answer put in, but costs of contempt not paid; order nisi to dissolve injunction. Plaintiff should move to discharge order for irregularity. *Id. ib.*

Defendant's answer reported insufficient, and order served on him to amend bill, and answer amendments and exceptions at same time; till this done, defendant cannot dissolve injunction obtained on original bill. *Mayne v. Hochin*, Dick. 255.

Bill for injunction and commission to examine, and both parties at liberty to examine and cross-examine; defendant examined witnesses, and plaintiff cross-examined them, but plaintiff takes out no commission; injunction dissolved, and publication ordered. *Emmet v. Ayliffe*, id. 239.

When plea is allowed, injunction dissolved absolutely. *Philips v. Langham*, id. 149.

An order for dissolving an injunction nisi will be made absolute, notwithstanding the plaintiff is bankrupt, unless he shews cause. *Agost*, 1 Ark. 263. But see *Waugh v. Austen*, 3 T. R. 437. *Mack v. Morris*, 1 Mod. 93; and *Lingard v. Wagg*, 3 Bro. C. C. 435. BANKCY. ABATEMENT.

After enlargement of time for shewing cause against dissolving an injunction, the plaintiff cannot shew exceptions for cause. *Pinkney v. Porter*, 3 Swan. 263. PR. ENLARGEMENT OF TIME TO SHEW CAUSE; PR. EXCEPTIONS.

If a plea is ordered to stand for an answer, the defendant cannot move to dissolve the injunction absolutely, but may, nisi. *Osborn v. Cowper*, Mds. 298. **Pr. PLEA ORDERED TO STAND FOR ANSWER.**

If the defendant puts in his answer, and then moves to dissolve the injunction, this waives an irregularity in obtaining it. *Davies v. Seacock*, Barn. 27. **Pr. WAIVER OF IRREGULARITY.**

The court refused to dissolve the injunction till all the defendants had answered. *Rowerst v. Donaldson*, 1 Fowl. Exch. Pr. 286.

# 11. Effect of amendment, and leave to amend without prejudice.

Upon an application for the plaintiff to amend his bill without prejudice to an injunction previously obtained on merits, the particular amendments must be specified. *Bell v. Brookbank*, 2 Y. & J. 181.

Motion to amend bill of discovery after answer without prejudice to injunction, by adding prayer for relief, or otherwise as plaintiff should be advised, refused. *Jackson v. Strong*, 1 McClel. 245. S. C. 13 Price, 494.

Where injunction has been obtained on merits, motion to amend without prejudice to injunction, is motion of course; but where it has issued on account of delay, notice of motion must be given and proposed amendment stated. *Pratt v. Archer*, 1 S. & S. 433. **Pr. MOTION OF COURSE.**

Amendment of bill allowed without prejudice to an injunction obtained on merits. *King v. Turner*, 6 Mad. 255.

After an injunction granted against one of two defendants who afterwards put in their answers, leave was given on application supported by affidavit, to amend bill without prejudice to injunction. Answer of defendant against whom injunction was not granted, stating facts which were a surprise on plaintiff, and which made amendments necessary. *Vesey v. Wilks*, 3 Mad. 475.

Injunction obtained *ex parte*. The answer was put in, whereupon motion was made to amend bill without prejudice to injunction, and proposed amendments were stated; but motion was refused. *Penfold v. Stoveld*, 3 Mad. 471.

Amendment of bill after exceptions allowed and not answered, does not prejudice an injunction previously obtained. Therefore it is a motion of course for leave to amend, and that defendant may answer amendments and exceptions together. *Dwyer v. Durant*, 3 Mer. 465.

Amendment of bill after exceptions to answer allowed, does not prejudice injunction previously obtained. *Adney v. Flood*, 1 Mad. 449. **ANSWER, EXCEPTIONS TO.**

Re-amendment permitted without prejudice to an injunction, on affidavit that the facts which must be stated, came to the plaintiff's knowledge since the bill filed, and on payment of costs. *Sharp v. Ashton*, 3 V. & B. 148.

Plaintiff cannot amend bill to enjoin further proceedings at law after verdict, without first paying into court the sum recovered at law, although the original bill was filed before verdict obtained. But he may be allowed to amend on bringing in money by a certain day. *Harrison v. Belmont*, 1 Price, 118. **Pr. PAYMENT INTO COURT.**

After answer not excepted to, liberty to amend the bill without prejudice to the injunction staying proceedings at law, being the common injunction not upon the merits, refused with costs. *Turner v. Besely*, 2 Ves. & B. 330.

Although irregular to file an amended bill without leave, after an order to continue an injunction on the terms of speeding the cause, yet the amendment was

material and such as the court would have allowed, and the plaintiff offering terms which tended to prevent delay, the injunction was continued, plaintiff paying the costs of defendant's motion to dissolve it. *Welsh v. Hansen*, 2 Scho. & L. 516.

In an injunction case where exceptions are taken to the answer, it is irregular to obtain an order to amend bill until the exceptions are disposed of. *Dixon v. Redmond*, 2 Scho. & L. 515. **Pr. EXCEPTIONS TO ANSWER.**

Plaintiff entitled to an injunction on affidavit, as to stay proceedings at law by a party abroad, must state the whole of his case within his knowledge upon the original bill, and cannot, after answer, upon which he neither moved nor excepted, have the injunction upon amendment and affidavit as a general rule, subject to exception as circumstances come to his knowledge subsequently, surprise, &c. *Norris v. Kennedy*, 11 Ves. 565.

Injunction does not drop of course on plaintiff's amending bill. *Mason v. Murray*, Dick. 536.

## 12. Against proceeding at law.

- (a) Generally.
- (b) Against ejectment.
- (c) To stay trial and extending common injunction.
- (d) To stay execution and distress.
- (e) To stay proceedings in other courts.
- (f) Where money will be ordered into court on granting.
- (g) In cases of fraud and public policy.

### (a) Generally.

If a defendant who has been taken on an attachment, still refuses to answer, the plaintiff may at the same time proceed to enforce answer by the process of this court, and bring an action against him, and his sureties on the bond given to the sheriff under the attachment. *Boddall v. Page*, 2 Sim. 225. **Pr. ANSWER; Pr. ATTACHMENT.**

Certain persons, as directors of an intended joint stock company, agreed to purchase mines; articles of agreement were entered into, by which the purchasers agreed to pay to the vendors the purchase money by instalments, and it was provided that if the directors should not have received the deposits or instalments from the shareholders in time to pay the purchase money, they should be allowed six months further time. A bill was filed by some of the directors to restrain the vendors from suing for the purchase money, alleging that the plaintiffs only intended to become liable as directors, and to the extent of funds received by them, and not to incur any personal responsibility, and that they had no funds as directors; a demurrer was allowed. *Hodson v. Hancock*, 1 Y. & J. 317. **AGREEMENT.**

Motion by a plaintiff for an injunction to restrain an action brought by one defendant against a co-defendant, granted. *Kingham v. Maizey*, 2 Sim. 41.

A bill was filed by a person in possession of certain lands, for the specific performance of an illegal parol agreement to grant him a lease for seven years, and for an injunction to restrain an ejectment; the defendant by his answer admitted that he had been disposed to permit, and would have permitted the plaintiff, if he had been satisfied with his conduct, to remain in possession for the time and on the terms alleged to have been specified in the supposed agreement, and that the plaintiff reasonably expected to remain in possession for the time and on those terms, but he had now denied that such agreement had been made, and he insisted that the plaintiff was

tenant only from year to year, and had done many acts which would have been breaches of the covenants of the lease supposed to have been covenanted; the court upon his answer refused to make the order nisi absolute, and continued the injunction upon terms. *Attwood v. Barnham*, 2 Russ. 186. PL.

ANSWER; SPEC. PERF.

Defendant in suit by will in equity for tithes, relying on defence of tithes having been duly set out, may (notwithstanding the cause be at issue) bring action of trespass for not carrying them away; court refused an injunction to restrain him. *Bradley v. Bensted*, 13 Price, 221. S. C. 1 M'Clel. 80. TITHES.

Cross demand accrued after verdict is no ground for injunction to stay proceedings on verdict. *White v. O'Brien*, 1 S. & S. 551. SET-OFF AFTER VERDICT.

Injunction granted on interlocutory application in court of chancery in Ireland, to restrain proceeds at law there, is not of itself a sufficient ground to obtain injunction in this court to restrain proceeds on same matter in K. B. here. *Bull v. Storie*, 1 S. & S. 210. IRELAND; INTERLOCUTORY ORDER.

But a final judgment might have been different. *Id. ib.*

After decree for administration of assets, executor pleaded false plea to action brought against him by creditor of testator, in order to have an opportunity of applying for injunction to restrain action. Court granted injunction and held creditor not entitled to judgment against executor *de bonis propriis*. *Fielden v. Fielden*, 1 S. & S. 255. PR. DECREE FOR ADMIN. OF ASSETS; EXECUTOR; PL. FALSE PLEA.

Where guardian, after his ward attains full age, continues to manage property at the request of ward, and before the accounts of receipts and payments during minority are settled, it is in effect a continuance of the guardianship as to the property, and he must account on the same principle as though the transactions were during the minority. Therefore injunction was granted on terms to restrain guardian from proceeding in an action to recover balance claimed by him on account of the transactions after his ward became adult. *Mellish v. Mellish*, 1 S. & S. 138. GUARD. & WARD; ADULT.

Injunction to stay proceeding at law was granted, a decree of reference to take an account having been obtained on a creditor's bill against executors before action brought, but defendant not having notice of decree or of this application, it was ordered that all his costs should be first paid. *Fairlow v. Wilson*, 11 Price, 95. PR. DECREE FOR ACCOUNT; PR. NOTICE; PR. COSTS.

To an action by a creditor the executors pleaded non-assumpsit and set-off, and a *plene administravit prater*, and the verdict was against him on all these pleas; a decree for administration of the estate having been pronounced pending the action, an injunction was granted against the creditor on payment of his costs at law. *Lord v. Wormleighton*, 1 Jac. 143. DECREE FOR ADMIN.

After a decree for the administration of a testator's estate, creditors suing at law restrained on the application of a legatee. *Clarke v. El. Ormonde*, 1 Jac. 122. DECREE FOR ADMIN.; LEGATEE.

After a decree for a specific performance against a defendant, he cannot proceed by action at law on the contract for damages. *Reynolds v. Nelson*, 6 Mad. 290. SPEC. PERF.

It is no ground for application to court of equity to restrain plaintiff in suit for tithes in equity from proceeding in actions brought by him against parishioners not parties to that suit, for not setting out their tithes, that equity has decreed same to try the validity of (parochial) moduses laid in answers as

covering the articles in respect of tithes of which actions are commenced. Nor will the fact of such parishioners having entered into a bond to pay costs of all suits, &c. relating to such tithes, entitle them to relief. *Taylor v. Cook*, 9 Price, 207. ISSUE AT LAW; TITHES; MAINTENANCE OF SUIT.

Injunction to restrain proceedings at law for recovering an annuity secured to the wife by a deed of separation not containing any covenant to indemnify the husband from her debts, refused. *El. Westmeath v. Cs. Westmeath*, 1 Jac. 126. HUSB. & WIFE; DEED OF SEPARATION; CONTRACT.

A party bringing an action at law for damages, in consequence of having been arrested on an attachment, which, on his application, has been set aside for irregularity, will be restrained from proceeding in it, but without prejudice to any application he may be advised to make to the court for compensation. *Froud v. Lawrence*, 1 Jac. & W. 655. JURISDICTION.

Creditor giving time to debtor without notice to suety, releases him; and injunction granted to restrain proceedings at law against him. *Governor of Bank of Ireland v. Bergford*, 6 Dow, 233. PRINCIPAL & SURETY.

Where agent was, quasi agent, obliged to indorse bill, and fact was known to indorsee, injunction was granted to restrain proceedings thereon against him. *Kidson v. Dilworth*, 5 Pri. 564. BILL OF EXCHANGE, INDORSEMENT; PRINC. & AGENT.

Injunction to stay proceedings at law for rent by landlord, prayed on ground of agreement under which landlord was more than the amount of rent indebted to tenant, refused, being a legal sett-off. *Townrow v. Benson*, 3 Mad. 203. SET-OFF.

Apprentice, after serving part of time and then running away from master, the latter is not bound to receive him again or return part of apprentice fee. Nor will holder of promissory note given for amount be restrained from recovering it at law. *Cuff v. Brown*, 5 Price, 297. APPRENTICESHIP.

On a bill for specific performance, the questions whether time was originally of the essence of the contract, and whether, being so, the defendant has done any act whereby he has waived it as a ground of objection to the performance, are questions depending on evidence, and not to be decided except upon the hearing. *Lery v. Lindo*, 3 Mer. 81. SPEC. PERF.

Injunction, after a decree to account, to restrain a creditor from proceeding at law upon a verdict which would entitle him to a judgment *de bonis propriis* against an executor, refused. In cases where the injunction is granted, it may be obtained on the application of the plaintiff in equity, as well as of the executor. See note, *Terrest v. Featherby*, 2 Mer. 430. DECREE TO ACCOUNT; EXOR.

An account signed and settled by plaintiff in equity, leaving a balance in favour of defendant in equity, is sufficient ground to refuse an injunction to restrain defendant's proceeding at law, though there have been subsequent dealings; but plaintiff has refused to come to a settlement. *Hirst v. Pierce*, 4 Price, 339. ACCOUNT SETTLED.

Where set-off may be made at law, no bill for injunction will lie to stay proceedings at law. *Id.* SET-OFF.

To bill (also praying discovery) stating that partnership subsisted between plaintiff in equity and deceased partner of a banking firm in another concern in which plaintiff had chief management, and that cheques were drawn under special circumstances founded on mutual understanding, &c. Answer denying privity of defendants, or that they were in any way engaged in concern as partners or otherwise, sufficient to prevent injunction to stay defendant's proceed-



ings at law to recover amount of cheques paid by them on account of plaintiff in equity. *Askam v. Thompson*, 4 Price, 330. PL. ANSWER.

After a decree to account, an injunction granted, on the application of the defendant, to restrain the plaintiff from proceeding at law in an action commenced by him pending the suit in equity. *Wilson v. Wetherhead*, 2 Mer. 406. PR. DECREE TO ACCOUNT.

Remedy by injunction to restrain an action on breach of covenant to repair, on the peculiar circumstances of the case, not amounting to neglect or surprise, and there having been no waiver or abandonment on the part of the defendant. *Hannam v. South London Waterworks*, 2 Mer. 65. BREACH OF COVENANT.

Court will grant injunction to restrain a landlord from proceeding at law on an assignment of replevin bond against the sureties if there has been an agreement to refer, and a reference between landlord and tenant without concurrence of surety, of matters in difference whereby performance of condition of bond (to proceed with effect) has been suspended. *Bowmaker v. Moore*, 3 Pri. 214. PRINC. & SURETY, DISCHARGE.

Recognition of surety for receiver being refused, and action brought against surety on application, reference directed as to what was due, and order made for payment by instalments, and injunction to stay proceedings granted by consent on paying costs of application, and proceedings consequent on order. *Walker v. Wild*, 1 Mad. 528. PR. RECEIVER, SURETY FOR.

Injunction in this court granted, though the court of law in which the action has been brought, have, upon an application made to it to stay proceedings, on a release of one of the plaintiffs, and affidavits of the circumstances of the cases, refused to stay proceedings. *Whitfield v. Ralfe*, Coop. 89.

Equity will not restrain by injunction farther proceedings at law, upon a verdict obtained through the defendant's neglect, to produce his certificate in evidence. *Lingard v. Hibbertson*, 1 Rose, 459. BANKCY. NEGLECT TO PRODUCE CERTIFICATE AT LAW.

Jurisdiction by injunction upon ground of vexation by repeated actions for breach of covenant. *Waters v. Taylor*, 2 V. & B. 302. VEXATION; JURISDICTION.

Vendor proceeding in treaty beyond the time for completing the contract, and the vendor having brought an action and withdrawn his record, finding he could not support it, not having got in a judgment amounting to half the purchase money, and the purchaser having brought an action for his deposit and obtained a verdict; an injunction to restrain his proceeding, was refused. *Wood v. Bernul*, 19 Ves. 220. VEND. & PURCH.

A and B partners, gave a joint and several bond to C, who afterwards becomes indebted to A. B becomes bankrupt; C proves the bond under the commission, and then brings a joint action against A and B, to which B pleads his certificate. A being by this form of action precluded from setting off his separate debt, applies for and obtains injunction against C's proceeding in the joint action. *Bradley v. Millar*, 1 Rose, 273. BANKCY. SET OFF; BANKCY. PARTNERSHIP.

Where commissioners had found a balance in favour of party against whom assignees were proceeding as a debtor to estate, injunction granted. *Exp. Menzies*, id. 395. BANKCY. SET OFF.

Injunction upon an interpleading bill against bankrupts and their assignees by a debtor to the estate sued by the bankrupts with the view of indirectly defeating the commission. *Loundes v. Cornford*, 18 Ves. 299. INTERPLEADER; BANKCY. COMMISSIONER.

No equity in favour of a lessee of a house liable to repair with the exception of damage by fire, for an injunction against an action under the contract for payment of rent upon the destruction of the house by fire. *Moltzappel v. Baker*, 18 Ves. 115. See contra *Brown v. Quikton*, Ambl. 619. S.C. 2 Eden, 210. COVENANT TO REPAIR; DAMAGE BY FIRE; LANDL. & TEN.

Creditor having, among other securities, a bond with a surety, taking a mortgage from the principal debtor, and agreeing to receive the residue by instalments, secured by warrant, &c. without prejudice to any security he now holds: injunction granted against suing the surety. *Boulton v. Stubbis*, 18 Ves. 20. PRINC. & SURETY.

Injunction granted against an action commenced by plaintiff while proceeding under a decree to account for the same matter, it being a contempt to proceed at law after the subject of the cause had been attached in court. *Mocher v. Reed*, 1 Ball & B. 318. PR. DECREE TO ACCOUNT.

Petition to restrain an action by commissioners of bankruptcy against the assignees for costs of defending an action against the commissioners and messenger for false imprisonment in which the plaintiff was nonsuited, or for a contribution among the creditors, dismissed. No distinction exonerating creditors who were absent; proving by affidavit, they adopt all the proceedings. *Exp. Linthwaite*, 16 Ves. 234. BANKCY. ASSIGNEES, LIAB. OF; BANKCY. COSTS.

Demurrer allowed to a bill by the Bank of England for an injunction against the action of an executor, claiming a transfer of stock. Considering the stock as specifically bequeathed (which was doubtful) to trustees in France upon special trusts, if the executor cannot maintain the action upon the nature of the bequest, or as having assented, the injunction is unnecessary: if he can, upon his title to the stock, to be applied as the other property, there is no equity. *Bank of England v. Lunn*, 15 Ves. 569. EXOR.; PL. DEMURRER; BANK OF ENGLAND.

No jurisdiction in equity by injunction to stay process of a court of law upon an award, made a rule of court under the stat. 9 & 10 W. 3. c. 15. *Gwinett v. Baunister*, 14 Ves. 530. JURISDICTION; AWARD; RULE OF COURT; STAT. C. OF.

A decree against an executor in nature of a judgment at law; after that, he may, on motion, without filing a bill for an injunction, restrain a creditor suing at law. The executor must pay the costs till notice of the decree; and he must make an affidavit as to funds in his hands. *Parton v. Douglas*, 8 Ves. 520. DECREE FOR ADMON. OF ASSETS; COSTS.

After foreclosure and sale of the mortgaged estate, injunction was granted to restrain the mortgagee from recovering the difference at law. *Perry v. Barker*, 8 Ves. 527. See *Tooke v. Hartley*, 2 Bro. C. C. 126. MORTGAGE, FORECLOSURE OF.

Bill by insurance broker for a discovery and account of money paid and received by him in that capacity on account of defendant, and money due to him for commission, &c. and for promissory notes indorsed to him, and to restrain an action as brought contrary to the universal custom of the business. Demurrer allowed, the subject being matter of set off. *Dunwiddie v. Bailey*, 6 Ves. 136. PR. SET OFF.

Injunction against securities obtained by one French emigrant against another, by arresting him when about to sail on the expedition against France, and under an obligation entered into in France as surety which, according to the law of France, could not affect the person. *Talbot v. Boulton*, 3 Ves. 447. FOREIGN LAWS.

Motion for an injunction to restrain an action against the auctioneer for the deposit, refused where

there had been great delay on the part of the vendor. *Lloyd v. Collett*, 4 Bro. C. C. 469. **VEND. & PURCH.**

Injunction obtained by bail against a creditor who had obtained a verdict, dissolved, the principal debtor being made a party defendant, and stated by bill to be out of jurisdiction. *Roceray v. Grayson*, 3 Swan. 145. **BAIL.**

Where a bill has been filed, and a decree made for an account, and a creditor comes before the master but afterwards brings an action, the court will enjoin. But where the defendant has not applied in the first instance, it shall be without costs. *Hardcastle v. Chettle*, 4 Bro. C. C. 163. **DECREE FOR ACCOUNT; PR. COSTS.**

Injunction against creditors suing at law after a decree to account. *Martin v. Martin*, 1 Ves. 211. **PR. DECREE TO ACCOUNT.**

After a general decree against an executor to account, &c. a creditor shall be restrained by injunction from proceeding at law, not only staying execution, but from going to trial. *Goate v. Fryer*, 2 Cox, 291. **DECREE TO ACCOUNT.**

Action at law on a bond given to a trustee only reciting that the obligor was (on the resignation of obligee's *custui que* trust) appointed to an office, not restrained by injunction; but may be pleaded at law in order to try whether the consideration was corrupt. *Thrale v. Ross*, 3 Bro. C. C. 57. **BOND; CONSIDERATION.**

A bond for performance of covenants to build a bridge, and the sum agreed for actually paid, an injunction granted to restrain an action on the bond, and an issue *quantum damnificatus* ordered, the sum mentioned in the bond being a penalty. *Ferrington v. Aunesly*, 2 Bro. C. C. 341. S. C. Dick. 692. **BOND; ISSUE AT LAW.**

If a defendant fail in proving a material fact at law of which he afterwards obtains a discovery from the adverse party in equity, it is a ground for granting an injunction, though he would not be permitted to prove the fact by any other witnesses whom he could have examined at law. *Duckey v. Vernon*, 2 Cox, 12. **PR. EVIDENCE.**

An administratrix entered into the usual bond in the prerogative court to exhibit an inventory within a limited time, &c. The time having elapsed without an inventory being exhibited, a creditor put the bond in suit in the name of the archbishop. The administratrix filed her bill for an injunction, which was granted on the terms of her giving judgment in the action which was to stand as a security for the costs at law and in equity (but not for the debt), and amending the bill by submitting to account. *Thomas v. Archbp. Canterbury*, 1 Cox, 399. **ADMINISTRATION BOND.**

The loyalists estates in America were, under the forfeiting acts, to be sold for the payment of debts. This no ground for an injunction to restrain an action here on a bond. *Kempie v. Antill*, 2 Bro. C. C. 11. **AMERICAN LOYALIST; MARSHALLING SHIPMENTS.**

Where the penalty of a bond is only to secure the enjoyment of a collateral object, equity will grant an injunction against a suit for the recovery, and an issue *quantum damnificatus* to try the real damage. *Stonau v. Walter*, 1 Bro. C. C. 418. **BOND; ISSUE AT LAW.**

There being a decree for payment of debts, &c. on the suit of the trustees, though the parties have not proceeded under that decree, a creditor restrained by injunction by bill here for the purpose from proceeding at law against the executor. *Brown v. Reynolds*, id. 163. S. C. 2 Dick. 603. **DECREE FOR PAYMENT.**

After a decree for satisfaction of creditors, the court will enjoin a single creditor from suing at law for his debt. *Douglas v. Clay*, Dick. 393. *Thompson v. Worthington*, id. 668.

Where the party applying for a commission to examine witnesses appears, from the nature of his case, to be entitled to it, the granting an injunction in the mean time is no more than a necessary consequence of that right. *Nicol v. Verelst*, 4 Bro. P. C. 416. **COMMISSION TO EXAMINE ABROAD.**

Under what circumstances a commission to examine witnesses abroad, and an injunction to restrain proceedings at law in the mean time, ought not to be granted. *Cajamout v. Verelst*, id. 407. **Id.**

Lessee of a house and wharf covenants to repair, accidents by fire excepted; the house is burnt down, and the lessor having insured, received the insurance money, but neglected to rebuild, and brought an action at law for the rent. Bill for an injunction held proper till the house was rebuilt; but it went off on another matter. *Brown v. Quilton*, Amb. 619. S. C. 2 Eden, 210. See contra *Holtzapfel v. Baker*, 18 Ves. 115. **LAND & TEN.; INSURANCE.**

An annuity for life of the plaintiff; injunction to stay proceeding upon it at law upon plaintiff's paying all the arrears into court. *Searle v. Carpenter*, Amb. 242. **ANNUITY; REDEMPTION OF.**

Reference, which suit by *proch. amis* most advantageous to infant; one ordered to prosecute, other not restrained further, it being at his peril to proceed. *Owen v. Owen*, Dick. 310.

The holder of promissory note delivered to him without indorsement, after it is become due and noted for non-payment, shall not be staid by injunction from enforcing a judgment at law obtained by default. *Dunbar v. Wilson*, 6 Bro. P. C. 231. **PROMISSORY NOTE.**

The bill stated the plaintiff was legatee under a will of which the defendant was executor; that the usual decree for an account of the personal estate had been made, and the parties had been before the master, when the plaintiff was charged with several articles of the personal estate possessed by him; that the account between them was afterwards referred to an arbitrator, who found a small sum in favour of the plaintiffs, but never made an award; that after that the defendant, as executor, brought an action against the plaintiff for the effects of the testator so in his possession, and the bill prayed an injunction to restrain the defendant from proceeding at law; and that the value of the articles possessed by the plaintiff might be deducted out of the interest taken by him under the will. The court thought upon this case that the plaintiff was entitled to an injunction till the master made his report; a demurrer, for want of equity, was, therefore, overruled. *Milner v. Goolden*, 1 Cox, 196. **LIS PENDENS.**

Injunction, until hearing, to restrain an action by a bankrupt against the assignees under his commission, upon the ground of his long acquiescence under the commission. *Flower v. Herbert*, 2 Ves. 326. **BANKRUPT; DISPUTING COMMISSION.**

Equity will enjoin proceedings upon a bond conditioned for the receipt of the money, although there be a breach of condition, provided nothing be due. *Peck v. Payne*, Ridg. 295.

Whilst suits are depending here, plaintiffs indict defendant's agent at the sessions where they themselves are judges, for a breach of the peace. Order made to restrain plaintiffs from proceeding at the sessions till the hearing of the cause and further order. *Mayor, &c. of York v. Pilkington*, 2 Ark. 302. S. C. 9 Mod. 273. **LIS PENDENS; CRIMINAL MATTERS.**

There is no restraining power over criminal prosecutions in this court. *Id.*

The Attorney-general, of course, grants a *noli prosecute* to a criminal prosecution where action of trespass will lie. *Id.*

*Pendente lite* here, this court would have stopped an action of trespass *vi et armis*. *Id.*

Where bill is brought to grant possession; if after that plaintiff prefers indictment for forcible entry, this court will stop proceedings upon such indictment. *Id.*

A brings a bill against B to recover divers sums on account, and also 10,000*l.* on a stale bond of above twenty years' standing. The defendant demurs as to what related to the bond, for that the plaintiff might sue at law. The demurrer being allowed, the obligee in the bond sues the bond at law, and gets a verdict; after which the defendant brings his bill to be relieved against the bond, as having been satisfied: the court ordered an injunction, for that there was no reason to grant relief in equity, though the defendant had demurred to the bill brought on the bond. *Humphreys v. Humphreys*, 3 P. W. 395.

A subscribes 1000*l.* into S. S. Company, and their cashier gives a receipt for money. By mistake of clerk, a wrong christian name is inserted instead of A's in their books. A brings an action against them for money, and, on their filing bill in equity, demurs by A, for want of equity, allowed. *S. S. Comp. v. Carson*, 2 Bro. P. C. 284. JURISDICTION.

A, a clothier, and B, a dyer, had mutual dealings in the way of their trade, which were carried on several years without payment of money on either side. B dies intestate, and indebted to others by specialties, who, as principal creditor, takes out administration to him, and sues A at law. Equity will enjoin the action and order an account, and that A shall be allowed, by way of discount, what was due to him from B. *Docum v. Matthew*, Prec. Chan. 531. ACCOUNT.

One of the late directors of the S. S. Company owes money which is recovered against him at law: though all his estate is taken from him by the late act, and provision made for his creditors, yet the court denied any injunction. *Holditch v. Mist*, 1 P. W. 695.

Where party allows and acquiesces in erection of a nuisance, he shall be stayed in action at law. *Anon.* 2 Eq. Ab. 522. FRAUD.

The court will not suffer a man to be sued at law for executing the process of the court, though it issued irregularly. *Bailey v. Bererue*, 1 Vern. 269. PROCESS, IRREGULARITY; JURISDICTION.

Executor relieved after a verdict at law had against him upon a *plene administravit*, and the verdict was had on producing the executor's own letter confessing a mortgage made to the testator for 300*l.*, the executor proving in equity that this mortgage appeared afterwards to be worth nothing, and that there were two prior mortgages upon the same estate. *Robinson v. Bell*, 2 Vern. 146. EXOR. LIAB. OR.

In debt against an executor for 700*l.*, executor pleads *ne unques* executor, and on proving at the trial that a chimney back or some other slight thing came to the defendant's hand, plaintiff had a verdict; but equity relieved against the verdict. So in another case upon the like plea of *ne unques* executor, plaintiff proved the defendant took money for a pot of ale sold by the testator in his life time, and equity relieved. *Id.* 147. *Id.*

Injunction granted to stay proceedings at law for forcibly taking from defendant money which he had won of the plaintiff at play, though the defendant had by answer denied all the circumstances of fraud charged in the bill. *Firebrasse v. Brett*, 1 Vern. 489. GAMING.

If a member of parliament sues at law, and a bill is brought to be relieved against that account, the court will grant an injunction till answer or further order. *Anon.* id. 329. MEMBER OF PARLIAMENT.

Injunction to stay proceedings because plaintiff had commenced suit in chancery. *Bill v. Body*, Cary 50.

Proceedings stayed till plaintiff has joined person defendant as is prayed in aid by defendant. *Lucas v. Arnold*, id. 57.

An action at law will lie upon a recognizance, but if it is entered into in pursuance of an order of this court, the court will not allow it to be sued otherwise than by a *scire facias* in this court. *Grant v. Stone*, 1 Vern. 313. SC. FA. ON RECOGNIZANCE.

Injunction to stay judgment. *Aylard v. Bacon*, Cary, 36.

Plaintiff refusing to seal release, defendant sues bond, and stayed by injunction. *Rowles v. Rowles*, id. 78.

Injunction to stay judgment wrongfully obtained in action of waste. *Cavendish v. Cavendish*, id. 76.

Bond put in suit for performance of award stayed by injunction. *Id.* 104.

Relief sought against bond to make jointure in consideration of payment which was never made, and granted. *Asbourn v. Havers*, id. 112.

Proceedings staid at law, suit for same object in chancery. *Bull v. Body*, Dick. 1.

Defendant enjoined in open court not to proceed at law under 200*l.* penalty. *Riche v. Fourd*, Cary, 38.

Attorney at law enjoined in open court not to proceed or call on judgment. *Sedgewick v. Redman*, id. 90. *Bishop v. Jessop*, id. 80.

Injunction upon defendant's not appearing to stay proceedings at law. *Knot v. Jackson*, id. 40.

Injunction "*si ita sit*" to stay judgment and execution. *Aschughe v. Sketton*, id. 42.

Defendant's attorney ordered to stay proceedings at law; defendant proceeds and gets judgment. Injunction granted to bring money levied into court, and defendant to answer contempt. *Segewick v. Redman*, id. 41.

Injunction to stay proceedings; defendant proceeds, decreed that he shall acknowledge satisfaction on judgment. *Colteruett v. Boney*, id. 45.

#### (b) Against ejectment.

Injunction granted to restrain an action of ejectment brought by a bankrupt at the instigation of the petitioning creditor and another creditor, to recover the possession of premises sold under a commission at auction in for seven years. *Exp. Grant*, Buck. 90. BANKRY. COMMISSION; ACQUESCENCE.

Lessee proceeded against by ejectment, and who has received notice from a claimant, disputing his landlord's title, not to pay him any more rent, and has been threatened with distress by landlord, if he does not pay rent, cannot restrain either the ejectment or distress by injunction. *Homan v. Moore*, 4 Price, 5. LANDLORD & TENANT.

Injunction refused against a verdict in ejectment, upon a breach of covenant by lessee for years, as to the mode of cultivation, if admitting relief; the defendant having been prevented from proving other breaches, against which no relief could be had, as by assigning without license. *Leat v. Lt. Ranelagh*, 3 V. & B. 24. LANDLORD & TENANT; BREACH OF COVENANT.

Relief against breach of covenant by non-payment of rent; lessor, therefore, compelled to proceed on some other covenant, not admitting relief. *Id.* 30. *Id.*

Distinction as to injunction between landlord and tenant, upon an actual lease and a mere agreement; in the latter case no relief, if the covenant would have been violated in the former, some ground necessary either in the conduct of the lessor, or under the statute 4 Geo. 2. c. 28. *Id.* 29. LANDLORD & TENANT.

**BREACH OF COVENANT; LEASE; AGREEMENT FOR LEASE.**

Injunction against an ejectment for breach of covenant, to insure against fire, refused. *Reynolds v. Pitt*, 19 Ves. 134. **COVENANT TO INSURE, BREACH OF.**

Where a decree, giving relief to a party, whose title was gone at law, directs the accounts on the rents reserved in *bona fide* leases of tenants, not parties to the suit; the party relieved will be restrained from proceedings at law to evict the tenants, they being tacitly protected by the decree. *Shine v. Gough*, 1 Ball & B. 436. **ACCOUNT.**

Injunction against an ejectment under a deed of appointment, as obtained by a husband from his wife by undue influence, oppression, &c. and an issue directed. *Peel v. —*, 16 Ves. 157. **FRAUD; HUSB. & WIFE.**

Equity for a landlord against whom judgment had been obtained in ejectment by his own negligence, to restrain his tenant and those to whom he had attorned, from setting up the lease against his ejectment; though only a year and three quarters of the term was unexpired; and it is not necessary that the ejectment should be brought before the bill actually filed. *Baker v. Mellish*, 10 Ves. 544. **LANDLORD & TEN.**

Injunction against a surviving partner proceeding by ejectment to obtain possession of a farm of which a joint lease had been made to himself and his deceased partner. *Elliot v. Brown*, 3 Swan. 489. **PARTNERSHIP PROPERTY.**

Motion by a remote remainder-man and tenants, to restrain receiver from ejecting tenants, refused with costs, their interest not being sufficient. Receiver is to let the estate to the best advantage, but he cannot raise the rents upon slight grounds, nor turn out tenants, nor let even for one year, without application to the master. *Wynne v. Id. Newborough*, 1 Ves. J. 164. 165. **PR. RECEIVER.**

On a bill for an injunction to stay an ejectment at law against the plaintiff's tenant, the tenant ought to be a party. *Lawley v. Wadden*, 3 Swan. 142. **PR. PARTIES.**

Party suffering decree, which debarred his right to estate, to be enrolled, &c., stayed by perpetual injunction from bringing ejectment till decree reversed. *Selby v. Selby*, Dick. 678.

**(c) To stay trial, and extending common injunction.**

Motion to extend the common injunction granted, where the answer, which was filed on the same morning, was insufficient, and the trial was coming on the next day but one. *Alennings v. Adamson*, 1 Sim. 510.

Motion to extend injunction obtained, with discovery in aid of defence to action, to stay trial, on affidavit that two defendants were in contempt for non-appearance, cannot be made *ex parte*. *Higham v. Antwis*, 11 Price, 759.

Injunction in case of account dissolved, so far as it extended to stay trial, where the defendant being of unsound mind, the answer was put in by a guardian unable to give a full discovery. *Barrett v. Tickell*, 1 Jac. 154. **LUNATIC, &c.**

A defendant of unsound mind answering by a guardian, unable to give a full discovery, on a motion to dissolve an injunction, affidavits cannot be read by the plaintiff to prove facts that might be given in evidence at law. *Id.* 155. **LUNATIC.**

After a common injunction has been obtained, the plaintiff may move to extend it to stay trial upon the usual affidavit, although the defendant, by the rules of the court, must put in his answer before the trial can take place. *Taylor v. Leigh*, 2 Jb. & W. 388.

Court will grant injunction to stay trial of ejectment

at the next assizes, on motion made 27th February, of which notice had been given to defendant's clerk in court only on 26th, if moved on merits confessed in answer put in only that day; and application to dissolve such injunction before hearing on an affidavit, was refused with costs. *Hayward v. Greenwood*, 7 Price, 537. **NOTICE.**

Action was commenced in 1816, and tried at Y. 1817. In January 1818 new trial was granted, and plaintiff filed bill of discovery, and obtained common injunction. New trial at Y. was fixed for March 1818. Motion to extend injunction to stay trial, on ground that defendant was not aware deeds were of such importance, refused with costs. *Field v. Beaumont*, 3 Mad. 102.

On a bill for discovery, and a commission to examine witnesses abroad, in aid of the defence to an action, the plaintiff having obtained the common injunction for want of an answer, was held entitled to a commission, and to extend the injunction to stay trial. *Bowden v. Lodge*, 2 Swan. 258. **PR. COMMISSION TO EXAMINE ABROAD.**

An answer filed is a sufficient objection to a motion to extend an injunction to stay trial; but, as the defendant submitted to exceptions, the order was made, an insufficient answer being no answer. *Bishton v. Birch*, 1 V. & B. 366. **PR. ANSWER, INSUFFICIENCY.**

Injunction extended to stay trial, on affidavit that plaintiff cannot safely go to trial without the answer, and believes it will produce discovery material to his defence. *Earnshaw v. Thornhill*, 18 Ves. 488.

Injunction to stay trial just at the time of the assizes, refused. *Blacoe v. Wilkinson*, 13 Ves. 454. **LACHES.**

Plaintiff being entitled to move for the common injunction to stay execution for want of answer, cannot, in the first instance, move for special injunction to stay trial. *Garlick v. Pearson*, 10 Ves. 450.

An injunction to stay trial cannot be obtained until after the common injunction, and therefore, where the time for the defendant's appearance was the day for which notice of trial was given, the trial cannot be stayed. *Wright v. Broins*, 2 Cox, 232. S. C. 3 Bro. C. C. 87. See note there.

After injunction dissolved upon the merits, motion to stay trial of ejectment till full answer to the amended bill, refused with costs. *Iy. Markham v. Dickenson*, 1 Ves. J. 30. **PR. AMENDED BILL.**

Injunction extended to stay trial in actions by a corporation, for petty customs, till answer, where defence at law may arise out of the answer. *Anon.* 2 Ves. 620.

**(d) To stay execution and distress.**

Surety under annuity deed, having redeemed annuity after bankruptcy of grantor, sued the grantor on the bond of indemnity, and obtained judgment for arrears since bankruptcy, and the price of redemption, (see 3 B. and A. 186.) Injunction to restrain suing execution for arrears, refused. *Quere as to the price of redemption.* *Watkins v. Flanagan*, 6 Mad. 280. **PRINC. & SURETY; ANNUITY.**

A party against whom a verdict has been obtained at law must pay money recovered into court, before he can entitle himself to an injunction to stay execution, though he has since obtained a rule requiring plaintiff to show cause against a new trial. *Austen v. Thomson*, 11 Price, 1. **PR. PAYMENT INTO COURT; VERDICT.**

Court will not restrain party from taking out execution on warrant of attorney, on affidavit of merits, and irreparable mischief, by special injunction before

answer. *Naylor v. Christie*, 8 Price, 534. **WARRANT OF ATTORNEY.**

Injunction to stay execution granted before appearance, against defendants, to a bill of revivor, executors of the original defendant, on the merits disclosed by his answer, and on affidavit of personal service of the notice of motion. *Turner v. Wright*, 1 Jac. & W. 290.

Injunction to stay execution on a bill filed after a judgment at law, refused. *Protheroe v. Forman*, 2 Swan. 227. **JUDGMENT.**

Whether on a bill filed for the administration of assets, the court will restrain the legal proceedings of a creditor who had previously obtained a right of execution against the personal representative; *Quare? Drevry v. Thacker*, 3 Swan. 529. **DECREE FOR ADMINISTRATION.**

No injunction after a decree for the administration of assets, without information of their state. *Id.* 546.

Court has no jurisdiction to stay execution on judgment obtained against defendant, till plaintiff shall do any act, however reasonable, to make the defendant a title to the subject matter of the action; a rule for that purpose was discharged with cost. *Bell v. v. Bilke*, 4 Price, 291. **JURISDICTION.**

Demurrer by judgment creditor, bill for injunction to restrain him from taking out execution on his judgment against an estate sold (before he had obtained judgment) and ineffectually conveyed to purchaser, (the plaintiff), whereby the legal estate descended, since his judgment, to the heir at law, overruled. *Prior v. Penpraze*, 4 Price, 99. **PL. DEMURRER.**

Injunction will not be granted to restrain defendant from taking out execution, on judgment being suffered by default, on a case made by bill and answer, that bill of exchange on which the action had been brought, was given in consideration of defendant's delivering up a former bill which had been endorsed in consideration of a gaming debt. *Graves v. Houditch*, 2 Price, 147. **CONSIDERATION.**

Injunction to stay execution, or sale under execution, when granted. *Rose v. Wood*, 2 Swan. 234.

Where an action at law has been brought on bail-bond given to sheriff on an attachment from equity side of exchequer, for not answering according to the condition, and a verdict have been recovered, if defendant, instead of pleading the answer put in, pleads *non est factum*, and refuses to settle with plaintiff by paying costs pending the action, when he had an opportunity before the judge on a summons, equity will not restrain plaintiff from taking out execution, (although defendant has answered since the action brought), except on terms of paying all costs at law; though the plaintiff has not, as he ought to have done, refused to accept the answer when it came on till the contempt were cleared, but has actually waived them by excepting to answer, and amending his bill. But the court will not order the defendant at law to pay costs in equity also, because they were waived by accepting the answer. *Hurd v. Partington*, 3 Price, 222.

Injunction to restrain sheriff from executing *fi. fa.* against furniture, &c. of defendant at law, which, with house, &c. had been let by him to plaintiff, who was in possession, refused. *Gurstin v. Asplin*, 1 Mad. 150. **FIERI FACIAS; LANDLORD & TEN.**

After a lapse of six or seven years, equity will not restrain by injunction a creditor of an executor from taking in execution the goods of a testator for the executor's own debt. *Ray v. Ray*, Coop. 264. **EXOR.; LENGTH OF TIME.**

Injunction granted upon bill filed, and affidavit to restrain proceeding in an arbitration, under the circumstances. *Mytne v. Dickenson*, Coop. 195. **ARBITRATION.**

Plaintiff being entitled to move for the common in-

junction to stay execution for want of answer, cannot in the first instance move for special injunction to stay trial. *Garlick v. Pearson*, 10 Ves. 450. **PR. INJUNC. TO STAY TRIAL.**

A executed a deed by which he conveyed chattels to B in trust, as to one moiety for certain scheduled creditors, as to the other for A's own benefit. C, a creditor, not in the schedule, sued A, and recovered and took out execution against the chattels in the hands of B. B sued the sheriff's officer, and recovered at law. Bill for an injunction, on the ground that the deed was void against creditors for the moiety. The court refused the injunction, for there can be no execution against goods in the hands of a trustee. *Cail-lan v. Estwick*, 2 Anst. 381. **EXECUTION; TRUSTEE.**

Where one distrained, and on replevin, made three comurances as bailiff to different persons, on affidavit stating the claim to be under one of the persons, and that he had absconded insolvent, will not entitle plaintiff to an injunction. *Nichols v. Philips*, 3 Anst. 636.

Where the principal subject in dispute is the locality of the lands of each, which have been confused while occupied by one person, an ejectment does not decide anything; and therefore a court of equity will not allow the lessor of the plaintiff to take out his execution, so as to choose his own part of the lands. Where lands are confused, and the plaintiff at law recovers on an instrument which states the whole to be twenty-five acres, of which eighteen belonged to him, and in fact it appears that the whole land is only twenty-one acres, he shall not be allowed to take out execution for eighteen, but must abate proportionably. *Hardcastle v. Shafto*, 1 Anst. 184. **CONFUSION OF BOUNDARIES.**

The practice of the court of law compelling a plaintiff on a bond not to take execution beyond his real debts, does not oust the jurisdiction of this court in awarding an injunction. Demurrer to a bill on that ground overruled. *Codd v. Wooden*, 3 Bro. C.C. 73. **BOND; JURISDICTION.**

Injunction to stay judgment on certificate of judges of assize. *North v. Helewich*, Cary, 49.

Plaintiff after bill, answer, and replication, distrains for which an injunction is granted. *Kidner v. Harrison*, *id.* 48.

Injunction granted to discharge execution, defendant not appearing, though served. *Hebby v. Kent*, *id.* 41.

Execution of lands which party agreed not to proceed against. *Pulvertost v. Pulvertost*, *id.* 37.

(c) *To stay proceedings in other courts.*

Injunction granted *ex parte* to stay process at law, in a court of great sessions of a Welsh county, where the action was commenced at so late a period as to render it impossible for the plaintiff in equity to obtain the common injunction in time to serve any useful purpose. *Jones v. Russell*, 2 Russ. 405.

Injunction granted to stay proceedings upon a sentence in the Admiralty court, new evidence having been discovered at a period when, according to the practice of that court, it could not be received. *Jarvis v. Chandler*, 1 Turn. & R. 319.

Injunction to stay proceedings on bill to foreclose in foreign court, redemption being in progress in court of chancery here, granted. *Beckford v. Kemble*, 1 S. & S. 7. **JURISDICTION; FOREIGN COURT.**

Under circumstances, injunction granted to stay proceedings in court of session in Scotland. *Bushby v. Munday*, 5 Mad. 297. **FOREIGN COURT; JURISDICTION.**

Injunction to restrain proceedings in the court of session in Scotland, dissolved under the circumstances.

**Kennedy v. El. Cassili**, 2 Swan. 313. SCOTLAND; JURISDICTION.

Injunction granted against proceeding under foreign attachment by joint creditor upon a separate commission of bankruptcy overreaching the attachment by relation to the act of bankruptcy. **Barker v. Goodair**, 11 Ves. 78. FOREIGN ATTACHMENT; PRIORITY OF SECURITY, &c.

Where privateer had taken a prize without having letters of marque, and the court of Admiralty had sentenced her a droit to the crown, yet the court of chancery refused with costs to restrain the parties from receiving, or the register of the Admiralty from paying, the proceeds under a treasury warrant. **Nichol v. Goodall**, 10 Ves. 155. JURISDICTION OVER ADMIRALTY COURT.

An administratrix having an equitable demand against the personal estate of her intestate, the court will enjoin the next of kin from proceeding in the spiritual court to compel a distribution: but they may proceed to compel the administratrix to exhibit an inventory. **Buckhouse v. Hunter**, 1 Cox, 342. DISTRIBUTION; ADMOR.

Injunction granted at suit of a wife to stay proceedings in ecclesiastical court by husband for legacy to her, without making a settlement. **Meades v. Meades**, 5 Ves. 517. note (94). S. C. Dick. 373. HUSB. & WIFE, SETTLED BY COURT.

Injunction to restrain proceedings in the ecclesiastical court to set aside a will, contrary to agreement. **Gascoyne v. Chandler**, 3 Swan. 418. S. C. Dick. 281. ECCLESIASTICAL COURT.

The court of B. R. will not grant a prohibition in a suit for subtraction of tithes, unless it be shown that the modus has been pleaded in the ecclesiastical court, and denied there; and on the same grounds that a court of law grants a prohibition, equity grants an injunction. **Retherham v. Fairclark**, 3 Atk. 628. TITHES, MODUS.

The owners of two privateers seized upon a ship, as a lawful prize, it appearing by her papers, that she had carried provisions to the enemy, and the captain signed a note, acknowledging that they had justly confiscated his cargo; afterwards the captain brought his bill for an injunction to stay a suit in the admiralty court, on the lawfulness of the transaction, suggesting that some of the papers were lost, and that if the note should be produced which he was compelled to give, he should be cast at law. The court denied the injunction, for if it was to be granted on such pretences, it would defeat the statute respecting prizes, and if the admiralty find, that the note was obtained by duress and imprisonment, they can suppress it of their own authority. *Anon.* 3 Atk. 350.

If the validity of a will has been already determined, and it has been acted upon, equity will restrain proceedings in the prerogative court to controvert it. **Sheffield v. Ds. of Bucks**, 1 Atk. 628. PROBATE, WHERE VALIDITY EXAMINABLE.

Where there is a trust, or anything in the nature of a trust, notwithstanding the ecclesiastical court has an original jurisdiction in legacies, yet the court of equity will grant an injunction. *Anon.* 1 Atk. 491. JURISDICTION.

Where the husband of an infant institutes a suit in the ecclesiastical court for her legacy, upon the executors bringing a bill and suggesting this matter to the court, an injunction will be continued to the hearing. S. C. *Ib.*

Injunction granted to stay suit *ex quo minus* in exchequer. **Jones v. Miles**, Cary, 112.

Injunction against spiritual court, suit commenced in chancery. **Parre v. Tipelady**, id. 73.

Staying proceedings in spiritual court. **Banvill v. Banvill**, id. 64.

A man suing for his wife's jointure in the spiritual court, will be restrained by an injunction in equity, till he has made a competent provision for her. **Tanfield v. Davenport**, Totl. 114. HUSB. & WIFE, SETTLEMENT BY COURT.

(f) Where money will be ordered int court on granting.

Where injunction is granted against proceedings at law, on instrument obtained either as a gift or purchase in fraud of fiduciary situation of the donee or purchaser, the court will not impose terms of paying money into court, if the relationship be that of attorney and client. **Goddard v. Carlisle**, 9 Pri. 169. SOL. & CLIENT; FRAUD. FID. SIT.

Injunction granted and continued on terms of paying demand into court, to restrain defendant from proceeding at law on a security given to defendant's testator, the latter having agreed to accept another security in lieu of it, though still remaining executory. **Dally v. Catehlee**, 4 Pri. 147. AGREEMENT, EXECUTORY.

Where four of many actions, against the various underwriters, on policies on several ships (individually) had been tried, and verdicts passed for plaintiffs at law, the court granted an injunction to restrain them (the plaintiffs at law), from proceeding further in a case where there was a strong suspicion of fraud in the assured, on the money being paid into court, on the ground of answer of one of defendants not having come in. **Keasington v. White**, 3 Pri. 164. FRAUD.

Court will not order plaintiff who has obtained injunction to stay proceedings at law on bill filed for discovery, by which he seeks to establish a case of goods being charged at a much greater price than the one agreed on, to pay even the price acknowledged to be just into court, to abide the result of the action. **Parrell v. Nesbitt**, 2 Pri. 149.

Order for a commission to examine witnesses abroad, returnable without delay pending an injunction against an action, without paying the money into court. **Cock v. Donovan**, 3 V. & B. 76. PR. COMMISSION TO EXAMINE ABROAD.

Plaintiff having obtained injunction to restrain proceedings at law, cannot be called on to pay into court the sum demanded at law on an affidavit of equitable grounds by one of the defendants, the answers of the others not having come in, nor will the court in the alternative dissolve the injunction. **Menzies v. Rodrigues**, 1 Pri. 133.

Where an injunction against proceeding at law is obtained till the coming in of the answer of one defendant who resides abroad, the plaintiff is not compellable to bring the money into court, unless on special circumstances. **Sholbred v. Marnuster**, 2 Anst. 366.

Where a verdict has been obtained at law, and an injunction bill is filed while the plaintiff at law is out of the kingdom, and an injunction obtained against him for want of his answer, the court will direct the plaintiff in equity to pay into court the money recovered, and in default thereof will dissolve the injunction. **Potts v. Butler**, 1 Cox, 330.

Where a defendant has obtained a verdict at law, and an injunction bill is filed against him while he is out of the kingdom, the plaintiff in equity shall be put upon terms of paying the money in question into court, or otherwise his injunction be dissolved. **Sherwood v. White**, 1 Bro. C. C. 452. S. P. **Acton v. Market**, 2 Bro. C. C. 14. **Culley v. Hickling**, id. 182.

## (g) In cases of fraud and public policy.

Injunction granted to restrain action at law to recover the arrears of annuity granted to wife, of person who from fiduciary connection with grantor, was held to have abused his confidence by undue exercise of influence, ordered at hearing to be continued. *Godard v. Carlisle*, 9 Pri. 169. FRAUD; FID. STR.

An action on a *post obit*, as contrary to the principles of this court was restrained, and subsequent motion to set injunction aside, was refused with costs, such case being an exception to general rule, that costs of motion for injunction, or to dissolve injunction refused, are costs in cause. *Marsack v. Reeves*, 6 Mad. 108. PR. COSTS.

On bill for discovery and injunction to stay proceedings at law on bill of exchange, and for delivery up of bill to be cancelled, and charging fraud, not answered by defendant; if discovery obtained would be a defence at law, injunction to stay proceedings refused, but granted to stay execution. *Houlditch v. Nias*, 8 Pri. 689. PL. BILL OF DISCOVERY.

Injunction to stay proceedings in an action brought by a purchaser to recover the amount of his deposit, refused, the description in the printed particulars of sale being calculated grossly to deceive as to the real nature and value of the estate sold. *Stuart v. Alliston*, 1 Mer. 26. FRAUD; VEND. & PURCH.

Injunction granted to restrain the defendant from suing for a rent charge, granted to qualify him to sit in parliament, the purpose never having been answered. *Platanone v. Staple*, Coop. 250. FRAUD; PUBLIC POLICY.

Bond to marry or pay money established at law, but injunction granted till hearing, on ground of public policy, being an engagement upon expectations under will of third person, though not a relation, from whom it was kept secret, to marry at his death, and no mutual obligation. *Cock v. Richards*, 10 Ves. 429. BOND; MARRIAGE; PUBLIC POLICY; MUTUALITY.

Where a verdict has been obtained against a defendant who neglects to apply for a new trial within the time appointed by the rules of the court of law, this court will not entertain a bill for an injunction, on the ground that the plaintiff's demand was unconscientious, or that it was subject matter for an account, provided it was competent to the party to lay those grounds before the jury on the trial, or before the court of law, on motion for a new trial. *Bathnan v. Willoc*, 1 Sch. & L. 201. NEW TRIAL.

Injunction granted to stay action against the auctioneer for the deposit, although the estate sold was represented as freehold, with leasehold adjoining, and turned out to be almost all leasehold; and although there had been great delay in making out the plaintiff's title. *Fordyce v. Ford*, 4 Bro. C. C. 494. FRAUD; MISREPRESENTATION; VEND. & PURCH.

Injunctions granted to restrain defendant from recovering a demand from one of the plaintiffs, he having represented to the agent of the other plaintiffs on a treaty of marriage with his daughter, that there was no such demand existing. *Nerille v. Wilkinson*, 1 Bro. C. C. 543. FRAUD; CONCEALMENT OF TITLE.

Jointress giving leave to the next of kin in remainder for life, without impeachment, &c. to cut timber, the remainder man in tail having acquiesced and encouraged his doing so, the latter was restrained by perpetual injunction from bringing action of waste against the jointress. *Aston v. Aston*, 1 Ves. 396. TENANT FOR LIFE, AND REM. MAN; WASTE.

## 13. Against darkening ancient lights.

Injunction granted *ex parte* to restrain the owner of a house from making any erections or improvements

so as to darken or obstruct the ancient lights or windows of an adjoining house. *Buck v. Stacy*, 2 Russ. 121.

Injunction to restrain obstruction of ancient lights refused, the nature of the alleged injury not requiring preventive interposition before a trial at law, and the legal right being doubtful. *Wynstanley v. Lee*, 2 Swan. 333.

Injunction against darkening ancient windows not in every case affecting the value of premises that would support an action, the effect must be that material injury, amounting to nuisance, which should not only be redressed by damages, but upon equitable principles prevented. *Att. Gen. v. Nichol*, 16 Ves. 338.

Injunction to stay building not granted in cases of mere injury or inconvenience to property or persons adjoining, or otherwise except by agreement, or the building being of such a nature as to stop up ancient lights. *Morris v. Lessees of Lt. Berkeley*, 2 Ves. 463.

Injunction to restrain building in London 17 feet off plaintiff's house refused. *Fishmongers Comp. v. E. L. Comp.*, Dick. 164.

## 14. Against breach of contract, covenant and trust.

Injunction granted to restrain the disclosure of secrets came to the defendant's knowledge in the course of a confidential employment. *Evitt v. Price*, 1 Sim. 483.

Mere temptation to the abuse of partnership effects is not sufficient to induce court to grant injunction. *Glasington v. Thwaites*, 1 S. & S. 124. PARTNERSHIP.

All the proprietors of the M. paper, being also, with the exception of one, proprietors in the E. paper, an injunction to restrain using effects of former partnership, to assist latter in consideration of an annual sum, was refused where there had been agreement permitting use on those terms which had been long acted under. *Id. ib.* PARTNERSHIP AGREEMENT.

But injunction granted to restrain using effects not included in agreement. *Id. ib.*

Injunction to restrain the breach of a covenant, that buildings shall be erected upon a general plan, refused: the covenantee having acquiesced in a partial deviation from the plan, and not having made immediate application to the court. *Roper v. Williams*, 1 Turn. & R. 18. WAIVER; LACHES; COVENANT, BREACH OF.

A landlord who relaxes, in favour of some of his tenants, a covenant entered into for the benefit of all, is not entitled to an injunction to restrain the other tenants from infringing that covenant. *Id. ib.*

A person having, in articles of partnership, covenanted not to do certain acts after a specified period of time; the court will not, before the arrival of that period, grant an injunction to restrain him from acting in breach of his agreement, nor for mischief, which is no breach at law of the covenant between the parties. *Coates v. Coates*, 6 Mad. 287. BILL, QUIA TIMET.

Injunction to restrain a defendant from communicating certain recipes for medicines, and vending them, granted, on the ground that he had obtained a knowledge of the mode of preparing them by a breach of trust. *Yobut v. Wingard*, 1 Jac. & W. 394. SECRETS IN TRADE.

An injunction will not be granted to restrain the breach of a covenant in articles of partnership which has not been infringed for any length of time, where the bill does not pray a dissolution of the partnership. Whether the court will in any case grant such an injunction, unless there is ground for, and the bill prays

a dissolution of partnership: *Qu?* *Marshall v. Coleman*, 2 Jac. & W. 266. **PR. BILL: PARTNERSHIP.**

The court will not interfere by injunction to prevent the violation of an agreement of which, from the nature of the subject, there could be no decree for a specific performance, as, for instance, to restrain the defendant from imparting the secret of an invention which had been the subject of a patent long since expired. *Newbery v. James*, 2 Mer. 446.

Distinction between express covenant and implied agreement as to be enforced by injunction granted in the former instance, not in the latter, against tenant, removing articles contrary to the custom of the country. *Kimpton v. Ece*, 2 V. & B. 319. **AGREEMENT.**

Injunction granted to restrain a breach of covenant secured for forfeiture of the lease and a penalty. *Barrett v. Blagrove*, 5 Ves. 555. **BREACH OF COVENANT.**

The plaintiff's house being so near the church, that the ringing of the five o'clock bell in the morning disturbed her; the plaintiff came to an agreement in writing, with the churchwardens and inhabitants, at a vestry, that she should erect a cupola and clock at the church, in consideration of which the bell was not to be rung in the morning; this agreement good, and decreed to be binding in equity, and an injunction was granted. *Martin v. Nutkin*, 2 P. W. 266. **SPEC. PERM.**

### 15. *Infringement of copyright and patent.*

The court will interfere to protect copyright from piracy at the suit of plaintiffs, who appear to have a good equitable title, even though it should not be quite clear that their legal title is complete. Mode in which the court exercises its jurisdiction, where one work of compilation, such as encyclopædia, copies matter from a preceding work of the same description. *Mauvman v. Tegg*, 3 Russ. 385.

An author having sold copyright of work published under his own name, and covenanted with purchaser not to publish any other work to prejudice sale of it: semble, that another publisher, who had no notice of this covenant, will be restrained from publishing work subsequently purchased by him from the same author, and published under his name, on the same subject, but under a different title, and though there be no piracy of the first work. *Parfield v. Nicholson*, 2 S. & S. 1. **AGREEMENT.**

Injunction to restrain the infringement of copyright in a work, as to which it appeared doubtful whether it did not intend to impugn the doctrines of the scriptures, refused. *Lawrence v. Smith*, 1 Jac. 471. **PUBLIC POLICY.**

Injunction granted to restrain the performance of a comedy, the copyright of which had been sold by the author, and had been afterwards assigned by writing to the plaintiffs, although it did not appear whether the original assignment was in writing. *Morris v. Kelly*, 1 Jac. & W. 481.

Letters written by the plaintiff to the defendant, having been returned by him, with a declaration, that he did not consider himself entitled to retain them, the publication of copies taken before the return without the knowledge of the plaintiff, was restrained by injunction, though represented by the defendant as necessary for the vindication of his character: the jurisdiction to restrain the publication of letters is founded on a right of property in the writer. *Gee v. Pritchard*, 2 Swan. 403. **PRIVATE LETTERS.**

No injunction to restrain the publication of letters painful to the feelings of the writer. *Id.* 413.

The publication of letters may be restrained, although not designed for profit. *Id.* 416.

The acts of the party may supply reasons for not restraining the publication of letters. *Id.* 427.

Injunction refused to restrain publication of a work which had been left for twenty-three years by the author in the hands of a bookseller, to whom it was originally sent, with an intention of its being published; that intention being afterwards relinquished, and the work having passed into the hands of the defendants, who published it without the consent or privy of the author. *Southey v. Sherwood*, 2 Mer. 435.

The court will not interfere by injunction, upon the author's application to restrain the publication of a work which is of such a nature as that an action could not be maintained upon it for damages. *Id. ib.*

Where there has been a length of exclusive enjoyment under a patent, the court will grant an injunction in the first instance, without previously putting the party to establish this right by an action at law; otherwise where the patent is recent. *Hill v. Thompson*, 3 Mer. 622.

Copyright in music not asserted against violations by several persons for fifteen years, not protected by injunction, until established at law. *Platt v. Bulton*, 19 Ves. 447. **LACHES; TITLE.**

Injunction granted on application of the executor to restrain defendant from publishing letters the property of the testator. *Grand v. Dunkin*, 1 Ball & B. 207. **PRIVATE LETTERS.**

Injunction against pirating a court calendar, the individual work creating copyright; though the general subject, as in the case of a map or chart, is common. *Longman v. Winchester*, 16 Ves. 269.

Injunction until the hearing under the order of the house of lords for publishing *Ld. Melville's* trial, and prohibiting any other publication of it. *Gurney v. Longman*, 13 Ves. 493.

Injunction upon possession under a patent until the right can be tried, though subject to considerable doubt: the patent being for improvement upon a machine, the subject of a former patent, expired, and the specification describing the original machine, with the improvement as one entire machine, the subject of the latter patent, not distinguishing the improvements. *Harmer v. Plummer*, 14 Ves. 130.

Though copyright cannot subsist in an East India calendar as a general subject, any more than in a map, chart, series of chronology, &c. it may in the individual work; and when it can be traced, that another work upon the same subject is not an original compilation, but a mere copy with colourable variations, the original will be protected by injunction, which, in this instance, was continued until the hearing without a trial at law. *Matthewson v. Stockdale*, 12 Ves. 270.

Injunction to restrain publishing a magazine as a continuation of the plaintiff's magazine, in numbers, and as to communications from correspondents received by the defendant while publishing for the plaintiff; not preventing the publication of an original work of the same nature, and under a similar title. *Hogg v. Kirby*, 8 Ves. 215.

Injunction against infringement of copyright depending on effect of agreement; refused till recovery in an action. *Walcot v. Walker*, 7 Ves. 1. **TITLE.**

Court will not act either by giving an injunction or account even upon a submission in answer upon a publication of such a nature that an action could not be maintained. *Id. ib.* **ILLICIT PUBLICATION.**

Injunction against a colourable abridgement of the term reports among other law reports till answer or further order upon certificate of the bill filed. *Butterworth v. Robinson*, 5 Ves. 709. **ABRIDGMENT.**

The plaintiff published a book of roads of Great Britain comprising *Patterson's* book, to the copyright of which the plaintiff was not entitled, with improve-



ments and additions obtained by actual survey, and otherwise; an injunction to restrain a publication of an edition of Patterson, comprising the plaintiff's improvements and additions, was refused. *Cary v. Faden*, 5 Ves. 24.

A patentee claiming an exclusive right of printing bibles, must establish his right at law before he can have an injunction in equity. *Greerson v. Jackson*, 1 Ridg. L. & S. 304. TITLE.

Qu. What differences between two books will be sufficient to resist an application for an injunction to restrain defendant from publishing the latter work. *Carnan v. Bowles*, 1 Cox, 283.

A voyage of discovery having been executed, and a narrative of it prepared under the orders of the crown, the narrative is the property of the crown; but on a bill by a publisher authorized by the secretary to the board of admiralty to publish such a narrative, the profits remaining at their disposition, an injunction restraining publication by a stranger was dissolved. *Nicol v. Stockdale*, 3 Swan. 687.

Injunction shall be against a publication piratically taken from another, but not against a fair abridgment. *Bell v. Walker*, 1 Bro. C. C. 451.

Injunction to restrain the executor of the testator to whom they were written, from publishing private letters without leave of the executor of the person who wrote them. *Thompson v. St. John*, Amb. 737.

Injunction to restrain the publishing in a magazine a farce occasionally suffered by the author to be acted, but never printed or published. *Macklin v. Richardson*, Amb. 694.

Upon a bill brought by the king's printer to restrain the defendant from the publication of certain acts of parliament, &c. to which the patentees for printing law books were also defendants, the court refused to interfere between the contending patents, and, therefore, only restrained the defendant from printing at any other than a patent press. *Baskett v. Cunningham*, 2 Eden, 137.

Injunction to restrain the printing of an unpublished MS., a copy of which had been, by the representative of the author, given to a person under whom defendant claimed, but not with the intention that he should publish it. *Dk. Queensberry v. Shebbeare*, 2 Eden, 329.

Injunction till hearing to restrain the publication of Milton's poems with Dr. Newton's notes, notwithstanding a small addition of original commentary. *Tonson v. Walker*, 3 Swan. 672.

Plaintiff, through several mesne assignments, being in possession of a right, originally in the city of London, of supplying Southwark with water, prayed injunction to restrain defendant from encroaching on this right by raising engines, laying pipes, &c. Defendant demurred to bill, for that plaintiff ought first to have established his right at law: demurrer allowed. *Whitechurch v. Hyde*, 2 Atk. 391.

Injunction denied to stay an interloper's trading to the E. Indies till the validity of the E. I. company's patent has been tried. *E. I. Comp. v. Sandys*, 1 Vern. 127.

#### 16. Against setting up legal bars and defences.

Where the statute of limitation attaches a demand pending the retention of a bill in equity, the validity of the debt being directed to be tried at law, the court restrained the debtor from availing himself of the benefit of the statute at law. *Sirdefield v. Price*, 2 Y. & J. 73. S. P. *Anon.* 1 Vern. 74. LIMITATION, STAT. OF.

Injunction to restrain setting up of outstanding term in bar to ejectment will not be granted on mo-

tion. *Barney v. Luckett*, 1 S. & S. 419. S. P. *Northey v. Pearce*, id. 420. *Id.* ib.

Plaintiff in a bill to restrain the setting up of outstanding terms, cannot bring an ejectment before the hearing without the leave of the court. *Beer v. Ward*, 1 Jac. 194. PR. EJECTMENT.

Injunction to restrain the setting up of terms not obtained on motion. *Id.* 196.

Decree on bill for delivery up of deeds, having left parties to remedy at law, and directed defendant to bring an ejectment, the plaintiff ought not to be restrained from defeating it by means of an outstanding term. *Brackenbury v. Brackenbury*, 2 J. & W. 391. EJECTMENT.

After decree to bill for delivery up of deeds directing ejectment to be brought, an order to restrain setting up of outstanding terms cannot be made on motion. *Id.* ib. PR. DECREE; PR. MOTION.

A court of equity never refuses to remove temporary bars to enable parties to try their rights, unless there be fraud imputable to the plaintiff, or the defendant is purchaser for valuable consideration without notice. *Blennerhasset v. Day*, 2 Ball & B. 137.

It is a general rule, that where a party is prevented by court from proceeding to establish his right at law, it is the duty of the court to see no injury arise to him in consequence of its interference. Therefore, where an annuitant was restrained by injunction from proceeding at law to recover the arrears of rent charge, interest was allowed. *O'Donel v. Braine*, 1 Ball & B. 262. S. P. 6 Ves. 93. INTEREST; ARREARS OF RENT CHARGE.

Outstanding term to attend the inheritance, the trusts, being performed, may be an objection to the conveyance, not to the title. *Berkeley v. Dangle*, 16 Ves. 380. VEND. & PURCH.; TITLE.

The court will not order temporary bars to be waived on motion. *Byrne v. Byrne*, 2 Scho. & L. 537. PR. MOTION.

In what cases court of equity will restrain a party setting up a fine as a bar to an ejectment, especially where the non-claim has run pending a suit in equity between the same parties. Decree, dismissing the bill reversed. *Pincke v. Thornycroft*, 4 Bro. P. C. 92. Reversing 1 Bro. C. C. 289. EJECTMENT.

Every heir has a right to inquire by what means and under what deed he is disinherited; and, before he has established his title at law, he may go into equity to remove terms out of the way, which would prevent his recovering there; and may also have a production and inspection of deeds, and writings in equity. *Harrison v. Southcote*, 1 Atk. 539. PL. DISCOVERY; HEIR AT LAW.

Equity will not take away any defence the party may have at law a voluntary deed; but if a deed for a good consideration had been discharged by voluntary release, such defence would be restrained. *Praund v. Turner*, Fitzgib. 105. VOLUNTARY DEEDS.

A dowress shall have the trust of a satisfied term removed against the heir at law. *Dudley v. Dudley*, Prec. Chan. 241. DOWER.

Court will not entertain bill by dowress to set aside an outstanding term as against a purchaser, though he had notice. *Bolton v. Venlebensdy*, 1 Vern. 356, 179. DOWER; VEND. & PURCH.

#### 17. Against nuisance.

Jurisdiction by injunction on danger of irreparable injury to property, though, as a public nuisance, an object of prosecution by the attorney general; the subject a corn mill to powder mills, from site, construction, &c., eminently dangerous to the neighbourhood and public. Injunction directed with an arrangement for a speedy trial, and preventing im-

mediate danger in the interval. *Crowder v. Tinkler*, 19 Ves. 617. PUBLIC NUISANCE; JURISDICTION.

Jurisdiction by injunction on information by the attorney general, at the relation of individuals against a nuisance by an offensive and unwholesome process in trade, not exercised without a trial at law; regulating according to justice the time of trial of an indictment depending, and removed by *certiorari* into the King's Bench, from the assizes as against the relators; whether as against the defendants, *quare*? *Att. Gen. v. Cleaver*, 18 Ves. 211. JURISDICTION.

Where a nuisance and purpresture in a harbour are committed, an information in equity lies to abate it. *Att. Gen. v. Richards*, 2 Anst. 603.

Injunction to re-erect a nuisance, denied. *Anon.* 2 Ves. 193.

#### 18. Against payment of money or transfer, or negotiation of security or estate.

The wife of a bankrupt, having separate property, died in France, in possession of other property there, which was claimed by the creditors as belonging to the husband; she by will disposed of all her separate estate, except 1,500*l.* consols, which, in default of, appointment was held in trust for her executors or administrators, and appointed a lady, resident in France, her executrix. Injunction granted at the suit of the assignees to restrain the transfer of the consols, but refused as to the rest of the separate estate. *Stead v. Clay*, 1 Sim. 294. DEBTOR & CRED.; HUSB. & WIFE, SEPARATE ESTATE.

Injunction granted *ex parte* to restrain the negotiation of a bill of exchange, by a holder who had given valuable consideration for it, but who had notice that it had been improperly accepted by a partner of the plaintiffs, in the partnership's name. *Hood v. Aston*, 1 Russ. 412. BILL OF EXCHANGE; VENDOR & PURCH.; NOTICE.

Injunction granted to restrain payments by friendly society, founded on erroneous principles tending to exhaust its funds. *Peter v. Perkins*, 2 J. & W. 390. FRIENDLY SOCIETY.

Where an injunction is issued after execution against the goods, the sheriff may proceed to sell; but the court will, in special cases, stay the money in his hands. *Hawkshaw v. Perkins*, 2 Swan. 549. PR. SALE BY SHERIFF.

Injunction to restrain the vendor of copyhold premises after delivery of possession, and receipt of part of the purchase money, from surrendering them to persons other than the purchasers. *Spiller v. Spiller*, 3 Swan. 556. COPYHOLD, SURRENDER OF.

Injunction to restrain the negotiation of bills of exchange, void in their creation. *Hood v. Gordon*, 2 Swan. 180. NEGOTIATION OF SECURITIES; BILL OF EXCHANGE.

The solicitor to a commission restrained by injunction from negotiating a promissory note that he had received from the bankrupts for his bill of costs in procuring his certificate, the bankrupt having purchased the debts of many of the creditors; and the solicitor being indebted to the estate in such a sum, that the share of it coming to the bankrupt, standing in the place of the creditor, in respect of the debts so purchased by him, would exceed the amount of the promissory note. *Eip. Harding*, 1 Buck. 24. BANKRU., SOLICITOR.

*Quare*, whether a court of equity, in the exercise of its jurisdiction to decree the specific performance of an agreement, can interfere by injunction to restrain a party from divulging a secret in medicine which is unprotected by patent. In this case an injunction, which had been granted for that and other purposes, was dissolved, upon the affidavit of the

defendant (an infant) denying the facts of the case as represented by the plaintiff's affidavit in support of the injunction, and upon the ground that there was no secret in the alleged invention. *Williams v. Williams*, 3 Mer. 157.

General demurrer to bill filed by judgment creditor against his debtor (who had been discharged under insolvent act), and the executrix of will, by which debtor was entitled to a share of residue of testator's personal property, praying an injunction against executrix to restrain her paying it over to debtor, and that plaintiff might be allowed his debt thereout; allowed because a sufficiently strong case was not made out. *Olley v. Line*, 7 Price, 274. LEGACY; DEBTOR & CRED.

If there are vexatious alienations, *pendente lite*, the court will restrain them. *Daly v. Kelly*, 4 Dow, 440. ALIENATION PENDENTE LITE.

Mortgage of ship at sea (the form of registry act being observed) held valid, and injunction granted to prevent an improper indorsement on certificate of registry of ship. *Thompson v. Smith*, 1 Mad. 395. MORTGAGE; SHIP.

Injunction restraining vendor, defendant to a bill for specific performance, from conveying the legal estate. *Echlin v. Bulabin*, 16 Ves. 267. ALIENATION PENDENTE LITE.

Affidavits cannot be read in support of an injunction to restrain the negotiation of bills of exchange. *Berkely v. Byrmer*, 9 Ves. 335. PR. INJUNCTION, AFFIDAVIT IN SUPPORT.

Injunction until answer restraining a transfer of stock, standing in the name of a steward, on strong evidence by affidavit, that it was the produce of his master's property, rents, &c., received for many years without account; refused as to money at his banker's in his name. *Ld. Chedworth v. Edwards*, 8 Ves. 46. PRIN. & AGENT.

Application under 39 and 40 Geo. 3. c. 36. to restrain bank from making transfer without making them parties, must be upon notice to defendant, and upon affidavit as in cases of waste. *Hammond v. Maundrell*, 6 Ves. 772. (note). BANK OF ENGLAND; STAT. C. OR.

Injunction granted to restrain transfer, and receiver appointed to preserve property *pendente lite* in ecclesiastical court, upon the will. *King v. King*, 6 Ves. 172. JURISDICTION.

Bill of exchange, given to secure procuration money agreed to be given to colonel of regiment for commission, is void, and court will interfere, even after money is in hands of sheriff, on execution at law. *Whittingham v. Bourgoigne*, 3 Anst. 990. PUBLIC POLICY; SALE OF OFFICES.

A, having charged his estates by mortgages and other incumbrances to a very large amount, appointed B to be his steward or receiver of all his estates, with verbal directions to pay the interest to the mortgagees, and to pay over the surplus of the rents to himself; on the making a fifth mortgage, A, by deed, appointed B receiver of the estates comprised in that mortgage, in trust to keep down the interest of that mortgage, and to pay over the residue of the rents to himself. A afterwards granted several annuities, which he charged on all the mortgaged premises, and demised the same to a trustee for securing the said annuities in manner therein mentioned; and subject thereto, to permit A to receive the surplus for his benefit. At the time of granting these annuities, A represented the estates to be free from all incumbrances. On a bill filed by the annuitants against A and B, (without making any of the prior incumbrancer's parties), the court will restrain B from paying over any part of the rents to A, and will appoint a receiver without prejudice to the prior mortgagees

taking possession. *Dulmer v. Dashwood*, 2 Cox, 378. **MORTGAGE.**

Widow being, as administratrix, possessed of property of intestate consisting of bank stock, motion to restrain her from disposing of it, to pay it into court, refused; but, being clearly entitled to her third, ordered to pay the two-thirds into court. *Rogers v. Rogers*, 1 Anst. 174. **PAYMENT INTO COURT; ADMINISTRATRIX.**

Injunction to restrain defendant from negotiating a bill of exchange given for goods not delivered, issued on certificate of bill filed, and to be served with the subpoena. *Patrick v. Harrison*, 3 Bro. C. C. 476.

Injunction against purchaser, on behalf of creditor, to restrain payment to heir. *Green v. Lances*, 3 Bro. C. C. 217. **VENDOR & PURCH., PAYMENT OF PURCH. MONEY.**

An injunction to restrain a suit in the exchequer for the same matter was refused, but granted to prevent the parties from disposing of the fund until the rights in chancery were determined. *Bullock v. Bullock*, 3 Swan. 698. **EXCHEQUER.**

A commission of bankrupt issued against A and B, but was not proceeded on. A and B had a very large sum of money in the hands of their bankers. This court will not, under these circumstances, interfere to prevent A and B from recovering the money at law from the bankers, although the commission remains in force. *Fuller v. Gibson*, 2 Cox, 24. **BANKCY. ASSIGNMENT.**

Where money in the public funds is the subject of a suit, to which the bank is made a defendant, the court will not, on the application of the bank, make any order on the litigating parties to restrain them from proceeding at law against the bank to compel a transfer, but they must file a bill of interpleader. *Birch v. Corbin*, 1 Cox, 141. **BANK OF ENGLAND; PL. INTERPLEADER.**

Where plaintiff gave defendant a note for undertaking to procure him a marriage, and the fact was supported by affidavit; the court made an order upon the defendant to keep the note in his possession, and not assign or indorse it, but would not extend the injunction, to prevent his proceeding at law. *Smith v. Aikewell*, 2 Atk. 566. **MARRIAGE BROKER.**

Where an insolvent executor is getting in the assets before probate, the court will restrain him, and direct money to be paid into the bank. *Id. ib.* **EXECUTOR.**

Husband, possessed of term in right of wife, was divorced *à mensa et thoro*, and, he being about to sell term, injunction was granted to prevent him. *Anon.* 9 Mod. 43. See *Shute v. Shute*, Prec. Chan. 111. **HUSB. & WIFE, SEPARATE ESTATE.**

Injunction granted for delivering up of plate, *nisi causa*, &c. *Geoffry v. Davis*, Cary, 34.

Where a will was litigated in the spiritual court, on a suggestion, that it was unduly obtained from a man sick of the plague, the court, on the motion, ordered that the executor (who was supposed insolvent) should forbear to receive the debts of the deceased *pendente lite*. *Smalpiece v. Anguish*, 1 Ch. Ca. 75. **ADMON. CONTROVERTED.**

#### 19. To quit possession.

It is usual in Ireland, for a lessee who has been three years in possession, and is disturbed, to file his bill in the court of chancery there, for an injunction to quiet him in possession, till evicted by due course of law; and this usage is founded upon the equity of the statutes made against forcible entries. But all bills of this kind must allege, and it must also be proved, that the sole and actual possession is in the plaintiff, and that no ownership or possession is in

any other person. *Vernon v. City of Dublin*, 4 Bro. P. C. 398. **IRELAND.**

An injunction was awarded to restore and quiet the plaintiff and his tenants in the possession of the premises in question, but it was at the same ordered, that he should appear to an ejectment to be brought by the defendant, in order to try the title. An ejectment was accordingly brought, and the defendant obtained a verdict, and was afterwards put into possession. But on an appeal by the plaintiff, it was ordered that he should be at liberty to bring an ejectment, to recover possession of the premises, and that no mortgage should be set up in bar of his title. *Seymour v. Ryan*, id. 390.

Bill to be quieted in possession of a right of common, and to prevent distresses. Defendants produced affidavits of fifty years right of common and quiet possession; but the court would not interpose till after one or more verdicts at law. *Anon. Gilb. Eq. Rep.* 183.

An injunction is awarded by a decree, to put the plaintiff into possession of the premises in question, and at the same time, the parties are directed to try the title at law; this decree is repugnant and must be reversed, as to the injunction. *Id. Tanesborough v. Elwood*, 4 Bro. P. C. 385. **PL. DECREE.**

Injunction for plaintiff's possession as at time of filing bill, and three years before. *Sapote v. Newport*, Cary, 47.

Injunction for defendants in possession against plaintiff's entering. *Dawche v. Perrot*, id. 45.

Commission to put plaintiff into possession, injunction being dissolved or disobeyed. *Boles v. Walley*, id. 38.

Granted to put defendant in such possession of lands as he had at time of bill exhibited. *Hawkes v. Champion*, id. 36. 45.

#### 20. Against sailing of ships.

Injunction to restrain the sailing of vessel, containing goods sold to a person who had become insolvent, but over which the plaintiff retained a right of stoppage *in transitu*, refused. A court of equity has not jurisdiction in any case to stop goods *in transitu*. *Semble v. Goodhart v. Lowe*, 2 Jac. & W. 349. **STOPPAGE IN TRANSITU; JURISDICTION.**

Injunction to restrain the sailing of a ship, upon the application of a part-owner, refused. Where the ship was intended to sail the next day, and it did not appear by the affidavit filed in support of the motion, that there were any circumstances to account for the plaintiff's delay in applying. *Christie v. Craig*, 2 Mer. 137. **LACHES.**

#### 21. Against sale.

Pending an appeal, the court will sometimes stay the sale of property which the decree has directed to be sold, but if the property consists of personal chattels remaining in the possession of the appellant, he must give ample security for their value. *Nerot v. Burnard*, 2 Russ. 56. **PL. APPEAL.**

Injunction, *ex parte*, to restrain the assignees from selling the bankrupt's effects. *Exp. Figes*, 1 G. & J. 122. **SALE OF EFFECTS.**

Injunction to restrain the exercise of a power of sale given to secure a balance, to be ascertained by an arbitrator, refused; although the award was made after the plaintiff had executed a deed for the purpose of revoking his authority. *Harcourt v. Ramsbottom*, 1 Jac. & W. 505. **ARBITRATION.**

Injunction not granted to restrain mortgagee from selling, under power in mortgage deed; otherwise where there is a trustee for sale, and he proceeds precipitately and without notice to both parties. *Anon.* 6 Mod. 10. **POWER OF SALE; MORTGAGE.**

On separate commission against one partner, the assignees took possession of partnership property, and were about to sell it. Injunction on filing bill and affidavit, granted to restrain sale. *Allen v. Kilbre*, 4 Mad. 464. **BANKCY., PARTNERSHIP; BANKCY. JOINT & SEPARATE COMMISSION.**

Injunction granted, restraining sale of estates till answer to bill, alleging parcel agreement to exchange, partly performed by plaintiff having purchased estate for that purpose. *Curtis v. Mary, Buckingham*, 3 V. & B. 168. **SPEC. PERF.; PART PERF.**

There is no exclusive right in a subject not protected by patent, to prevent sale by another person under the same title, not assuming the name and character of the plaintiff. *Canham v. Jones*, 2 V. & B. 218.

Voluntary settlement void, under stat. 27 Eliz. c. 4. against a subsequent purchaser for valuable consideration with notice, though a fair provision for a wife and children, an injunction restraining the husband from selling, was refused, but a demurrer by the husband overruled, as covering too much, the plaintiff being entitled until a sale to an execution of the trust. *Pulcerty v. Pulcerty*, 18 Ves. 84. **VOLUNTARY SETTLEMENT; NOTICE; HUSB. & WIFE.**

On a trust to sell, a suggestion in the bill of improper conduct of the trustees, in not giving sufficient notice of the sale, is not a ground for an injunction to stop the intended sale. *Pechel, Bart. v. Fowler*, 2 Anst. 549. **PL. BILL.**

Defendant, before he had prayed time to answer, or was in contempt, restrained from selling diamonds. *Toumin v. Prout*, Dick. 387.

Motion by the king's patentees for an injunction to stop the sale of English bibles printed beyond sea, denied till the validity of the patent had been tried at law. *Anon.* 1 Vern. 120. **TITLE; COPYRIGHT.**

## 22. Against trespass.

Injunction granted in cases of trespass. *Field v. Beaumont*, 1 Swan. 208.

Whether after a verdict at law, in an action of trespass, the court will grant an injunction against future trespasses, in favour of parties who refused at the trial to produce documents necessary to a fair decision, *Qu?* *Id.* 210.

Though the court will not restrain an action of trespass by a party, through whose estate a canal is cutting for deviating from the line, because he has laid by and rested upon his legal rights; yet if he files a bill to restrain their deviating, and then moves to commit them, the court will not do so, without a trial by jury in a disputed case, and directing an issue at law. *Agar v. Regent's Canal Comp.* Coop. 77. **ISSUE AT LAW.**

Injunction in trespass; where the title was disputed. *Kinder v. Jones*, 17 Ves. 110.

Lessee committed waste by opening a mine, and continued to work into the other land of the lessor, not comprised in his lease. Injunction was granted as to both. Cited in *Hanson v. Gardiner*, 7 Ves. 308. **INJUNCTION TO STAY WASTE.**

Injunction against a mere trespasser committing waste, not granted. *Mogg v. Mogg*, Dick. 670.

The court will not grant an injunction to restrain a person from committing a trespass, where it is temporary only; otherwise, where it has continued so long as to become a nuisance. *Coulson v. White*, 3 Atk. 21.

On bill stating intent of defendant to encroach on plaintiff's land, &c. by building; defendant by answer claiming title to land himself; motion for injunction was refused, not being sufficient to try title on. *Buteman v. Johnson*, Fitzgib. 106. **TITLE.**

## 23. Against waste.

The court will not grant an injunction to stay waste at the instance of a judgment creditor in a suit by him against the heir and administrator of the debtor. *Lenke v. Beckett*, 1 Y. & J. 339.

Tenant for life, without impeachment, restrained from cutting timber planted or left standing for ornament, &c., whether ornamental or fanciful, the protection extending beyond the mansion-house, to rides, &c. through a wood at a considerable distance, but not to the whole wood to prevent cutting other parts for repairs and sale. *Wombwell v. Belasyse*, cited, 6 Ves. 110. note a. **TIMBER, ORNAMENTAL.**

Injunction may be obtained upon motion to restrain purchaser under decree, not a party to cause, who has not paid purchase-money, from committing waste on property purchased. *Cusamejor v. Storde*, 1 S. & S. 381. **VEND. & PURCH.**

The Ld. Ch. Baron will take motions for special injunctions to stay waste or other pressing matters during vacation at his own residence, or on the circuit. *Tucker v. Sanger*, 10 Price, 132. *S. P. Galloway v. Appleton*, id. 133. *S. P. Creswell v. Long*, id. ib. *S. P. Williamson v. Tompson*, id. 134. *S. P. Rigby v. Dracley*, id. ib.

Defendant having appeared, motion for injunction in matter of waste not immediate, without notice, refused. *Collard v. Cooper*, 6 Mad. 190. **PR. NOTICE.**

Where equitable waste of one kind only has been done or threatened, the injunction is not to be extended to equitable waste of other kinds. Semble, usual injunction in cases of equitable waste not extended to trees which protect the premises from the effect of the sea. *Coffin v. Coffin*, 1 Jac. 70. **EQUITABLE WASTE.**

In equitable, as in legal waste, if one act of waste be established, the court will restrain equitable waste generally. *S. C.* 6 Mad. 17. **JURISDICTION.**

Court will restrain cutting underwood of insufficient growth. *Brydges v. Stephens*, 6 Mad. 279. **UNDERWOOD.**

Where injunction to stay waste had been granted on petition, a reference was made to inquire what timber, &c. might be cut advantageously. *Att. Gen. v. Dk. Marlborough*, 5 Mad. 280. **PR. REFERENCE TO MASTER.**

Injunction to stay waste refused, the acts of waste committed being trivial, and the plaintiffs proceedings having been dilatory. *Barry v. Barry*, 1 Jac. & W. 651.

A small degree of waste manifesting an intent to do more, is sufficient for the court to act upon. *Id.* 653.

In cases of waste, it is the business of the reverentior to apply to the court promptly. *Id. ib.* **IACTUS.**

A mortgagee is entitled to an injunction to restrain a mortgagor in possession from cutting down timber, if the land without it is a scanty security. It may be extended to cutting down underwood contrary to the usual course of husbandry, but not to underwood generally, although the mortgagor is insolvent. *Thompson v. Harrison*, 1 Jac. & W. 581. **TIMBER; MORTGAGEE & MORTGAGE.**

Injunction to restrain mortgagor from cutting timber will not be granted unless without timber security is scanty or insufficient. *Hippesley v. Spencer*, 5 Mad. 422. **MORTGAGEE & MORTGAGE; TIMBER.**

The court will not by injunction, restrain the working of mines, permitted during eight years, without directing an action. *Field v. Beaumont*, 1 Swan. 208. **MINES.**

Plaintiff and defendant (partners) having agreed to dissolve, and that defendant on payment of half

value of effects should take the whole, though defendant took possession but failed to make the payment, and had begun to pull down part of buildings, injunction to restrain him refused. *Coston v. Horner*, 5 Price, 537. **PARTNERSHIP.**

Persons authorized by act of parliament to cut a canal, and required to appropriate certain sums for the construction and maintenance of works to protect a harbour in which the canal was intended to terminate, not restrained from cutting through their own lands, at a distance from the harbour, in the event of a present insufficiency of funds for the completion of the undertaking, pending an application to parliament for further powers to levy money. *Mayor, &c. of King's Lynn v. Pemberton*, 1 Swan. 244. **CANAL.**

But persons authorized by act of parliament to cut canal, if their funds are insufficient for completion of undertaking, may, on the prompt application of the owner of lands through which they are cutting, be restrained from proceeding. *Id.* 250.

On a motion after the answer for an injunction to stay waste, affidavits filed, subsequently to the answer, cannot be read. *Smythe v. Smythe*, 1 Swan. 252. **PR. EVID.; AFFIDAVITS WHEN FILED.**

The lessees of a colliery having agreed to grant to the lessees of a neighbouring colliery licence to use a right of way enjoyed by the former, and the owner of the first colliery having granted to the second lessees the same right of way during a term of years, and afterwards by assignment from the first lessees become possessed of the first colliery, and the right of way, an injunction was granted to restrain him from removing the materials and destroying the way. *Newmarch v. Brandling*, 3 Swan. 99. **RIGHT OF WAY; LESSOR & LESSEE.**

Injunction granted to stay waste and from sowing land with pernicious crops. *Pratt v. Brett*, 2 Mad. 62. **LANDLORD & TEN.**

Injunction against permissive waste. *Coldwell v. Baylis*, 2 Mer. 408.

Injunction against the act of commissioners of sewers reducing the height of water in a river dissolved, there being a much shorter remedy by certiorari in the court of King's Bench, who interfere with great caution. *Harrison v. Sparrow*, 19 Ves. 449. **JURISDICTION.**

Court will not treat as a bill to restrain waste, a bill to restrain an acting partner from collecting debts or creating them and for appointing a receiver, though otherwise if partner has been shewn guilty of culpable conduct and is insolvent. *Lawson v. Morgan*, 1 Price, 303. **PARTNERSHIP.**

Devise to A and her heirs for ever, in the fullest confidence that after her decease she will devise the property to my family, being restrained to an estate for life by decree at the Rolls, the devisee was enjoined from cutting timber pending an appeal. *Wright v. Atkins*, 1 V. & B. 313. See also 19 Ves. 299. 17 Ves. 255. Coop. 111. 1 Turn. Rep. 143. **TENANT FOR LIFE; WILL, C. OF, WORDS PRECATORY.**

Injunction granted to stay waste against defendant who insists on his own title, but admits he received possession from plaintiff's tenant without plaintiff's knowledge in breach of tenant's duty. *Norway v. Rowe*, 19 Ves. 154. **LANDLORD & TEN.**

Injunction granted against waste by tenant. *Kimpton v. Ene*, 2 V. & B. 349. **LANDLORD & TEN.**

Waste by destruction of a dove-cote: not by removing presses, &c. unless fixed. *Id.* *ib.*

Injunction against draining preparatory to opening a coal mine with prejudice to a canal, before establishing the right at law, refused upon laches for two years, permitting expenditure. *Birmingham Canal Comp. v. Lloyd*, 18 Ves. 516. **LACHES.**

The jurisdiction against waste by injunction, and account applied to trespass by exceeding a limited right to enter, and take stone from a quarry, being a destruction of the inheritance as in the case of timber, coal, &c. and the distinction between waste and trespass therefore disregarded. *Thomas v. Oakley*, 18 Ves. 184. **TRESPASS.**

Covenant to repair, and at the end of the term surrender buildings in good condition, does not preclude an injunction against pulling them down and carrying away materials just before the end of the term. *Mayor of London v. Hedger*, 18 Ves. 355. **LANDLORD & TEN.; COVENANT TO REPAIR.**

Injunction against trespass upon irremediable mischief, in nature of waste, on a bill by the lord of a manor and his lessees against taking stones, having a peculiar value, found at the bottom of the sea within the limits of the manor. *El. Couper v. Baker*, 17 Ves. 128.

Injunction in the case of trespass by the lord of a manor digging for coal on the premises of a copyhold tenant, from the nature of the subject and the consequences, such an injunction not to be continued without securing the means of a speedy trial. *Grey v. Dk. Northumberland*, 17 Ves. 281.

Injunction against waste not prevented by appearance the day before the motion. *Allard v. Jones*, 15 Ves. 605. **PR. APPEARANCE.**

Injunction against waste between tenants in common, on the ground that one was occupying tenant to the other, not granted except as to destruction. *Twort v. Twort*, 16 Ves. 128. **TENANTS IN COMMON.**

Injunction granted to restrain a tenant from year to year under notice to quit, as in the case of a lessee for a longer term, from doing damage and from removing the crops, manure, &c. except according to the custom of the country. *Onslow v. —*, 16 Ves. 173. **LANDLORD & TEN.**

Tenant of a lunatic's estate restrained on petition from committing waste, no bill being filed. *In mre. Creagh*, 1 Ball & B. 108. **LUNACY; PR. PETITION.**

Injunction against cutting ornamental timber upon the principle of equitable waste extended to trees planted for the purpose of excluding object from view. *Day v. Whephdale*, 16 Ves. 375. **EQUITABLE WASTE.**

Injunction against cutting timber in the case of trespass, viz. by a person having got possession under articles to purchase. *Crackford v. Alexander*, 15 Ves. 138. **TRESPASS.**

Injunction against proceeding with alterations in a house under an agreement for a lease upon circumstances that would probably prevent a specific performance, viz. surprise, the effect of fraudulent misrepresentation and concealment, and the particular nature of the alterations for the conversion of a private house to the purpose of a coachmaker's business, wholly changing the nature of the subject. *Bonnett v. Saddler*, 14 Ves. 526.

Injunction by a copyholder restraining the lord preparing to open a mine. Distinction as to a mine opened and working. *Grey v. Dk. Northumberland*, 13 Ves. 236. **COPYHOLD; MINES.**

Injunction in the nature of a writ of estoppelment of waste does not lie against a tenant holding under a lease containing a covenant for perpetual renewal. *Calvert v. Gason*, 2 Sch. & L. 561. **LANDLORD & TENANT; COVENANT FOR PERPETUAL RENEWAL.**

Heir who is entitled by way of resulting trust until the determination of an event upon which the future contingent estates were to arise, was restrained from cutting timber. *Stansfield v. Ilabergham*, 10 Ves. 273. **HEIR AT LAW; WASTE.**

Where there is an executory devise over, even of a legal estate, this court will not permit timber to be

cut, more especially in the case of a trust estate. *Id.* 278. EXECUTORY DEVIANT; TIMBER.

Injunction against trespasser cutting timber by collusion with tenant, without prejudice to case of a mere trespasser. *Courthorpe v. Mappleden*, 10 Ves. 290. TRESPASS.

An order specifically to repair the banks of a canal and stop gates, &c. refused; but by injunction restraining defendant from impeding plaintiff from navigating, &c. by continuing to keep banks, &c. out of repair, &c. the effect of such former order was given. *June v. Newdgate*, 10 Ves. 192. REPAIRS; CANALS, &c.

Mortgage of wood and underwood; it is not waste by the mortgagor in possession, to cut underwood at seasonable times and of proper growth; but being a bankrupt an injunction was granted on the right of the mortgagee to have the estate sold in the plight in which it was at the bankruptcy, and to prove the rest of his debt. *Hampton v. Hodges*, 8 Ves. 105. MORTGAGE; MORTGAGE; BANKRUPTCY.

Injunction against cutting timber refused where the title was disputed as between the devisee and heir at law. *Smith v. Collyer*, 8 Ves. 89. TITLE.

Injunction to restrain a surviving partner from disposing of the joint stock and receiving the outstanding debts. *Hurtz v. Schrader*, 8 Ves. 317. PARTNERSHIP.

Injunction to stay waste not granted without positive evidence of title. *Daries v. Lee*, 6 Ves. 781.

Injunction obtained on affidavits against pasturing cattle and cutting in a wood; the plaintiff prayed the injunction as tenant in fee, or as lord of the manor inclosing under the statute, the defendants denying the former title, and as to the latter claiming common of pasture and estovers, and stating that after the enclosure sufficient common of pasture would not be left: the plaintiff having, before the bill filed, been nonsuited in an action of trespass, and entered into an agreement with some of the tenants. The injunction was dissolved upon the answer. *Quare*, Whether the original new affidavits could be read in such a case? *Hanson v. Gardiner*, 7 Ves. 305. TITLE.

Injunction against cutting ornamental timber confined to timber standing for ornament or shelter, the court refusing to extend it by inserting the words "contribute to ornament." *Williams v. McNamara*, 8 Ves. 70. ORNAMENTAL TIMBER.

Injunction between tenants in common against destruction not against pure equitable waste. *Hole v. Thomas*, 7 Ves. 589. TENANTS IN COMMON.

Lessee committed waste by opening a mine, and continued to work into the other land of the lessor not comprised in his lease. Injunction was granted as to both. *Cited in Hanson v. Gardiner*, 7 Ves. 308. INJUNCTION AGAINST TRESPASS.

Injunction against waste granted in favour of tenant for life, particularly as to ornamental timber, not so much upon his interest as his enjoyment. *Daries v. Lee*, 6 Ves. 787. TENANT FOR LIFE.

Injunction against ploughing up pasture upon covenant to manage in a husbandlike manner. *Drury v. Molins*, 6 Ves. 328.

Injunction granted where defendant having begun to work mine in his own land, continued it into plaintiff's. *Mitchell v. Dore*, 6 Ves. 147. MINES.

Injunction granted on affidavit to restrain tenant from ploughing up meadow to build on, contrary to express covenant. *Quare*, if granted on ground of waste, or no covenant? *Id. De Wilson v. Saxon*, 6 Ves. 106.

Injunction to stay waste not granted against defendant in possession claiming by an adverse title. *Pillworth v. Hepto*, 6 Ves. 51.

Injunction granted to restrain tenant not impeachable for waste, from cutting clumps of trees for ornament two miles from house. *Marg. Downshire v. Ly. Sandys*, 6 Ves. 107. TIMBER, ORNAMENTAL.

Injunction granted to restrain tenant for life without impeachment, from cutting timber and other trees planted, &c. for ornament, &c. and from cutting except in husbandlike manner. *Id. Tamworth v. Id. Ferrers*, 6 Ves. 419. TIMBER, ORNAMENTAL.

Where a tenant defending an ejectment brought by his landlord, makes default at the trial, and makes use of the interval to do all the mischief he can by breaches of covenant and wilful waste, an injunction will be granted on motion, or in the vacation on petition: but it was refused, where no ejectment had been brought. *Lathropp v. Marsh*, 5 Ves. 259. LANDLORD & TENANT.

Court will not interfere to prevent tenant carrying off dung from farm, contrary to covenants of lease. *Johnson v. Goldsacaine*, 3 Aust. 749. *sed vid. contra Geest v. Id. Belfast*, *id. note*. BREACH OF COVENANT.

A tenant for life liable to waste, having sold timber, cannot prevent the vendee from cutting it. *Wentworth v. Turner*, 3 Ves. 3. TENANT FOR LIFE.

The general controlling power of the court over charities does not extend to a charity regulated by governors under a charter, unless they have also the management of the revenues, and abuse their trust, which will not be presumed; but must be apparent or made out by evidence. The Foundling Hospital is an institution of this kind; therefore, on motion, injunction to restrain the governors from building round it, refused; breach of trust or probability of it not being made out, and held not in nature of waste to turn meadow into buildings, unless clearly injurious. *Att. Gen. v. Governors of Foundling Hosp.* 2 Ves. J. 42.

Injunction to stay waste refused, where the plaintiff and the defendant in possession were tenants in common, but granted on affidavit of defendant's insolvency. *Smallman v. Oulons*, 3 Bro. C.C. 621. INSOLVENCY.

Injunction granted from farther digging a ditch, but court will not order it to be filled up till after answer. *Anon.* 1 Ves. J. 140.

Order made to prevent removal of timber wrongfully cut. *Anon.* 1 Ves. J. 93. WASTE.

The court will not interfere by way of injunction to stay waste where the defendant may be turned immediately out of possession. *Mortimer v. Cotterell*, 2 Cox, 205.

Injunction granted to stay waste against the widow of a rector at the suit of the patroness during vacancy. *Hoskins v. Featherstone*, 2 Bro. C.C. 552. PERSONAGE.

Where an injunction to stay waste has been obtained on bill filed and affidavit, the defendant may, immediately on coming in of his answer, move to dissolve the injunction without obtaining any order nisi; but then his answer can only be received as an affidavit, and the plaintiff may read affidavits in contradiction to it; and if afterwards, upon exceptions, the answer appear insufficient, the injunction shall be revived. *Cs. Strathmore v. Bowes*, 1 Cox, 263. *PR. MOTION TO DISSOLVE INJUNCTION; PR. EVID.*

Affidavits read against the answer in support of injunctions to stay waste. *S.C.* 2 Bro. C.C. 88. *PR. EVID. AGAINST ANSWER.*

Demandeur to a bill for an injunction to restrain injuring fish ponds, overruled. The court also in this case restrained a tenant from building so as to interrupt his landlord's prospect. *Bathurst v. Burden*, 2 Bro. C.C. 64. *PR. DEMANDUR.*

Injunction to restrain defendant from preventing

water flowing in regular quantities to a mill. *Robinson v. Byron*, 1 Bro. C. C. 588.

Injunction for waste denied; plaintiff's right being doubtful. *Field v. Jackson*, Dick. 599.

Injunction must be prayed against present waste. *Anon.* Loft. 151. PL. PRAYER.

Injunction against cutting young saplings, wavers and fruit trees. *Kaye v. Banks*, Dick. 431.

Injunction to stay waste only granted on interlocutory application. *Kettle v. Corbin*, Dick. 314.

Patron of a living may have an injunction against the incumbent to stay waste. So may the attorney general against a bishop. But they cannot pray any account of the profits for their own benefit as patrons. *Knight v. Mosely*, Amb. 176. ACCOUNT BY WHOM.

The court will restrain waste in an under-lessee at the suit of the ground landlord. So against a first tenant for life, at the suit of the remainder-man, notwithstanding an intermediate life-estate; so against a mortgagee (not applying the produce of timber in sinking the principal and interest,) at the suit of the mortgagor; so against a mortgagor committing waste to the prejudice of the mortgagee. *Farrant v. Lovel*, 3 Atk. 723.

Injunction refused to restrain the father who was tenant for life without impeachment of waste, from removing a deal floor he had placed, and young oaks he had planted, breaking up meadow &c. To ground such an injunction there must be waste and spoliation, and no delay in applying for it. *Peirs v. Peirs*, 1 Ves. 521. TENANT FOR LIFE.

Injunction to stay tenant for life from committing waste by cutting trees growing for ornament, and saplings not proper to be felled. *O'Brien v. O'Brien*, Amb. 107. S. C. 1 Bro. C. C. 168. in note. ORNAMENTAL TIMBER.

The court will restrain tenants for life, without impeachment of waste, to a reasonable exercise of the right. *Aston v. Aston*, 1 Ves. 264. TENANT FOR LIFE.

Garden grounds used for trades as much protected by the highway acts, &c. as private property. Plaintiff therefore, quieted in possession by injunction against the commissioners. *Hughes v. Trustees of Morden College*, 1 Ves. 188. HIGHWAY ACTS.

If a defendant by his answer admits that he has committed waste before the filing of the bill, though he swears he has committed none since, yet the court will not dissolve the injunction. *Anon.* 3 Atk. 485. Pn. ANSWER, ADMISSIONS BY.

The court will restrain a tenant for life, without impeachment of waste, from cutting down trees in lines or avenues, or ridings in a park, as they are for ornament; and whether trees grow naturally, or where planted, if they serve for ornament or shelter, it is the same thing. *Packington's Case*, 3 Atk. 215.

An injunction will be granted before answer to stay waste, by a person having no interest in the thing wasted, but merely acting as a servant. *Ld. Orrey v. Newton*, Ridgw. 252.

If a person only threatens to open mines, plaintiff may come into court to restrain him from doing it. *Gibson v. Smith*, 2 Atk. 182.

It is not necessary to stay till waste is actually committed, where the intention appears, and the person insists on his right to do it. *Id.*

Though no proof appears of waste, yet if tenant for life insists on a right to do it and has none, the reversioner may have an injunction. *Id.*

The court will grant an injunction to stay waste in favour of an infant *in ventre sa mere*. *Wallis v. Hudson*, 2 Atk. 117. CHILD IN VENTRE SA MERE.

Injunction against tenant in possession, not party to stay waste. *Att. Gen. v. Dk. Ancaster*, Dick. 68.

Lessee for years sans waste, remainder in fee to a

bishop; lessee enjoined from digging the ground for brick. *Bp. London v. Webb*, 1 P. W. 527. LESSOR & LESSEE.

Injunction granted to prevent tenant for life punishable for waste from pulling down a castle. *Pane v. Ld. Bernard*, 1 Salk. 161. TENANT FOR LIFE.

Injunction to stay waste in cutting trees, granted on bill by party who was only tenant for life, and had no right to trees, and though party entitled to inheritance was not joined. *Dagrell v. Champness*, 1 Eq. Ab. 400. PL. PARTY.

Injunction to stay waste, granted against jointress. *Cooke v. Whaley*, 1 Eq. Ab. 400. But where it was covenanted that jointure should be of certain value, which it was not, court refused the injunction. *Carew v. Carew*, id. ib. JOINTURE.

In a lease for years of land, lessee covenants not to plough pasture land, and if he does, then to pay after the rate of 20s. per annum for every acre ploughed. The court will not grant an injunction against the tenants ploughing; for the parties themselves have agreed the damage, and set a price for ploughing. Nor will court relieve the lessee against the penalty if he plows. *Powdercard v. Gyles*, 2 Vern. 119. LANDL. & TEN.; STIPULATED DAMAGES.

A, tenant for life; remainder to B for life; remainder over. A, though punishable of waste at law by reason of the mesne remainder for life, yet shall be enjoined from committing waste in a court of equity. But tenant for life, without impeachment of waste, shall not be enjoined from committing waste. *Tracy v. Tracy*, 1 Vern. 23. TENANT FOR LIFE.

An injunction to restrain a lessee from ploughing pasture lands, which had remained unploughed during the continuance of the lease for thirty years, but were ploughed within six years prior to its commencement, refused. *Goring v. Goring*, 3 Swan. 661. LANDL. & TENANT.

Defendant stayed by injunction from pulling down his rooms to prejudice of plaintiff's rooms. *Bush v. Fuld*, Cary, 90.

Writs of prohibition and assistance, to prevent a prebendary from committing waste on his prebend. *Acland v. Atwell*, 3 Swan. 499. PREBEND; WASTE.

Waste by a bishop is the subject of prohibition. *Bp. Winchester v. Wolgar*, id. 493. BISHOP; WASTE.

Injunction to restrain the lessee for years of the temporalities of a bishop, under a lease confirmed by the dean and chapter, and without impeachment of waste, from felling timber. *Id. ib.* WASTE; ECCLESIASTICAL LEASE.

A tenant for life of coal mines may open new pits or shafts for the working old veins of coals, for it is hazardous to grant an injunction to stay the working of a coal mine, as it may ruin the colliery for ever. So one seized of lands, wherein there are coal mines not opened, settled those lands on A in tail, remainder to B for life. A opened the mines and worked, and died without issue. B may continue to work all the mines lawfully opened. *Clavering v. Clavering*, 2 P. W. 388. Sel. Ch. Ca. 79. MINE.

Injunction to restrain the landlord from cutting ornamental trees in a lawn during the term, upon his conduct; amounting to a consent to the tenant's plan of improvement, laying out the lawn, &c. Sending a surveyor to mark out trees, is a sufficient ground for an injunction. *Jackson v. Cater*, 5 Ves. 688. LANDLORD & TENANT.

#### 24. In other cases.

Where persons who were merely hirers and occupiers of seats or pews in a dissenting meeting-house,

which was held in trust for the use of the congregation, but who did not take the sacrament there, had been excluded from voting at the election of a minister to officiate in the meeting-house, an application for an injunction to restrain the individual so elected, from acting as minister or receiving the emoluments attached to his office, was refused. *Leslie v. Bernie*, 2 Russ. 114. **DISSENTERS.**

Where defendant denies charges in bill of fraud and misconduct in partnership, and explains others away, and alleges his inability to put in a full answer by reason that plaintiff withheld improperly the partnership books, court would not even grant the injunction prayed by bill, but refused it without prejudice. *Littlewood v. Caldwell*, 11 Price, 97. **PL. ANSWER; FRAUD, DENIAL OF.**

A clerk to a solicitor commencing practice for himself, not to be restrained from acting as solicitor for parties against whom his master was employed, upon general allegations of his having in his former service acquired information likely to be prejudicial to the clients of his master. *Bricheno v. Thorp*, 1 Jac. 309. **SOL. & CLIENT; PROFESSIONAL CONFIDENCE.**

Motion to restrain a solicitor from giving evidence of confidential matters, refused; the propriety of his being examined being left to the consideration of the court, before which he might appear as a witness. *Beer v. Ward*, 1 Jac. 77. **Id.**

A solicitor who has been discharged, may, upon proof of his misconduct, be restrained from communicating information that came to him confidentially from his client. *Semble. Id. ib.*

If a person is refused, at a fair or market, the accommodation to which he is entitled, a court of equity cannot interfere by injunction. *Semble. Wcale v. West Middlesex Waterworks Comp.* 1 Jac. & W. 373. **MARKET; JURISDIC.**

Injunction to restrain husband from preventing his wife's solicitor and friends from having access to her, she being confined by dangerous illness in his house, to enable her to execute a deed of appointment under a power in her marriage settlement, refused; it not being proved that she had given instructions for such a deed. Whether under any circumstances, such an injunction would be granted; *Qu.?* *Middleton v. Middleton*, 1 Jac. & W. 94. **HUSB. & WIFE; EXECUTION OF POWER.**

In general, during a suit for specific performance, the court will not restrain the owner from dealing with his property. *Spiller v. Spiller*, 3 Swan. 557. **SPEC. PERF.**

Whether an injunction can be issued against proceeding under an extent; *Qu.?* The crown is not subject to the equity of using its securities for those secondarily liable to pay, against those primarily liable. *Whitehouse v. Partridge*, 3 Swan. 376. **EXTENT.**

Two persons having agreed to work a coach from Bristol to London, one provided horses for a part of the road, and the other for the remainder, and in consequence of the horses of one having been taken in execution, the other having provided horses for that part which had been undertaken by the first, and claiming the whole profits of the journey; the court refused an injunction against continuing to provide horses. *Smith v. Fromont*, 2 Swan. 330.

A coach-master having sold his share of the business to his partner, with an undertaking not to be concerned in any coach running from R. to London, or prejudicial to the business which he had sold, an injunction was granted restraining him from running a coach from P. through R. to London. *Williams v. Williams*, 2 Swan. 253. **GOODWILL.**

Five hundred pounds awarded to B., retiring partner, for goodwill, &c. on understanding not expressed

in award, that he should not set up same trade in the vicinity. On parol evidence injunction was granted to enforce award, and such understanding. *Harrison v. Gardner*, 2 Mad. 198. **AWARD; GOODWILL.**

Trust-deed for payment of creditors, no creditors being a party, nor made by agreement, and without consideration on the part of any creditor. The debtor afterwards executes other deeds, varying the trusts of the first; motion for an injunction by a creditor under the first deed, who had filed a bill to restrain the trustees from executing the trusts of the subsequent deeds, till they had raised money to answer the first, refused. *Wallwyn v. Coutts*, 3 Mer. 707. **DEED, VOLUNTARY; DEBTOR & CRED.**

Objections to award being such as might have been equally the subject of jurisdiction in the court of law, where reference was made a rule of court; injunction dissolved. Award being prepared by solicitor to one of the parties, is no objection. *Featherstone v. Cooper*, 9 Ves. 67. **AWARD.**

Where, by neglect, the number of trustees in a trust to present to a living was not filled up at the time of an avoidance, the court would not by injunction prevent the effect of a presentation, under the legal title of the heir of the surviving trustee without a special ground; but the court will take care as to the future, that the trust shall be properly filled up. *Att. Gen. v. Bp. Litchfield*, 5 Ves. 825. **PRESENTATION TO LIVING; TRUST; LACIES.**

Sequestrators forcibly dispossessed, restored by injunction. *Ld. Pelham v. Ds. Newcastle*, 3 Swan. 289. **PR. SEQUESTRATION.**

Injunction to restrain surviving partners from using the name of a deceased partner in the firm of the trade, refused. *Webster v. Webster*, 3 Swan. 490. **PARTNERSHIP.**

Court with reluctance grants injunction to stay working a colliery. *Anon. Anbl.* 209. **MINES.**

Where a question is one determinable at law, and no obstacle or inconvenience in trying it, a court of equity will not interpose by injunction. In this case an injunction to stay the use of a market, was refused. *Anon.* 2 Ves. 414. **MARKET.**

A right cannot be established against all persons under a mere bill for one injunction. *Id. ib.*

An injunction to restrain a man in the exercise of his trade, refused before answer. *Jackson v. Barnard*, Ridgw. 259. **TRADE.**

Lord incloses part of the common, insisting it was an improvement within the statute of Merton, and that he had left sufficient common for the tenants. They throw open the inclosure by force. Court granted an injunction, and at hearing directed issue, whether the defendant had a right of common, and whether sufficient common left. *Arthington v. Fawkes*, 2 Vern. 356. **INCLOSURE OF COMMON; ISSUE AT LAW.**

## XLVII. INQUEST, GENERALLY.

See LUNACY, IV. 1; 2.

Application for leave to traverse an inquisition refused, no evidence being produced, except the oath of the applicant, to invalidate the inquisition. A mere trustee, it seems, is not allowed to traverse. *In re Sadler*, 1 Mad. 581. **TRUSTEE.**

Inquisition finding some points well, and nothing as to others may be supplied by *melius inquirendum*; otherwise, if defective in points found. *Layton v. Manlove*, 2 Salk. 469. *Sed quare, Exp. Duplessis*, 2 Ves. 539.



XLVIII. INSPECTION OF DEEDS, &c.

See also PRODUCTION OF DEEDS.

The court does not usually compel a party to produce his title deeds as evidence; but where a party produces them to defeat his adversary, the opposite side is entitled to an inspection of them. *Grange v. Cross*, 2 Y. & J. 241. PR. PRODUCTION OF DEEDS; TITLE DEEDS.

Motion by defendant for inspection of book produced by plaintiff under commission issued after publication had passed, was refused with costs. *Forester v. Helme*, 1 M'Clel. 558. PR. PUBLICATION.

Solicitor refusing to act longer in cause, ordered to permit client to inspect papers in his possession at all reasonable times, without any undertaking on her part to proceed to taxation of bill. *Moir v. Mudie*, 1 S. & S. 282. SOLICITOR & CLIENT; LIEN.

A party claiming to be heir to the lunatic, permitted, after the possession of the estate had been given up to the parties reported to be the heirs, to inspect deeds and documents remaining in the master's office, which it seems may be obtained till a proper investigation has taken place. *Erpe Clarke*, 1 Jac. 589. HEIR AT LAW; LUNACY.

In a bill against executors, the plaintiff having stated two promissory notes of the same date, one for 15000*l.* sterling, the other for 15000 French louis, given by the testator for securing a sum of 15000*l.*, on an affidavit by one of the executors, that he had inspected the first note, and observed on the face of it circumstances tending to impeach its authenticity, that he was informed and believed that the second note had been produced by the plaintiff for payment in a foreign country, and that he was advised and believed that it was necessary, in order that his answer might fully meet the case, that he should, before answer, have inspection of the second note, it was ordered, that the defendants should not be compelled to answer till a fortnight after production of the second note. *Princess of Wales v. El. Liverpool*, 1 Swan. 114. PR. TIME TO ANSWER.

A solicitor declining to be farther concerned in a cause, is not entitled to compel payment of his costs by refusing to permit such inspection of the papers in his hands, or such production of them before the court or the master, as may be necessary in the conduct of the cause. *Commerell v. Poynton*, 1 Swan. 1. SOLICITOR & CLIENT; LIEN.

Upon a reference to the master, it being necessary (to enable him to make his report) to have the evidence of entries in the books of the bank of England, the master is bound to grant his certificate, in order to justify the bank in permitting an inspection, rather than compel the parties by his refusal to file their bill for a discovery. *Bruce v. Ormond*, 1 Mer. 409. PR. MASTER'S CERTIFICATE; BANK OF ENGLAND.

Inspection ordered, on a motion, of articles claimed by the plaintiffs as heir looms, in a chest at the banker's of the defendant, insisting by answer on a lien. *El. Macclesfield v. Davis*, 3 V. & B. 16. LIEN; HEIR LOOMS.

An heir at law has no equity except to remove incumbrances in the way of his legal right; he cannot cannot call for an inspection of deeds in possession of the devisees. *Lady Shaftesbury v. Arundell*, 4 Ves. 66. HEIR AT LAW.

Bill by heir in tail against devisees, on motion an inspection was ordered of all deeds of settlement, admitted to be in the possession of the defendants creating estates in tail general, but no farther. *Id. ib.*

Papers specifically referred to in an answer, and admitted to be in defendant's custody, may be

ordered to be inspected by the plaintiff. *Gardiner v. Mason*, 4 Bro. C. C. 479.

Where the heir admits by his answer, that he is testator's heir, and that the will is duly executed, and to the purport set forth in the bill, he shall not be entitled to an inspection of the title deeds. *Potter v. Potter*, 3 Atk. 719. 1 Ves. 274. Amb. 98. HEIR AT LAW.

The heir is not entitled to see any deeds in the hands of the jointress without confirming her jointure, though the jointure was made after marriage. *Towers v. Darys*, 1 Vern. 479. JOINTURE; HEIR AT LAW.

A sends to his London factor to sell; factor pawns goods. Pawnee by answer admits factor pawned some goods, but knows not whether they were the plaintiff's. Ordered, that A, in the presence of two or more, may have a view of them. *Maraden v. Panshall*, 1 Vern. 407. PL. DISCOVERY.

XLIX. INSPECTION, ORDER FOR.

The respondent, an inappropriate rector, having, by decree of court of chancery, been found entitled to tithes according to value of warehouses in London, occupied by appellants, and which had never been rented, court has jurisdiction to make order for inspection upon appellants to ascertain value. Such order cannot be executed by force, but operates on person as ground for contempt, or bill *pro confesso*, if necessary. *E. J. Comp. v. Kynaston*, 3 Bli. 153. JURISDICTION.

See on this subject, *Ld. Lonsdale v. Curwen*, 3 Bli. 168. note. *Walker v. Fletcher*, id. 172. *Broune v. Moore*, id. 178.

Owners and occupiers of houses in London subject to tithe; defendants, at suit of tithe owner, ordered to permit witnesses to inspect them, preparatory to examination on interrogatories for proving their value. *S. C.* 3 Swan. 248. PR. EVIDENCE.

Instances of order to permit inspection and entry. *Id.* 264.

In a suit by the city of London, the defendants obtained an order to inspect the city books and their bye-laws. *City of London v. Thomson*, 3 Swan. 255.

Under what circumstances court will, on bill of discovery, direct search to be made in boxes of absent party in hands of defendant as depositary. *Att. Gen. v. Elliott*, 1 Price, 377. See further this case, 2 Price, 48. PR. BILL OF DISCOVERY.

Issue at law directed by consent to try right of stopping up or obstructing lights; and view to be had of premises, &c. *Att. Gen. v. Bentham*, Dick. 277.

Issue directed to try and settle boundaries of two manors by special jury, and to have a view. *Lechevillier v. Ld. Castlemaine*, Dick. 46.

On a bill by the lord of a manor, praying a commission to ascertain the boundaries of a copyhold estate, an issue was directed to try what copyhold lands were in the possession of the defendant. But on an appeal, this decree was reversed, and a commission of inquiry directed, with a previous inspection of all deeds, &c. *Rois v. Barker*, 4 Bro. P. C. 660. BOUNDARIES.

INSUFFICIENCY, see PR. MASTER, REFERENCE, 1. (d). —PR. ANSWER, 19.

L. INTERLOCUTORY ORDER.

Defendant not being the party seeking relief, therefore is not entitled to apply for an interlocutory order for his own security or relief as to subject matter of suit, unless the object of his motion may be imposed as a condition on an order applied for by plaintiff. *Wyburn v. Griffiths*, 1 S. & S. 147. PR. PARTY, DEFENDANT.

Injunction granted on interlocutory application in Irish court of chancery, to restrain proceedings at law there, is not of itself sufficient ground to obtain injunction in this court to restrain proceedings on same matter in K. B. *here*. *Bull v. Storie*, 1 S. & S. 210. IRELAND; INJUNCTION TO STAY PROCEEDINGS.

The court will make interlocutory orders for production, only for security or discovery, and will not anticipate the decree. *Lingen v. Simpson*, 6 Mad. 290. **PR. PRODUCTION OF DEEDS, &c.**

Reference of title before answer, plaintiff, the vendor, undertaking to do all such acts for the purposes of executing what the court thinks right, as if the answer was in, and the cause brought to hearing. Direction, if the report shall be against the title, for compensation, refused, as to indemnity. *Balmanno v. Luntan*, 1 V. & B. 224. **REFERENCE AS TO TITLE.**

Final decree cannot be made upon an interlocutory order, without consent. *Allan v. Borer*, 3 Bro. C. C. 149. **PR. DECREE.**

INTERPLEADER, *see* PR. BILL OF INTERPLEADER. — **PR. COSTS**, 10, (c). — **PR. EVID.** 11, (f). — **PR. PAYMENT INTO COURT**, 3.

## LL. INTERROGATORIES.

*See also* PR. EVID. *passim*; and as to Demurrer to Interrogatories, PR. EVID. 27, (d).

Interrogatories when scandalous to be suppressed. *Keane's Orders*, 25.

So when impertinent. *Id.* 25, 27, 2.

Defendant not to be examined on. *Id.* 31.

Exceptions thereto. *Id.* 31.

For examination of witnesses, only to extend to points material, and not confessed. *Id.* 70, 164.

That interrogatories, as to knowledge of parties, plaintiffs, and defendants, be not needlessly used. *Id.* 171.

Exceptions thereto. *Id.* 71.

Offenders herein, to be punished with costs. *Id.* 71.

Interrogatories to be pertinent and material. *Id.* 71, 183, 272, 312.

No new interrogatories to examine witnesses examined in court on a schedule of interrogatories. *Id.* 73, 193.

No witnesses to be examined in court after publication. *Id.* 73, 186.

But new interrogatories may be exhibited in court for examination of new witnesses any time before publication. *Id.* 97.

Interrogatories to be apt. *Id.* 183.

Not to be leading. *Id.* 272, 312.

Must be drawn or perused and signed by counsel. *Id.* 273, 312.

Personal interrogatories to be settled by the master. General Rule, June 18, 1803, 1 Sch. & L. 178. O'Keefe's Ed. 92.

No witness to be examined to a general interrogatory; and any set having such an interrogatory, must not be received by the examiners or commissioners, on speeding any commission in any cause in this court. Ord. Ch. Irel. 1724. O'Keefe's Ed. 33. No witnesses to be examined on any direct interrogatories, that shall not be first entered with and signed by the register, who is also to mention the number of interrogatories that each schedule contains; and put his initials at the foot of each entry: witnesses not to be examined to any interrogatories that are interlined, unless the register's initials be written immediately before the place of such interlineation. **Depositions**

taken contrary to this rule, to stand suppressed. Ord. Ch. Irel. 27th Feb. 1740. O'Keefe, 54.

No objection to be made on the hearing against the reading depositions, for that the interrogatories are leading, but to be made by motion immediately after publication passed. Ord. Ch. Irel. 22d Feb. 1731. O'Keefe's Ed. 43.

Commissioners, before whom witnesses shall have been examined on cross interrogatories, to put their initials to each of such cross interrogatories. Ord. Ch. Irel. 27th Feb. 1740. O'Keefe's Ed. 55. So, before any cross-examination takes place, the cross interrogatories must be first regularly entered with the register, and certified by counsel. Ord. Ch. Irel. 19th March, 1798. *Id.* 88.

Where witness has demurred to interrogatory, as tending to subject him to a penalty, and demurrer is overruled as too general; it was ordered without costs, and that new commissions should issue, plaintiff undertaking by interrogatories to make no use of answer for the purpose of enforcing such penalties. *Jackson v. Benson*, 1 Y. & J. 36. **WAIVER OF PENALTIES**; **PR. EXAM. OF WITNESS.**

If after defendant has put in his examination to the usual interrogatories before the master, the plaintiff discovers that defendant has received sums not mentioned in his examination, the master is at liberty to receive a new state of facts, and further interrogatories founded upon them, without an order of court. *Sitden v. Foster*, 1 S. & S. 335. **PR. EXAMINATION**; **PR. STATE OF FACTS.**

Interrogatories in support of articles for purpose of discrediting witnesses, may relate to particular facts not in issue in the cause, as well as to the credit of the witnesses generally. *Piggott v. Crowhull*, 1 S. & S. 467. **PR. DISCREDITING WITNESSES.**

Master may, at his discretion, receive further interrogatories. *Pryce v. Lytton*, 5 Mad. 465. **PR. REFERENCE TO MASTER.**

Court refused, (with costs,) to order interrogatories to be suppressed, however impertinent, if witnesses have answered there; they should demur: answering them waives impertinence. *Jeffries v. Whitlock*, 9 Pri. 436. **WAIVER**; **PR. IMPERTINENCE.**

Practice as to exhibiting of further interrogatories before master. *Lynn v. Buck*, 3 Mad. 280.

If plaintiff do not file his answer to interrogatories, an order will be made on him to show cause why they should not be taken *pro confesso*. *Leves v. Morgan*, 5 Pri. 471.

On a bill for discovery, and a commission to examine foreign witnesses in aid of an action at law, a motion that the plaintiff might communicate to the defendant the interrogatories exhibited by him, was refused. *Butler v. Balkelly*, 2 Swan. 373. **PR. COMMISSION TO EXAMINE ABROAD.**

Interrogatories to examine parties must be settled by the master. *Willan v. Willan*, 19 Ves. 593.

After defendant's examination on interrogatories and motion for payment into court on that examination, plaintiff permitted to file further interrogatories. *Hatch v. —*, *id.* 116.

Interrogatories and depositions not referred for impertinence alone without scandal. *White v. Fussell*, *id.* 113. **PR. REFERENCE FOR IMPERTINENCE**; **DEPOSITIONS.**

Re-examination not of course, but at discretion of the court on special application. Order after decree, on behalf of a defendant for the examination of another defendant, upon interrogatories, who had been examined and cross-examined, restrained to such of the points in the cause to which she had been examined, as the master should think reasonable. Interrogatories for examination of a party settled by the master. *Purcell v. M'Namara*, 17 Ves. 434. **PR. RE-EXAMINATION.**

Objections to interrogatories settled by master for impertinence, must be taken by exceptions, not by petition, as an objection to appointment of receiver. *Hughes v. Williams*, 6 Ves. 459. PR. EXCEPTIONS TO MASTER'S REPORT.

An interrogatory being suppressed as leading, the court, on the circumstances of the case, gave leave to exhibit a fresh interrogatory. *Mentill v. Payne*, 3 Anst. 923.

Where parties go before the master upon a reference, he must receive interrogatories from both, though one of them should not have gone into any proof in the former stage of the cause. *Hough v. Williams*, 3 Bro. C. C. 190.

Order for leave to exhibit interrogatories to falsify examination, *pro interesse suo*, obtained by motion of course. *Rowley v. Ridley*, 3 Swan. 308. PR. EXAMINATION, PRO INTERESSE SUO; PR. MOTION OF COURSE.

If, so late as at the hearing, an interrogatory appeared to be leading, the court will reject the evidence taken upon it. *Delres v. Bagot*, 2 Fowl. 152.

Interrogatories referred for being impertinent and leading, and the depositions taken thereon, referred also. *Henriques v. Henriques*, 2 Fowl. 151.

The words in an interrogatory, "in order to bring him home to England by law or in chancery," were held to be leading. *Nash v. P. L. Co.*, 2 Fowl. 154. And by a subsequent order, the depositions taken thereon were suppressed. *Id.*

Interrogatories referred to the master, being reported to be leading, on motion to confirm his report, were with the depositions taken thereon, ordered to be suppressed, with costs. *John v. Prothero*, 2 Fowl. 153. *Gaynon v. Ferron*, *id.*

New interrogatories may be exhibited for new witnesses, any time before publication. *Lewis v. Owen*, Dick. 6.

Court will not allow interrogatories to be exhibited as of course. *Bromby v. Child*, *id.* 128.

Copy of interrogatories relating to contempt, refused. *Welsh Copper Comp. v. Moore*, *id.* 335.

Witness examined in chief before hearing, cannot afterwards be examined before master, without special order, and then not on any matters he had been before examined to, or wherein interested; master to settle interrogatories. *Browning v. Barton*, *id.* 508.

Exceptions do not lie to master's certificate of his having settled interrogatories. *Stanford v. Tudor*, *id.* 548.

An new set of interrogatories allowed to be settled before a master, the former being suppressed, as leading. *Spence v. Allen*, Prec. Chan. 493. S. C. Gilb. Eq. Rep. 150.

The plaintiff's christian name being mistaken in the title of the interrogatories, the depositions could not be read, nor would the court permit the title to be amended, though most of the witnesses since their examination were gone to sea. *White v. Taylor*, 2 Vern. 435. PR. INTERROGATORIES, AMENDM. OF.

### LII. INTITULING PLEADINGS.

A petition praying that the committee of a lunatic may be ordered to transfer property vested in the lunatic as a trustee, ought to be entitled in the lunacy, and need not be entitled in the matter of the act, which authorises the lord chancellor to make the order. *In re Fowler*, 2 Russ. 449. LUNACY.

The title to a petition in bankruptcy is not vitiated by its being also entitled "In chancery." *Exp. Hudson*, 2 G. & J. 228. BANKCY. PET. INTITULING.

No objection to an affidavit, that it was not headed in the matter of the bankruptcy in which it was used, if from the accompanying circumstances it is manifest that it was judicially used in the bankruptcy. *Exp.*

*Simmonds*, 2 G. & J. 44. BANKCY. AFFIDAVITS, HOW INTITULED.

Petition in bankruptcy should be entitled in bankruptcy not in chancery; but leave given to amend. *Exp. Glanfield*, 1 G. & J. 387. BANKCY. INTITULING PETITION.

Plea by husband and wife, entitled as joint and several plea, word "several," mere surplusage, and does not vitiate plea. *Fitch v. Chapman*, 2 S. & S. 31. PLEVY; SURPLUSAGE.

Exceptions irregularly entitled, ordered to be taken off file. *Williams v. Davis*, 1 S. & S. 426. PR. EXCEPTIONS, MISTAKE.

Application to remove a solicitor from being, or acting as a master extraordinary of the court of chancery, and to strike him off the roll of such court, though it may be properly made, by reason of his conduct in matter of bankruptcy, should not be made in the bankruptcy, but should be addressed to the general jurisdiction of the court. *Exp. Lowe*, 1 G. & J. 78. SOLICITOR.

Petition under 33 G. 3. c. 54. s. 10, in consequence of bankruptcy of trustee of friendly society, should, it seems, be entitled in bankruptcy only, and not in matter of the society. *Ann.* 6 Mad. 98. FRIENDLY SOCIETIES.

Court has no jurisdiction in bankruptcy, to declare an infant heir of assignee a trustee of bankrupt's estate; the petition must be entitled under 6 G. 4. c. 74. *Exp. Kirk, Buck*, 478. S. P. *Exp. Beddam*, 1 Rose, 310. BANKCY. JURISDICTION; INFANT TRUSTEE.

Demurrer to an amended bill need not be intituled as a demurrer to original and amended bill, but as a demurrer to the amended bill. *Smith v. Byron*, 3 Mad. 428.

Answer taken off the file when the title omitted the words "to the bill of complaint of." *Peters v. Thompson*, Coop. 249. PR. ANSWER, FORM; PR. TAKING PLEADINGS OFF FILE.

Answer ordered off the file, it purporting to be an answer to the bill of five complainants, where there were six. *Cope v. Parry*, 1 Mad. 83. PR. ANSWER.

Order for taxing a bill of costs, entitled in the cause if obtained by the party to the cause, regular under the general jurisdiction; but a person not a party in the cause, must apply *ex parte* under the statute 2 G. 2. c. 29. s. 22. Such an irregularity would be waived by proceeding under the order. *Bignol v. Bignol*, 11 Ves. 328. PR. ORDER FOR TAXATION.

### LIII. ISSUE AND ACTION AT LAW, AND CASE SENT FOR OPINION OF JUDGES.

See also PR. COSTS, 10. (bb).

1. Form of.
2. When directed.
3. Issue devisavit vel non.
4. Practice on generally, and trial of, and verdict, proceedings and effect of. See further, PR. NEW TRIAL.

#### 1. Form of.

A bill was filed by one executrix against her co-executrix, charging her with having secretly and improperly possessed herself of part of the testator's property during his lifetime. The defendant, by her answer, denied the accusation, and insisted that the spoliation was committed by the plaintiff, but did not file a cross bill. If an issue is directed to try the fact, the issue must be, not merely whether the defendant possessed herself of any part of the testator's property in the manner alleged, but also whether the plaintiff

possessed herself of any part of it in like manner. *Launceston v. Atkinson*, 2 Russ. 60. FRAUD; SPOILATION OF DEEDS.

Where parties to an alleged concerted commission make affidavits to support commission, which are not so satisfactory as to enable the court to come to a conclusion, and the court is compelled to direct an issue to try the concert, the court will direct as to the form of the issue. *Exp. Carter*, 1 G. & J. 326. BANKRY. CONCERTED COMMISSION.

Form of issue not changed on a motion for a new trial. *White v. Lisle*, 3 Swan. 351. PR. NEW TRIAL.

In directing an issue, the court will not order the examination of persons at the trial who, by the rules of the court of law, could not be examined without order, except sometimes in cases where the facts in dispute rest only in the knowledge of the plaintiff and defendant. *Exp. Dister*, Buck, 234. PR. ORDER FOR EXAM. OF WITNESS.

On issue directed, liberty for each party to examine the other, refused, without consent. *Howard v. Braithwaite*, 1 V. & B. 374. PR. EVID., EXAM. OF PARTIES TO CAUSE.

Amendment in issue, without serving defendant with subpoena to answer it. *Hail v. Camp*, Dick. 108. *Bugshaw v. Batson*, id. 113.

Case for opinion of judges stated in order, and not referred to master to settle. *Ashburnham v. Kirkhall*, Dick. 73.

Form of issue to try who are co-heirs. *Tegart v. Sheffield*, Dick. 87.

Where a party claims under marriage articles and settlements made in pursuance thereof, it is not sufficient to direct an issue to try the validity of the articles only, but the issue should be extended to try the execution of the subsequent settlements. *Edgeworth v. Swift*, 4 Bro. P. C. 654. EXEC. OF DEEDS.

In an issue directed to try whether M made a contract for his own use, or in trust for B, C, and D, M is very properly made a party, and ought not to be a witness; because, as a witness, he was to answer to his own advantage, viz., to lessen the number of his partners in a beneficial contract. *Darson v. Franklin*, 4 Bro. P. C. 626. PL. PARTY.

## 2. When directed.

The defendants to a bill by a rector for tithes of hay, set up a modus of twopence for each load of hay of the weight of one ton, payable at Easter by the several occupiers in lieu of tithes of hay grown from Easter in the year preceeding inclusive; and they, by their answer, further stated that the amount of the modus payable to the rector under such custom had been usually ascertained by a person, on behalf of the rector, inspecting the ricks of hay made within the parish in each year, and forming an estimate of the number of loads of one ton weight contained in each rick, upon which estimate the whole of the annual modus payable to the rector was calculated, but that this mode of estimating the weight formed no part of the custom: it also appeared that, in a suit instituted in the exchequer by the same rector against some occupiers for the title of hay in the same parish, an issue had been directed, and the jury having found that twopence for every load of hay of the weight of one ton had been immemorially paid to the rector at Easter in each year by the several occupiers of lands, in lieu of the tithes of hay, the rector's bill had been dismissed with costs. Held, that the alleged modus was bad in law; and the account ought to be directed against the defendants, without directing an issue as to the validity of the modus. *Goodenough v. Powell*, 2 Russ. 219. MODUS.

An issue directed to try a plaintiff's right, though no adverse claim is set up, and strong uncontradicted evidence is produced on his part. *Moons v. De Bernales*, 1 Russ. 301. TITLE.

The court has jurisdiction to declare an instrument forged, and to order it to be delivered up; it may make such a declaration and order, without sending the fact of forgery to be tried by a jury. Where one witness swears to the authenticity of the instrument, the court will not make a decree against it without directing an issue to try the fact of forgery. *Peake v. Highfield*, 1 Russ. 559. JURISDICT.; DELIVERY UP OF DEEDS.

Where bill is retained for a year, with liberty to bring an action, the proper course is, not to set down the cause on the postea, or as on the equity reserved, but to set down the cause for further hearing, and give the verdict and judgment at law in evidence. *Wing v. Murrell*, 1 M'Clel. & Y. 620.

Where, in a suit for tithes, the question depends entirely on the construction of ancient documents, the judge in equity is more competent to draw the proper conclusion than a jury; and in such case, an issue will not be directed. *Fisher v. Id. Graves*, 1 M'Clel. & Y. 362. TITHES.

Where a case depends on inference to be drawn from comparison of conflicting testimony, the court is not in the habit of drawing such inference without reference to jury; where, therefore, the situation and character of plaintiff in suit for tithes, as vicar, were equivocal, court directed an issue. *Stokes v. Edmeades*, 1 M'Clel. & Y. 436.

Where, on bill for account of profits of voyage against captain of East India ship, the executors of captain alleged the consideration to be that of procuring him the command of the ship, a case was sent to law as to the consideration, and question, as to agreement being against public policy, reserved. *Money v. Macleod*, 2 S. & S. 301. PUBLIC POLICY; CONSON.

Semble, an issue to try money payment set up as a *firm modus*, may be granted on the parol evidence of a single witness, uncorroborated by other evidence; but his testimony must be positive and distinct, and should apply to every thing necessary to be proved before the jury, in order to establish the fact intended to be tried: if it be insufficient or unsatisfactory in any of those respects, the court will not grant an issue, but will proceed to decree an account of the tithes. *Walley v. Brownhill*, 13 Price, 500. S. C. 1 M'Clel. 317. MODUS.

Judges in equity are not bound by opinion of courts of law on cases sent there. *Maxwell v. Warr*, 11 Price, 18.

Issue is not to be directed, unless there is reasonable doubt of the fact, and when it depends on evidence more properly triable by a jury. *Short v. Lee*, 2 J. & W. 464.

It is no ground for application to court of equity, to restrain plaintiff in suit for tithes in equity from proceeding in actions brought by him against parishioners, not parties to that suit, for not setting out their tithes, that equity has decreed issue to try the validity of (parochial) moduses, laid in answers as covering the articles in respect of tithes of which actions are commenced; nor will fact of such parishioners having entered into bond to pay costs of all suits, &c., relating to such tithes, entitle them to relief. *Taylor v. Cook*, 9 Price, 207. INJUNC. TO STAY PROCS. AT LAW; MAINTENANCE OF SUIT.

Courts of equity are not bound to adopt the opinion of the courts of law to which a case is sent for advice. *Lansdowne v. Lansdowne*, 2 Bligh, 60. JURISDIC.

Issue will not be directed to be tried in exchequer, unless for some special reason, and on a motion made

or that purpose. *Antrobus v. F. I. Comp.* 5 Mad. 3. EXCHEQUER.

Courts of law will not answer speculative question; and therefore a case must state conveyances, &c., that may raise the question. A case sent for the opinion of a court of law must be signed by counsel on each side; and if either side refuse to sign, they are understood to waive the benefit of it. *Bliss v. Collins*, 1 Jac. & W. 426. SIGN. OF COUNSEL.

Case sent to law, "Whether the purchaser of lot 2 would, by the conveyance of the vendor alone, without the concurrence of the lessee, acquire the same rights and remedies against the lessee, in respect of the apportioned rent of 40l. therein to be reserved to him, as he would acquire in case no rent were mentioned in such conveyance from vendor, and the annual rent of 40l. were legally apportioned by a jury for that part of the reversion comprised in lot 2." S. C. 4 Mad. 229. VEND. & PURCH.; TITLE.

Upon a petition to stay a certificate, imputing conduct to the bankrupt which, if proved, would amount to felony, the court will not direct an issue to try the fact of conformity. *Exp. Scott*, Buck, 275. BANKCY. PETITION TO STAY CERTIFICATE; FELONY ON BANKRUPT LAWS.

To a bill for tithes, even by a lay impropriator, prescription *in non decimando*, or *in presumptio* from mere retainer, without colour of title, is no defence, and will not be sent to law. *Berney v. Harvey*, 17 Ves. 119. TITHES.

Where tithe of corn has never been paid in parish within memory, and a contributory payment exempting the whole parish is paid by certain, though not all, of the owners and occupiers of estates, the question whether it is a farm or district modus, must go to an issue. *De Whelpdale v. Milburn*, 5 Price, 485. MODUS.

Where an adverse title to tithes is set up and established against a demand by rector who offers no evidence to impeach title, he is not entitled to an issue. *Wilmot v. Hellaby*, 5 Price, 355. RECTOR; TITHES.

A modus being clearly invalid as laid, the question of law is decided without directing an issue on the question of fact. *Blackburn v. Jepson*, 3 Swan. 132. MODUS.

Bill by devisees, praying a conveyance upon the ground of an alleged equitable title in the testator, originating in an agreement, which was denied by the answer, but supported by evidence of ownership, as the receipt of rents and profits, &c. Issue directed to try whether the testator was, at his death, beneficially entitled. *Burkett v. Randall*, 3 Mer. 466. DEVISEES; TITLE.

Modus of 15s., payable on Easter Monday by all the occupiers of land in the township, or some or one on behalf of all, in lieu of tithe of grass growing within the township, whether the same be mown or made into hay, or eaten by barren and unprofitable cattle, covering the tithe of agistment, if there be evidence given of its having been paid, and for tithe of agistment, will be sent to an issue. *Williamson v. Ld. Lonsdale*, 5 Price, 25. MODUS.

Rector is entitled, as a matter of right, to issue at law as to tithes where he sues alone. *Williams v. Price*, 4 Price, 156. TITHES.

Issue will not be granted to try part of a custom. *Leathes v. Newitt*, 4 Price, 370. CUSTOM.

Issue directed to try whether F M was living at the death of his father, the testator; the father and son having been shipwrecked together on their voyage from India, and all on board having perished. *Mason v. Mason*, 1 Mer. 308.

In an issue, and in an action directed by the court, the practice varies. In the first, the motion for a new trial must be made to the court directing it; in the second, to that in which it is tried. Nor is this rule

affected by any special provisions by which the direction of the action is accompanied. *Curtains v. Stein*, 2 Rose, 178. PR. ISSUE AT LAW; PR. NEW TRIAL.

Though the court will not restrain an action of trespass by a party through whose estate a canal is cutting, for deviating from the line, because he has laid by, and rested upon his legal rights; yet, if he files a bill to restrain their deviating, and then moves to commit them, the court will not do so, without a trial by jury in a disputed case, and directing an issue at law. *Agar v. Regent's Canal Comp.*, Cooper, 77. PR. INJUNG. TO STAY TRESPASS, IN NATURE OF WASTE IRREPARABLE.

When the court of chancery directs an action to be tried at law, though it is with special directions, as that the bankruptcy of the defendant shall not be pleaded in bar, and that the parties shall be examined on oath, the application for a new trial must be to the court of law; but it is otherwise with an issue. *Exp. Kensington, Coop.* 96. PR. ISSUE AT LAW; PR. NEW TRIAL.

Where a party has failed to prove the terms of the agreement he relies on, equity will not assist him by directing an issue to ascertain the terms: if he be plaintiff, it is incumbent on him to state in his bill the agreement of which he calls on court to decree the performance, and to prove the agreement as stated. *Savage v. Carroll*, 2 Ball & B. 451. AGREEMENT.

Bill had been filed under stat. 37 Hen. 8. c. 12. to recover 2s. 9d. in the pound for tithes, and an issue was refused, under these circumstances; 1st, mispleading; the defendants not stating customary payments by their answer, but adopting *ore tenus* payments, disclosed by the answer to their cross bill, instead of moving for leave to file a supplemental answer: 2d, the improbability of establishing those payments, after two unsuccessful trials at bar in another cause. *Warden, &c., of St. Paul's v. Kettle*, 2 V. & B. 1.

Issue, whether an instrument was obtained by fraud, &c., not directed on motion after answer; as where the decree depends upon a simple fact, viz., legitimacy or competence, according to the present practice, to refer a title on motion. *Fallagar v. Clark*, 18 Ves. 481. PR. MOTION.

Bill by heir, suggesting a secret void trust for charity in residuary devise, but without evidence of a trust expressed, or of an engagement expressed or tacit, preventing it, dismissed with costs, unless the heir would take an issue, to which he is entitled. *Paine v. Hall*, 18 Ves. 475. HEIR AT LAW; WILL; FRAUD.

The question as to agent's authority denied by the answer, and by his deposition, stating his declaration to the contrary at the time of execution, to be determined by an issue. The evidence of a witness impeaching the instrument he has attested, as a witness to a will denying the sanity of the devisor, &c., being admissible, but to be received with the most anxious jealousy. *Howard v. Braithwaite*, 1 V. & B. 202. PRIN. & AGENT; PR. EVID.

Defendant not entitled to an issue, or inquiry to establish a case relied on by his answer, but omitted in proof. *Savage v. Carroll*, 1 Ball & B. 548. PR. PARTY DEFENDANT.

Court will not direct an issue to try composition real, where defendant, by his answer, only alleged a modus. *Bennett v. Neale*, Wightw. 324. PL. ANSWER.

Rector is not entitled to issue where defendant sets up a grant of a portion, and constant non-payment of tithes, which defence is not impeached by plaintiff. *Baker v. Baker*, Wightw. 397. TITHES.

Issue directed to try modus of 12d. an acre; when

of tithe hay, moduses of 1s. 6d. and 2s. 6d. per acre for tithe hay, held rank. *Henton v. Cooke*, Wightw. 281. **TITHES; MODUS.**

Where there is contradictory evidence, raising a doubt in the mind of the court, then a reference or issue will be granted; aliter, where no evidence whatever. *Savage v. Carroll*, 1 Ball & B. 283.

Where contradictory evidence, raising a doubt, or witnesses are discredited after case proved, an issue or inquiry is directed; but not where a party fails to establish his case. *Id. ib.*

Plaintiff withdrawing issue, pays costs. *Brookland v. Golding*, Wightw. 100. **PR. COSTS.**

Issue directed on modus for certain lands, amounting to 1s. per acre for all tithes, notwithstanding apparent rankness. *O'Connor v. Cook*, 6 Ves. 665. See S. C. 8 Ves. 535. **MODUS.**

No instance of an issue upon the question between execut or and next of kin as to the residue. *Walton v. Walton*, 14 Ves. 323. **EXECUTOR; NEXT OF KIN; RESIDUE.**

Where chancellor was dissatisfied with opinion of court of law on a case sent for their opinion, it was sent back to another court, there being but one case of sending it back to same court to be reviewed. *Trent v. Hanning*, 10 Ves. 495.

A bill filed, in 1757, by H, pretending to be a devisee, charging that B, the only son of testator, was illegitimate, and making M a party, (who, in case of B's illegitimacy, was heir at law to testator): issue of *derisavit vel non* directed; H and B proceed to the trial of that issue, M taking no part in it: the issue found in the negative, and bill dismissed in 1770. On a bill filed, in 1776, by B for the possession and title deeds, he has an equity against H's ever insisting on the will, or the illegitimacy, and also against M's insisting on the illegitimacy, after having declined to contest it on the issue. *Bond v. Hopkins*, 1 Scho. & L. 113.

Executor having under a misconception of a will, at the trial of an issue, upon a debt, entered into an improper compromise with the creditor, expressly subject to the approbation of the court, was permitted to try the issue, paying the costs. *Lagh v. Hollnagel*, 8 Ves. 213. **EXOR; MISAKE.**

The court of K. B. refused to answer a case from the Rolls, stated as a trust. *Parsons v. Parsons*, 5 Ves. 578.

Upon a question as to the amount of a legacy, from a doubt as to a figure, an issue was directed instead of a reference to the master. *Norman v. Morrell*, 4 Ves. 769. **WILL; C. OR.**

Where a title to tithes in a layman is clearly made out, though not supported by possession, the court will decree an account, without an issue. *Ligon v. Strutt*, 2 Anst. 602. **ACCOUNT; TITHES.**

Plaintiff prayed a discovery, injunction and delivery of a bill of exchange upon the answers and evidence, the right being clear, the court refused an opportunity of trying it at law, and decreed an immediate delivery. *Newman v. Milner*, 2 Ves. J. 483. **DELIVERY UP OF DEEDS; TITLE.**

The court refused to direct an issue on motion by consent. *Anon.* 2 Anst. 480. But see *Att. Gen. v. Jane*, id. 589.

When a bill for an account of tithes against one who had a lease of his own and the other tithes in the parish, and the whole question in the cause turns upon the validity of the lease, and of the notice given to determine it; this court will not proceed till those points are settled at law. *Boucher v. Morgan* 2 Anst. 404. **LEASE; TITLE.**

Ejectment to try a title under an order of the equity side of the Exchequer, ought to be brought in the Exchequer. *Kingsborough v. Orpen*, 1 Ridgw. L. & S. 303. **EJECTMENT.**

Issue directed to try whether there was *donatio mortis causa*, as it did not appear to have been in the last illness. *Blount v. Burrow*, 1 Ves. J. 546. 4 Bro. C. C. 71. **DONATIO MORTIS CAUSA.**

Issue ordered to discover a witness's interest. *Stokes M'Kerral*, 3 Bro. C. C. 228. **WITNESS, COMPETENCY OF.**

A bond for performance of covenants to build a bridge, and the sum agreed for actually paid, an injunction granted to restrain an action on the bond, and an issue *quantum damnificatus* ordered, the sum mentioned in the bond being a penalty. *Errington v. Aynesley*, 2 Bro. C. C. 341. **BOND; INJUNCTION AGAINST PROCEEDING AT LAW.**

Bill for rent of a mine retained for a year, to suffer plaintiff to try an issue as to the quantity of coal, which by the custom of the country constituted a stack, the reservation being one shilling per stack. *Geast v. Barker*, id. 61. **PR. RETAINING BILL.**

Where the penalty of a bond is only to secure the enjoyment of a collateral object, equity will grant an injunction against a suit for the recovery, and an issue *quantum damnificatus* to try the real damage. *Sloman v. Walter*, 1 Bro. C. C. 418. **INJON.; BOND.**

Under what circumstances a new trial of an issue directed to try vicar's right to tithes, ought to be refused. *Brownlow v. Deane*, 7 Bro. P. C. 83. **NEW TRIAL.**

There being but one witness against an answer, court directed an issue. *Penby v. Mathew*, Dick. 550.

Where modus is set up, but not proved by clear legal evidence, court of equity ought not in first instance to decree an account, but should direct an issue to try its validity. *Whitchend v. Trave* 7 Bro. P. C. 49. **MODUS; ACCOUNT.**

After a sentence in the ecclesiastical court, determining the question of who are the next of kin of an intestate, and granting letters of administration to the person found to be such next of kin; the court of chancery is precluded from directing an issue to try that question. *Bouchier v. Taylor*, 4 Bro. P. C. 708. **SENTENCE OF ECCLESIASTICAL COURT; JURISDICTION.**

Courts of equity have for many years past adopted a practice which has been extremely beneficial to the suitors; for where they see the dispute between the parties is a mere question at law, and must be ultimately determined there, instead of putting the parties to a diffuse examination of witnesses in equity, they leave, by interlocutory orders, either directed an issue, or given the party liberty to bring an action within a limited time, and reserved the consideration of all further directions till after the verdict. And after a verdict has been found, it has been the uniform practice of the court, for the party in whose favour the verdict has been obtained to set down the cause for the further directions reserved by such interlocutory order. *El. Pomfret v. Smith*, 4 Bro. P. C. 700.

Wherever the question of right in a suit commenced in a court of equity is a mere legal question, the court does right in sending it to law to be tried, upon a proper issue, even though the whole of the evidence is written evidence, and the question depends upon the construction of that evidence. *Collins v. Sawrey*, 4 Bro. P. C. 692. **TRIAL.**

Issue to try if plaintiff or defendant was heir at law. *Newton v. Newton*, Dick. 443.

Where bill is filed by protestant discoverer, to have the benefit of the lease granted to a papist, on ground of rent reserved being of less than two-thirds the yearly value, the fact ought to be tried by jury upon issue. *Kentley v. Davies*, 5 Bro. P. C. 460. **PAPIST; LEASE.**

In taking an account before the master, one of the parties is charged with 4000l. as the value of a note which he had wilfully destroyed. The master by his

report allows this charge, and upon an exception being taken to the report for so doing, the court first allowed, and afterwards overruled the exception. But upon an appeal, an issue was directed to try the fact of spoliation, and what damage was sustained thereby. *Porrett v. Goodere*, 4 Bro. P. C. 679. SPOILIATION.

Courts of equity should send matters of fact to be tried by a jury. *Davis v. Oliver*, 1 Ridgw. P. C. 9.

On the hearing of an information brought for the recovery of certain mine duties, the court of chancery proposed to the attorney-general an issue to try whether the crown, or its lessee, was by custom entitled to those duties; but the issue being refused, the information was dismissed. On an appeal, the decree was reversed; and proper issues to try the custom were directed. *Att. Gen. v. Wall*, 4 Bro. P. C. 665. CUSTOM.

Issue at law directed by consent to try right of stopping up or obstructing lights; and view to be had of premises, &c. *Att. Gen. v. Bentham*, Dick. 277.

Purchaser of an equitable title to a rent charge, claiming against some purchasers of the land, for a valuable consideration, without notice, must try his title at law, in the name of his vendors. *Whitfield v. Fausset*, 1 Ves. 387. VENDOR & PURCHASER; TITLE.

Where, in an agreement for a lease, the particular rent, commencement, and duration of the lease are uncertain, or depend upon the approbation of a third person, a court of equity will direct proper issues to ascertain these several facts, before any specific performance of the contract is decreed. *Plunket v. Ld. Kingsland*, 1 Bro. P. C. 322. AGREEMENT FOR LEASE; SPEC. PERF.

After bankrupt has surrendered and acquiesced a year and a half since the taking out the commission, an issue at law will not be directed to try the bankruptcy. *Exp. Nutt*, 1 Atk. 102. BANKRUPT. SURRENDERING COMMISSION; ACQUIESCENCE.

As to when issue at law will be directed. *Patterson v. Tash*, 9 Mod. 397.

Bill for title of copies by custom, to pay every tenth penny, or the value of it. Defendant by his answer denied the custom, whereupon the court directed an issue to try it. *Randall v. Head*, Hard. 188. TITHES, MODUS.

Where a parishioner insisted on a modus, and it appeared that the parishioners had usually paid differently, the alleged modus will be disregarded, and he will be decreed to account for the tithes in kind; and where the matter is plain, the court will not direct the modus to be tried at law. *Charlton v. B. v. p. Colles*, P. C. 206. TITHES, MODUS.

The court will direct an issue to try a modus, though not proved exactly as laid in the bill. *Laithes v. Christian*, Bunb. 340. TITHES, MODUS.

Heir at law of J, who was the last of three lives named in grant of copyhold, brought bill against lord of manor to be admitted to estate for his own life, and the lives of two other persons whom he should nominate, alleging the custom of manor to be so. Defendant denied the custom by answer, and insisted he was not bound to renew. Issue was directed as to the obligation to renew, but on appeal, order was reversed. Bill dismissed. *Dk. of Grafton v. Horton*, 2 Bro. P. C. 284. COPYHOLD, ADMITTANCE TO; CUSTOM.

Issue directed to try and settle boundaries of two manors by special jury, and to have a view. *Leithellier v. Ld. Castlemaine*, Dick. 46.

J agreed to sell a wood upon his estate to W, and to give him a certain time for cutting and carrying it away. The purchaser being interrupted by persons who pretended a title to the estate after the death of J, who they insisted was only tenant for life, and therefore, had no power to sell, brought his bill for a performance of this agreement. The court, upon the

hearing, were of opinion, that this was only a colourable agreement, set up in order to try the defendant's title in equity, which was properly triable at law, and therefore dismissed the bill with costs. But on an appeal, the decree was reversed, and an issue directed to try the title. *Stone v. El. Angelsea*, 1 Bro. P. C. 218. TITLE.

On a bill by the lord of a manor, praying a commission to ascertain the boundaries of a copyhold estate, an issue was directed to try what copyhold lands were in the possession of the defendant. But on an appeal, this decree was reversed, and a commission of inquiry directed, with a previous inspection of all deeds, &c. *Rans v. Barker*, 4 Bro. P. C. 660. BOUNDARIES.

If mortgagee fraudulently antedate mortgage for purpose of overreaching marriage settlement; mortgage is void, but fact must be first tried at law. *Ostborn v. Len*, 9 Mod. 97. FRAUD; MORTGAGE.

An issue to try whether a particular manor was intailed by a particular deed is not proper, being rather a point of law than a matter of fact, or at least so complicated as not to be fit for the inquiry of a jury. *Ld. Blane v. Mahon*, 4 Bro. P. C. 61.

Subsequent mortgagee prays redemption of first mortgage, upon payment of what was due, and pending suit, first mortgagee sets up another mortgage prior to all. Issue directed as to its validity, and amount of money paid, &c. *Douse v. Rue*, 9 Mod. 53. ACCOUNT; MORTGAGE.

A parson sued for 2s. 9d. per pound for tithes of houses in London, under the statute 37 Hen. 8. But an issue was directed to try, whether less than that sum had ever been paid; although there was no proof of any regular modus. *Bennet v. Froppess*, 4 Bro. P. C. 650. TITHES.

Where reference is to judges, on a case stated, no writ of error will lie on their judgment. But if they certify their reasons, the court may reconsider it. *Gore v. Gore*, 9 Mod. 5. PLEA WRIT OF ERROR.

In the case of a charity, the most expeditious and least expensive methods should be adopted; and where no material fact is disputed, nor any point of law arises, but what a court of equity may determine upon, such court ought to determine finally without directing an issue. *Bp. Rochester v. Att. Gen.* 4 Bro. P. C. 643. CHARITY.

No issue ought to be directed to try a matter not fully put in issue in the cause, and therefore where a bill was filed to take advantage of a forfeiture by marrying without consent, and an issue was directed to try whether the party was a papist or not at the time of the marriage, the order was reversed, and the plaintiff left at liberty to amend his bill by putting in issue in the cause, the matter intended to be tried by the said issue. *Filkin v. Holt*, id. 640.

Whether a party has broken any of his covenants or not, is a matter properly triable at law; as the damages (supposing a breach), cannot be settled without such trial. *Stafford v. City of London*, id. 635. COVENANT, BREACH OF.

In a suit for title hay, the defendants, by their answer, only set up several moduses by the name of straw tithes; an issue in this case proper to try whether the moduses insisted on by the defendants, in their answers, have been time out of mind paid and payable for and in lieu of title hay in kind. *Hanington v. Horton*, id. 624. MODUS.

A gives three bonds to B for 500l. each, payable at different times. The two first are paid, but upon the parties settling an account relative to other matters, the third bond is delivered up by mistake, instead of a particular voucher, belonging to that account. Equity will relieve against this mistake, by directing an issue to try whether there were two bonds or three, and

whether the last bond was paid or not. *Vanhoven v. Giesque*, 4 Bro. P. C. 622. MISTAKE.

Issue at law directed upon a rehearing of exceptions taken to a decree made by commissioners of charitable uses, after that decree had been twice confirmed. *Corpus Chris. College, Oam. v. Parish of Naunton*, 2 Vern. 507. COMMISSIONERS OF CHARITABLE USES.

An issue at law was directed in a matter where the plaintiff had a proper action at law, and was under no impediment in respect of bringing such action. *Gilbert v. Emerton*, id. 503.

Lord inclosed part of the common, insisting it was an improvement within the statute of Merton, and that he had left sufficient common for the tenants. They throw open the inclosure by force. Court granted an injunction, and at hearing, directed issues whether the defendant had a right of common, and whether sufficient common left. *Arthington v. Fackes*, id. 356. INCLOSURE OF COMMON; INJUNCTION.

Equity can determine as to fraud in deeds, without issue at law. *White v. Hussey*, Prec. Chan. 14. JURISDICTION; FRAUD.

Settlement being alleged to be made in pursuance of a marriage agreement, a trial was directed, to try what was the marriage agreement, but ordered the settlement should not be given in evidence. On a bill of review, the last part of the order reversed. *Beachinall v. Beachinall*, 1 Vern. 246. PR. EVIDENCE.

Bill by the issue in tail, to discover a settlement; the defendants plead that the plaintiffs are bastards. A trial at law was directed upon that point, and that the defendants pay the plaintiff 50l. to carry it on, but the money not being paid, nor the trial had, the plea was overruled. *Devereux v. Devereux*, Rep. T. Finch. 324.

An issue to try a custom of a manor was refused, where the court thought the evidence in support of the custom insufficient to influence a jury. *Chamberlayn v. Symonds*, Barn. 98.

Where at the hearing of a cause, a matter not in issue appears to the court to go to the very right; the court will sometimes order an issue. *Batch v. Tucker*, 2 C. C. 40.

### 3. *Devisavit vel non.*

An heir at law contesting his ancestor's will, in a suit to establish it in equity, is not entitled to an issue *devisavit vel non* to try the validity of it in a court of law in all cases, and at any distance of time; but he is not precluded from the exercise of that usual right, except by case of such acquiescence as would bar his possessory rights at law (*viz.* twenty years) or would put the adverse parties in a much worse situation than they would have been in, had he disputed the will originally. *Tucker v. Sanger*, 1 McClell. 424. S. C. 13 Price, 119.

Heir at law is usually entitled to an issue *devisavit vel non*, and is not liable to pay costs, notwithstanding the issue is found against him and will established. *Id.* 425. COSTS.

In what cases an heir at law is refused his costs, in an issue *devisavit vel non*. *Id.* 439. 446. PR. COSTS.

Heir at law is in cases of wills entitled to issue *devisavit vel non*, but if counsel for infant heir feels clear, from evidence, that there is no ground to impeach the will, he is well justified in declining to ask an issue. *Levy v. Levy*, 3 Mad. 245.

On the trial of an issue *devisavit vel non*, all the subscribing witnesses must be examined, except in cases of necessity, as death, insanity, or absence abroad, or the heir waves his right, and the rule is

not merely technical. *Bootle v. Blundell*, 19 Ves. 494. 500. S. C. Coop. 136. PR. EVID.

An issue directed to try the validity of a will several years after testator's death, as a will cannot be established against the heir in equity by a decree, without an issue or ejectment, if he require it, and a person claiming under the will has a right to have its validity established. *Blake v. Foster*, 2 Ball & B. 387.

Heir at law defendant desiring an issue upon a will, in which he failed, entitled to his costs in equity; no costs on either side as to the issue; ordered to pay costs of a groundless motion for a new trial. *White v. Wilson*, 13 Ves. 87. COSTS.

Will is never set aside without issue *devisavit vel non*. *Pemberton v. Pemberton*, 11 Ves. 53.

Upon bill for specific performance of contract overreached by commission of lunacy, the plaintiff not having traversed the inquisition, an issue was directed, whether the defendant was lunatic at the execution; if so, whether he had lucid intervals, and whether the contract was executed during a lucid interval; the difficulties in executing the contract which was for sale of estate vested in lunatic, *viz.* that the price was to be fixed by persons to be nominated, not appearing strong enough to preclude the previous inquiry with a view to performance, the plaintiff being willing to take the title. *Hall v. Warren*, 9 Ves. 605. LUNACY; SPECIFIC PERFORMANCE.

Heir at law is not entitled to issue at law, if construction of will is clear. *Muddle v. Fry*, 6 Mad. 270.

If an adult heir at law refuse an issue on the hearing of a cause, the court will establish the will against him, though he does not admit it. *Jackson v. Barry*, 2 Cox, 225.

Bill by an heir at law, for an issue to try the validity of a will made in England, dismissed, partly on the ground of his acquiescence, both in the ecclesiastical court, and upon a bill to perpetuate testimony, but principally because the lands lay in Pennsylvania. *Pike v. Houre*, 2 Eden, 182. S. C. Amb. 428. JURISDICTION.

Will established against heir at law's bill; he pays costs at law and equity, but on bill by devisee, no costs on either side. *Johnson and Gardiner, et c. contra*, Dick. 313. Same point, *Gough v. Botevil*, Dick. 396.

Issue directed to try whether an agreement to carry on an illegal game, and a contribution for that purpose had been made or not. *Nash v. Ash*, 1 Eden, 378. ILLEGAL TRANSACTIONS.

Costs given to heir at law, where he brings bill to dispute will or bill against him to establish it. *Plinks-home v. Feast*, Dick. 153.

Otherwise if heir at law infant. *Id. ib.*

On question of validity of devise, issue at law must determine it. *Dawson v. Chater*, 9 Mod. 90. DEVISE.

Heir at law disputing will, though on trial, there were shown no ground for disputing it; yet held, he was entitled to his costs at law and equity. *Crew v. Jolliff*, Prec. Chan. 93. PR. COSTS.

### 4. *Practice on, generally, and trial of, and verdict, proceedings and effect of.*

See further, PR. NEW TRIAL.

The object of an issue is attained, when the conscience of the equity judge is satisfied that at the trial, justice has, upon the whole, been substantially done. *Collins v. Hare*, 1 Dow, N. S. 139. S. C. 2 Bli. N. S. 106.

A new trial of an issue will not be granted, merely because on the former trial evidence was rejected,



which ought to have been received. Neither will a new trial be granted, merely because the judge made to the jury an inaccurate representation of the effect of the defendant's answers. *Barker v. Ray*, 2 Russ. 63. **PR. NEW TRIAL.**

Vicar after issue directed to try modus, suffering issue to be taken *pro confesso*, pays costs. *Drake v. Smith*, 1 M'Clel & Y. 380. **TITHES; COSTS.**

As to costs in general of issue at law, relative to tithes. See *id. ib.*

Dissatisfaction expressed by judge, at verdict on trial of issue, how far a ground for new trial. *Atkyns v. Drake*, 1 M'Clel & Y. 213. **NEW TRIAL.**

Court will not direct new trial of issue on ground of evidence adduced on former trial, where that evidence was a surprise on the other party, and tended to defeat the intention of the court in directing former issue. *Currington v. Jones*, 2 S. & S. 135. **EVIDENCE; NEW TRIAL.**

Modus established by verdict of jury on an issue, is conclusive on judge in equity. *Davies v. Moseley*, 13 Price, 423. S. C. 1 M'Clel, 143. **MODUS.**

Where after two trials of an issue on modus, in both of which defendant (in equity) obtained verdicts, the court dismissed bill as to tithes covered by modus, with all costs at law and in equity, except the costs of the first trial of the issue as to which they ordered each party to pay his own costs, the question raised by motion for new trial having been doubtful. *Stuart v. Greenall*, 13 Price, 755. S. C. 1 M'Clel. 705. **PR. COSTS.**

At the trial of issue to ascertain whether one of defendants, a layman, was entitled to tithes or a modus in lieu of tithes of certain lands, it was proved that a payment described as a tithe or rate tithe, issuing out of the lands in question, had been conveyed by defendant's title deeds for the last 150 years, and that this payment had been received by him and his ancestors, and that no tithe had been paid to plaintiff the rector, within living memory, and verdict was found for defendant. Motion for new trial was refused. *Williams v. Bacon*, 1 S. & S. 415. **NEW TRIAL; TITHES; EVIDENCE.**

Where decree directs issues to try validity of moduses, and plaintiff wishes to have them tried in county different from that wherein lands lie, an order for that purpose cannot be inserted in decree, but must be obtained by petition. *Sparke v. Ivatt*, 1 S. & S. 366. **DECREE; PETITION; VENUE.**

On mis-trial of issue directed by courts of equity, there can be no motion in arrest of judgment. *Moseley v. Davies*, 11 Price, 162. **PR. MOTION FOR ARREST OF JUDGMENT.**

Both parties ordered to be examined upon the trial of an issue directed, upon a motion for an injunction, supported by the plaintiff's affidavit, and opposed upon affidavit of the defendant contradicting it. An order directing an issue not to be appealed from, after the trial has taken place. *Semble. Tastet v. Bordenave*, 1 Jac. 516. **PR. EXAMINATION; PR. APPEAL.**

The verdict on the first trial of an issue in a tithe cause being for the defendant, in consequence of a misdirection of the judge, and on the second trial being for the plaintiff, the costs of the suit of the motion for a new trial, and of the second trial given against the defendant, but no costs given of the first trial. *Beaurock v. Tyler*, 1 Jac. 571. **PR. COSTS.**

Person interested in issue *devisavit vel non* refusing to be party to it, is yet allowed to attend the trial by counsel, and ordered to produce deeds, &c. except those he held as mortgagee. *Pindar v. Smith*, 6 Mad. 48. **PR. PRODUCTION OF DEEDS.**

It is not necessarily a substantive part of decree directing issue at law, to order it shall be tried by special jury. *Stuart v. Greenall*, 9 Price, 480. **PR. DECREE.**

Where minutes were drawn up, omitting to direct issue at law to be tried by special jury, and decree in consequence contained no such order; court refused to amend minutes by insertion thereof. *Id. ib.* **PR. VARYING MIN. OF DECREE.**

A bill against several defendants being retained with liberty for the plaintiff to bring an action against one of the defendants, the trial may take place during an abatement occasioned by the death of one of the other defendants, if the decree does not direct them to attend it. *Humphreys v. Hollis*, 1 Jac. 73. **PR. RETAINING BILL; PR. ABATEMENT.**

Where action is directed to be brought in court of law, and plaintiff resides abroad, motion for security of costs thereof must be made in equity. *Despres v. Mitchell*, 5 Mad. 87. **PR. COSTS, SECURITY FOR.**

If issue be directed but not tried, nor any notice of trial given; on motion and affidavit of notice, in absence of other party, &c. ordered to be tried subsequently or taken *pro confesso*. *Anon.* 4 Mad. 255.

Upon a petition to expunge the proofs upon certain bills of exchange, an action had been directed to be brought against the bankrupts to try the validity of the debt, a material witness being abroad, the court of common law put off the trial; it was ordered upon petition, that the bankrupt should be at liberty to file a bill for a commission to take the examination of the witness abroad. *Exp. Coles*, Buck, 293. **BANKCY. COMMISSION TO EXAMINE WITNESSES ABROAD.**

On bill for injunction against infringement of copy-right and account, court of law on issue having certified against plaintiff's right, defendant cannot move to dismiss bill. *Brooke v. Clarke*, 1 Swan. 550. **PR. BILL, MOTION TO DISMISS.**

Mortgagee on bill to redeem, insisted heir at law was living; master on reference reported him dead: exceptions were twice taken thereto and issue at law directed, by which he was found to be dead. Mortgagee not to pay costs of issue as it was not vexatious, so long as court thought fit to direct issue. *Wilson v. Metcalfe*, 3 Mad. 45. **MORTGAGE & MORTGEE; COSTS; VEXATION.**

It is in the discretion of the Ld. Ch. to permit or refuse a defendant at law to have copies of his examination before the commissioners. Upon this petition, the examinations having been laid before the Ld. Ch. he refused the application. *Exp. Chater*, Buck, 290. **JURISDICTION; BANKCY. COPIES OF EXAMINATION IN AID OF DEFENCE AT LAW.**

Where there are several issues, and some are found for plaintiff, and others for defendant, the parties will be allowed costs on issues found in their favour, and must pay in those against them. *Prevost v. Bennett*, 2 Price, 272. **PR. COSTS.**

In an issue, and in an action directed by the court, the practice varies. In the first, the motion for a new trial must be made to the court directing it; in the second, to that in which it is tried. Nor is this rule affected by any special provisions, by which the direction of the action is accompanied. *Carnstairs v. Stein*, 2 Rose, 178. **PR. NEW TRIAL; PR. ACTION DIRECTED BY COURT.**

Distinction between taking the opinion of a court of law conclusively, and directing an issue for the satisfaction of this court, reserving to itself the review of that passed at law, with reference to the record in equity. *Boote v. Blundell*, 19 Ves. 500.

No new trial upon the improper rejection of evidence; if the court, judging upon the whole record, is satisfied that the verdict is right. *Id.* 503. **PR. NEW TRIAL.**

Where the court of chancery directs an action to be tried at law, though it is with special directions, as that the bankruptcy of the defendant shall not be pleaded in bar, and that the parties shall be examined

on oath, the application for a new trial must be to the court of law; but it is otherwise with an issue. *Exp. Kensington, Coop. 96. PR. ACTION AT LAW DIRECTED BY CHANCERY; PR. NEW TRIAL.*

To enable the court to disturb a verdict found on an issue, it must be either contrary to the evidence or given under the misdirection of the judge. *Savage v. Carrol, 2 Ball & B. 455. JURISDICTION.*

The improper rejection of written evidence, no ground for granting a new trial of an issue: the court being satisfied with the verdict upon all the evidence, including that rejected. *Hampson v. Hampson, 3 V. & B. 41. PR. NEW TRIAL.*

Order to read on a trial, directed at law, depositions of witness, proved by affidavit, from age and infirmity, incapable of attending without great danger of death, with liberty to examine them on interrogatories, and the depositions of such other persons as should be proved at the trial to be dead, or unable to attend: such order, whether to be made in equity, or left to the judge at law, depending on a sound discretion. *Corbett v. Corbett, 1 V. & B. 335. EVIDENCE AT LAW.*

Witness being proved unable to attend a trial, auxiliary to a suit in equity, the depositions may be read without an order, but not without producing the bill, answer, and all proceedings. *Id. ib.*

The party who has to sustain the affirmative, is to be plaintiff in an issue, and, as such, has the choice of the court in which it is to be tried. *Exp. Malkin, 2 Rose, 27.*

Order, that depositions shall be read at the trial of an issue, if the witnesses shall be then dead, or proved to be in such a state of health as not to be capable of attending. Without such order to make the depositions evidence at law, the whole record must be read. *Palmer v. Id. Aylesbury, 15 Ves. 176. EVIDENCE; PR. ORDER AS TO READING DEPOSITIONS.*

Two wills, originally duplicates, but one altered and cancelled, and a codicil without date. After three verdicts for the devisee, the Id. Chancellor, being satisfied with the result of the third trial, refused a fourth. *Pemberton v. Pemberton, 13 Ves. 290. PR. NEW TRIAL.*

Issue at law directed at Rolls, a motion for new trial may be made before Id. Chancellor. *S. C. 11 Ves. 50. Id.*

Issue directed as to lunacy is established by two verdicts. *Exp. Hotyland, 11 Ves. 10. LUNACY.*

After two trials at bar in favour of claimants of tithes, under decree and act of parliament, upon issue; whether any, and what less sum had been paid: a new trial was refused, though evidence was rejected, that ought to have been received as material. *Wardens, &c. of St. Paul's v. Morris, 9 Ves. 155. PR. NEW TRIAL.*

Upon equity reserved the court refused to increase damages on suggestion, that interest was omitted at law through mistake, on the supposition that it would be given in equity. *Stevens v. Prued, 2 Ves. J. 518. INTEREST.*

An application to read the deposition of a witness on the trial of an issue at law, directed by the court of chancery, on the ground of the witness being so aged and infirm, as to be unable to attend in person, must be made to the judge at the trial, and not to the court which directs the issue. *Jones v. Jones, 1 Cox, 184. EVIDENCE; DEPOSITIONS DE BENE ESSE.*

After trial of issue or decree, plaintiff cannot dismiss bill. *Gartside v. Isherwood, Dick. 612.*

Defendant neglecting to name attorney to try issue out of chancery, directed to do it in four days, or issue to be taken as tried, and verdict for plaintiff. *Wilson v. Ginger, id. 521.*

Under what circumstances a new trial, after trial of second issue, may be granted. *Ashe v. Ashe,*

*7 Bro. P. C. 149. S. P. Pomfret v. Smith, id. 169. NEW TRIAL.*

Plaintiff, after issue directed, may, at any time before issue tried, move to dismiss bill. *Carrington v. Holly, Dick. 280.*

Defendant making default at trial of issue, shall have day to show cause. *Peacock v. McKercher, id. 434.*

New trials granted in issues directed to try the right of the soil, though the judge certified in favour of the verdict, as there was no precedent of a decree, where the inheritance would be bound, being made upon one verdict only. *El. Darlington v. Bowes, 1 Eden. 270. PR. NEW TRIAL.*

New trial for mis-direction of the judge, and absence of a material witness. *Cleave v. Gascoigne, Ambl. 323. NEW TRIAL.*

If, on issue directed, the judge certifies, that the weight of evidence was against the verdict, court will order a new trial. If a verdict is not against evidence, a court of law cannot grant a new trial, but a court of equity will, for the verdict must satisfy the conscience of the court. *Faulconberg v. Pierce, Ambl. 210. Id.*

When the estate in question is of small value, instead of sending it to be determined by a whole court, it may be directed to be heard and argued before two judges at their chambers. *Rigden v. Vallier, 3 Atk. 735.*

On a bill to settle the boundaries of a manor, it was decreed, that each party should give to the other a note of their boundaries, and that it should be tried in a feigned issue. And the issue being found for the defendant on the first, second, and third trial, the defendant was not only allowed the costs of all the trials at law, but also the costs in equity; in regard, the defendant had no bill, and the plaintiff might have tried it at law without coming into equity: on a bill of partition no costs on either side, because it is for the benefit of both parties. *Metcalfe v. Beckwith, 2 P. W. 376. PR. COSTS; BILL TO SETTLE BOUNDARIES.*

Parties resting their defence, in an issue at law, upon instruments ascertained at the trial to be forged, will not be allowed to enter into any other evidence, or to say the forged instruments were immaterial. *Kemp v. Mackrell, 2 Ves. 579. PR. EVIDENCE.*

In case of an issue out of chancery, it is proper to move that court for costs, for not going on to trial, or to move there for a special jury. *Aum. 2 P. W. 68. PR. MOTION FOR COSTS.*

Defendant's answer directed to be read as evidence at a trial at law. *Ibbotson v. Rhodes, 2 Vern. 555. PR. EVIDENCE; PR. ANSWER.*

A copy of a deed to lead the uses of a fine, and enrolled for safe custody, only allowed to be read as evidence at a trial at law. *Combes v. Spencer, 2 Vern. 471. Semble. S. C. Id. 591. PR. EVIDENCE, LOST DEEDS.*

Bill for writings and a partition; defendant insists the plaintiff has no title, and there is an intail subsisting; the court gave the plaintiff a year's time to try his title: and upon a trial in ejectment, verdict for the plaintiff, upon coming in upon the equity reserved, it was insisted, this being a matter of right of inheritance, defendant ought not to be bound by one trial; *sed non allocatur* it being a decree only for a partition; *sed quere?* *Blissman v. Brown, 2 Vern. 232. PARTITION.*

The case was referred to law, and it was ordered, that the defendant do not insist on a title set aside by the decree, and he does insist on it; whereupon the plaintiff read the decree, but was, nevertheless, non-suited, and then moved the court of chancery for a commitment of the defendant, and establishment of

the possession, which was ordered. *Anon.* 1 C. C. 267. PR. DECREE.

Where customs sought to be established concerned tenant-right estates, and were general through the country, where the cause of suit arose, as well as the neighbourhood counties, the court directed the issue to be tried by a jury from Middlesex. *El. Thanet v. Paterson*, Barn. 252.

A trial at law, directed to be in Easter term then next, or the issue to be taken *pro confesso*. *Oliver v. Leman*, 2 C. R. 124.

#### LIV. JUDGMENT.

See also PR. DECREE.—PR. HEARING, &c.—PR. SUBPONA, 3.

Suits after judgments admitted in chancery. Beame's Orders, 18.

But bond given with good securities to prove the bill. *Id.* 18.

Decrees on such suits not to weaken the judgments. *Id.* 19.

Only to correct the corrupt conscience of the party. *Id.* 19.

Where defendant is served to hear judgment, and does not appear, he has day given to shew cause against decree. *Dandon v. Ready*, 1 S. & S. 44. PR. DAY TO SHEW CAUSE; PR. DECREE.

On mis-trial of issue directed by court of equity, there can be no motion in arrest of judgment. *Moseley v. Davies*, 11 Price, 162. PR. ISSUE AT LAW.

The defendant (plaintiff at law), subsequently on the day when the common injunction might otherwise have been obtained, puts in a demurrer which is overruled, and in the meantime, pending the demurrer, the plaintiff is taken in execution; after which, and immediately on the overruling of the demurrer, the common injunction is obtained; upon an application to discharge the plaintiff out of custody, on the ground that the demurrer being overruled, the parties are entitled to be replaced in the situation they would have been in if no demurrer had been filed, and by analogy to the case of goods taken in execution, the application being opposed on the ground that the parties would not, by granting it, be placed in the situation in which they would otherwise have stood, since the judgment had been satisfied by the taking in execution, and if now discharged the debts would be gone; ordered, that the plaintiffs be discharged on undertaking again to confess judgment, so that he might not afterwards say the existing judgment and debt had been satisfied by the execution from which he was so discharged. *Franklyn v. Thomas*, 3 Mer. 225.

Death of one of defendants does not necessarily prevent judgment. *Davis v. Davis*, 9 Ves. 461. PR. ABATEMENT OF SUIT.

LETTER MISSIVE, see LETTER MISSIVE, ante, 654.

MASTER, see OFFICERS OF COURT, 6.

MASTER EXTRAORDINARY, see PR. OFFICERS OF COURT, 7.

#### LV. MASTER, PROCEEDINGS BEFORE.

See also ACCOUNT, VIII. 2.—PR. CHARGE AND DISCHARGE.—PR. COSTS, 10. (gg).—PR. EVID. 8; 28. (d).—PR. STATE OF FACTS.

Regulations, where a master is directed to settle a conveyance, or to tax costs. 76th Gen. Order, 3rd April, 1828. PR. TAXATION OF COSTS.

No warrant to review proceedings in master's office, unless on special application to master. 68th Gen. Order, 3rd April, 1828.

The master may proceed without order *de die in diem*. 58th Gen. Order, 3rd April, 1828.

On any subsequent attendance, master shall fix time of any further proceedings. 52nd Gen. Order, 3rd April, 1828.

If all the parties do not attend, master may, if he thinks fit, proceed *ex parte*. 53rd Gen. Order, 3rd April, 1828.

And such proceeding shall not be liable to review, except on special application. 54th Gen. Order, 3rd April, 1828.

Where proceeding fails from non-attendance, master may certify the costs to be paid by the party in default; and court, on motion or petition, will order payment. 55th Gen. Order, 3rd April, 1828. PR. COSTS.

Minutes are conclusive, unless (after reading) they are altered, or register fail to do duty. Beame's Orders, 270. 271.

Due observation to be given by parties to minutes. *Id.* 271.

The masters to take minutes of facts admitted before them, which shall be conclusive on admitting party. *Id.* 304, 305.

Petition to rectify minutes must be presented within six days after order pronounced. *Id.* 325.

Application to rectify to be made within certain time. *Id.* 334, 337.

Under a decree to account, made upon taking the bill *pro confesso*, against a defendant, who has appeared but not answered, he cannot attend the master without leave of the court; but leave to attend given, and the sequestration discharged upon payment of the costs of the contempt of the suit. *Keyn v. Keyn*, 1 Jac. 49. PR. CONTEMPT; PR. DECREE, PRO CONFESSO.

It is general rule, that creditors and next of kin going before master to prove claims, pay the costs; but if afterwards they are mixed up in cause as parties, costs are allowed them. *Waite v. Waite*, 6 Mad. 110. PR. COSTS; DEBTOR & CRED.; NEXT OF KIN.

A creditor, whose debt has been disallowed by the master, and allowed by the court upon petition, is not entitled to costs. *Watkins v. Maule*, 1 Jac. 105. DEBTOR & CRED.; PR. COSTS.

Costs of proving debt before master upon usual decree upon creditors bill not allowed. *Abell v. Screech*, 10 Ves. 355. PR. COSTS.

Solicitor arrested in his return from attending the master, discharged in the original action and subsequent detainers; the proper course is an order upon all the plaintiffs to discharge him. *Esp. Sedwich*, 8 Ves. 598. CONTEMPT OF COURT; ARREST, PRIVILEGE FROM.

No certificate by a master as by accountant-general; but there must be a report in order to take notice of any thing in master's office. *Fox v. Mackreth*, 1 Ves. J. 70. CERTIFICATE.

On the client's neglecting to attend before the master on the taxation of the bill, the chancellor would not order him to bring the money into court, but only that the order of reference should be discharged if he did not procure a report in a fortnight.

**Anon. Mos. 68.** PR. TAXATION OF COSTS; PR. PAYMENT INTO COURT.

**LVI. MASTER, REFERENCE TO, REPORT AND CERTIFICATE.**

**1. Reference.**

- (a) On what facts inquiry made, and where reference directed.
- (b) Proceeding on.
- (c) As to title.
- (d) As to scandal, impertinence, and insufficiency. See also PR. ANSWER, 18; 19.
- (e) If two suits are for similar object.
- (f) If suit for infant's benefit.
- (g) To appoint guardian, &c.
- (h) In cases of foreclosure and redemption of mortgage.

**2. Report and certificate.**

- (a) Form of.
- (b) Settlement and signature, effect of.
- (c) Filing and obtaining in what times.
- (d) Review and amendment of.
- (e) Confirmation and effect thereof.
- (f) Separate report and what acts may be done without waiting for report.
- (g) Certificate, when necessary.
- (h) Exceptions.
  - (1) General orders.
  - (2) When proper or necessary, and obtaining leave of court.
  - (3) Form of.
  - (4) Deposit on.
  - (5) Time of filing and effect of.
  - (6) Setting down, hearing, and arguing.
  - (7) Allowance and overruling, effect of.

**1. Reference.**

- (a) On what facts inquiry made, and where reference directed.
- (b) Proceeding on.
- (c) As to title.
- (d) As to scandal, impertinence, and insufficiency.
- (e) If two suits are for similar object.
- (f) If suit for infant's benefit.
- (g) To appoint guardian, &c.
- (h) In cases of foreclosure and redemption of mortgage.

- (a) On what facts inquiry made, and where reference directed.

Inquiry not directed to masters where witnesses have not been examined. *Beame's Orders*, 230.

Exceptions. *Id.* 23. 81.

Of matters of account after hearing. *Id.* 22. 81.

Unless parties consent before hearing. *Id.* 24.

Of court rolls to two masters. *Id.* 24.

Of answer as insufficient, how to be granted. *Id.* 24.

Of account forthwith, where answer confesses trust. *Id.* 24.

A bill being filed by a shareholder in a joint stock company against the directors and other shareholders, in order to have the partnership dissolved, and the proper accounts taken, fourteen of the directors, who all appeared by the solicitor of the company, having filed fourteen separate answers, with long schedules to each, all of which answers and schedules were nearly *verbatim* the same: Held, that in that stage of the cause no inquiry could be directed into the ne-

cessity or expediency of filing those separate answers with a view to the defence of the suit. The plaintiff in such a suit, notwithstanding the adoption of such a mode of defence, will not be permitted to dismiss his bill without costs on his application; nor will any reference be directed to the master, with a view to modify the costs which the plaintiff shall pay. *Vansandun v. Moore*, 1 Russ. 441. PR. ANSWER; PR. COSTS.

An allegation in the answer, concerning a fact lying especially within the knowledge of the plaintiff, does not entitle the defendant to an inquiry on that point. *Walker v. Woodward*, 1 Russ. 107. PR. ANSWER.

Where an inquiry as to debts has been directed before decree, and the master has reported that there are no debts, the decree at the original hearing must nevertheless direct an account of debts. *Hornby v. Hunter*, 1 Russ. 89. PR. ACCOUNT.

Bequest to the children of A, described spinsters, and nothing on the face of the will shewing that illegitimate children were intended. Inquiry, whether she left illegitimate children, refused. *Osmond v. Tindall*, 5 Ves. 534. WILL, C. OF; BASTARD.

If, in the course of proceedings in a suit for specific performance, there comes out a fact, not put in issue in the cause by either party, which affects the legality of the contract, or tends to shew that the contract is not fully stated in the bill, the court will direct an inquiry into the fact so disclosed. *Parken v. Whitby*, 1 Turn. & R. 366. SPECIFIC PERFORMANCE.

Where defendant in title cause submits to part of plaintiff's demand, the court will on motion for that purpose, on part of defendant, refer it to master in any stage of proceeding to ascertain what is due, and to tax costs; the defendant undertaking to pay the amount, without prejudice to any other question in the cause. *Lowe v. Perkins*, 11 Price, 453. PR. WITHDRAWING FROM CAUSE; TITHES.

Where legacy given for permanent charitable purposes to trustees, not having corporate character, court will not transfer fund to them without reference. *Wellbeloved v. Jones*, 1 S. & S. 40. LEGACY; CHARITY; TRUSTEE; PR. TRANSFER.

Court always sends case to master to inquire what testator meant, as well where there is misdescription of fund, as of legatee. *Evans v. Tripp*, 6 Mad. 91. LEGACY, SPEC.; WILL, C. OF, MISTAKE.

Where injunction to stay waste had been granted on petition, a reference was made to inquire what timber might be cut with advantage, &c. *Att. Gen. v. Dk. Marlborough*, 5 Mail. 280. PR. INJUNCTION AGAINST WASTE.

Infant put to his election under will, and reference to master to ascertain what election would be most to his benefit. *Ebrington v. Ebrington*, 5 Mad. 119. INFANT.

Upon an exception to a master's report, stating the capital and stock in trade of a partnership to consist, at the time of the bankruptcy of one of the partners, of the estimated value of the dead stock employed in it, it was referred back to the master, to state what was the amount of the capital, and also of the stock in trade at that time, in order to adjust the amount of subsequent profits, to which the assignees of the bankrupt partner were to be entitled, as against the other partners, who had continued to trade with the partnership property after the bankruptcy. *Crawshaw v. Collins*, 1 Jac. & W. 267. PARTNERSHIP.

Trustees of a charity are never appointed by the court without a reference, though the fund be extremely small. *Att. Gen. v. El. Arran*, 1 Jac. & W. 229. TRUSTEES, APPOINTMENT OF; CHARITY.

When trustees have a power to appoint new trustees, the court will not, on their application, direct

an appointment without a reference. — *v. Roberts*, 1 Jac. & W. 251. TRUSTEES, APPOINTMENT OF.

Where discretion of trustee is to be exercised on matter of fact, court will substitute a master; but not if upon matter of opinion or judgment. *Walker v. Walker*, 5 Mad. 424. TRUSTEE, DISCRETIONARY POWER.

Estates being devised to trustees to be sold for payment of debts, and subject thereto for the testator's infant children, the surviving trustee retains possession of one of the estates in satisfaction of debts, which he alleges himself to have paid, the testator being insolvent. On a bill for an account and conveyance of this estate by one of the children, and the representatives of another, forty-five years after the testator's death, stating that they had recently discovered the facts; special inquiries directed to ascertain whether they had any notice of the circumstances; whether they had in any manner released; and whether the trustee had advanced to the amount of the value of the estate. *Chalmer v. Bradley*, 1 Jac. & W. 51. LENGTH OF TIME.

Prochain ami cannot remove himself from that situation, without reference to master. *Snelling v. Snelling*, 4 Mad. 261. PR. PROCHAIN AMI, REMOVAL OF.

Court will not, except under special circumstances, order reference to ascertain whether or not it is more advantageous to infant to invest fund in hand of executors on mortgage; practice being to invest in 3 per cent. consols. *Norbury v. Norbury*, 4 Mad. 191. INFANT; INVESTMENT.

On the motion of defendant before answer, it was ordered, that reference be made to master to ascertain debt, &c. claimed by bill, which was to be paid by a given day and suit to be stayed, and if not paid, plaintiff's costs given him, and to be at liberty to proceed in the cause. *Boys v. Ford*, 4 Mad. 40. PR. ANSWER.

Infants being bound to elect to take under or against a will, reference to the master to inquire which was for their benefit. *Gretton v. Howard*, 1 Swan. 413. ELECTION; INFANT.

Under sequestration landlord is entitled to be paid arrears of rent without reference to master. *Dixon v. Smith*, 1 Swan. 457. LANDL. & TEN.; PR. SEQUESTRATION.

An act of parliament having authorised the vicar of C. to grant leases of the glebe lands, with the consent of the patron in writing, the patron being a lunatic, a petition by the committees of his person and estate, for a reference to the master to inquire whether it would be fit that they, on his behalf, should consent to a lease, was refused. *Exp. Smyth*, 2 Swan. 393. LUNATIC.

M gives to the defendant all her freehold and copyhold estates, upon trust to permit E to receive the rents, &c. during her life, and after her death, to sell, and out of the produce to pay 100*l.* to such person as she should by will appoint. E, by will, without reference to the power, gives 100*l.* and the whole of her household furniture to the plaintiff. It was charged by the bill, and not denied, that the testatrix had no personal property at the time of her death, besides some household furniture to a very small amount in value; but no evidence was gone into, and an inquiry was asked as to the state of the property at the time of making the will, with the view of ascertaining that the testatrix must have intended the gift of the 100*l.* as in execution of her power. But the inquiry was refused, and the bill dismissed. *Jones v. Tucker*, 2 Mer. 533. POWER, EXECUTION OF; WILL, C. OF.

No inquiry as to the quantum of personal property, to determine whether a gift is, or is not, in execution of a power. Secus, as to an inquiry whether there be anything but copyhold to answer a devise of land;

the question then being, whether there was anything for the will to operate upon at the time when it was made; whereas a will of personality speaks at the death. *Ib. ib.*

On hearing of cause, an inquiry will not be directed to master, unless ground of it is laid on the pleadings. *Holloway v. Millard*, 1 Mad. 414. PL. BILL.

Decree for specific performance of an agreement to grant a lease, rejecting one item for such conditions, &c. as shall be judged proper by J, and substituting reference to the master, the agency of J not being of the essence of the contract. *Gourlay v. Dk. Somerset*, 19 Ves. 429. SPEC. PERF.; LEASE.

Legacy to A, in case he should come to England and claim within three years; if not, gift over to B. B cannot claim without reference to ascertain if A has been in England. *Burgess v. Robinson*, 1 Mad. 172.

Institution of suit on behalf of persons having a common interest, not directed on motion and affidavit, without reference to master as to their benefit. *Musgrave v. Meder*, 3 V. & B. 167. PR. MOTION.

Order to compel election to proceed at law, or in equity of course; but if upon a false suggestion, that the suits are for the same matter, discharged; and that question, if of any difficulty, referred to the master; and all proceedings stayed in the meantime. *Mills v. Fry*, 3 V. & B. 9. PR. ELECTION, LAW OR EQUITY.

In a case of competition between creditors and an annuitant, on the legality of the consideration of whose annuity there was some doubt, an inquiry by master into the consideration was properly directed. *Hunt v. Mannsell*, 1 Dow, 211. CONSIDERATION.

Devise in strict settlement, with a clause of forfeiture by cutting any trees. Upon a bill by the infant remainder-man in tail an inquiry was directed, whether any trees in the park, not ornamental, or affording shelter to the mansion-house, are proper to be felled; and whether it would be for the benefit of all parties interested, that they should be felled, and sold; and the money laid out in other estates, to be settled to the same uses. *Delapole v. Delapole*, 17 Ves. 150. WILL, C. OF; TIMBER.

Where contract for the purchase of an estate is not complete in the lifetime of the ancestor, the terms of it not being ascertained, heir is not entitled to have the personal estate applied in payment of the purchase-money. A reference, or issue, will not be granted to ascertain the terms of the contract. The application of the personal estate by the heir, in completing the contract for purchase by the ancestor, but not binding on him, raises no trust in the lands for the next of kin. The money so laid out, is a charge on the purchased lands. *Savage v. Carroll*, 1 Ball & B. 265. CONTRACT; HEIR AT LAW.

Reference, whether several title causes should be consolidated, not of course before answer. *Keighly v. Brown*, 16 Ves. 344. PR. CONSOLIDATION OF TITLE CAUSES.

Society for raising an annuity fund for the members; the rate of subscription being too low, though the subsisting fund was equal to the annuities then payable, and no adequate remedy by the articles, inquiries were directed; 1st. to ascertain the state of the society, the defect of the plan, &c.; 2ndly. to provide a remedy, viz. by additional subscription, adequate to the object, by paying the arrears, and providing for the present and future annuities. *Pearce v. Piper*, 17 Ves. 1. FRIENDLY SOCIETIES.

Upon appeal the Ld. Chancellor's opinion being, that the reversion of the copyhold estate passed under the general devise, "as to all such worldly estate and effects as it may please God to bless me withal, or I may leave, or I may be entitled to, at the time of my decease, whether real or personal, not before given or disposed of," especially if there was no freehold estate, inquiries were directed to ascertain that fact;

and also, whether there was any custom of surrendering a vested interest in reversion or remainder expectant upon an estate tail. *Church v. Munday*, 15 Ves. 396. WILL, C. OF.

General objection by the answer to an information, that all the terre-tenants of the premises charged with the charity, are not parties without any particular description, the court will direct inquiries, what other lands are charged, &c. previously deciding the validity of the charge against the defendants before the court. *Att. Gen. v. Jackson*, 11 Ves. 365. PL. PARTIES; PL. INFORMATION.

On motion, reference directed to inquire, whether defendant trustee remains accountable for any acts done by him as such, and if not, to settle release. — *v. Osborne*, 6 Ves. 455. TRUSTEE, RELEASE.

Order for liberty to trustee to let infant's estate without reference to master, the property being small, but not to extend to building leases, or beyond minority. *P. — v. Bell*, 6 Ves. 419. INFANT.

A defendant, claiming as a mortgagee, and by his answer denying notice of the plaintiff's title, which was neither alleged by the bill, nor proved; an inquiry for the purpose of affecting him with notice, was refused, first, upon a petition to vary the minutes, and, again, upon a rehearing. An inquiry as to what sums he had advanced upon the security of the mortgage, and at what times respectively, was granted. *Hardy v. Reeves*, 5 Ves. 426. PL. ANSWER; NOTICE; MORTGAGOR & MORTGAGEE.

A work alleged to be a piracy referred to the master. — *v. Leadbetter*, 4 Ves. 681. INFRINGEMENT OF COPYRIGHT.

Accounts referred to the master; afterwards an order of reference was made to arbitrators to take an account of all dealings and transactions in like manner, as if the same was referred to the master, and that the parties should be concluded and bound by the award, and should observe it; and farther directions were reserved: this reference is not in nature of a reference to the master, therefore the parties are bound by a general award of a balance due without particulars stated, the decision being final, because upon matter of fact, and no corruption or misconduct imputed; and the court will not require particulars merely as a ground for costs. *Dick v. Milligan*, 4 Bro. C. C. 117. S. C. 2 Ves. J. 23. AWARD.

Devisee of stock for life with absolute power of appointment if no children, referred to the master for inquiry about a child upon the grounds for suspicion. *Sculthorp v. Burgess*, 1 Ves. J. 91. DEVISEE.

There must be a reference to the master for a proper settlement before contempt for marrying a ward of court can be cleared. *Sterens v. Savage*, 1 Ves. J. 154. PR. CONTEMPT; WARD OF COURT; SETTLEMENT BY COURT.

Reference to the master to inquire whether the plaintiff's late father had appointed a guardian for the plaintiff, and if not, that the master should approve of a proper person to be appointed guardian of the plaintiff (an infant). *Bettesworth v. Bettesworth*, Dick. 729.

A question whether an interest in a heritable bond, charged upon lands in Scotland, will pass by will, referred to the master to report the law of Scotland. *Glover v. Strathoff*, 2 Bro. C. C. 32. FOREIGN LAW.

On a bill for a specific performance of an agreement for the sale of a house, the plaintiff made out his case; but it appeared that the defendant had actually sold the house to another person for a valuable consideration. The court directed the master to inquire what damages the plaintiff had sustained by the non-performance of the agreement, and that such damages, together with the costs of the suit, should be paid by defendant. *Denton v. Stewart*, 1 Cox, 258. SPECIFIC PERFORMANCE; DAMAGES.

Testator authorised his executors, at any time before T should attain the age of twenty-six years, to raise by sale of a sufficient part of certain bank annuities, any sum of money not exceeding 600*l.*, and pay and apply the same towards the preferment or advancement in life, or other the occasions of T, as the said executors should think proper; and at the age of twenty-six, he gave the said 600*l.* to T absolutely. The executors declining to act, the court will not give this 600*l.* to T before twenty-six, without referring it to the master to inquire whether T's situation requires the 600*l.*, or any part thereof, to be advanced. *Lewis v. Lewis*, 1 Cox, 162. WILL, C. OF; ADVANCEMENT OF LEGACY.

Court refused a reference to the master to inquire whether plaintiffs were natural children. *Grave v. Salisbury*, 1 Bro. C. C. 425. BASTARD.

Bill for specific performance against vendor, the vendor being in possession, and an account being necessary of the vendee's personal estate; referred to the master to fix a short day for the payment of the purchase money, otherwise the bill to be dismissed as against those defendants, with costs. *Louthorpe v. Andorer*, 1 Bro. C. C. 396. VENDOR & PURCH.; PR. PAYMENT OF MONEY.

On motion for injunction against infringement of copyright; reference to master to see if two books were the same. *Jeffery v. Routes*, Dick, 429.

Power contained in a will for the devisees for life, when in possession to cut down timber as four trustees, or the survivors or survivor of them should direct, &c.: all the four trustees being dead, held, that the court, would execute the trust by referring it to a master to see what timber was fit to be cut down from time to time. *Hewitt v. Hewitt*, 2 Eden. 332. S. C. Ambl. 508. POWER, EXECUTION BY COURT; WILL, C. OF.

Plaintiff's bill only referred to wills, &c., whereon he founded his title; reference to master to state case whereon to found decree. *Punnefort v. Fl. of Lincoln*, Dick, 362.

Depositions of witness examined as to credit, referred for scandal and impertinence. *Bray v. Bulkley*, Dick, 288.

A decree having been made for sale of an estate, that a trustee should join in the conveyance; that trustee dying, his infant heir bound to execute a conveyance under the stat. 7 Ann. c. 19. Such a decree against the ancestor would obviate any doubt as to whether his infant heir were or not a trustee within the act. *Hawkins v. Obeon*, 2 Ves. 559. INFANT TRUSTEE; PR. DECREE.

The master cannot inquire into the property in chattels sequestered without an order. *Anon.* 3 Swan. 311. PR. SEQUESTRATION.

Court will not change a mere trustee for wife under marriage settlement, without sending it first to master to see if a proper person is proposed. *O'Keeffe v. Calthorpe*, 1 Atk. 18. TRUSTEE.

Where the will is writ blindly, and hardly legible, and the legacies in figures, court referred it to a master to examine what those legacies were; and the master to be assisted with such as understood the art of writing. WILL, C. OF, WHAT PASSES.

Legatee's name very falsely spelt referred to a master to see who was intended. *Id. ib.* WILL, C. OF, WHO TAKE.

#### (b) Proceedings on.

The direction to the master not to disturb settled accounts, applies only to mutual accounts between the parties, by which they would be bound, and is a special direction; but the direction to report special

circumstances is one of course, and very often introduced without any object. *Milford v. Milford*, 1 McCl. & Y. 151.

Upon reference to master to approve of settlement on wife out of fund accruing in her right, which was claimed by assignees of husband bankrupt, master directed to have regard to extent of fortune received by husband in wife's right, as well as to any other settlement which he might have made on her. *Green v. Otte*, 1 S. & S. 250. BANKCY. ALLOWANCE TO WIFE; HUSB. & WIFE.

Will of real estate not to be proved on a reference before the master. *Lechmere v. Brasier*, 2 Jac. & W. 289. WILL; EVIDENCE.

Master may, at his discretion, receive further interrogatories. *Price v. Lytton*, 5 Mad. 465. PR. INTERROGATORIES, FURTHER.

Order empowering the master from time to time to receive proposals for leases, and to report on them. *McDermott v. Kealy*, 1 Jac. 374. LEASES.

Court will itself, in bankruptcy, decide on validity of equitable mortgage without reference to commissioners; but when established, a reference is made to ascertain what is due upon it. *Exp. Jennings*, 1 Mad. 331. BANKCY., EQUITABLE MORTGAGE.

Privilege of a witness from arrest, as a person going to make an affidavit before a master. *Exp. Jones*, 2 V. & B. 374. PRIVILEGE FROM ARREST.

On a reference of a matter in bankruptcy to the master, affidavits, which might have been read at the hearing of the petition in court, may be received in evidence by him. *Exp. Jackson*, 1 Rose, 45. EVID.

Order to refer back to the master an examination, under the direction in a decree for examination of the parties, to see whether it was sufficient. *Purcell v. McNamara*, 12 Ves. 166.

Though judgment creditor cannot stir at law without *sci. fa.* before master, it is sufficient to produce the record of the judgment, and swear the debt is due. *Burroughs v. Elton*, 11 Ves. 36. JUDGMENT CREDITOR.

The practice settled that there should be an order for the master to proceed *de die in diem*. Such order not imperative on the master, but subject to his discretion. *Purcell v. McNamara*, 11 Ves. 362. PR. ORDER TO PROCEED DE DIE IN DIEM.

Reference removed from one master to another on allegation of counsel, that he found former in such a state from his advanced age and infirmity, that it was not proper to go into the business before him. *Anon.* 9 Ves. 341.

Where there is a reference to the master in a case of lunacy, he shall make his report although the lunatic be dead. *Exp. Armstrong*, 3 Bro. C. C. 238. LUNACY; PR. ABATEMENT.

Where, on plea of former decree, plaintiff sets down cause, he waives his right to reference to master as to such decree. *Morgan v. Morgan*, 1 Atk. 53. PR. PLEA OF FORMER DECREE; WAIVER.

A trustee, by his answer, declined to act, and, on the hearing, it was referred to the master to appoint new trustees; the original trustee afterwards agreed to act, and on application to the court, that the trustee might be at liberty to amend his answer in this respect, so as to enable the court on a rehearing to vary that part of the decree, the court refused to do this; but thought the master was at liberty, on statement of these circumstances, to decline the appointment of new trustees. *Miles v. Neave*, Cox. 159. TRUSTEES, REMOVAL OF.

Exceptions to answer; the answer reported sufficient; plaintiff amends, upon answer coming in; seventy exceptions taken; motion that these exceptions be referred to the same master with the former set, granted. *Pratt v. Tessier*, 1 Bro. C. C. 39. PR. EXCEPTIONS TO ANSWER.

### (c) As to title.

Quare whether a master to whom a question of title is referred, has a right to require the parties to procure for him the opinion of any conveyancer who he shall select, upon the abstracts of title which have been brought into his office? *Flower v. Walker*, 1 Russ. 408.

On a reference of title in a suit by vendor, for the specific performance of a contract for the purchase of lands, the mere fact that a suit has been subsequently instituted, and is pending, in which part of the lands are claimed adversely to the vendor, is not a sufficient ground for reporting that a good title can be made. *Osbaldeston v. Askew*, 1 Russ. 160. VENDOR AND PURCH.

If the master reports against the title to an estate, purchased under a decree, the purchaser will be paid the costs of the reference out of the funds in the cause. *Reynolds v. Blake*, 2 S. & S. 117. VENDOR AND PURCH.; COSTS.

Where answer to bill for specific performance raises other objections to performance beside defect of title, court will not, on motion by plaintiff for reference of title, after the answer, decide whether other objections are frivolous or not. *Semble. Withy v. Cottle*, 1 S. & S. 174. *S. P. Gordon v. Bull*, id. 178. VENDOR AND PURCH.; PR. ANSWER.

A decree for reference of title, on a bill for specific performance, should contain a declaration that the contract ought to be specifically performed. *Mole v. Smith*, 1 Jac. 495. PR. DECREE, FORM OF; SPEC. PERF.

Receiver appointed on the motion of the vendor pending a reference of title. *Boehm v. Wood*, 2 Jac. & W. 236. VENDOR & PURCH.; PR. RECEIVER.

Although the court will not order a reference of title, on motion, when a purchaser resists the performance of the contract on another ground, yet it will take care that the latter is substantial. *Semble.* The motion was therefore granted, where the only other ground insisted upon by the owner was, that the time of possession had been made of the essence of the contract, but which, upon looking into it, appeared not to be the case. Merely undertaking to deliver an abstract and possession at a particular time, does not make it of the essence of a contract. *S. C.* 1 Jac. & W. 419. VENDOR & PURCH.

Court will not, on motion, after an order for reference, direct master to enquire (if he have found that a good title can be made to premises, the subject of a suit for specific performance), when such good title could be first made. Such direction should have been applied for at hearing. *Lubin v. Lighthody*, 8 Price, 606. PR. VARYING ORDER.

Motion after bill filed, and before answer for reference as to title, counsel for defendant stating there were other matters in question besides title, motion was refused. *Mathews v. Dunn*, 3 Mad. 470.

Motion may be made on bill for specific performance, for reference as to title, and whether title was shown prior to filing bill. *Anon.* 3 Mad. 495.

Reference having been made as to title on one motion, party cannot afterwards, by another motion, have reference as to delivery of abstract. *Hyde v. Wroughton*, 3 Mad. 279.

There can be no reference of title except where the title only is in dispute. *Morgan v. Shaw*, 2 Mer. 138.

On a reference of title, the master having reported that a good title could be made, order referring it back to the master to see whether such title could have been made prior to the filing of the bill by the vendor for a specific performance. *Birch v. Haynes*, 2 Mer. 444.

Specific performance decreed against purchaser without reference as to title, upon ground of posses-



sion, a correspondence and no objection to title till two years after delivery of abstract. *Marg. Anspach v. Noel*, 1 Mad. 310. SPEC. PERF.; VENDOR & PURCH.

The court of exchequer will not, on bill for specific performance, make an interlocutory order to refer a title, the validity of which is denied by answer, and depends on facts, to the deputy remembrancer, until the cause is brought to a hearing without consent. *Bowyer v. Bright*, 3 Price, 300.

Decree for a reference upon the title; the cause coming on for further directions, after a report approving the title, the defendant is entitled to have an enquiry at what time a title could have been made. *Daly v. Osborne*, 1 Mer. 382. VENDOR & PURCH.

Upon reference to the master as to the title, a report that A B, with the concurrence of C D, &c. can make a good title, is an excess of his authority, being a report upon the conveyance rather than upon the fact, title or not. Parties, therefore, having omitted to take exceptions to it, are not concluded by its confirmation. *Lewis v. Loxam*, 1 Mer. 155.

On reference of title on bill for specific performance the reference may extend to all that concerns the title, but not to other matters; it may be extended, therefore, to enquire whether it appeared by the abstract in pleadings mentioned, that good title could be made. *Jennings v. Hopton*, 1 Mad. 211.

Reference of title before decree refused, where the purchaser, besides objecting to the title, claimed compensation for defect of quantity, even though he submitted to complete his agreement. *Lowe v. Manners*, 1 Mer. 19. VENDOR & PURCH.

No reference of title upon a question whether the estate was tithe-free, having been sold as such. *Waltinger v. Hilbert*, 1 Mer. 104. *Ib.*

Court will not make absolute the common order *visi* to dissolve injunction, (granted to restrain purchaser from proceeding at law to recover part of the purchase money paid by him in advance, the vendor not being able to make title, and there being outstanding incumbrances,) without master's report as to sufficiency of title, although objections are fully stated in defendant's answer. *Church v. Leger*, 1 Price, 301. PR. DISMISSAL OF INJUNCTION; VENDOR & PURCH.

Costs to a purchaser: the vendor having established his title before the master, after contest, upon a different ground from that in the abstract delivered. *Fielder v. Higginson*, 3 V. & B. 142. VENDOR & PURCH.; COSTS.

Order to dismiss a bill for want of prosecution, not of course, pending a reference on motion, the title alone being in question. *Biscoe v. Brett*, 2 V. & B. 377. PR. DISMISSAL OF BILL.

Reference of title before answer; plaintiff the vendor undertaking to do all such acts for the purpose of executing what the court thinks right, as if the answer was in, and the cause brought to hearing, direction, if the report shall be against the title, for compensation; refused as to indemnity. *Balmanno v. Lamley*, 1 V. & B. 224. PR. ANSWER.

Reference before decree confined to the case of title; where there was a farther subject of dispute, under a claim of compensation, it was refused with costs. — *v. Skelton*, 1 V. & B. 516. PR. DECREE.

Reference as to title before decree refused, where purchaser on other grounds, resists performance of contract. *Paton v. Rogers*, 1 V. & B. 351. PR. DECREE; VENDOR & PURCH.

Inquiry as to time when title could be made is the subject of further directions after report upon title, and is not to be continued with reference as to title. *Gibson v. Clarke*, 2 V. & B. 103.

Reference as to title before decree only made where title alone is in dispute. *Blyth v. Elmhirst*, 1 V. & B. 1. VENDOR & PURCH.

Specific performance decreed against purchaser without reference as to title, upon possession and no objection made to abstract. *Fleetwood v. Green*, 15 Ves. 594. VENDOR & PURCH.; SPEC. PERF.

The practice to direct a reference upon title, on motion after answer, limited to the case where the title only is disputed. *Gumpertz v. —*, 12 Ves. 17.

After answer submitting to perform contract, if good title can be made, reference was directed, on motion whether good title can be made, and whether it appears on the abstract. *Wright v. Bond*, 11 Ves. 39.

General rule that court will not decide upon a title without reference to master, unless unequivocally, and without fraud or surprise, waived; a plaintiff seeking specific performance of contract being entitled to opportunity of making a better title before the master, and the defendant having a right to further inquiry, beyond objections arising on abstract, upon principle that bill seeks relief beyond the law. *Jenkins v. Hiles*, 6 Ves. 646.

Court refused to make order under act of parliament for sale of estate, upon opinion of conveyancer approving conveyance merely, without reference to master. *Exp. Ds. Newcastle*, 6 Ves. 454. PR. SALE.

The bill praying the inquiry into the title, and a specific performance, on the defendant's motion after answer, an inquiry was directed as to the title, at what time the abstract was delivered, and whether it was sufficient, but the court would not decide upon any matter of relief. *Moss v. Mathews*, 3 Ves. 329. SPEC. PERF.

On reference to a master to see whether a good title can be made, the master proceeds on the abstract only, unless the purchaser requires the production of the deeds themselves, and if he omits to make such requisition, he cannot except to the report, on the ground of the deeds not having been produced before the master. *Poole v. Shergold*, 1 Cox, 160. VENDOR & PURCH.

Title established before master, not being clear on abstract, vendor pays costs. — *v. Collinge*, cited 3 V. & B. 143. note. PR. COSTS; VENDOR & PURCH.

(1) *As to scandal, impertinence, and insufficiency.*

See also PR. ANSWER, 18.

No order to refer any pleading for scandal and impertinence shall be made, unless exceptions be taken in writing, and signed by counsel, 11th Gen. Ord. 3d April 1828.

Order referring answer or pleading for insufficiency or scandal shall be considered as abandoned, unless party obtaining it procure report within a fortnight, or master certify further time to be necessary. 12th Gen. Ord. 3d April 1828.

Any party, without order of reference, may take out warrant to expunge from state of facts, or other proceeding before master, matter that is scandalous or impertinent. 73d Gen. Ord. 3d April 1828.

Master's report on reference for impertinence must be obtained in four days. Gen. Ord. 25th January 1822. 10 Price, 29.

Ordered that in future all references of answers of defendants for insufficiency, or for scandal and impertinence, or for impertinence made in the same cause, be made to the same master; and farther that where answers of defendants have been referred for scandal and impertinence, or for impertinence, and the court shall afterwards refer the same for insufficiency, the latter reference be made to the same master as the former reference. Gen. Ord. 10th March 1818.



Where answers have been referred for scandal, &c. and court shall afterwards refer the same for insufficiency, the latter reference shall be made to same master as former reference. *V. C.* 10 March, 1818. 3 *Mad.* 317. *GEN. ORD.*

A common injunction having been obtained for want of answer, on the answer coming in, exceptions were taken and allowed; the bill was then amended, to which and the exceptions a further answer was put in; the further answer was referred for scandal and impertinence; the master reported it was neither scandalous nor impertinent, and on this report the defendant obtained the usual order to dissolve the injunction *nisi*. Exceptions to the answer to the amended bill were offered to be shewn as cause, but the court considered the reference for scandal and impertinence a dilatory proceeding, and dissolved the injunction. *Stone v. Bottridge*, 2 *Y. & J.* 482. *PR. INJUNCTION.*

An affidavit made in support of a state of facts may be referred for scandal, but not for impertinence, by a party who has filed in support of a certain state of facts, an affidavit which appears to be an answer to the former. *In mrs. Burton*, 1 *Russ.* 380. *PR. REFERENCE FOR SCANDAL; PR. AFFIDAVIT.*

An order referring a defendant's examination for impertinence cannot be obtained as of course, if the plaintiff have proceeded on the examination. *Jenkins v. Ure*, 2 *S. & S.* 578. *WAIVER.*

A party cannot refer for impertinence, on affidavit filed in support of a motion, if after that affidavit was filed, he has filed any affidavit in opposition to the motion. *Keeling v. Hawkins*, 2 *Russ.* 319. *WAIVER.*

An exception may be regularly filed to the master's report as to impertinence, after the order to expunge, and at any time before the impertinent matter is actually expunged. *David v. Williams*, 1 *Sim.* 17. *PR. EXCEPTIONS TO MASTER'S REPORT.*

An examination setting out material accounts, clearly and conveniently, is not rendered impertinent, by varying from strict course pointed out by the interrogatories, nor by introducing three columns of figures, so as to occasion blank columns in the office copy, although blank columns are an abuse. *Bully v. Williams*, 1 *McClel. & Y.* 334. *ACCOUNTS.*

Master's report of impertinence must be obtained in four days: where this was not complied with, order to refer was discharged with costs; and where defendant had obtained order *nisi* to dissolve injunction, and plaintiff meanwhile had obtained a reference for impertinence, which was allowed as a good cause against dissolving injunction, but plaintiff omitted to comply with above rule; on motion to discharge order of reference, and dissolve injunction absolutely, the first part being granted, the plaintiff was obliged to show cause instant against the dissolution. *Hodgson v. Pritchitt*, 1 *McClel.* 209. *S. C.* 13 *Price*, 451. *INJUNCTION, DISSOLUTION OF.*

Reference of answer for impertinence is good cause against dissolving injunction. *Joseph v. Simpson*, 10 *Price*, 25. *PR. INJUNCTION, DISSOLUTION OF, CAUSE AGAINST.*

Interrogatories and depositions not to be referred on motion of course, before the hearing for impertinence alone, without scandal. *Osmond v. Tindall*, 1 *Jac.* 625. *PR. MOTION OF COURSE; PR. INTERROGATORIES AND DEPOSITIONS.*

Where bill found scandalous by master, injunction not granted till such matters expunged. *Davenport v. Davenport*, 6 *Mad.* 251. *INJUNCTION.*

Court refused (with costs,) to order interrogatories, however impertinent, to be suppressed, if witnesses have answered them; they should demur: answering them waives impertinence. *Jeffries v. Whittuck*, 9 *Pri.* 486. *WAIVER; PR. INTERROGATORIES TO WITNESS.*

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If defendant means to except to report of impertinence, he must first move for leave, and notice of motion must be given. *Ward v. Botalin*, 8 *Pri.* 86. *PR. IN EXCH.; DEP. REMEMR.; REPORT; EXCEPTIONS.*

In exchequer, report of officer on reference, that answer is impertinent, must be confirmed by the court on motion, of which notice must be given for that purpose. *Id. ib.*

Stranger to record, cannot move to refer bill for scandal. *Anon.* 4 *Mad.* 252. *Sed. quare?* See 6 *Ves.* 514. and *id.* note. *Beame's Ord.* 25. *STRANGER.*

In injunction cases, the master's report on the question of impertinence must, at least, without reference to the inquiry, whether there is farther impertinence, have the same weight as his report on the question of insufficiency. *Raphael v. Birdwood*, 1 *Swan.* 232. *PR. INJUNCTION.*

Answer being referred for impertinence, and reported not impertinent, order upon motion of course, to refer it to the master to tax the defendant's costs. *Tyrrel v. Redifer*, 1 *Mer.* 132. *PR. COSTS.*

Reference for scandal and impertinence, is a sufficient proceeding with effect to save a bill. *Goodwin v. Dirs.*, 1 *Pri.* 378. *PR. DISMISSAL OF BILL, CAUSE AGAINST.*

Motion to commit upon a fourth insufficient answer refused, the plaintiff not having a report of the insufficiency of such fourth answer, though the defendant had filed a fifth answer. *Const v. Ebers*, *Coop.* 262. *PR. COMMITTAL FOR INSUFFICIENT ANSWER.*

Practice in master's office, to report answer insufficient generally, upon establishing one exception, without entering into more, corrected. *Roure v. Chudgum*, 1 *V. & B.* 331.

Interrogatories and depositions not referred for impertinence alone, without scandal. *White v. Fussell*, 19 *Ves.* 113. *INTERROG.; DEPOSITIONS.*

Jurisdiction to expunge scandal from an affidavit in lunacy or bankruptcy, on reference to the master. *Exp. Le Heup*, 18 *Ves.* 221. *JURISDICTION.*

Motion of course to refer a bill or answer for impertinence or scandal. *Id.* 223.

Any proceeding may be referred for scandal and impertinence as a state of facts before the master, and affidavits in bankruptcy. *Erskine v. Garthshore*, 18 *Ves.* 114.

Scandalous matter, as allegations reflecting upon moral character, and not relevant to the subject, to be expunged from the record, whether in a suit or bankruptcy, and without an application. *Exp. Simpson*, 15 *Ves.* 477.

Allegations, material to the issue, are not impertinent, and being relevant and pertinent, though they may be false, and of whatever nature, are not scandalous. *Id. ib.*

Motion to refer the answer for impertinence, allowed as cause against dissolving an injunction, upon the terms of procuring the report in a week. *Goodinge v. Woodhams*, 14 *Ves.* 534. *PR. DISSOLVING INJUNCTION.*

Depositions referred for scandal upon motion of course, without notice. *Eusthum v. Liddell*, 12 *Ves.* 201. *PR. NOTICE.*

Reference of answer for impertinence is waived by subsequent reference for insufficiency. *Pellow v. —*, 6 *Ves.* 456. *WAIVER.*

After an order for time to answer, the bill may be referred for scandal, but not for impertinence. *Anon.* 5 *Ves.* 656. *PR. TIME TO ANSWER.*

The answer being referred for impertinence, is a good ground to continue an injunction. *Hurst v. Thomas*, 2 *Anst.* 591. *INJUNCTION.*

The master's report on a reference for impertinence, needs no confirmation, and a report that the bill is not impertinent, entitles the plaintiff to an injunction,

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unless an answer has been filed. *Martyn v. Brough-ton*, 3 Swan. 232. **PR. CONFIRMATION OF MASTER'S REPORT.**

Where bill is reported scandalous, defendant is entitled to have it expunged as of course, upon report made; and to a reference to tax costs *instantly*, after report made. *Muscott v. Halded*, 4 Bro. C. C. 222. **PR. COSTS.**

A plaintiff cannot refer an answer for impertinence after replication, or an undertaking to speed the cause; but he may refer for scandal at any time. *Barnes v. Saibn*, 3 Swan. 232.

Exceptions to report of impertinence cannot be taken after impertinence is expunged, nor without special order, while the order to expunge remains in force; a report of impertinence having been obtained by surprise, the master was ordered to abstain from acting on order to expunge, until exceptions had been argued. *Mortimer v. West*, 3 Swan. 228. **PR. EXCEPTIONS; PR. ORDER TO EXPUNGE.**

Exceptions to report of impertinence cannot be taken, nor be set down for argument, after an order to expunge without special leave. *Wadman v. Birch*, 3 Swan. 230. **EXCEPTIONS; ORDER TO EXPUNGE.**

Order to refer answer for impertinence not prosecuted, is no objection to a motion to dismiss for want of prosecution; and defendant need not obtain master's report in his favour. *Railton v. Woodrick*, 3 Swan. 247. **PR. BILL, DISMISSAL OF.**

A discharge carried in before a master, may be referred for impertinence. *Price v. Shaw*, 2 Cox, 184. **PR. CHARGE AND DISCHARGE.**

An answer having been referred for impertinence, and reported impertinent, it is not necessary to have the impertinent matter actually expunged before the defendant moves to dissolve an injunction upon coming in of his answer, though he cannot move it pending the reference. *Kenn v. Barnwell*, 2 Cox, 26. **PR. MOTION TO DISSOLVE INJUNCTION.**

Plaintiff having referred a plea for impertinence, afterwards set the plea down for argument; this is a waiver of the reference for impertinence, notwithstanding the defendant had attended the master upon it. *Dixon v. Olmies*, 1 Cox, 412. **PR. PLEA; WAIVER.**

It is not considered as a species of impertinence that many witnesses are examined to the same fact, provided the fact be material; but if it be admitted by the answer, and therefore not in issue in the cause, any depositions to this point would be deemed impertinent. *Vaughan v. Lloyd*, id. 313. **PR. EVIDENCE.**

A defendant to a bill, though not served with process, may appear gratis, and refer it for impertinence. *Fell v. Master, &c. of Christ's Coll. Camb.* 2 Bro. C. C. 279. **PR. APPEARANCE GRATIS.**

Practice as to reference of an answer for impertinence, after an order nisi, to dissolve an injunction. *Jennings v. Walker*, 1 Cox, 178. **PR. ORDER NISI, TO DISSOLVE INJUNCTION.**

The bill being referred for impertinence, the plaintiff cannot move (as of course,) for an injunction for want of an answer, but is in the same situation as if the time for answering were not out, until the master has reported on the reference. *Neale v. Wadeson*, 1 Cox, 104. S. C. 1 Bro. C. C. 574. **INJUNCTION.**

Any record of the court may be referred for scandal at any time, and even by strangers to the suit; but it is otherwise as to a reference for impertinence; though such orders are discretionary to a certain extent, the opportunity may be lost or waived. *Anon.* 2 Ves. 631.

Reference for scandal may be at any time, not so as to mere impertinence. Scandal includes imperti-

nence, but a matter may be impertinent, without being scandalous. Nothing scandalous that is strictly relevant to the merits. *Fenhoult v. Passavant*, 2 Ves. 24.

Affidavit referred for impertinence. *Phillips v. Mulman*, Dick. 113.

After time to answer, bill cannot be referred for impertinence, though it may at any time for scandal. *Farrar v. Farrar*, id. 173.

In this case an order was made to refer the affidavit of plaintiff's own solicitor for impertinence. *Phillips v. Phillips*, 3 Atk. 391.

If answer be reported sufficient, and on exceptions held insufficient, defendant is not to pay the 40s. costs for insufficient answer. *Knightly v. Deacon*, Dick. 82.

The court will order depositions to be referred for scandal and impertinence to a master. *Cocks v. Worthington*, 2 Atk. 235.

If a bill be referred for impertinence, and master report it pertinent, defendant may except generally, without specifying the parts of the bill which are impertinent. *Blackworth v. Briggs*, 2 Atk. 182. **EXCEPTIONS TO MASTER'S REPORT.**

After the defendant has answered the bill, he cannot refer it for scandal. *Abergavenny v. Abergavenny*, 2 P. W. 311. *Sed quare.* **WAIVER.**

Demurrer of a witness to interrogatories, enquiring after matter defamatory to a third person, and not material in the cause, allowed. *Mulgrave v. Id. Dunbar*, 2 Swan. 198. **PR. DEMURRER TO INTERROGATORIES.**

An answer may be scandalous even in the title, if it refers upon the plaintiff, because it is no part of the defence, and cannot be put in issue. *Peck v. Peck*, Mos. 46.

A counsel who sets his hand to a bill containing scandalous matter, is liable to costs. *Emerson v. Dallison*, 1 C. R. 104. **PR. SIGNATURE OF COUNSEL.**

The defendant obtained an order to refer the bill for impertinence, after he had twice prayed time to answer: the chancellor ordered that he should procure a report within four days, or the order be discharged. *Anon.* Mos. 71. **PR. TIME TO ANSWER.**

(c) *If two suits are for similar objects.*

On a reference to the master to inquire whether proceedings at law and in equity are for the same matter, all proceedings are in general stayed in the mean time. *Anory v. Brodrick*, 1 Jac. 530. **PR. STAYING PROCEEDINGS.**

Where an information and a petition under the 52 G. 3. c. 101, are proceeding together, and include the same or part of the same objects, the court will refer it to the Attorney-general to consider which should proceed. *Att. Gen. v. Green*, 1 Jac. & W. 303. **CHARITY.**

A reference to the master to inquire whether proceedings at law and in equity are for the same matter, stays all proceedings, without the special order of the court, which will give or withhold leave to proceed, according to the circumstances of each case. *Curwick v. Young*, 2 Swan. 239. **PR. STAYING PROCEEDINGS.**

Upon order being made on plaintiff to elect whether he will proceed at law or in equity, and on motion to discharge that order, court will, if there are sufficient facts before it, decide whether election necessary without reference to master. *Anon.* 2 Mad. 395. **PR. ELECTION, LAW OR EQUITY.**

Where two suits are instituted in the name of an

infant by different persons, acting as his next friends, it is of course, to refer it to the master to see which is most for the infant's benefit, upon the more allegation of the counsel, that both suits are for the same purpose, it being at the risk of the party moving, in case the allegation should prove untrue, to have the order for reference discharged with costs upon the special application of the other party. *Sullivan v. Sullivan*, 2 Mer. 40. INFANT.

Upon such a reference, the master is at liberty to suggest any improvement in the frame of the suit, and to report any special circumstances that may be for the infant's advantage. *Id. ib.*

Suggestion that the defendant is doubly vexed by suits in equity and at law for the same matter, ascertained by reference to the master. *Boyd v. Heinzelman*, 1 V. & B. 381. ELECTION, LAW OR EQUITY.

Plea of another suit for the same matter referred to master. *Wild v. Hobson*, 2 V. & B. 110. PR. PLA.

Reference whether two suits are for the same matter is obtained by plea in chancery as in the exchequer; not by motion. *Murray v. Shadwell*, 17 Ves. 353.

(f) If suit for infant's benefit.

A suit instituted on behalf of infants by a solicitor wholly unconnected with the family, it was, on the motion of the defendant, referred to the master to inquire whether it would be for the infant's benefit that the suit should be prosecuted, the defendant undertaking to render to the master the accounts prayed for by the bill. *Richardson v. Miller*, 1 Sim. 133. P. AMT.

Infants being added as parties to a cause after the report had been made, it was referred to the master to enquire whether it would be for their benefit that the report should be adopted as to them. *Brookfield v. Bradley*, 1 Jac. 632.

After a decree in one or two suits commenced in the name of an infant, it is not usual to refer it to the master to enquire which suit is most beneficial. *Taylor v. Oldham*, 1 Jac. 527. PR. DECREE.

Court will not enquire if suit is for benefit of infant, unless there is a strong case of no benefit, or of an improper motive. *Stevens v. Stevens*, 6 Mad. 97.

Infants being made co-plaintiffs in two suits relative to the same matter, the court will not before a decree (on the master's report that one suit is more for the benefit of the infants), dismiss the bill in the other suit unless by consent. *Martimer v. West*, 1 Swan. 358. PR. DISMISSAL OF BILL.

No reference upon an application by the next friend of an infant, to see whether a suit which he himself has instituted is for the infant's benefit. *Jones v. Powell*, 2 Mer. 141. PROCEIN AMT.

Reference, which suit by *prochein amis* most advantageous to infant. One ordered to prosecute; other not restrained further, it being at his peril to proceed. *Owen v. Owen*, Dick. 310.

Where there are two suits brought by different *prochein amis*, the court will refer them to see which is most proper, because the court, as guardian of infants, will take care that what is done shall be for their benefit. *Anon.* 3 Atk. 603.

A father left a great personal estate to two infant children, and made his wife executrix. A bill was brought in the infant's name by a relation as *prochein ami*, to call the mother to an account. On affidavit of several other relations that this suit in the infant's name was out of pique, and not for the infant's good, the court referred it to a master, who reporting the

matter to be so, the suit was stayed. *Da Costa v. Da Costa*, 3 P. W. 140.

(g) To appoint guardian.

An infant's property being very small (290l.), maintenance ordered out of the principal without a reference. *Exp. Green*, 1 Jac. & W. 253. INFANT, MAINTENANCE.

So interest of 1200l., the property of three infants. *Exp. Dudley*, id. 354. n.

Guardian not to be appointed without a reference when the infant's property amounts to 150l. per annum. *Exp. Janion*, 1 Jac. & W. 395.

Reference for maintenance and appointment of guardian of an infant, ordered on petition without suit: property 200l. per annum. *Exp. Myeracough*, id. 151. PR. PETITION; INFANT MAINTENANCE.

Order appointing a guardian without a reference only where the property is excessively small, refused where it amounted to 1500l. *Exp. Wheeler*, 16 Ves. 266.

Maintenance allowed for an infant though no cause in court. *Exp. Kent*, 3 Bro. C. C. 80.

When a father, by his will, names guardians for his natural child, the court will not appoint them guardians without any reference to the master. *Ward v. St. Paul*, 2 Bro. C. C. 583. But see contra *Peckham v. Peckham*, 2 Cox, 46. GUARD. TESTAMENTARY; BASTARD.

Infant apprenticed to particular person, and fee paid without reference, father alleging he thought it proper. *Mendes Da Costa v. De Paz*, Dick. 168.

Reference for maintenance without suit when first introduced; court will order costs on reference for maintenance without suit. *Exp. Thomas*, Amb. 146.

(h) In cases of foreclosure, and redemption of mortgage.

On motion for reference under 7 G. 2. c. 20. the court refused to direct master to take into account costs incurred at law, no mention of proceedings at law having been made in the bill; but leave was given to amend bill in that respect, and motion to stand over in mean time. *Miliani v. Magor*, 3 Mad. 433. PR. BILL, AMENDMENT OF; PR. COSTS.

Mortgagor defendant to a bill of foreclosure being in contempt, cannot obtain the reference on motion under the stat. 7 G. 3. c. 20. *Hewitt v. M'Cartney*, 13 Ves. 560. STAT. C. OF; CONTEMPT.

Defendant to a bill for an account, cannot, upon motion immediately after answer, have a reference to the master by analogy to the case of a mortgage by stat. 7 Geo. 2. c. 20., and the case of specific performance according to the practice settled, though the reason of it is questionable. *Ultridge v. Porter*, 14 Ves. 139. PR. BILL FOR ACCOUNT.

2. Report and certificate.

- (a) Form of.
- (b) Settlement and signature of, and effect thereof.
- (c) Filing and obtaining, in what time.
- (d) Review of, and amendment of.
- (e) Confirmation, and effect thereof.
- (f) Separate report, and what acts may be done without waiting for report.
- (g) Certificate, when necessary.
- (h) Exceptions.
  - (1) General orders.
  - (2) When proper or necessary, and of obtaining leave of court.
  - (3) Form of.

- (4) Deposit on.
- (5) Time of filing, and effect of.
- (6) Setting down, hearing, and arguing.
- (7) Allowance and overruling, effect of.

(a) Form of.

Master's report not to be respected which exceeds terms of reference. *Beame's Ord.* 23.

How master's reports are to be drawn. *Id.* 81.

On motion to dismiss for want of prosecution, clerk in court, (six clerk, see 10 Ves. 404. n.) on his certificate as to proceedings in the cause, (which may be obtained after motion is made), must not state any proceedings subsequent to motion. *King v. Noel*, 5 Mad. 13. PR. DISMISSAL FOR WANT OF PROSECUTION.

If on reference in bankruptcy to master, he finds examination of witnesses necessary, he must certify accordingly to court, who will make the order. *Anon.* 4 Mad. 379. PR. ORDER FOR EXAMINATION OF WITNESSES BY MASTER.

Master in his report is always at liberty, though not directed by decree, to state his reasons for disallowance of a claim. *Champernowne v. Scott*, 4 Mad. 209.

The master's certificate in support of a motion for an absolute order for production of books, &c., or commitment, must bear date on the day of the motion. *Hopkinson v. Leach*, 3 Swan. 98. PRODUCTION OF DEEDS.

Where some exceptions to answer are overruled, and some allowed, master should by report point out which are and are not allowed. *Agar v. Gurney*, 2 Mad. 389. PR. EXCEPTIONS TO ANSWER.

Under a decree for account of proceeds of a joint adventure, on bill by one party on behalf of himself and the others, and inquiry who are concerned with the plaintiff, the master, having by advertisements, as usual, declared those who should not come in excluded, reported several persons who had not come in to claim, entitled to shares; further advertisements directed, but payment into court of those shares refused, and the decree not to be executed as to those who should not come in. *Good v. Blewitt*, 19 Ves. 336. PR. PAYMENT INTO COURT; PR. DECREE TO ACCOUNT.

Where a surplus to be distributed in an uncertain sum, the master ought to report the shares in aliquot parts, not in money. *Att. Gen. v. Haberdashers' Comp.* 1 Ves. J. 295.

On a reference to a master in bankruptcy, with liberty for him to examine parties on interrogatories if he should think fit; it seems that if the master should decline to examine any party when required so to do, he should state the grounds on which he declined to do so. *Exp. Charter*, 2 Cox, 168. PR. EXAMINATION BEFORE MASTER.

Schedules of accounts, referred to in the master's report, must be annexed to and filed with the report, and not entered in a book, and kept in the master's office as was attempted in this case. *Smith v. Smith*, Dick. 789.

Masters in chancery, in reports which are special, are only to state bare matters of fact. *Dk. Marlborough v. Wheat*, 1 Atk. 454.

Where a master reports any thing as admitted by either party, which report is afterwards excepted to, the report must *primâ facie* be taken to be true, and requires at least an affidavit to falsify it. *Allen v. Pendlebury*, cited, *Da Costa v. Da Costa*, 3 P. W. 142. note.

In a creditor's suit against the administrators, and account decreed, the master reported that defendant had assets sufficient to satisfy plaintiff's demand; costs were decreed generally against the administrator.

*Dury v. Seys*, Mos. 204. PR. COSTS; DECREE FOR ADMON. OF ASSETS.

Where some tenants entered into an agreement to stand by others of the tenants, who are made defendants to a suit brought against them by the lord upon consent, the court will direct that the agreement shall be annexed by way of schedule to the master's report. *Thanet v. Paterson*, Barn, 255.

(b) Settlement and signature of, and effects thereof.

Defendant may file further answer before master has signed his report of insufficiency of first answer. *Wynne v. Jackson*, 2 S. & S. 226. PR. FURTHER ANSWER.

Order for injunction for want of answer obtained after master has signed his report of insufficiency of answer, but before report is filed, is irregular. *Id. ib.* PR. INJUNCTION.

Motion cannot be made for opinion of court to obviate difficulties of master in drawing up his report. *Agar v. Gurney*, 2 Mad. 389.

Evidence not to be received by master after he has settled his report. *Thompson v. Lamb*, 7 Ves. 587. PR. EVIDENCE.

(c) Filing and obtaining, in what time.

Master's report on reference for impertinence must be obtained in four days. *Gen. Ord.* 25th Jan. 1822. 10 Price, 29. IMPERTINENCE.

To be filed with register within four days after signing. *Beame's Ord.* 293.

Master's report of impertinence must be obtained in four days; where this was not complied with, order to refer answer was discharged with costs. And where defendant had obtained an order nisi to dissolve injunction, and plaintiff in the interim had obtained a reference for impertinence which was allowed as cause against dissolving injunction, but plaintiff did not comply with the above rule; on motion to discharge order of reference and dissolve injunction absolutely, the first part having been granted, the plaintiff was obliged to show cause instantan against the dissolution. *Hodgson v. Pritchit*, 1 M'Clel. 209. S. C. 13 Price, 451. REF. FOR IMPERTINENCE; PR. INJUNC. DISSOLUTION OF.

Master's certificate of disobedience to decree directing deed, &c. to be produced before him, need not be filed within four days after it is signed; it is sufficient if filed before four-day order is delivered out. *Harris v. De Tastet*, 1 S. & S. 263. FILING PLEADINGS, &c.

Sufficient if a master's report is filed before any proceedings had thereon, though not within four days after it was made. *Eyles v. Ward*, 2 P. W. 517.

(d) Review of and amendment of.

The master was ordered to tax the costs of all parties, and the account was directed to be paid out of the assets of the testator in the cause by his executors, who were to be at liberty to pay the costs of certain parties to A their solicitor. A was an attorney of K. B. and C. P. but never had been admitted as a solicitor in the court of chancery, and the master for that reason disallowed the whole of his charges except what he had paid to his clerk in court. He had however previously received from his clients to the full amount of his bills. The clients then petitioned for an order on the master to review his certificate and tax A's bills, but their petition was dismissed. *Preamble v. Bognhurst*, 2 Sim. 247. PR. COSTS, TAXATION OF.

After the confirmation of a report, a review will not be ordered, unless on a very strong case; and objections affecting the substance of it will not be per-

mitted, but mere mistakes may be rectified. *Turner v. Turner*, 1 Jac. & W. 39. **REPORT, CONFIRMATION OF.**

Master directed to review his certificate and state reasons why examination impertinent. *Anon.* 3 Mad. 246.

It is not competent to the lord chancellor to order the master to review a report confirmed and followed by a decree of the master of the Rolls, containing consequential directions, while that decree stands. *Turner v. Turner*, 1 Swan. 154. **JURISDICTION.**

The master ordered to review his report after confirmation. *Id.* 157. **PR. REPORT, CONFIRMATION OF.**

After report was confirmed in favour of title by one master, and then master in another proceeding made a report by which the title was affected, motion that it should be referred back to the first master, granted. *Jeuwine v. Alcock*, 1 Mad. 597.

On reference to master to approve settlement to be made on wife, &c. of bankrupt, in respect of her property, the master approving the whole of her property on exceptions directed to review his report. *Beresford v. Hobson*, 1 Mad. 362. **HUSB. & WIFE; BANKCY. SETTLMT.**

Upon reference to master as to fact of person's death, the report only stating the circumstances, viz. absence abroad fourteen years without any account of him, but not drawing the conclusion, it was referred back to master to state whether he was dead at the time when administration was granted, especially as two years more had elapsed since the report. *Lee v. Willock*, 6 Ves. 605.

The court will not interfere with the master's appointment of a consignee unless upon special grounds and a strong case. *Bowersbank v. Colasneau*, 3 Ves. 164. **CONSIGNEE OF W. INDIA ESTATE.**

Allowance of a debt in the master's report, which had been obtained by fraud, rectified, the proper mode of proceeding being by original bill, not by bill of review; and held that it was not necessary to pray specifically that the act of the court should be set aside, plaintiff having made a sufficient case to obtain that relief under the prayer for general relief. *Manaton v. Molesworth*, 1 Eden. 18. **PL. BILL OF REVIEW.**

Master to review report in order that exceptions may be taken. *Tallance v. Weldon*, Dick. 291. **AMBL. 126. PR. PAROL EVID.; WIDOW.**

Where the error in a master's report is owing to a party's not laying a material piece of evidence before him, the court will not direct him to review his report, but upon the exceptant giving up his deposit. *Hedges v. Cardonell*, 2 Atk. 408.

Mistake in report enrolled, amended, and docketed also. *Yow v. Townsend*, Dick. 59.

Part of the decretal order directing an allowance to the defendant was omitted in the register's book, and the master in consequence refused the defendant's claim, but on exceptions the allowance was made. *Tredcroft v. White*, 3 C. R. 72.

#### (d) Confirmation and effect thereof.

The order nisi to confirm a report, may be obtained on a petition. 21st Gen. Ord. 3rd April, 1828.

The general rule is, that where the report of the deputy remembrancer may be excepted to, it requires confirmation; but the case of trustees approved of by him is an exception; there the report is good, unless excepted to. Gen. Ord. 18th June, 1792.

Not confirmed without day given. *Same's Ord.* 22.

Purchaser who has confirmed his report nisi, can-

not after notice to open biddings, confirm absolutely. *Vansittart v. Collier*, 2 S. & S. 608. **PR. SALES, JUDICIAL, OPENING BIDDINGS; VENDOR & PURCHASER.**

Where exceptions will lie to master's report, it must be regularly confirmed before an order can be made upon it. *Scott v. Livesey*, 2 S. & S. 300. **PR. EXCEPTIONS TO MASTER'S REPORT.**

Master's report of receiver's accounts does not require confirmation, and cannot be excepted to; but court will enter into consideration of objections to the general principle on which master has proceeded in taking such account, but not of objections to particular items in it. *Shewell v. Jones*, 2 S. & S. 170. **PR. RECEIVER'S ACCOUNTS.**

The master's report on reference of title, will not be suspended to wait the event of a suit commenced against the vendor for recovery of part of the estate; but the two suits may be heard together. *Ostaldiston v. Askew*, 2 J. & W. 539.

Filing exceptions alone, does not prevent the confirmation of a report; they must be set down. *Mole v. Smith*, 1 Jac. & W. 670. **S. P. Abel v. Nodes**, 2 Cox, 169. **EXCEPTIONS TO REPORT.**

On a petition to confirm a report, and praying consequential directions, a party cannot, without presenting a counter petition, show cause against the confirmation, except upon grounds appearing on the face of the report. *Brodie v. Barry*, 1 Jac. & W. 470.

After the confirmation of a report, a review will not be ordered, unless on a very strong case; and objections affecting the substance of it will not be permitted; but mere mistakes may be rectified. *Turner v. Turner*, 1 Jac. & W. 39. **REVIEW OF MASTER'S REPORT.**

The master ordered to review his report after confirmation. *Turner v. Turner*, 1 Swan. 157. **PR. ORDER TO REVIEW MASTER'S REPORT.**

Exceptions to a report may be taken off the file, if filed after the report has been confirmed absolute. *Sterling v. Thompson*, Coop. 271. **PR. EXCEPTIONS TO REPORT; PR. TAKING PLEADINGS OFF FILE.**

Biddings will not be opened after confirmation of the report, unless fraud is shown in purchaser, or fraudulent negligence in agent, &c. or other special circumstances. *Morice v. Bk. of Durham*, 11 Ves. 57. **PR. SALES JUDICIAL, OPENING BIDDINGS.**

Irregular to confirm reports, as to maintenance on motion. *Greenwell v. Greenwell*, 5 Ves. 199. **PR. MOTION.**

After an order for confirming the report nisi, filing exceptions and making the deposit with the register are no cause to prevent that order being made absolute, unless an order for setting down the exceptions to be argued is obtained, which may be done either by the plaintiff or defendant, the order confirming the report was discharged on payment of costs. *Gildart v. Moses*, 4 Ves. 617. **PR. ORDER NISI; PR. EXCEPTIONS TO REPORT.**

Bond and judgment assigned, interest must be calculated to the date of the report, so as not to exceed the penalty. *Sharp v. El. of Scarborough*, 3 Ves. 557. **INTEREST HOW CALCULATED.**

After final report of costs, &c. nothing remaining but application of the fund; ordered, that service on the clerks in court of the defendants should be good service, in order to confirm the report, on motion and affidavits, that some lived in the East and West Indies, and others in different parts of this country, though there were only five defendants. *Jackson v. —*, 2 Ves. J. 416. **PR. SERVICE SUBSTITUTED.**

The master's report on a reference for impertinence needs no confirmation, and a report that the bill is not impertinent, entitles the plaintiff to an injunction, unless an answer has been filed. *Martyn v. Broughton*, 3 Swan. 232. **PR. IMPERTINENCE.**

Interest not given from the confirmation of the report upon demands liquidated by it, but not bearing interest in their nature, as legacies and arrears of annuities, though both legacies and annuities were charged upon land, and the annuities were not paid out of the rents and profits as possession was taken by mortgagees, and though one of the annuities was the provision for a widow. *Crenze v. Hunter*, 2 Ves. J. 167. 4 Bro. C. C. 157. **INTEREST.**

Interest is computed by the master's report, upon such debts only as carry interest according to the rate they carry; and upon farther directions, subsequent interest is directed, only on those upon which the report has already computed interest, but no interest is computed on simple contract debts by the report or order afterwards. *Id.* 115.

In exchequer, if defendant conceives himself aggrieved by master's report, he must file exceptions thereto, and such exceptions must be set down to be argued in court; but if no exceptions are taken, the court confirms the report as of course, and thereupon gives proper directions. *Kaye v. Bruere*, 2 Bro. P. C. 420. **PR. EXCEPTIONS TO MASTER'S REPORT.**

Exceptions allowed to be taken to report, though confirmed, and though none were taken to draft. *Allen v. Allen*, Dick. 362.

Commissioners' certificate confirmed as a report. *Keeling v. Cartwright*, Dick. 401.

Bare filing exceptions is not showing cause against confirmation of report. *Hall v. Mulliner*, Dick. 604.

Biddings opened after confirmation of the master's report upon a considerable advance, there having been a mistake, made in a particular of the estate left with the master, and one of the parties who confirmed the report having been steward of the family, and knowing more than he communicated. *Ex. Gower v. El. Gower*, 2 Eden, 348. **FRAT; SALES JUDICIAL, OPENING BIDDINGS.**

Defendant permitted to take exceptions to a report after confirmation, without having taken objections previously. *Allen v. Allen*, 1 Swan. 158. **PR. MASTER'S REPORT, EXCEPTIONS TO.**

Confirmation of master's report opened, and the report allowed to be excepted to, or reviewed upon particular circumstances, although previous exceptions had been disallowed after argument. *Hawkins v. Day*, 1 Ves. 189. *Id.*

A master's report of what was due to a mortgagee for principal interest and costs, was confirmed nisi, and by the register's minutes at a subsequent seal in the same cause taken down, order absolute, but never entered; on the register refusing to do it, an application for an order *de novo*. *Anon.* 3 Atk. 521.

Not usual to have reports of receiver's accounts confirmed. *Curper v. El. Cowper*, 2 P. W. 729. **PR. RECEIVER'S ACCOUNT.**

Where a debt is liquidated by a report, the whole carries interest from the time of confirming such report, and so *toties quoties* as any new report is made. *Bradshaw v. Astley*, 4 Bro. P. C. 505. **INTEREST.**

A master reports so much due for the principal of a portion, and so much for the interest; the court of chancery decreed the money so reported due to be paid, together with interest upon the principal sum till payment. On an appeal, interest was directed to be carried on for the whole sum, principal and interest, stated by the master's report, from the time of confirming that report. *Kelly v. Id. Bellow*, 4 Bro. P. C. 495. *Id.*

A party cannot move upon a master's report to bring the cause on for further directions, till the report is confirmed. *Smith v. Reynolds*, Mos. 71. **PR. MOTION; PR. FURTHER DIRECTIONS.**

(f) *Separate report, and what acts may be done, without waiting for general report.*

Master may make separate reports as he shall deem expedient. 70th Gen. Ord. 3rd April, 1828.

In separate report as to debts and legacies, he may certify as he pleases on state of the assets. 71st Gen. Ord. *Id.*

Report of insufficient answer, when to be produced. Beame's Ord. 53.

A separate report is never allowed, except for the purpose of expediting the general proceedings. *Hare v. Ruscombe*, 1 M'Clel. 101. S. C. 13 Price, 277.

Motion by plaintiffs to restrain masters from making a separate report, until a month after the trial of an indictment for perjury, upon affidavit carried on by that party in support of charges, or until further order, or that the report might be without prejudice to plaintiff's thereafter prosecuting his claims, refused with costs. *Bolaffey v. Bendelack*, 1 M'Clel. 573.

If testator's personality paid into court be clearly more than sufficient for payment of debts, legacies, &c. &c. so that there is no occasion to resort to the produce of the estate devised to be sold for the purpose of creating a subsidiary fund for exigencies of will, court will proceed to decree execution of trusts in exoneration of fund, without waiting for a final report, which would in strictness be necessary, or until the devised property should be sold. *Noel v. Henley*, 7 Price, 248. **EXECUTION OF TRUSTS OF WILL.**

Court of exchequer will not direct dep. rememb. to proceed to make a general report, until the previous orders for separate reports are regularly disposed of, although he have before him a full statement of facts. *Lewis v. Morgan*, 3 Price, 175.

Separate report under circumstances allowed as to costs alone, without waiting for general report in the cause. *Eids v. Rose*, 2 Mad. 448. **PR. COSTS.**

Where estate is devised to infants charged with payment of debts, if personal insufficient, sale of real not decreed till master report personal insufficient, though infants at hearing admit it to be so. *Birch v. Glover*, 4 Mad. 376. **INFANT, WHEN BOUND BY ADMISSIONS; PR. SALE WHEN DIRECTED; TRUST TO PAY DEBTS.**

Arrears of annuity ordered to be paid to widow and executrix, although no report of debts had been made, it being stated, by her answer, that there was no deficiency of assets. *Skinner v. Sweet*, Coop. 54. **PR. PAYMENT OUT OF COURT; ANNUITY, ARREARS OF.**

Sale of real estate decreed provisionally, without waiting the account of the personal estate previously applicable. *Curtis v. Price*, 12 Ves. 105. **SALE OF REAL ESTATE; PR. DECREE.**

Before report, court refused to order balance of charges allowed against defendant upon account, and the whole alleged in his discharge to be paid into court, upon certificate by the master, and defendant's examination before him, but also refused a motion to take the certificate off the file. *Fox v. Mackreth*, 1 Ves. J. 69. **PR. PAYMENT INTO COURT.**

A separate report directed, of what was due to a doweress, without entangling her in a general account of incumbrances. *Eccleston v. Berkeley*, Ridg. 263. **ACCOUNT.**

(g) *Certificate, when necessary.*

On application, the master shall certify the several proceedings which have taken place in his office. 57th Gen. Order, 3rd April, 1828.

Upon a reference to the master, it being necessary (to enable him to make his report) to have the evidence of entries in the books of the bank of England, the master is bound to grant his certificate, in order to justify the bank in permitting an inspection, ra-

than compel the parties, by his refusal, to file their bill for a discovery. *Brace v. Ormond*, 1 Mer. 409. PR. INSPECTION OF DEEDS, &c.; BANK OF ENGLAND.

The master not ordered to certify whether he was satisfied with the production of the papers by a party. *Cotton v. Harvey*, 12 Ves. 391. PR. PRODUCTION OF PAPERS.

No certificate by a master as by accountant general; but there must be a report in order to take notice of any thing in master's office. *For v. Mackreth*, 1 Ves. J. 70. PR. PROCEEDINGS IN MASTER'S OFFICE.

A commission for the examination of witnesses to falsify an examination of a party before a master cannot be had without the usual certificate from the master of the necessity of such a commission. *Fearcroft v. Berkeley*, 2 Cox, 108. PR. COMMISSION TO EXAMINE.

#### (h) Exceptions to.

- (1) General orders.
- (2) When proper or necessary, and of obtaining leave of court.
- (3) Form of.
- (4) Deposit on.
- (5) Time of filing, and effect of.
- (6) Setting down, hearing, and arguing.
- (7) Allowance and overruling, effect of.

#### (1) General orders.

Exceptions to reports must be filed with the register. *Beane's Orders*, 211.

Deposit and costs thereon. *Id.* 211. 236. 267. 289. 316. 326. 459.

To be entered by register in paper. *Id.* 211.

And notice given by exceptant to clerk of other side. *Id.* 211. 292.

Not to be filed by register (if concerning sufficiency of answer) unless brought and filed, and notice given to clerk of other side. *Id.* 254.

Notice of exceptions to be set up in the register's office two days before hearing. *Id.* 254.

Exceptions not admitted (if relating to sufficiency of answer), unless filed with register within eight days after subpoena for costs of answer, &c. *Id.* 258.

Though exceptions are allowed, yet if party brought not in objections to master, he shall pay costs. *Id.* 269.

If exceptions to report, as to paying money into court, are admitted after time for filing is out, proceedings on report not to be stayed without bringing money into court. *Id.* 261.

The order containing the three last positions suspended. *Id.* 294.

Good cause of exception that affidavit, ground of report, was not filed before report passed. *Id.* 307.

#### (2) When proper or necessary, and of obtaining leave of court.

The general rule is, that where the report of the deputy remembrancer may be excepted to, it requires confirmation; but the case of trustees approved of by him, is an exception: there the report is good, unless excepted to. Gen. Order, 18th June, 1792.

In equity, the proper mode in this court of objecting to the master's taxation of costs, is to move upon affidavits, stating the ground of objection, for leave to file exceptions to the report. *Wright v.*

*Southwood*, 1 Y. & J. 420. PR. TAXATION OF COSTS.

The master's certificate, as to production of books, &c. by a party, cannot be excepted to; a motion must be made to quash it. *Jones v. Powell*, 1 Sim. 387.

If a general exception is taken to a master's report, and the court is of opinion that the master is right in any one particular, the exception must be overruled. *Green v. Weaver*, 1 Sim. 404.

Exceptions cannot be taken to master's report approving new trustee; nor will court interfere with report where there is no complaint that persons approved of are unfit. *Att. Gen. v. Dyson*, 2 S. & S. 523. TRUSTEE.

Where party objects to principle on which account is taken by master, he should except to report; and if he neglects to do so, it will not be sent back to be reviewed, though in fact taken on an erroneous principle. *Brown v. Sansome*, 1 M'Clel. & Y. 427.

Where exceptions will lie to master's report, it must be regularly confirmed before an order can be made upon it. *Scott v. Livesey*, 2 S. & S. 300. PR. CONFIRMATION OF MASTER'S REPORT.

Leave must be obtained previous to filing exceptions to master's certificate. *Thornha v. Pellatt*, 11 Price, 732.

After an answer has been reported insufficient, an order to amend, and for the defendant to answer amendments and exceptions together, prevents the defendant from taking exceptions to the report, if it be served before the exceptions are set down. *Farquharson v. Balfour*, 1 Jac. 587. PR. ORDER TO AMEND.

An order inconsistent with the original decree cannot be made upon exceptions to the report. *Brown v. De Tastet*, 1 Jac. 284. PR. ORDER.

The application for leave to file exceptions to master's certificate of taxation of costs must be made on affidavit, stating the facts on which exceptions are founded, and the notice of motion should state the exceptions intended to be filed, and the ground of exception. *Jenkinson v. Royston*, 9 Price, 215. S.P. *Oliver v. Court*, *id.* 216. note.

Leave given to except to master's report of costs, on payment of taxed costs into court. *Exp. Leigh*, 4 Mad. 394. PR. PAYMENT INTO COURT.

If master reports that certain admissions were made before him, and exceptions are taken to such statements of admissions in the report, the court cannot allow such exceptions without consulting the master as to the fact of such admissions. *E. J. Comp. v. Keighley*, 4 Mad. 16.

Master by report had refused to allow discharge for want of sufficient evidence. To support exceptions thereto, it must be shewn, that from the evidence before him master ought to have allowed it, and a distinct motion must be made to order him to receive additional evidence in support of discharge. *Redifer v. O'Brien*, 3 Mad. 43.

Exceptions do not lie to master's report as to costs, nor can there be a re-taxation as to quantum. Irregularity in proceedings, or master acting on mistaken principle, will induce court to interfere. *Fenton v. Crickett*, 3 Mad. 496. COSTS.

Exceptions to report of impertinence cannot be taken after impertinence is expunged, nor without special order, while the order to expunge remains in force. A report of impertinence having been obtained by surprise, the master was ordered to abstain from acting under the order to expunge until exceptions had been argued. *Mortimer v. West*, 3 Swan. 228. PR. IMPERTINENCE; PR. ORDER TO EXPUNGE.

Exceptions to report of impertinence cannot be taken nor set down for argument after an order to expunge without special leave. *Wadman v. Birch*,

3 Swan. 230. IMPERTINENCE; ORDER TO EX-  
PUNGE.

Purchaser who is dissatisfied with deputy remem-  
brancer's report of title of premises sold under decree,  
must move for leave to file exceptions thereto, otherwise  
the motion to confirm may be made absolute in the  
first instance, but on moving, if prepared, he may show  
exceptions instant. *Eyton v. Dicken*, 4 Price, 303.  
PR. SALES JUDICIAL.

Exceptions to master's report in favour of title of  
vendor of bishop's lease, on ground of non-produce-  
tion of bishop's title, overruled. *Fane v. Spencer*,  
2 Mad. 438. TITLE; VEND. & PURCH.

To maintain an exception to the master's appoint-  
ment of a receiver, a strong case of disqualification is  
necessary. *Sharpe v. Sharpe*, 12 Ves. 317. PR.  
RECEIVER, APPT. OF.

Exception to report in favour of title on ground  
that reversion in fee might have been disposed of, so  
as not to have descended to heir from whom the title  
was derived, overruled. *Sperling v. Trevor*, 7 Ves.  
497.

Upon further directions a question decided by mas-  
ter was opened without any exception, all the circum-  
stances appearing by report. *Adams v. Claxton*,  
6 Ves. 226. PR. FURTHER DIRECTIONS.

Objections to master's report settling interrogato-  
ries must be taken by exceptions, not by petition, as  
an objection to appointment of receiver. *Hughes v.*  
*Williams*, 6 Ves. 459. PR. INTERROGATORIES.

Plaintiff may except to the report, and at the same  
time set down the cause for farther directions. *Yeo v.*  
*Frere*, 5 Ves. 424. PR. SETTING DOWN CAUSE FOR  
FURTHER DIRECTIONS.

Exception to the master's appointment of a re-  
ceiver disallowed. *Wilkins v. Williams*, 3 Ves. 588.  
PR. RECEIVER.

Bill by devisees in trust to sell, for specific per-  
formance of an agreement to purchase, that the heir  
of the devisor is not a party to the suit, is not matter  
of exception to the report in favour of the title. *Wake-*  
*man v. Dk. Rutland*, 3 Ves. 234. PL. PARTY;  
HEIR AT LAW.

Exceptions are not regularly taken to the master's  
report for costs only, but should be by petition. *Pitt*  
*v. Mackreth*, 3 Bro. C. C. 321. PR. COSTS; PR.  
PETITION.

Exceptions to a master's report of a proper person  
to be receiver, overruled, as the report ought to stand  
till the party approved is impeached as an improper  
person. *Creuse v. Hp. London*, 2 Bro. C. C. 253.  
PR. RECEIVER, APPT. OF.

Proper way to bring report appointing receiver  
before court, is by exceptions to it. S. C. Dick. 687.

Where an exception is taken to a master's report  
including several distinct matters, and the report  
appears right in any one instance, the exceptions  
must be overruled. *Hodges v. Salmons*, 1 Cox,  
249.

A master's report on a reference to inquire whether  
a suit instituted in the name of an infant by a pro-  
chain ami was necessary, is not a subject for ex-  
ceptions; but any objection to it must be made on  
the motion to confirm the report. *Whittaker v. Mar-*  
*lar*, 1 Cox, 285. PR. MOTION; PR. PROCHAIN  
AMI.

Exceptions will not lie to a master's report of  
maintenance, and a title set up against that of the  
infant cannot be taken notice of, but must be estab-  
lished elsewhere. *Exp. Nichols*, 1 Bro. C. C. 577.  
MAINTENANCE.

In exchequer, if defendant conceives himself ag-  
grieved by report, he must file exceptions thereto, and  
such exceptions must be set down to be argued in  
court. But if no exceptions are taken, the court  
confirms the report as of course, and thereupon gives

the proper directions. *Kaye v. Bruere*, 2 Bro. C. C.  
420. PR. REPORT.

Exceptions do not lie to master's certificate of his  
having settled interrogatories. *Stanford v. Tudor*,  
Dick. 548.

Exceptions allowed to be taken to report, though  
confirmed, and though none taken to draft. *Allen v.*  
*Allen*, Dick. 362.

When accounts, &c. are referred to commissioners  
of bankrupt, their jurisdiction and proceedings are  
contiguous to accounts taken before a master in a  
suit in equity, and also to that of auditors, under the  
old action of account at law. In the case of excep-  
tions to the report of a master or the certificate of  
commissioners, they must be founded on objections  
made before the master or commissioners. If the  
master, &c. varies his report, &c. on the objections,  
the other party may except as to such parts, though  
the exceptant be not strictly warranted by the objec-  
tions; commissioners, as well as a master, may pro-  
ceed ex parte, if the parties will not attend. *Exp. Bar*,  
2 Ves. 388. BANKCY. COMMISSIONERS, POWERS OF;  
ACCOUNT TAKEN BEFORE; ACCOUNT, HOW TAKEN.

A defendant who did not except to the first report  
of insufficiency of an answer: held not absolutely  
excluded from insisting on the same matter in his  
second answer. *Finch v. Finch*, 2 Ves. 491.

On reference to master's opinion no exceptions  
thereto to be taken, but court to judge and determine.  
*Neal v. Billing*, Dick. 93.

If the plaintiff moves to confirm a report nisi, and  
the defendant shews exceptions for cause, the plaintiff  
may except also. *Anon. Mos.* 305.

### (3) Form of.

Exception to the report and in general terms that  
the master had reported the examination sufficient,  
whereas he ought to have reported it insufficient, is  
regular, but not to be encouraged, and therefore being  
overruled, costs beyond the deposit were given. *Pur-*  
*cell v. McNamara*, 12 Ves. 166. PR. EXCEPTIONS,  
DEPOSIT ON; PR. COSTS.

Exception will not lie to a master's report of the  
appointment of a receiver, without shewing that the  
person appointed is improper. *Thomas v. Dawkin*,  
3 Bro. C. C. 508. S. C. 1 Ves. J. 452. PR. RE-  
CEIVER, APPT. OF.

If bill be referred for impertinence, and master  
report it pertinent, defendant may except generally,  
without specifying the parts of the bill which are im-  
pertinent. *Mackworth v. Briggs*, 2 Atk. 182. S. C.  
Dick. 81. IMPERTINENCE.

On an answer being reported scandalous or imper-  
tinent, if the plaintiff except to the report, he must  
show specially wherein it is scandalous or impertinent.  
*Craven v. Wright*, 2 P. W. 181. PR. ANSWER;  
REF. FOR SCANDAL.

Bill by devisees in trust to sell, for specific per-  
formance of an agreement to purchase; exception to  
the report in favour of the title that the persons enti-  
tled to the purchase money, subject to debts, lega-  
cies, and other charges, were not parties to the suit;  
the Ld. Ch. was of opinion they ought not to be  
parties to the conveyance, and if they were, their  
covenant ought to extend only to their own acts and  
those of the devisor, not to a general warranty with-  
out a special contract for it; but as the point must  
come properly upon objections to the conveyance,  
the exception was overruled upon the form. *Wake-*  
*man v. Ds. of Rutland*, 3 Ves. 233. PL. PARTY;  
CESTUI QUE TRUST.

### (4) Deposit on.

Deposit on exceptions to master's report shall be  
10l. 41 Gen. Ord. 3rd April, 1828. See Beame's  
Ord. p. 211. 236. 267. 289. 316. 326. 459.



Exceptions to the report and in general terms that the master had reported the examination sufficient, whereas he ought to have reported it insufficient, is regular, but not to be encouraged, and therefore being overruled, costs beyond the deposit were given. *Purcell v. M'Namara*, 12 Ves. 166. PR. EXCEPTIONS, DEPOSIT ON; PR. COSTS.

A party having prevailed in some exceptions to the master's report and failed in others, the court in this instance ordered the deposit to be returned. The court has, however, of late years ordered the deposit to be divided. *Parker v. Prout*, 4 Bro. C. C. 4.

#### (5) Time of filing, and effect of.

An exception may be regularly filed to the master's report, as to impertinence, after the order to expunge, and at any time before the impertinent matter is actually expunged. *David v. Williams*, 1 Sim. 17. PR. MASTER'S REPORT OF IMPERTINENCE.

Order to dissolve injunction nisi may be obtained, though plaintiff has excepted to master's report as to sufficiency of answer. *Merest v. Coster*, 1 S. & S. 486. PR. INJUNC.

If sum be reported due, and exceptions are taken to report, the money will not, on motion, be ordered to be paid into court. *Creak v. Capels*, 6 Mad. 114. PR. PAYMT. INTO COURT; PR. MOTION.

Filing exceptions alone does not prevent the confirmation of a report; they must be set down. *Mole v. Smith*, 1 Jac. & W. 670. S. P. *Abel v. Nodds*, 2 Cox, 169. PR. REPORT, CONFIRMATION OF.

Defendant permitted to take exceptions to a report after confirmation, without having taken objections. *Allen v. Allen*, 1 Swan. 153. PR. CONFIRMATION OF REPORT.

Exceptions permitted with reference to one subject of inquiry, after exceptions to the same report, with reference to another subject, allowed, or overruled, on argument. *Hawkins v. Day*, 1 Swan. 160.

If, by mistake or surprise, objections are not carried in upon a warrant to settle report, the court will allow the party to file exceptions. *Bowker v. Nickson*, 3 Mad. 439.

Exceptions to a report of impertinence may be taken after an order to expunge, until that order has been acted upon. Not necessary to take objections before the master, previous to excepting to a report of impertinence. Under the circumstances of the case, the defendant was at liberty to take a general exception, without setting out the particulars in which he alleged the report to be erroneous. *Norway v. Rowe*, 1 Mer. 135. PR. ORDER TO EXPUNGE.

Exceptions allowed to be taken to master's report, though no objections before master while report was in draft, and report confirmed nisi, a special case being made. *Pennington v. Ld. Muncaster*, 1 Mad. 555.

Exception under the circumstances allowed to be taken *nunc pro tunc* to the master's report of insufficiency of answer, though after the report was made, a plea and further answer were put in, and the plea overruled. *Noel v. Ward*, 1 Mad. 339. PR. EXCEPTIONS, NUNC PRO TUNC.

The right to process under an undertaking for a serjeant at arms, &c., immediately on exceptions to the report of an insufficient answer disallowed, is waived by plaintiff's taking out a subpoena for a better answer, and excepting to the report entitling defendant to eight days after the exceptions are disposed of. *Algar v. Regent's Canal Comp.*, 19 Ves. 379. S. C. Coop. 221. WAIVER; PR. PROCESS; SERJEANT AT ARMS; PR. ANSWER, INSUFF. OF.

Exceptions to a report may be taken off the file, if filed after the report has been confirmed absolute. *Sterling v. Thompson*, Coop. 271. PR. TAKING

PLEADINGS OFF FILE; PR. REPORT, CONFIRMATION OF.

Exception to the master's report, as to impertinence, is not cause against dissolving an injunction. *Corson v. Stirling*, Coop. 93. PR. INJUNC., CAUSE AGAINST DISSOLVING.

On an application to dissolve an injunction nisi, on the coming of the answer, the plaintiff shewed exceptions for cause, with the usual undertaking to procure the master's report in four days: the master reported the answer to be sufficient, to which report the plaintiff excepted. The injunction is dissolved, notwithstanding the plaintiff's exceptions. *Botham v. Clark*, 2 Cox, 428. PR. INJUNC., DISSOLUTION OF.

Exceptions taken to report one hour before it is signed, are too late. *Anon.* 1 Anst. 277. LAQUES.

Filing exceptions is not cause against confirmation of report; they must be set down to be argued. *Hall v. Mullinger*, Dick. 604. *Abel v. Nodds*, id. 790.

Exceptions taken to report, though confirmed, and none taken to draft. *Allen v. Allen*, Dick. 362.

Master to review report, in order that exceptions may be taken. *Vallance v. Weldon*, Dick. 290.

There is a difference in consideration of law, and the strict rules of the court, as to the case of a lunatic being let in to take exceptions to a master's report after its being confirmed, and that of an infant, but it is equally open to the discretion of the court, in either case. *El. Bath v. El. Bradford*, 2 Ves. 587.

Confirmation of master's report opened, and the report allowed to be excepted to or reviewed, under particular circumstances, although previous exceptions had been disallowed after argument. *Hawkins v. Day*, 1 Ves. 189. PR. MASTER'S REPORT, CONFIRMATION OF.

#### (6) Setting down, hearing, and arguing.

Party exhibiting interrogatories before master for examination of adverse party, cannot set down exceptions taken to examination for insufficiency, to be argued before the court, but must obtain an order to refer it to master, to review his report, and to report thereon, with liberty to except. Gen. Order, 23 May, 10 Price, 169.

Exceptions to the master's report of the insufficiency of a fourth answer, ordered to be heard immediately, upon the terms of the defendant's rendering himself amenable to process. *Farquharson v. Balfour*, 1 Turn. & R. 188.

Where, in foreclosure suit, exceptions are taken to the master's report, and the time appointed for payment of the mortgage money is likely to elapse before the exceptions are heard, the defendant should apply to the court, upon the exceptions being filed, to have the time enlarged until the exceptions are disposed of. *Renvoise v. Cooper*, 1 S. & S. 364. PR. MORTGAGE FORECLOSURE; PR. ENLARGEMENT OF TIME.

Exceptions to master's report, under decree at rolls, may be set down before Ld. Ch. *Burdon v. Burdon*, 9 Ves. 499. JURISDIC.

After an order for confirming the report nisi, filing exceptions, and making the deposit with the registrar, are no cause to prevent that order being made absolute, unless an order for setting down the exceptions to be argued is obtained, which may be done either by the plaintiff or defendant. The order confirming the report was discharged on payment of cost. *Gillard v. Moss*, 4 Ves. 617. PR. CONFIRMATION OF REPORT; PR. ORDER NISI.

Upon exceptions to master's report, affidavits made subsequent to it cannot be read, notwithstanding the affidavits of the adverse party were filed but the evening before the report. *Davis v. Davis*, 2 Atk. 21. PR. EVID. AFFIDAVITS WHEN READ.

## (7) Allowance and overruling, effect of.

Where exceptions are taken to the master's certificate of the taxation of costs, on the ground that he has not charged the solicitor with all the monies received by him with which he ought to have been charged, and such exceptions are allowed, and the master directed to review his report in that respect, the court does not give the exceptant the costs of such proceedings, on the ground that they are necessary to correct a mistake, or misapprehension of the master. *Wright v. Smithwood*, 1 Y. & J. 527. Pr. Costs.

If exceptions taken to the report of a good title be overruled, other objections cannot be made; but if exceptions allowed, and new abstract of title delivered, other objection may be made. *Brooke v. —*, 4 Mad. 212. Title.

If a bill be referred for scandal and impertinence, and so reported, exceptions being taken to the report and allowed, the plaintiff shall have the costs of the reference; but he shall not, on exceptions being allowed to the master's report of irregularity. *Broomfield v. Chichester*, Amb. 464. Pr. Costs.

Reference before master in favour of defendant, on exceptions overruled; defendant does not pay costs of reference. *Stevens v. Long*, Dick. 282.

When the first answer is reported insufficient, the defendant, if he answer again without excepting, is to answer all the points objected to, though the same exceed the bill. *Crispe v. Neville*, 1 C. C. 60. Pr. Answer.

## LVII. MESSENGER.

See also BANKRU. VI. 14. (c)

A messenger, ordered to bring up defendant, dies, sergeant-at-arms will be ordered to go. *Macnab v. Mensel*, 2 Sim. 16.

The messenger, having defendant in custody under an attachment, and having afterwards let him go at large upon his undertaking to pay the costs, cannot use the process to compel payment. *Jenkins v. Sandys*, 1 Jac. 233. Pr. Costs.

Where defendant has been arrested on an attachment for contempt in not appearing to subpoena *ad respond.* court will not grant motion for a messenger to bring up the body if he have given a bail bond to sheriff, though the penalty be very inadequate to the occasion. *Birdwood v. Hart*, 6 Price, 32.

Where defendant resided in Lancashire, and sheriff had returned cepi corpus; on a habeas corpus being moved for, V. C. said the motion ought to be for a messenger, and afterwards for a sequestration. *Holme v. Cardwell*, 3 Mad. 114; but see *Anon. Wyatt*, 1 Pr. Reg. 392.

A defendant, having filed an answer and demurrer after a cepi corpus, returned on an attachment for not answering, an order for a messenger obtained before the demurrer and answer (of which the plaintiffs had bespoken an office copy) had been taken off the file, discharged with costs. *Curzon v. De la Zouch*, 1 Swan. 189. Pr. DEMURRER.

Commitment for contempt in assaulting the deputy messenger in discharge of his duty. *Elliot v. Halmaraek*, 1 Mer. 302. CONTEMPT.

Where an order for a messenger has been issued against a sheriff for contempt, in not returning attachment against defendant for not putting in answer, (other attachments having been issued before), it is peremptory, and court will not stay the order although it go to affect the sheriff not in office at the time of alleged original neglect, nor will they enlarge the time limited by the order. *Thomas v. Mathias*, 2 Price, 32. Pr. ATTACHMENT AGAINST SHERIFF.

The previous order to high sheriff to return the process may be well served on his under sheriff. *Id. ib.*

The messenger, under a commission of bankruptcy, was put out of possession of property on board a ship by threatening to throw him overboard, the parties also using contemptuous language; ordered to give security for answering the bankrupt's interest. An indemnity given against the consequences of a contempt involves the party giving it. *Exp. Dixon*, 8 Ves. 104. CONTEMPT OF COURT.

Return to an attachment for want of appearance cepi corpus, but, from illness and infirmity, she could not be removed, a messenger was ordered. *Miles v. Lingham*, 7 Ves. 230.

A motion for a messenger upon a cepi corpus returned, now is a motion of course, though formerly the court allowed messengers to those particular jurisdictions only where the sheriff had the amercements themselves, but the rule is now to send a messenger into every county generally without any restriction. *Anon.* 2 Atk. 507.

Plaintiff always pays messenger sent to bring up infant. *Perkins v. Hammond*, Dick. 287.

When the sheriff has the amercement, as in London, the course was for the court to grant a messenger, and order the sheriff to being in the body, or else the sheriff to pay the plaintiff all the costs. *Anon.* 2 P. W. 301.

The sheriff cannot take a bail bond upon an attachment for not paying costs, but in such case a messenger is to go to bring in the party. *Anon. Prec. Chan.* 331. Pr. ATTACHMENT FOR COSTS; Pr. BAIL.

Motion for a messenger upon a cepi corpus returned by the sheriffs of London. *Anon.* 1 Vern. 116, and see *Gibbs v. Cotton*, id. 154.

## LVII\*. MISNOMER.

See also AMENDMENT, (the references there.)

Bill filed by feme covert stating her to be a spinster; her solicitor being ignorant of the marriage, and the husband of the suit till after the decree. On motion by consent, husband was permitted to prosecute the decree under terms. *Farrer v. Watt*, 5 Mad. 449. Pr. PARTY; HUSB. & WIFE; Pr. DECREE, PROSECUTION OF.

Where, in former pleadings, Christian name was mis-spelt, and it was in subsequent pleadings corrected, six clerk ordered to file the latter notwithstanding the variance. *Faircloth v. Webb*, 5 Mad. 73.

## LVIII. MOTION.

See also Pr. Fviii. 11. (g), and the several titles which form the subject of motions.

1. General orders.
2. What may be effected by.
3. Notice of.
4. Motion of course, what effected by.
5. When, and how made.
6. Form of, and proceedings on.

## 1. General orders.

The rules counsellors are to observe in making motions. Beane's Ord. 82, 83.

No motion shall be made without two day's notice in writing. *Id.* 116.

The notice to be personal where it can, otherwise on clerk in court. *Id.*

The notice to state the points to be moved. *Id.*

If adverse party does not then attend, the order shall be absolute. *Id.* 116.

On Thursdays in term time, motions only to be heard. *Id.* 122.

Exceptions. *Id.*

No motion to suppress depositions until six clerks have been attended, and have certified. *Id.* 194.

No motion to retain after dismissal, without a certificate that the costs of dismissal are paid. *Id.* 207.

As to motions intended to be made before vice chancellor, the notices shall not express it. *Id.* 485.

When so expressed in notices, motions shall be made before vice chancellor. *Id.*

Certain cases to which this is to be without prejudice. *Id.*

## 2. What may be effected by.

If only one defendant, bill may be ordered *pro confesso*, on motion. *Lewis v. Marsh*, 2 S. & S. 220. *PR. BILL, PRO CONFESSO.*

Motion to stay all proceedings under decree, till after decision of appeal to House of Lords, unsupported by affidavit, and before signature of counsel obtained, refused with costs. *Edwards v. Morgan*, 1 M'Clel. & Y. 258. *PR. APPEAL.*

Commission to examine in West Indies on bill filed for discovery in aid of action at law brought by plaintiff, and for a commission (not praying relief,) ordered on motion, although defendant's answer had not come in, time for answering having expired. *Hibberson v. Cambridge*, 13 Pr. 796. *PR. COMMISSION TO EXAMINE ABROAD; PR. ANSWER.*

*Pr. ami*, becoming insolvent, and receiving groats after answer filed; motion that he be removed, and another appointed, refused as informal, but leave given to apply to stay proceedings until he be changed, or security given for costs. *Pennington v. Alcin*, 1 S. & S. 262. *PR. PROCURATOR AMI; PR. COSTS, SECURITY, INSOLVENCY.*

Though defendant in answer makes admissions which would entitle plaintiff to decree, plaintiff cannot therefore on motion, obtain order for payment of money into court. *Peachment v. Daw*, 6 Mad. 98. *PR. ANSWER, ADMISSIONS; PR. PAYMENT INTO COURT.*

Further directions by motion, when reference to master, is made on motion. *Whitcomb v. Foley*, 6 Mad. 3. *FURTHER DIRECTION.*

If sum be reported due, and exceptions are taken to report, the money will not, on motion, be ordered to be paid into court. *Creak v. Capell*, 6 Mad. 114. *PR. EXCEPTIONS TO REPORT; PR. PAYMT. INTO COURT.*

Minutes of decree cannot be varied on motion; it can only be done on petition. *Brown v. Sansome*, 9 Pr. 479. See also 7 Price, 661. 8 Price, 606. *PR. VARYING MINUTES OF DECREE.*

Whether, after a decree for administration for assets, a legatee will be restrained on motion from suing for his legacy, *quæd* *Jackson v. Leaf*, 1 Jac. & W. 229. *PR. DECREE FOR ADMINISTRATION; PR. STAYING PROCESS.*

After decree to bill for delivery up of deeds, directing ejectment to be brought, an order to restrain setting up outstanding terms, cannot be made on motion. *Brackenbury v. Brackenbury*, 2 J. & W. 391. *PR. DECREE; OUTSTANDING TERMS.*

The court, on motion, has sometimes stayed proceedings in a suit, where the parties have entered into an agreement for that purpose. *Roue v. Wood*, 1 Jac. & W. 337. *AGREEMENT TO STAY PROCEEDINGS.*

Institution of suit on behalf of persons having a common interest, not directed on motion and affidavit

without reference to master, whether it is for their benefit. *Mugraves v. Meder*, 3 V. & B. 167. *PR. REFERENCE TO MASTER.*

It is in equity, very common to decide a question on motion, where all the facts appear upon the bill and answer, and there is nothing to dispute but the law of the court. *Revell v. Hussey*, 2 Ball & B. 286.

After the dismissal of a bill for the specific execution of an agreement, the plaintiff being unable to make a good title, an injunction to restrain him from proceeding on the agreement at law granted on motion, the defendant undertaking forthwith to file a bill. *M'Namara v. Arthur*, 2 Ball & B. 349. *INJUNC. TO STAY PROC. AT LAW; SPEC. PERF.; DISMISSAL OF BILL.*

Issue whether an instrument was obtained by fraud, &c. not directed on motion after answer, as where the decree depends upon a simple fact, viz. legitimacy or competence, according to the present practice, to refer a title on motion. *Fullagar v. Clark*, 18 Ves. 481. *PR. ISSUE AT LAW.*

The court will not, on the motion of a creditor coming in under a decree, directing a sale of lands devised for payment of debts, set aside a lease obtained *pendente lite*, from the devisee under the will, with a leasing power. *Moore v. M'Namara*, 2 Ball & B. 186. *CREDIT. SUIT; ASSIGNMT. PEND. LIT.*

Decree on default setting aside a lease of a charity estate, with covenant for perpetual renewal, and directing an account of the actual rent, re-hearing permitted on paying costs, not disturbing proceedings before the master to the draft of a report, of what was due, but the money not to be paid into court before the report made; petition, not motion, the proper application. *Att. Gen. v. Brooke*, 18 Ves. 319. *PR. REHEARING; PR. PETITION.*

A motion by the committee, after the death of a lunatic, for a reference to ascertain his next of kin, in order that money in his hands might be distributed, refused. Such reference only made on bill against the committee, for an account of the lunatic's property. *Exp. Gilbert*, 1 Ball & B. 297. *LUNATIC; NEXT OF KIN.*

Executors not allowed on motion to account before the master for property the testator had bequeathed to minors; as an account so taken would not be binding on the minors, no suit being depending in court to which they were parties. *In m're. Burke*, 1 Ball & B. 74. *INFANT; ACCOUNT; EXECUTOR.*

Money not paid out of court on motion. *Id. Shipbroke v. Hinchinbrook*, 13 Ves. 394. But see *Anon.* 4 Mad. 228. *PR. PAYMT. OUT OF COURT.*

Payment in part of a legacy, ordered on motion, with consent, the fund admitted to be ample. *Pearce v. Baron*, 12 Ves. 459. *PAYMT. OUT OF COURT; LEGACY.*

After decree merely directing enquiries, such an order as could be had on further directions, may, by consent, be made on motion, as in this instance, to dismiss bill with costs. *Anon.* 11 Ves. 169. *PR. DECREE.*

The court will not order temporary bars to be waived, on motion. *Byrne v. Byrne*, 2 Scho. & L. 537. *OUTSTANDING TERMS, &c.*

After an order upon petition under the friendly society acts, the subsequent orders may be obtained on motion. *Exp. Friendly Society*, 10 Ves. 287. *FRIENDLY SOCIETIES; PR. ORDER.*

Infant defendant residing abroad, his father not interested in the suit, was assigned his guardian for purpose of putting in his answer on motion, without commission. *Jongma v. Pfiel*, 9 Ves. 357. *Sed quare*, see *Tappen v. Norman*, 11 Ves. 563. *PR. COMMISSION TO ASSIGN GUARDIAN.*

Omission in decree, if perfectly of course, supplied on motion with notice; in this instance, the common

direction to examine all parties upon interrogatories being omitted, an order was made that master should be at liberty to examine, &c. *Wallis v. Thomas*, 7 Ves. 292. PR. DECREE, AMENDMT. OF.

So also, in the usual decree upon creditor's bill against executors, the direction for account of personal estate. *Pickard v. Mattheson*, id. 293. *Id.*

Irregular to confirm reports as to maintenance on motion. *Greenwell v. Greenwell*, 5 Ves. 199. PR. CONFIRMATION OF REPORT.

Court will not, upon motion, make an order which will decide the merits of the cause. *Like v. Beresford*, 3 Bro. C. C. 366.

An order embracing the whole subject of the suit, cannot be made on motion without express consent. Notice to the other parties is not sufficient if they do not attend. *Id. ib.*

After injunction dissolved upon the merits, motion to stay trial of ejectment till full answer to the amended bill refused with costs. *J. y. Markham v. Dickens*, 1 Ves. J. 30. PR. INJUNCTION; PR. AMENDED BILL.

A master's report on a reference to inquire whether a suit instituted in the name of an infant by a *prochein ami*, was necessary, is not a subject for exceptions; but any objection to it must be made on the motion to confirm the report. *Whittaker v. Marlar*, 1 Cox, 285. PR. PROCHAIN AMI; PR. EXCEPTIONS TO MASTER'S REP.

A receiver may be granted on motion, notwithstanding the reservation of all matters under the decree, for this is a mere provisional order. *Cook v. Gwyn*, 3 Atk. 690. PR. RECEIVER.

The court will not determine matters in a summary way upon motion, that have been reserved between parties till after the master has made his report. *Id.* 3 Atk. 689.

In case of an issue out of chancery, it is proper to move that court for costs for not going on to trial, or to move there for a special jury. *Anon.* 2 P. W. 68. ISSUE AT LAW.

Where wrong party sued, it must be shown by plea, and not by motion. *Harrison v. Hauke*, Cary, 81.

Habeas corpus to bring up infant, arrested for necessities, to have guardian assigned him, must be by motion, and not petition. *Horne v. Lanoy*, Dick. 170.

Motion is proper proceeding to discharge order for commission to examine on master's certificate. *Chafe Jin v. Wills*, id. 377.

### 3. Notice of.

Notice of motions and petitions must be served two clear days before the hearing. 22nd Gen. Order, 3rd April, 1828.

Affidavits to be used on special applications are to be filed one clear day before application made, and where notice of motion is necessary, the filing of affidavits is to be mentioned at the foot of notice. Gen. Order, 10th Feb. 1821. 9 Price, 88. PR. IN EXCEQUER; AFFIDAVIT.

Where an injunction has been granted on the merits, motion to amend without prejudice to injunction is motion of course; but where it has issued on account of delay, notice of motion must be given and proposed amendments stated. *Pratt v. Archer*, 1 S. & S. 433. PR. INJUNCTION; PR. MOTION OF COURSE.

Writ of *ne exeat regno* granted, upon motion made, without notice of the appearance of the defendant. *Elliot v. Sinclair*, 1 Jac. 546. PR. NE EXEAT REGNO.

Defendant having appeared, motion for injunction, in matter of waste, not immediate, without notice re-

fused. *Collard v. Cooper*, 6 Mad. 190. INJUNC. AGAINST WASTE.

Where order to pay costs is made on person not a party to suit, motion for four days order or commitment requires notice. *In re Partington*, 6 Mad. 71. ORDER FOR PAYMENT OF COSTS.

A party not interested in a motion, who is served with notice, is entitled to the costs of appearing. *Heneage v. Agin*, 1 Jac. & W. 377. COSTS.

Personal service of a notice of motion to commit for breach of an injunction is necessary: and cannot be dispensed with, though counsel undertake to appear for the party. *Ellerton v. Thirsk*, 1 Jac. & W. 376. MOTION TO COMMIT; PR. INJUNC., BREACH OF.

Motion to withdraw replication and amend bill generally, of course; but where it extends to rules to produce witnesses, notice is requisite, and special case must be made. *Ld. Kilcurrey v. Ley*, 4 Mad. 212. MOTION TO WITHDRAW ANSWER, &c.; PR. MOTION OF COURSE.

Costs of notice of motion to confirm master's report, that answer was impertinent, allowed on taxation. *Donison v. Curry*, 8 Price, 87. note. PR. COSTS.

Replication filed after the notice of, but before the motion to dismiss; motion not sustainable, defendant entitled to costs. *Spurrier v. Bennett*, 4 Mad. 39. PR. MOTION TO DISMISS; PR. COSTS; PR. REPLICATION.

Where court is moved for payment of costs under Gen. order, 5th August, 1818, (3 Mad. 318.) on account of a notice of motion which has been abandoned; such notice of motion must be mentioned to the court, and must also be produced to registrar before he draws up order. *Whitney v. Haigh*, 3 Mad. 437. GEN. ORDER, C. OF; PR. COSTS; PR. MOTION, ABANDONMENT.

Plaintiff cannot move to amend his bill on an affidavit of equitable facts without notice to defendant; but if circumstances of case require it, and it is late in the term, court will order defendant to accept short notice of motion. *Harrison v. Delmont*, 1 Price, 117. PR. AMENDMENT OF BILL.

Notice of motion for order of sale of crown debtor's mortgaged lands, under extent, should be given to mortgagee before motion. *Rex v. Coombes*, 1 Price, 207. EXTENT; MORTGAGE.

Court will grant injunction to stay trial of ejectment at the next assizes, on motion made 27th Feb. of which notice had been given to defendant's clerk, in court only, on the 26th, if moved for, on merits confessed in answer, put in only that day; and application to dissolve such injunction before hearing, on an affidavit, was refused with costs. *Hayward v. Greenwood*, 7 Price, 537. PR. INJUNCTION TO STAY TRIAL.

Notice is not necessary of motion to dismiss bill for want of prosecution, three terms having elapsed after answer without replication, nor is it necessary to produce six clerks' certificate, on the motion, if it is produced to register when order is drawn up. *Att. Gen. v. Finch*, 1 V. & B. 368. PR. MOTION TO DISMISS.

Costs not given on a motion unless mentioned in the notice. *Mann v. King*, 18 Ves. 297. PR. COSTS.

Injunction to stay proceedings at law, dissolved for irregularity, plaintiff having obtained the injunction, as of course, for want of answer of two defendants who resided abroad, without notice to the other defendant, who was sole plaintiff at law, and had put in his answer in time. *Cooper v. Flint*, Wightw. 409. PR. INJUNC. FOR WANT OF ANSWER.

Objection to a motion, upon the right to costs of previous notices abandoned, cannot be made until the

fourth. *Anderson v. Palmer*, 14 Ves. 151. PR. COSTS.

Notice of motion by a party *in forma pauperis*, must be signed by the clerk in court. *Gardiner v. —*, 17 Ves. 387. PR. PAUPER CAUSE.

Motion to sell furniture under sequestration for not performing decrees, must be on notice. *Mitchell v. Draper*, 9 Ves. 208. PR. SEQUESTRATION.

Motion to examine witnesses *de bene esse*, except in certain cases, as upon the ground of age, requires notice. The affidavit must be, either that the witness is of the age of seventy, or the only witness to the particular fact; or if upon the ground of health, in a dangerous state. *Bellamy v. Jones*, 8 Ves. 31. PR. MOTION TO EXAMINE DE BENE ESSE; AFFIDAVIT.

Notice of motion on Saturday must be given for Tuesday, not Monday. *Maxwell v. Phillips*, 6 Ves. 146.

A being sued at law on policy of insurance which he had made as B's agent; on motion for injunction on affidavit of B's residing abroad, A must have notice. *Beachcroft v. Gordon*, 3 Anst. 686. INJUNCTION.

Motion to discharge an order to refer an answer for impertinence, obtained after notice of motion to dismiss refused. *Kenworthy v. Allen*, 1 Bro. C. C. 506. PR. MOTION FOR REFERENCE FOR IMPERTINENCE.

Notice must be given, before you can move to add new interrogatories for the examination of a defendant on the examinations before put in being reported insufficient; such an order obtained on a motion of course, is irregular, and will be discharged. *Anon.* 3 Atk. 511. PR. EXAMINATION OF DEFENDANT ON INTERROGATORIES.

Notice is necessary of a motion for sequestrators to set and let. *Neal v. —*, Ridgw. 193. SEQUESTRATION.

#### 4. Motion of course, what effected by.

A bill cannot be dismissed for want of prosecution by an order made as of course upon petition at the Rolls. *Vausandau v. Moore*, 1 Russ. 441. PR. DISMISSAL OF BILL.

It is of course, that a plaintiff, even after the peremptory order to speed his cause, should have an order for a commission to examine witnesses, with liberty to execute the same in term time. *Field v. Soule*, 1 Russ. 82. PR. COMMIS. TO EXAMINE; PR. ORDER TO SPEED CAUSE.

After demurrer overruled, time to answer merely can only be obtained on special application. *Trim v. Baker*, 1 S. & S. 469. and see note, *Id.* 470. S. C. 1 T. & R. 253. PR. DEMURRER; PR. TIME TO ANSWER.

Where injunction is obtained on merits, motion to amend without prejudice to injunction, is motion of course; but where it has issued on account of delay, notice of motion must be given, and proposed amendment stated. *Pratt v. Archer*, 1 S. & S. 433. PR. MOTION TO AMEND BILL; PR. INJUNCTION.

Interrogatories and depositions not to be referred, on motion of course, before the hearing for impertinence alone without scandal. *Osmond v. Tindall*, 1 Jac. 625. PR. REFERENCE FOR IMPERTINENCE; PR. INTERROGATORIES AND DEPOSITIONS.

After plea pleaded, and replication filed, and before the plea set down, it is not a motion of course to withdraw the replication, and amend the bill: an order for that purpose, obtained of course, discharged for irregularity, and the amended bill ordered to be taken off the file. *Carlton v. L'Estrange*, 1 Turb. & R. 23. PR. MOTION TO WITHDRAW REPLICATION AND AMEND.

It is motion of course to enlarge publication when

no witnesses have been examined. *French v. Lawsey*, 6 Mad. 60. PR. ENLARGING PUBLICATION.

Application by plaintiff to withdraw replication and amend bill, is not a motion of course, and can only be made in exchequer on affidavit of nature and materiality. *Markham v. Saythe*, 9 Price, 163. S.P. *Petre v. Wells*, id. 667. And where application was made twelve months after defendant had rejoined, and proceedings suffered to be far advanced, motion was discharged with costs, on opposition of defendant, who had had notice of motion. *Semble. Petre v. Wells*, id. 670. An amendment in such case, by striking out of bill certain tithes to which plaintiff was stated to be entitled; but of which no account was prayed, was allowed. *Markham v. Smith*, 9 Price, 163. PR. IN EXCH.; MOTION FOR WITHDRAWING REPLICATION AND AMEND.

Motion to withdraw replication and amend bill generally of course; but where it must extend to rules to produce witnesses, notice is required, and special case must be made. *Id. Kilcourcy v. Ley*, 4 Mad. 212. PR. NOTICE; PR. MOTION TO WITHDRAW REPLICATION &c.

Motion of course to file exceptions *nunc pro tunc* within two terms, and the following vacation, from the date of the master's report of impertinence. *Dyer v. Dyer*, 1 Mer. 1. PR. FILING EXCEPTIONS NUNC PRO TUNC.

Publication of deposition of witness who is dead, taken on bill to perpetuate, may be moved for as of course. *Bourne v. Bligh*, 1 Price, 307. PR. EVID. PUBLICATION; PR. EVID., DEPOSITIONS ON BILL TO PERPETUATE.

Court will discharge order for injunction obtained on motion of course, if it ought to have been moved for on notice. *Reed v. Bowyer*, 1 Price, 101. PR. INJUNC., DISCHARGING ORDER FOR.

Order on plaintiff's motion, that defendant shall be at liberty to put in his answer without oath or signature, is of course, if defendant is in this country; if abroad, his consent required. *Codner v. Hersey*, 18 Ves. 468. PR. ANSWER, SIGNATURE OF.

After answer, not of course, to enlarge publication until answer to a cross bill. *Dalton v. Carr*, 16 Ves. 93. PR. ENLARGING PUBLICATION.

Depositions referred for scandal upon motion of course without notice. *Eastham v. Liddell*, 12 Ves. 201. PR. REFERENCE FOR SCANDAL.

On bill for discovery, by plaintiff at law, in aid of action, motion for commission abroad is not of course. *Anon.* 1 Anst. 201. MOTION FOR COMMIS. TO EXAMINE ABROAD.

To put party to election to sue at law or in equity, is a motion of course. *Anon.* 1 Ves. J. 91. PR. ELECTION; LAW OR EQUITY.

After an undertaking to speed a cause, the plaintiff cannot, as of course, obtain an order to withdraw his replication and amend his bill. *Ryan v. Stewart*, 1 Cox. 397. PR. UNDERTAKING TO SPEED CAUSE.

Order for leave to exhibit interrogatories to falsify examination *pro interesse suo*, obtained by motion of course. *Rowley v. Ridley*, 3 Swan. 308. PR. EXHIBITING INTERROGATORIES; PR. EXAMON. INTERESSE SUO.

#### 5. When, and how made.

Motion in causes to be heard before Ld. Chief Baron alone in equity can only be made when sitting in the inner court. *Anon.* 4 Price, 309.

All motions to annul proceedings on ground of irregularity, must be made in term, when proceeding was had, or the court will not receive the application. *Id.* 3 Price, 37.

On motion, after order to dismiss bill for want of

prosecution, supported by affidavit of merits, &c. the bill retained on terms of paying costs. *Bellingham v. Brilly*, 1 *Mal.* 266. *PR. RETAINING BILL.*

This court will not entertain a motion for prohibition in term. *Montgomery v. Blair*, 2 *Scho. & L.* 136. *TERM TIME.*

On question whether defendant could be heard before his contempts were cleared, though he offered to pay all plaintiff's demands. Ordered that he should bring before master, principal, interest and costs, and then be at liberty to move to discharge sequestration. *Ld. Wenman v. Osbaldiston*, 2 *Bro. P. C.* 276. *PR. CONTEMPT.*

A motion cannot be made upon a decretal order till it is passed with the registrar. *Smith v. Reynolds*, *Mos.* 69. *PR. DECRETAL ORDER.*

A party cannot move upon a master's report to bring the cause on for further directions till the report is confirmed. *Smith v. Reynolds*, *id.* 71. *PR. MASTER'S REPORT, CONFIRMATION OF; PR. FURTHER DIRECTIONS.*

### 6. Form of, and proceedings on.

If a motion is intended to lay the foundation for a subsequent application against the solicitor of some of the parties, the solicitor, in his personal capacity, ought to be made a party to that motion. *Lansdau v. Moore*, 1 *Russ.* 411. *PL. PARTIES.*

In moving upon admissions in an answer for the payment of the money into court, the plaintiff may shew that upon the case stated in the answer, he has an interest in the sum in question, though the defendant in his answer expressly denies that the plaintiff has any such interest. *Domville v. Solly*, 2 *Russ.* 372. *PR. ADMISSIONS IN ANSWER.*

On a motion to discharge an order made by the Vice Ch., affidavits may be read, sworn after the order was made, and stating facts which were not before the Vice Ch. *Const v. Barr*, *id.* 161. *PR. EVIDENCE; AFFIDAVIT, WHEN SWORN.*

Application that documents may be produced, &c. and that publication may be enlarged, till, &c., being matters not only not inconsistent, but connected with and depending on each other, may be made by one motion. *Ferkins v. Lowe*, 13 *Price*, 193. *S. C.* 1 *McClel.* 73.

To obtain leave to withdraw replication and amend bill after an order to dismiss it for want of prosecution, the proposed amendments must be previously stated to the court. Motion was granted on payment of costs. *Scott v. Carter*, 1 *McClel.* 517. *S. C.* 13 *Price*, 753.

Party making successful motion is entitled to his costs, as costs in the cause, but party opposing it is not entitled to his costs, as costs in the cause. *Per V. C.* 1 *S. & S.* 357. *PR. COSTS.*

Party making motion which fails, is not entitled to his costs, as costs in cause, but party opposing it is entitled to his costs, as costs in the cause. *Id. ib.*

Where motion is made by one party and not opposed by other, costs of both parties are costs in the cause. *Id. ib.*

Upon a motion for a prohibition, a copy of the libel in the ecclesiastical court verified by affidavit, and a suggestion on parchment, setting forth the libel, and the ground of the prohibition prayed, must be delivered into court, and if the prohibition is granted, affidavits of the truth of the facts suggested must be filed within six months. *In re Magor*, 1 *Turn. & R.* 314.

Affidavits in support of a motion, which the plaintiff is prevented from making, may be read, if the answer is not filed until the day for which the notice is

given. *Semble. Goodman v. Whitcomb*, 1 *Jac. & W.* 589. *AFFIDAVITS.*

The application for leave to file exceptions to master's certificate of taxation of costs, must be made on affidavit, stating the facts on which exceptions are founded, and the notice of motion should state the exceptions intended to be filed, and the ground of exception. *Jenkins v. Raydon*, 9 *Price*, 215. *S. P. Oliver v. Court*, *id.* 216 *note*. *PR. MASTER'S CERTIFICATE, EXCEPTIONS TO.*

Where cause stands over with leave to amend bill, and motion becomes necessary, the plaintiff should amend within limited time. Plaintiff pays costs of such motion, but notice of motion must not be silent as to such costs. *Cox v. Allingham*, 3 *Mad.* 393. *PR. COSTS.*

Application for injunction, and appointment of receiver, should be made the subject of two successive motions. *Lawson v. Morgan*, 1 *Price*, 303. *INJUNCTION; APPOINTMENT OF RECEIVER.*

On motion to discharge order to take bill *pro confesso* on payment of costs, and an offer to put in an answer; the court required to see what answer they proposed to put in. *Horne v. Ogilvie*, 11 *Ves.* 77. *PR. ANSWER; PR. BILL, PRO CONFESSO.*

Motion not to be postponed so as to affect the right to notice. *Coffin v. Cooper*, *id.* 600.

Motion for payment of money into court, in future to name a day. *Higgins v. ———*, 8 *Ves.* 581. *PAYMENT INTO COURT.*

On motion at the last seal after Trinity term to make absolute an order to dissolve an injunction *nisi*, the plaintiff cannot have time till the next day of motions, upon the usual undertaking to shew cause on the merits, but was permitted to shew cause during the petitions. *Robinson v. Walcott*, 5 *Ves.* 552. *PR. TIME TO SHEW CAUSE.*

After order to dismiss for want of prosecution, plaintiff filed a replication, and afterwards moved to withdraw it and amend an affidavit of materiality; he must also shew why the amendment could not have been made before. *Longman v. Calliford*, 3 *Anst.* 807. *PR. ORDER TO DISMISS.*

A motion for leave to answer by guardian, must name the guardian. *Brassington v. Brassington*, 2 *Anst.* 369. *INFANT.*

Motion of course, after plea or demurrer, to amend the bill on twenty shillings costs, must state that the plea or demurrer is not set down. *Jennings v. Pearce*, 1 *Ves. J.* 448.

Amendments moved ought properly to be stated. *Nabob of the Carnatic v. E. J. Comp.* *id.* 388.

In a *scire facias* to repeal a patent, the venue cannot be changed from Middlesex to any other county. *Rea v. Haine*, 2 *Cox*, 235. *SCIRE FACIAS.*

On motion for application of money placed in bank by a former order, you must not only have a certificate that the money was paid in the bank, but that it is actually there at the time of the motion. *Anon.* 1 *Atk.* 519. *PR. PAYMENT OUT OF COURT.*

## LIX. NEW TRIAL.

1. When granted.
2. How obtained and proceedings on.

### 1. When granted.

A new trial of an issue will not be granted merely because, on the former trial, evidence was rejected which ought to have been received. Neither will a new trial be granted merely because the judge made to the jury an inaccurate representation of the effect of

the defendant's answer. *Barker v. Ray*, 2 Russ. 63. PR. ISSUE AT LAW.

The defendant having set up a farm modus in answer to a bill for tithes, issues were directed to try whether the ancient farm consisted of the lands mentioned in the answer, and whether a certain modus had been immemorially payable for the tithes arising upon it. The jury found that the farm consisted of these lands together, with four other places, and was covered by a modus. The circumstance that the jury found the ancient farm to consist of other lands besides those mentioned in the pleadings, is no ground for a new trial, unless the plaintiff can shew that he has evidence with respect to those four closes, which upon the supposition that they are parcels of the alleged ancient farm, might materially vary the substance of the case. *Bailey v. Sewell*, 1 Russ. 239. TITHES; MODUS.

Dissatisfaction expressed by judge at verdict on trial of issue, how far ground for new trial. *Atkins v. Drake*, 1 M'Clel. & Y. 213. ISSUE AT LAW.

Court will not direct new trial of issue on ground of evidence adduced on former trial, where that evidence was a surprise on the other party, and tended to defeat the intention of the court, in directing the former issue. *Carrington v. Jones*, 2 S. & S. 15. EVIDENCE; ISSUE AT LAW.

At the trial of an issue to ascertain whether one of defendants, a layman, was entitled to tithes, or a modus in lieu of tithes of certain lands, it was proved that a payment, described as a tithe or rate-tithe issuing out of the lands in question, had been conveyed by defendant's title-deeds for the last one hundred and fifty years, and that this payment had been received by him and his ancestors, and that no tithe had ever been paid to plaintiff, the rector, within living memory, and a verdict was found for defendant. Motion for new trial refused. *Williams v. Bacon*, 1 S. & S. 415. ISSUE AT LAW; TITHES; EVIDENCE.

New trial of an issue granted, the verdict being unsatisfactory, from the circumstances under which the jury returned it. *F. I. Comp. v. Bassett*, 1 Jac. 91.

No new trial upon the improper rejection of evidence, if the court, judging upon the whole record, is satisfied that the verdict is right. *Bootle v. Blundell*, 19 Ves. 503.

The improper rejection of written evidence no ground for granting a new trial of an issue: the court being satisfied with the verdict upon all the evidence, including that rejected. *Hampson v. Hampson*, 3 V. & B. 41.

Two wills originally duplicates, but one altered and cancelled, and a codicil without date. After three verdicts for the devise, the Ld. Ch. being satisfied with the result of the third trial, refusing a fourth. *Pemberton v. Pemberton*, 13 Ves. 290.

The granting a new trial of issue is discretionary, if justice has been done on the whole, though some evidence may be improperly rejected at law. S. C. 11 Ves. 52.

On application for new trial, not sufficient to shew that injustice has been done; it must be shewn that the court is warranted to interfere. *Bateman v. Willoe*, 1 Scho. & L. 204.

After two trials at bar in favour of claimants of tithes under decree, and act of parliament, upon issue, whether any and what less sum had been paid, a new trial was refused, though evidence was rejected that ought to have been received as material. *Wardens, &c. of St. Paul's v. Morris*, 9 Ves. 155.

There is no doubt upon the right of chancery to grant a new trial, after trial at bar. *Id.* 165. JURISDICTION.

New trial refused, after two verdicts against dea-

and a will, for fraud. *Byles v. Graves*, 2 Ves. J. 287.

After verdict on issue directed, new trial, on account of having farther evidence to produce, refused; there being no fraud or surprise, but the evidence having been kept back by the party applying, though the court was much dissatisfied with the verdict. *Standen v. Edwards*, 1 Ves. J. 133. PR. EVIDENCE.

Under what circumstances a new trial of an issue directed to try vicar's right to tithes, ought to be refused. *Brownlow v. Deric*, 7 Bro. P. C. 83.

New trial granted of issue to try whether, at given time, act of bankruptcy had been committed, founded on general assignment of bankrupt's effects, where not indebted, and in full credit. *Hassel v. Simpson*, Dick. 583.

Courts of equity may direct new trials in suspicious cases, and even where fraud or forgery is imputed in will. *Salter v. Hill*, 7 Bro. P. C. 189. JURISDICTION.

Under what circumstances a new trial, after trial of second issue, may be granted. *Ashe v. Ash*, 7 Bro. P. C. 149. S. P. *Pomfret v. Smith*, id. 169.

New trials granted in issues directed to try the right of the soil, though the judge certified in favour of the verdict, as there was no precedent of a decree, where the inheritance would be bound, being made upon one verdict only. *El. Darlington v. Bowes*, 1 Eden. 270.

New trial for misdirection of the judge, and absence of a material witness. *Cleeve v. Gascoigne*, Amb. 323.

If, on issue directed, the judge certifies that the weight of evidence was against the verdict, court will order a new trial. If a verdict is not against evidence a court of law cannot grant a new trial, but a court of equity will, for the verdict must satisfy the conscience of the court. *Faulconberg v. Peirce*, Amb. 210.

Courts of equity are much less strict in granting new trials than courts of law, it being necessary, not that the question should be decided to the satisfaction of others, though ever so often, but that the conscience of the court itself should be quite satisfied. *Stace v. Mahbott*, 2 Ves. 553.

New trials of modern introduction, and to avoid difficulties in case of attain. *Id.* ib.

Granted here in case of inheritance, or of value, or where the court was not satisfied, particularly on forestry. *Id.* ib.

No new trial, where there must be the same issues, and no surprise, &c. on the former trial; infancy no ground for it in such a case. *Parsons v. Lane*, 1 Ves. 192.

The court, for the more solemn determination in some cases, directs a second trial, without setting aside the first verdict; for otherwise the party in whose favour the first verdict was given, would lose the benefit of urging it in his favour. *Baker v. Hart*, 1 Ves. 29. 3 Atk. 542.

Where the court thought the evidence newly discovered, ought not to be the foundation for a different verdict, a new trial was refused. *Colgrave v. Juson*, 3 Atk. 197.

New trial only granted where it appears necessary, to justice of case, and new evidence not obtainable on former trial. *Montgomery v. Att. Gen.*, 9 Mod. 388.

The court will not grant a new trial upon a suggestion that the party was not apprised of a particular evidence, and therefore not prepared to give an answer. *Richards v. Symes*, 2 Atk. 319.

A distinction was taken formerly between trials at bar and at nisi prius; but in the case of the queen and the bailiffs and burgesses of Bewdley, eleven judges against one determined a new trial ought to be granted. *Id.*

The intent of directing issues here is only to inform the conscience of the court, and therefore not tied down to the same strictness of verdicts as courts of common law. *Ib.*

Notice to defendant before the trial, that the plaintiff will prove a person to be abroad, though it does not point out the particular place where, is sufficient for the defendant to be prepared to encounter this evidence. *Ib.*

If there is evidence plaintiff is not apprised of, he may suffer a nonsuit, and on his coming back to this court, it would order another issue at law, notwithstanding the nonsuit. *Ib.*

Verdicts being recovered in Suffolk by F there, against L, L brought his bill for a new trial in a different county; bill dismissed. *Tovey v. Young*, 2 Vern. 437. Prec. Ch. 193. S. C.

If a witness be convicted of perjury, or the party of forgery, it is good cause for a new trial. *Tilly v. Whorton*, 2 Vern. 379.

Bill for a new trial; plaintiff suggesting that the mark to the bond was forged by one W, and all the pretended witnesses to the bond were dead, and that the verdict was recovered by surprise; a new trial ordered. *Codrington v. Welch*, 2 Vern. 240.

A new trial granted to an issue directed, the matter in question being of value, and concerning all the copyholds in the manor. *Edwin v. Thomas*, 2 Vern. 75.

The grounds for a new trial are, new evidence discovered which could not possibly be made use of in the first, perjury in the witnesses, partiality in the jurors, &c. all which must be made out to the satisfaction of the court. *Sevell v. Freeston*, 1 Ch. Ca. 65. But it is a rule that the court will not set aside a trial at law for any matter which might have been made use of at the trial. *Curtis v. Smalbridge*, 1 Ch. Ca. 23. 2 Freem. 178.

Nothing is allowed as a ground for a new trial after judgment, or that is not ground for a bill of review. S. C. *Ib.*

#### *How obtained and proceedings on.*

Application for new trial must be to the judge who directed the issue. 47th Gen. Ord. 3d April 1828.

Motions in exchequer for new trial of issue directed from equity side of court, are not subject to the rule requiring such motions to be made within the first four days of the following term. They may be made at any time during the succeeding term, or the sittings after, but they should, in the first instance, be made before the Ld. C. Baron, sitting alone in equity, if they arise out of causes pending before him. *Pulley v. Hilton*, 11 Price, 380.

Form of issue not changed on a motion for a new trial. *White v. Lisle*, 3 Swan. 351.

Previous to motion for new trial of issue, it is not motion of course to obtain judge's report of trial at law. Mem. 6 Mad. 58. PR. JUDGE'S REPORT.

New trial of an issue on the validity of a modus; two new trials having been ordered for misdirection, and the verdict on the third trial, as in the two former, being in favour of the defendant, the plaintiff was ordered to pay the costs of the applications in equity, (except those of the first application to the lord chancellor), and the costs of the last trial at law. *White v. Lisle*, 3 Swan. 342. PR. COSTS.

In an issue, and in an action directed by the court, the practice varies. In the first, the motion for a new trial must be made by the court directing it; in the second, to that in which it is tried. Nor is this rule affected by any special provisions by which the direction of the action is accompanied. *Curtis v. Stein*, 2 Rose, 178. PR. ACTION DIRECTED BY COURT.

Where the court of chancery directs an action to be tried at law, though it is with special directions, as that the bankruptcy of the defendant shall not be pleaded in bar, and that the parties shall be examined on oath, the application for a new trial must be to the court of law, but it is otherwise with an issue. *Exp. Kensington*, Coop. 96. PR. ACTION AT LAW DIRECTED BY CHANCERY.

When a motion for a new trial, has been refused at the rolls, upon an issue directed by the M. R. the Ld. Ch. will not, by way of appeal, entertain a similar application. *Bourke v. Rothwell*, 3 Ball & B. 56. PR. APPEAL.

Issue at law directed at rolls; a motion for new trial may be made before Ld. Ch. *Pemberton v. Pemberton*, 11 Ves. 50.

An action having been commenced on the petty bag side of the court of chancery, but tried in K. B., an application for a new trial must be made in K. B. and not in the court of chancery. *Exp. Barker*, 1 Cox, 418.

It gave B, as his bailiff, a general authority to accept bills for him. B accepted several without the knowledge of H, and discounted them at H's bankers, and applied the money to his own use, and then died. The bankers afterwards obtained a bond from H, for the balance of his account with them, including the several bills so accepted by B. On a bill to set aside this bond as improperly obtained from H, the court directed the bankers to sue plaintiffs at law on these bills. The bankers selected some of these bills on which they brought their actions, and which were just sufficient to cover their demand; but on the trial there appeared a receipt indorsed on one of them, and the jury for that reason gave a verdict against the bankers on that bill, and for them on all the rest. There was no application for a new trial; but when the cause was set down again, the bankers applied to prove their demand on some other of the bills; held, that the remedy (if any) must be by motion or petition for a new trial; but the court would not assist the bankers to rectify their own inadvertence. *Holworthy v. Mortlock*, 1 Cox, 141.

Liberty given to bring action to try right, and verdict for defendant; motion for new trial must be to court where before tried. *Fowkes v. Chadd*, Dick. 576.

After two trials of an issue at the assizes, a third trial being directed, was ordered upon application of the plaintiff, to be tried at the bar of the King's Bench, instead of the assizes; the party who applied for the trial at bar agreeing to accept of nisi prius costs in the event of the verdict being in his favour. *Baker v. Hart*, 3 Atk. 546. *Hite v. Salter*, Dick. 495.

An original motion must be made for a new trial, the court will not answer a petition for it, where the cause comes on upon the equity reserved. *Att. Gen. v. Montgomery*, 2 Atk. 378.

Equity will not assist a party to make out a different case, upon a second trial at law, from that which he made upon the first. *Cockburne v. Hussey*, 2 Ridg. P. C. 504.

#### LX. NOTICE.

See also NOTICE, ante, p. 717.—PR. MOTION, 3.

1. Notice generally in practice.
2. Notice, denial of.

#### 1. Notice generally in practice.

Giving notice of trial after injunction to stay trial, is a breach of it. *Bird v. Branker*, 2 S. & S. 186. REMOVAL OF INJUNCTION.



Where assignee of money in court to credit of cause, claiming under an assignment from party entitled to it, petitions to have it paid out to him, he must show that party (or if dead his personal representatives) has had notice of petition. *Hurd v. Davenport*, 13 Price, 735. PR. PETITION; PR. PAPER WORK OF COURT.

The plaintiff has no right to notice of the defendant's examination. *Ferguson v. Ball*, 1 Turn. & R. 203. PR. EXAMINATION OF DEFENDANT ON INTERROGATORIES.

On motion for injunction; affidavits filed before answer may be read, where plaintiff by saving notice of motion till future day, enabled defendant to file answer before motion made. *Glaslington v. Thwaites*, 1 S. & S. 134. PR. AFFIDAVITS; PR. ANSWER; PR. INJUNCTION MOTION.

No application to take a petition out of its turn can be heard, unless notice has been given of the intention to make such application. *In re, Bell*, 1 G. & J. 182. PR. CAUSE ADVANCING, &c.; NOTICE OF PETITION TO ADVANCE PETITION.

Where bankrupt committed by commissioners is brought up by habeas corpus, notice must be given to the assignees; and notice on Saturday afternoon for Monday, unless right to discharge is clear, is not sufficient. *Bromley's Case*, 2 J. & W. 403. PR. HABEAS CORPUS.

Where one of several defendants sets down cause, he is only bound to serve plaintiff, and plaintiff is bound to serve the other defendants. *Smith v. Wells*, 6 Mad. 193. See *Clarke v. Dunn*, 5 Mad. 474. PR. SETTING DOWN CAUSE.

Defendant committed for breach of an injunction after notice of its having been obtained, although the order for the injunction had not been served. *Vansandau v. Rose*, 2 Jac. & W. 264. INJUNCTION, BREACH OF; PR. CONTEMPT.

Where answer is to be taken by commission in which plaintiff joins, plaintiff is entitled to six days notice, of time and place of taking the answer, to be given to commissioner named by him, and such notice should be a six-day notice and signed by two commissioners. *Pound v. Wildgoose*, 8 Price, 102. PR. COMMISSION TO TAKE ANSWER.

Plaintiff amending without requiring a further answer, should call on the defendant for his office copy to be amended; but when, though he neglected this, the defendant was otherwise apprized that an amendment had been made, but permitted the cause to come to a hearing: held, that he could not then object. *Woodhouse v. Meredith*, 1 Jac. & W. 204. PR. BILL, AMENDMENT.

Notice "for Monday the 12th of January, being the first seal before Hilary Term," is good notice for the first seal, though held on Thursday the 15th January. *Smith v. —*, 1 Swan. 10.

Upon an order to proceed to trial upon two issues to try the validity of the commission, the plaintiff was to give notice in writing to the bankrupt of the acts intended to be relied on at the trial. Held, that the petitioner in his notice must specify the acts relied on, the times when they were committed, and the witnesses who will be called to prove them. *Exp. Bogden*, Buck, 137. BANKCY. ISSUE AT LAW.

Defendant being in court when order for injunction is made, is bound by it from that time, and not from formal service thereof only. *Scott v. Becher*, 4 Price, 346. PR. INJUNCTION; PR. SERVICE.

Court will not hear special cause against dismissal of bill, unless notice of cause intended to be shown, be previously given to defendant. *Christie v. De Tastet*, 1 Price, 242. PR. DISMISSAL OF BILL, CAUSE AGAINST.

Breach of injunction after notice of the order, without personal service of the injunction or order.

*Kimpton v. East*, 2 V. & B. 240. INJUNCTION, BREACH OF.

Order made to dismiss the bill for want of prosecution after three terms, without replication of course, without notice, and pending an injunction staying execution. *Naylor v. —*, 16 Ves. 127. See id. note 85. S. F. JACKSON v. PENNELL, id. 204. PR. MOTION TO DISMISS FOR WANT OF PROSECUTION; PR. INJUNCTION.

In a writ to absolve a person unlawfully excommunicated, notice required. *Borlase's Case*, 16 Ves. 346. ABSOLUTION, WRIT OF.

The practice of personal service, as a foundation for process of contempt, dispensed with, where the party must have had notice; as upon being in court on making a short order for execution of a decree. *Rider v. Wadder*, 12 Ves. 202. *De Manneville v. De Manneville*, id. 203. PR. CONTEMPT; PR. SERVICE.

After a decree for an account in a suit by parties interested in the surplus, where due proceedings take place between the plaintiffs and defendants, there is no occasion to give notice to the creditors; costs having been given here in the first instance, they were to be paid before debts, &c. *Hare v. Rose*, 2 Ves. 558. ADMIN. OF ASSETS.

Where notice should be given of the issuing a commission for an inquest. *Rev v. Daly*, 1 Ves. 269. PR. COMMISSION OF INQUEST.

It does not excuse a party proceeding at law after injunction, that it was not served, for where a party or his solicitor have been present on an order for an injunction, they will be bound, although it be not sealed. *Anon.* 3 Atk. 567. INJUNCTION, BREACH OF.

If second feoffee to uses knows of first feoffment, he shall perform it, otherwise not. *Cary*, 10.

Suit to have award by assent decreed, both parties must have notice. *Wakefield v. Hawson*, id. 64.

Upon commission, notice given to one of defendants only; new commission granted, and defendant to have carriage. *Hollingworth v. Lucy*, id. 91.

Application, without notice to commit for contempt of process, ordered nisi causa, &c. on personal notice. *Van v. Price*, Dick. 91.

On death of *prochain ami*, plaintiff refusing to name *prochain ami*, defendant after ten days notice, to be at liberty to name one. *Lancaster v. Thornton*, id. 346.

## 2. Denial of notice.

If special notice of title is charged by bill, such notice must be denied as specially; a general demurrer is not sufficient. *Radford v. Wilson*, 3 Atk. 815. PL. ANSWER.

On plea of purchase for valuable consideration without notice of plaintiff's title, it is not sufficient to deny notice at or before the execution of the conveyance to him; he must aver that he had none at or before payment of the purchase money. *Story v. Ld. Windsor*, 2 Atk. 630. S. C. 1 Ch. Ca. 34. PL. PLEA; VENDOR & PURCHASER.

If a person purchase an estate which he sees has a defect upon the face of the deed, yet a fine will be a bar, for that defect is the very occasion of levying the fine. Secus, as to a purchase from a trustee a mortgagee. S. C. *Id.*

Denying notice of plaintiff's title at the time of the execution of the deed or payment of the consideration money is not sufficient, you must aver you had no notice at or before the execution. *Fitzgerald v. Buck*, 2 Atk. 397. PL. PLEA.

In a plea of a purchase, it is sufficient denial of notice to say that at the time of purchase, he had no notice, without saying of it any time before. *Jones v.*

*Thomas*, 3 P. W. 243. PL. PLEA; *VENDOR & PURCHASER*.

A defendant in a plea of a purchase for valuable consideration omits to deny notice, if the plaintiff replies to it, all the defendant has to do, is to prove his purchase, and it is not material if the plaintiff proves notice, for it was the plaintiff's own fault, that he did not set down the plea to be argued, in which case it would have been overruled. *Harris v. Ingledew*, 3 P. W. 94. *Id.*

Notice must be denied positively, not evasively. *Cason v. Round*, Prec. Chan. 226.

Bill by a dowress to remove trust term, defendant pleads himself a purchaser, but does not deny notice: ordered to answer. *Bodmin v. Vandenbendy*, 1 Vern. 179. PL. ANSWER; DOWER.

## LXI. OFFICERS OF COURT.

See also JURISDIC. And as to EXAMINERS, See PR. EVID. 28. (e).—DEPUTY REMEMR., See post, sub. 6.—MESSENGER, See PR. MESSENGER.—SOLICITOR, See SOLICITOR, post.

1. Generally.
  - (a) Rights, duties, privileges, and liabilities.
  - (b) Mistakes of.
  - (c) Their fees, lien for. See further SOL. & CLIENT, VII.
2. Accountant General.
3. Clerk in court.
4. Clerk of enrolments.
5. Curators.
6. Master.
7. Master extraordinary.
8. Registrars.
9. Six clerks.
10. Under clerks.
11. Usher.
12. Waiting clerks.
13. Warden of Fleet.

### 1. Generally.

- (a) Rights, duties, privileges, and liabilities.
- (b) Mistakes of.
- (c) Their fees, lien for. See further SOL. & CLIENT, VII.

#### (a) Rights, duties, privileges, and liabilities.

The master shall enter into a book a full description of the steps in any matter brought before him. 49th Gen. Ord. 3rd April, 1828.

Riding clerk to take notes of all writs, &c. Beame's Ord. 85.

List of fees to be taken in the accountant-general's and two masters offices of the court of exchequer, appointed under 1 G. 4. c. 35. 16th Dec. 1820. 8 Price, 699.

The six clerks are not responsible for the correctness of the office copies. The signature is affixed as a certificate that the original is filed. *Brown v. Barnard*, 1 Jac. 57.

Court will not permit its officers to be drawn into litigation which it cannot controul. *Kaye v. Cunningham*, 5 Mad. 406. STAYING PROCEEDINGS; ACTION.

Bill by clerk in court against solicitor for payment

of certain sum stated as amount of plaintiff's bill for fees and disbursements. Demurrer to relief overruled. *Barker & Dacie*, 6 Ves. 681. JURISDICTION.

Power of the court of exchequer to remove from the remembrancer's office, clerks who have not served a clerkship. *Exp. Windus*, 3 Swan. 96. JURISDICTION.

One of the six clerks of this court had been arrested in an action brought against him in one of the common law courts, whereupon he insisted on his privilege to be sued in the petty bag only; but it appearing by affidavit that he had not for a considerable time attended at his seat, but had secreted himself to avoid his creditors, the court would not make any order for his discharge. *Exp. Sheppard*, 2 Cox, 398.

By act of Irish parliament, 1772, a mortgagee, when three half years' interest are in arrear, may by a summary application get a receiver of estate in order to keep down arrears, &c. of interest. An application of this kind was made by respondent in Irish chancery, and though appellant held office of chief remembrancer in exchequer there, he was held to be incapable of pleading any privilege of office against such application. *Clanbrassill v. Taylor*, 5 Bro. P. C. 319. JURISDICTION.

Suitor having paid the officer his fee, and the officer having neglected his duty, by which means the process becomes irregular, the suitor is to pay the costs, but he to have them over against the officer, and though the officer in such case die, yet this being a duty and matter of contract, his executor will be liable. *James v. Philips*, 2 P. W. 658.

Master in chancery has privilege of being sued in Middlesex. *Burrough v. —*, Fitzgibbon, 40. MASTER IN CHANCERY; PRIVILEGE.

The master allows a security, which proves defective; master is not liable; otherwise if the master had by bribery or corruption allowed the security. *Comer v. Hollingshead*, 2 Vern. 90.

Plea of privilege by some of the defendants, not good if there is another defendant not privileged. *Fanshaw v. Fanshaw*, 1 Vern. 246. PL. PLEA OF PRIVILEGE.

Bailiffs who had served an execution in breach of an injunction, find money hid in their house and carry it away. Party at whose suit the execution was taken out ordered to make satisfaction. *Childrens v. Saxby*, 1 Vern. 207.

The plaintiff may move for a subpoena returnable immediately without an affidavit against an officer of the court, for he is presumed always to attend. *Anon. Mos. 41. PR. SUBPOENA RETURNABLE IMMEDIATELY.*

Wife executrix, is sued with her husband in C. P. who is clerk of crown in chancery, privilege disallowed. *Powle's Case*, Dyer, 377. pl. 30.

Mulier and bastard join in suing their livery, they are not therefore estopped in chancery. *Cary*, 20.

Person having privilege of Oxford loses it when joined defendant with another. *White v. Lougher*, *Cary*, 55.

No privilege to clerk in exchequer to be sued there, and if it did exist, rejected, defendant being joined with unprivileged person. *East v. Pitterson*, *Cary*, 67.

Attachment against defendant, and subpoena against one maltreating officer serving defendant with writ. *Rose v. West*, *Cary*, 38.

Commission to examine in perpet. mem. granted to officers of court. *Berntine v. Harbert*, *Cary*, 43.

(b) *Mistake of.*

Amendment of plea allowed where error was occasioned by mistake of clerk of outlawries, and did not affect substance. *Waters v. Mayhew*, 1 S. & S. 220. PR. PLEA; AMENDMENT.

Where by the mistake of the registrar in the name of the cause, the order for dismissal was drawn up by defendants after the plaintiff had undertaken to speed the cause, the plaintiff must indemnify the defendants against the costs of the order. *Hibbertson v. Cooke*, 4 Mad. 248. PR. ORDER TO DISMISS; PR. COSTS.

Mistake being made in decree whereby accountant-general entered accounts in wrong names. Order was made that registrar should alter decree, and accountant-general his account books. *Hawker v. Buncombe*, 2 Mad. 391.

Depositions taken on the part of the plaintiff having been suppressed as against some of the defendants, on the ground of no notice until after publication, upon evidence that the omission arose from a mistake committed by the clerk to the plaintiff's solicitor, in giving at the examiner's office the name of the clerk in court for others of the defendants, as the name of the clerk in court for all the defendants, in consequence of which the plaintiff's witnesses were produced only at the seat of the clerk in court so named; and upon the examiner's certificate that the name of that clerk in court only was delivered to him, the lord chancellor gave to the defendants the option, either of permitting the plaintiff to re-examine the same witnesses, or of allowing the depositions to stand, with liberty for them to cross-examine those witnesses, and to examine others. *Cholmondeley v. Clinton*, 2 Mer. 81. PR. DEPOSITIONS, SUPPRESSION OF.

Where a loss arises from a default of a receiver appointed by the court, the estate must bear it. *Hutchinson v. Massareene*, 2 Ball & B. 55.

(c) *Their fees, lien for.*

See further SOL. & CLIENT; LIEN.

Fees of subpoena office under order, 28th Nov. 1743. Beame's Ord. 412.

Solicitors' fees under Lord Erskine's order. Beame's Ord. 467.

Masters' clerks not to act as solicitors. *Id.* 306.

No fees to be paid for six clerk's certificate that cause is ready for hearing. *Id.* 47. 49.

Nor for six clerk's setting down cause. *Id.* 75.

Nor for registrar's entering demurrer in paper of causes. *Id.* 77.

Nor for six clerk's party's attorney signing a petition. *Id.* 84.

Fees of affidavit of office. *Id.* 93. 382.

Order for judges to empanel juries to enquire concerning fees usually taken. *Id.* 101.

Fees to continue as the two years preceding, 1657. *Id.* 129.

What fees the master may take under act 13 Car. 2. *Id.* 153.

What writs pay no fees. *Id.* 155.

Fees of various officers and offices according to order, 28th Nov. 1743. (viz.)

Fees of masters and their clerks. *Id.* 372. 374.

Of prothonotary. *Id.* 375.

Of registrar. *Id.* 377.

Of registrar of affidavits. *Id.* 382.

Of examiners and their clerks. *Id.* 384. 385.

Of six clerks. *Id.* 387.

Of sworn clerks and waiting clerks. *Id.* 389.

Of clerk of inrolments. *Id.* 396.

Of clerk of hanaper. *Id.* 397.

## Fees—continued.

Of keeper of records in Tower. *Id.* 400.

Of petty bag office. *Id.* 400.

Of curstor's office. *Id.* 407.

Of subpoena office. *Id.* 412.

Of sixpenny writ office. *Id.* 413.

Of office of chaff wain. *Id.*

Of office of sealer. *Id.* 416.

Of usher. *Id.* 417.

Of clerk of patents. *Id.* 418.

Of examiner's letter patent, &c. *Id.* 417.

Of clerk of the leases. *Id.* 419.

Of purse bearer. *Id.* 420.

Of principal secretary to Ld. C. *Id.* 421.

Of secretary of presentations. *Id.* 423.

Of secretary of commissions. *Id.* 424.

Of secretary of commissions of bankrupts. *Id.* 452.

Of clerk of inrolments in bankruptcy. *Id.* 426.

Of office for execution of law, &c. concerning bankrupts. *Id.* 427.

Of receiver of the fines. *Id.* 428.

Of secretary of decrees and injunction suit. *Id.* 429.

Of secretary of lunatics. *Id.* 429.

Of serjeant at arms. *Id.* 430.

Of messenger or pursuivant. *Id.* 431.

Of secretary of briefs. *Id.* 432.

Of clerk of briefs. *Id.*

Of secretary of appeals. *Id.* 433.

Of clerk of appeals. *Id.*

Of gentlemen of chambers attending great seal. *Id.* 434.

Of masters extraordinary. *Id.* 435.

Of usher of hall at L.C. *Id.* 436.

Of cryer of court. *Id.*

Of deputy warden of Fleet, or Ld. C.'s tipstaff. *Id.* 437.

Of door keeper. *Id.* 438.

Of keeper of court. *Id.* 440.

Of chief secretary of master of the Rolls. *Id.* 441.

Of under secretary of Rolls. *Id.* 442.

Of secretary of causes at Rolls. *Id.* 443.

Of secretary of decrees at Rolls. *Id.* 444.

Of clerk of chapel at Rolls. *Id.* 445.

Of gentlemen of chambers attending master of the Rolls. *Id.* 446.

Of usher of hall at Rolls. *Id.* 447.

Of porter at Rolls. *Id.* 448.

No officer to take any money or reward for expedition. *Id.*

All officers to give receipts for fees if requested. *Id.* 449.

No other fees to be taken than those prescribed as above, or officers to be punished. *Id.* 447.

Fees of solicitors under Lord Erskine's Order. *Id.* 457.

Fees of clerk in court under same. See "Under Clerks."

The master's fee for taxing bill of costs is usually paid by the party who brings the bill. *Gale v. Parkinson*, 1 M'Clel. & Y. 358. note.

A clerk in court and solicitor refusing to continue the conduct of a cause until his fees are paid, ordered to produce an office copy of the bill to be marked. *Mayne v. Hankey*, 3 Swan. 93. PR. PRODUCTION OF DEEDS, &c.

Under the order 18th June, 1668, regulating the office of six clerks they are entitled to receive their proportion of the fee from the sworn clerk, though he has given credit to the client. *Exp. Six Clerks*, 3 Ves. 589. GEN. ORD. C. OR.

Solicitor's fees not to be paid till he has settled clerk in court's bill. *Stevens v. Awwy*, Dick. 224.

Sequestrators to have each 1s. per day. *Prentice v. Prentice*, Dick. 388.

A six clerk is not obliged to deliver papers to

plaintiff till his fees are paid, though plaintiff has paid his solicitor, who satisfied his clerk in court (viz. the sixty clerk) the whole bill. *N.B.* In this case this sixty clerk had absconded. *Taylor v. Lewis*, 3 Atk. 727. 2 Ves. 3.

A clerk in court who lends money to the solicitor is not entitled thereby to detain a client's papers as a pledge. *Grey v. Corberick*, 2 Atk. 114. *LIES ON PAPERS.*

A country client employs an attorney or solicitor in the country in a cause in chancery, the solicitor employs a clerk in chancery, the client in the country pays his solicitor, but the clerk in chancery is unpaid. The client not bound to pay the clerk in chancery, but if the latter has any papers in his hands he may retain them. *Farewell v. Coker*, 2 P. W. 460. SOL. & CLIENT; LIEN; PRINC. & AGENT.

The clerk in court may proceed in chancery for his bill either against the solicitor or his client at law for want of a retainer. *Anon.* Mos. 172.

Where a clerk in court had obtained an order for taxing the costs of the solicitor who employed him, and afterwards another order for payment of the costs of taxation, he was allowed to detain the papers of the solicitor's client till the costs reported due under the first order were paid, but not for the costs of taxation. *Cockrell v. —*, Barn. 264. LIEN.

## 2. Accountant-general.

See also PR. PAYMENT INTO COURT. — PR. PAYMENT OUT OF COURT.

An act to provide, that property vested in the Accountant-general of the high court of chancery, as such, shall, upon his death, removal, or resignation, vest from time to time in those who shall succeed to the office. 64 G. 3. c. 14.

By order 26 May, 1725, masters of court are directed to deposit in bank of England, monies, bonds, tallies and other effects of the suitors of court which had been, or thereafter should be, under the direction of the court; and by another order 4th Nov. 1725, Beame's Ord. 340. the former was confirmed, with further directions as to the forms of paying, transferring, or drawing out any of such monies; and as to the mode in which the accounts should be kept. By the 12 Geo. 1. c. 32. s. 1. the said last mentioned orders are confirmed, and, by s. 3. & 4. a person appointed who is to do all such things relating to the suitor's money and effects as are by the said orders directed to be done by the masters and usher; such officer to be called "The Accountant-general of the court of chancery," who shall hold such office during the pleasure of the court, and shall stand in the place of the masters and usher, and shall receive no other fees from the master than is allowed by the said order (as to which, see Beame's Ord. Ch. 358. 360). By s. 5 & 7. transferable securities are to be taken in accountant-general's name, and to be vested in his successors. By the 23 & 24 Geo. 3. c. 22. (Irel.) a similar officer is created in Ireland, and by s. 14 & 15. a similar officer is provided for court of exchequer (Irel.) By the 30 Geo. 3. c. 41. s. 5. (Irel.) it is provided, that in case of sickness or absence of respective accountants-general of courts of chancery or exchequer, they may, with approbation in writing, of Lord Chancellor and Chief Baron (*mutat. mutand.*) appoint deputies, for whom they shall be answerable, and who shall receive no fees besides such as they are paid by the persons appointing them. The 4 G. 4. c. 7. fixes the salary and fees of the accountant-general (Irel.) and his officers. As to practice of accountant-general's office in England, see 1 Turn, &

Ves. 240. In exchequer, suitor's money was formerly paid and received through the hands of deputy remembrancer, the practice of whose office is regulated by order 17th July, 1747. See 1 Fowl. Ex. Pr. 335. But by 1 G. 4. c. 35. s. 2. the duties of deputy remembrancer of exchequer are transferred to an accountant-general (which office is created by act) to be appointed by lord chief baron; and all necessary directions are given as to forms of paying, transferring, and drawing out monies in hands of the accountant-general. By s. 8. it is provided that on the death, resignation or removal of accountant-general, all property in suitor's money vested in him, shall, *ipso facto*, become vested in his successors; similar provision to that made as to the accountant-general of the court of chancery by the 54 G. 3. c. 14.

Orders relating to accountant-general. Beame's Ord. 348. 359. 363.

Order as to small sums belonging to married women. *Id.* 464.

On petition for transfer of stock standing in the name of the accountant-general, subject to the order of the court, under a power in an act of parliament, the facts alleged being disproved, the petition is not dismissed, but an order made for the transfer to the persons appearing to be entitled. *Exp. Williams*, 1 Jac. & W. 89.

In *Garrey v. Hibbert*, 1 Jac. & W. 180. money was ordered to be paid under a power executed in America, attested by a notary, and authenticated by an American secretary of state. And an affidavit made before a mayor of a foreign town requires evidence of his holding that situation. S. C. So as to a magistrate. *Hutchison v. Marmington*, 6 Ves. 823.

The accountant-general being directed by an order in this cause to deliver to plaintiff, who resided at Paris, certain exchequer bills, plaintiff's solicitor, on application, obtained from the accountant-general a power of attorney to send to plaintiff for the purpose of enabling his solicitor to receive the bills, to which power were annexed the following instructions as to its execution: "This letter of attorney is to be executed in the presence of a notary, who will affix his official seal; it is requested that the chief magistrate of the place do certify that the person subscribing himself a notary public, is such, and that due credit may be given to his act and deed. The chief magistrate also affixes his official seal." The power was executed and authenticated by the notary as directed, but the notary at the same time certified that there was no chief magistrate, who, according to the French law, could give the certificate required; the accountant-general refusing to dispense with the chief magistrate's affixing his seal, unless by the order of the court, the vice chancellor granted an order accordingly, on condition that an affidavit was produced that the notary was such at Paris. *Kinnaird v. Saltoun*, 1 Mad. 227.

On a decree for payment of debts, if it appear on the pleadings that the creditor is an infant, the accountant-general will not pay such creditor though he has come of age, on a certificate of the baptism, but an order for the payment is necessary. *Anon.* 2 Mad. Chan. 582.

The rule of evidence in the accountant-general's office ought to be the same as in the court. Therefore, upon marriage of woman entitled to interest of fund for separate use, an affidavit was required beyond that of the marriage and identity, that there was no settlement or agreement for settlement, without prejudice to future cases. *Clayton v. Gresham*, 10 Ves. 288. *Evms.*

Where the court directs the payment of money by the accountant-general, and that the release which is to be executed by some of the parties should be settled by the master, in case the parties differ about it,

the accountant-general may refuse to pay the money unless the release has been settled by the master, although all the parties interested attend him and give their consent; in such case an order must be applied for by consent of all parties, directing the accountant-general to pay the specific sum mentioned in the order for which the release has been executed pursuant to the decree or order. *Elliott v. Booth*, 1 Turn. & Ven. Pr. 243.

However small the sums, a prerogative probate is, in all cases, necessary to authorize the accountant-general in paying a testator's money out of court. *Chollnor v. Murhall*, 6 Ves. 118. *Newman v. Hodgson*, 7 Ves. 409. *Thomas v. Davies*, 12 Ves. 417.; though in Lord Thurlow's time, and until he put a stop to it, the sum on which an order for a prerogative probate could be obtained was limited to 40*l*. In *Docker v. Horner*, 3 Bro. C. C. 240. S. C. Dick. 746. it seems that the sum was limited to 30*l*.

Where a decree directed a sum to be paid into the hands of the accountant-general, he refused to receive a part of the sum without an order. *Payne v. Collier*, 1 Ves. J. 170.

Where money is directed by act of parliament to be paid to the accountant-general, he is bound by the act to receive it, and the court will not al an order for that purpose. *Anon.* in 56. P. PAYMENT INTO COURT.

A party entitled at twenty-one to money invested in the name of the accountant-general, petitioned that the money should still continue in his name, but the court refused to make such order, and compelled him to take the money. *Isaac v. Compertz*, id. 44.

Money in the funds belonging to wards of court cannot be transferred into the name of the accountant-general, to the credit of the cause, until the account is taken by a master, and his report made. *Bencraft v. Rich*, 1 Bro. C. C. 56.

Where money is, by order of court, paid into the accountant-general's hands, to be placed in the bank till it can be laid out according to the directions of a decree, if you move for an application of this money, you must have a certificate, not only that the money was paid in, but that it is actually in the bank at the time of the motion made. *Anon.* 1 Atk. 519.

#### Clerk in court.

See also SOLICITOR—SOLICITOR & CLIENT.

Court never orders clerk in court, with whom exhibits have been deposited under usual order, to deliver them up to any other person for the purpose of their being produced in court or at the assignees, without consent of all parties, and payment of clerk in court's fees. *Harris v. Bodenham*, 1 S. & S. 283. PR. EXHIBITS; PR. DELIVERY OF PAPERS OUT OF COURT.

A clerk in court and solicitor refusing to continue the conduct of a cause until his fees are paid, was ordered to produce an office copy of the bill to be marked. *Mayne v. Watt*, 3 Swan. 93.

Where a party is avoiding service, and the clerk in court is dead, the proper course is to move first, that service of a subpoena to name clerk in court on the solicitor may be good service; if none is named, then that service on the solicitor may be good service. *Franklyn v. Colhoun*, 12 Ves. 2. PR. SUBPOENA, SERVICE SUBSTITUTED; PR. ABATEMENT & REVIVOR.

On a special motion (with notice) the court will restrain a party from paying his bill of fees to his solicitor, until the clerk in court employed by the solicitor in the cause shall be fully paid his bill. *Stevens v. Avery*, Dick. 224.

The clerk in court has a general lien on the duty

recovered by his diligence and expence, which extends as well to collateral proceeding as to a decree; and this lien cannot be defeated by a mere voluntary release from the party employing the clerk in court, to his adversary; although if the suit had ended on a *bond fide* compromise, or on a reasonable consideration paid, it would be otherwise. *Anon.* 2 Ves. 25.

Court will allow the clerk in court to retain the papers, even against the client, until he be paid. *Farewell v. Coker*, 2 P. W. 460.

A client is not liable to agent employed by his solicitor, beyond what he may be indebted to solicitor for business done in the cause. *Anon.* Dick. 802.

Interest against a purchaser for delaying payment, court will not make purchaser appoint a clerk in court, which is only necessary where the party is to appear. *Child v. Id. Abington*, 1 Ves. J. 94. VENDOR & PURCH.; INTEREST, WHEN PAYABLE.

Defendant having examined his clerk in court, plaintiff exhibited interrogatories for cross-examining him, to which he demurred, for that he knew nothing of the matters inquired of, except as defendant's clerk in court or agent. Demurrer over-ruled; first, because it ought to conclude that the party knew nothing but by the information of his client; secondly, because it appeared that the matters inquired after were transactions antecedent to the commencement of the suit; thirdly, the party having been examined, plaintiff might certainly cross-examine him to the same matter; fourthly, because it concluded that the party knew nothing but as clerk in court "or agent," and an agent might be only a steward or servant, who is not privileged. *Faillant v. Dodemead*, 2 Atk. 524.

A clerk in court's lending a solicitor money to carry on a cause, does not entitle the clerk in court to detain the papers, but he must deliver them up to the party and get the money from the solicitor the best way he can. *Gray v. Cockrill*, 2 Atk. 114. But see Dick. 224. 802. 2 P. W. 460.

The clerk in court may pray payment of his bill in this court, either against the solicitor or the client, though he cannot proceed at law against the client for want of retainer. *Anon.* Mos. 172.

If the party's clerk in court be dead, no process can be taken against the party until he has appointed a new clerk in court, and a *subpoena ad faciend. attorn.* must be taken out for that purpose. *Rutcliffe v. Roper*, 1 P. W. 420. PR. ABATEMENT & REVIVOR.

#### 4. Clerk of enrolments.

Order concerning clerk of enrolments. Beame's Ord. p. 98.

Their fees under order 20th November, 1743. *Id.* 396.

#### 5. Cursitor.

Order concerning cursitors. Beame's Ord. 212, 213, 214.

Fees of their office under Order, 28th November, 1743. *Id.* 407.

Cursitor to make out original in trespass, *quare clausum*, &c., and party not to apply to flazer. *Exp. Inghman*, Dick. 224.

#### 6. Master and deputy remembrancers.

No reference to master of demurrers touching jurisdiction. Beame's Ord. 22.

Nor of causes where witnesses have been examined. *Id.* 23. 80.

Exceptions thereto. *Id.* 23. 81.

Are not to certify state of cause. *Id.* 23. 80.

Are not to take affidavits touching proof of title, merits, &c. *Id.* 83.

Their certificates ground of pauper's admission. *Id.* 80.

Not to take the oath to an affidavit, except it be fairly written in one hand without blotting, &c. *Id.* 65. 149. 210.

To prefix convenient times for hearing matters referred to them. *Id.* 79.

At such time shall proceed, admitting no pretended delays. *Id.*

And speedily thereafter send in their reports. *Id.*

But if they cannot proceed, (the parties, &c. without cause absenting themselves) they are to certify default to court, &c. *Id.* 80.

If they admit gross delay, the reference is to be removed, &c. *Id.*

No reference to master whether injunction shall be granted or not. *Id.*

Exception. *Id.*

How their reports and certificates are to be drawn. *Id.* 81. 208. 209.

Their fees, hours of attendance, &c., according to act 3 Car. 2. *Id.* 150.

Are to expunge scandal, and tax party his costs. *Id.* 167.

How they are to certify contempt. *Id.* 203.

How to pass exemplifications of depositions. *Id.* 207.

Are not to return special certificates unless in certain cases. *Id.* 208.

Are to administer oaths themselves, and in what manner. *Id.* 209. 249.

Their certificate, when positive, (not being to ground decree), is to stand. *Id.* 210.

How exceptions to their reports are to be filed. *Id.*

Previous to 1667 armed with commissions to examine witnesses, and to direct commissions into country. *Id.* 218.

Such commissions and examinations not to be returned to masters. *Id.*

After hearing, may in certain cases direct parties to draw interrogatories and examine in court. *Id.* 220.

Or direct commission into country. *Id.*

How they are to proceed as to a quaker's answer. *Id.* 248. 249.

When they have prepared their reports, are to summon parties to attend, who are to bring in objections, if at all, before they settle their reports. *Id.* 259.

Refusing to take a peer's answer on his honor, the master commits a breach of privilege. *Id.* 262.

Are not to deliver pleadings to any but six clerks, or sworn clerks. *Id.* 282.

Are not to receive depositions ready drawn. *Id.* 285.

Their clerks not to examine witnesses. *Id.*

But the masters themselves are to examine all witnesses. *Id.*

Depositions to the contrary to be suspended. *Id.*

The masters are to take minutes of facts admitted before them, which shall be conclusive on admitting party. *Id.* 304. 305.

Clerks to master are not to act as solicitors. *Id.* 306.

Masters are to attest affidavits which are to be filed before report made. *Id.* 307.

Are not to take an infant's answer or plea by guardian, without order, &c. produced. *Id.* 310.

Fees to be taken by the masters and their clerks, under order 28th November, 1743. *Id.* 372. 374.

Certain rules and regulations to be observed by the masters and their clerks. *Id.* 374.

Are annually to certify state of accounts of committees, and receivers of lunatic's estate. *Id.* 453.

So with respect to the accounts of receivers. *Id.* 354.

As to further course they are to adopt respecting receivers, (see RECEIVERS.)

Late order to their charge for particulars of sale. *Id.* 483.

In the exchequer, the suitor's money was formerly paid and received through the hands of the deputy remembrancer, the practice of whose office is regulated by an Order 17th of July, 1747. See 1 Fowl. Ex. Pr. 335. But by 1 Geo. 4. c. 35. s. 2. the duties of deputy remembrancer of exchequer are transferred to an accountant-general (which office is created by such act) to be appointed by the lord chief baron; and by the same statute, all necessary directions are given as to the forms of paying, transferring, and drawing out the monies in the hands of the accountant-general. By the 8th section of the statute, it is provided that on the death, resignation, or removal of the accountant-general, all property in the suitor's money vested in him, shall, *ipso facto*, become vested in his successors; a similar provision to that made as to the accountant-general of the court of chancery by the 54 Geo. 3. c. 14.

The jurisdiction of the two masters of the exchequer appointed by 1 Geo. 4. c. 35. in receiving and reporting on references, is limited (in the same manner as that of the deputy-remembrancer had previously been) to such matters as are specially referred to them. *Foreman v. Cooper*, 1 M'Clel. 538. JURISDICTION.

Court refused to appoint master in chancery to office, in respect of which he would be liable to account. *Exp. Fletcher*, 6 Mad. 427.

#### 7. Master extraordinary.

Ancient orders concerning masters extraordinary. Beame's Ord. 48.

Are not take acknowledgements, &c. within five miles of London. *Id.* 49. 126.

Except with leave of court first obtained. *Id.* 49. 127.

Are to add time and place, when and where any answer, affidavit, deed, or recognizance be taken. *Id.* 126. 212.

Are not to take affidavit, &c. within twenty miles of London. *Id.* 212.

Their fees under order 28th of November, 1743. *Id.* 435.

Petition of an attorney, a Roman catholic, to have the oath under the statute 31 Geo. 3., substituted for the oath of supremacy in a commission for swearing him a master extraordinary, refused. *Exp. Agar*, 3 V. & B. 169. ROMAN CATHOLIC.

#### 8. Registrars.

Registrars are to be sworn. Beame's Ord. 19.

Are to mention the former order in the latter. *Id.*

Are to set down orders as pronounced. *Id.* 20.

Are not to deliver drafts of orders to parties, without keeping copies. *Id.*

Are not to omit opinion of court, in orders referring causes. *Id.*

Are to pay no respect to interlineation, &c. by counsel of their (registrars') drafts. *Id.* 21.

Are to be careful in drawing up decrees. *Id.*

Are to state to the chancellor, when they present the same to him, the decrees of weight. *Id.*

Are to insert in special orders, the particular grounds of departing from general orders. *Id.* 22.

Their note, ground of subpoena *ad audiendum judicium*. *Id.* 46. 48. 504. 504.

Are not to make, pass, &c. any process grounded on affidavit not first filed and registered. *Id.* 57. 64. 146.

The rules they are to observe in drawing up orders. *Id.* 75.

If they lend a draft, &c. to counsel; to note it if not returned in twenty-four hours. *Id.* 76.

Are not to enter decrees and dismissions, until signed by the Ld. Ch., &c. *Id.*

Are to enter demurrers without fee. *Id.* 77.

Are to enter but two demurrers in paper of same day, unless specially ordered. *Id.*

Are within certain time to certify to the chancellor, what references are in hands of masters, &c. *Id.* 81.

Are not to enter orders, on motion of counsel moving for a pauper not really so admitted. *Id.* 83.

Are not to enter a rule or attachment issuing from six clerks' office, without a note from six clerk's attorney in cause. *Id.* 110.

Are not to pass affidavits, blotted or interlined. *Id.* 149.

Are to set down cause without fee. *Id.* 197.

But may demand their fees unpaid in stay of hearing. *Id.*

At the beginning of term shall deliver to six clerks a list of decrees, &c. signed by chancellor, the term and vacation before. *Id.* 207.

Are to set up in their office a note of all causes, &c. two days before hearing. *Id.* 254.

Are not to receive exceptions to reports of insufficient answers, without notice to clerk of other side. *Id.*

Are to indorse on back of reports and certificates the day of receiving and filing them. *Id.* 293.

Their fees according to order, 28th Nov. 1743. *Id.* 377.

Their privilege as to setting down causes. *Id.* 378.

Certain rules and regulations to be observed by them. *Id.* 380.

Certain other rules to be observed by them in recitals contained in orders. *Id.* 381.

A suitor had paid the registrar his fee for entering an attachment, but he neglected to do so, whereby the process became irregular: Held, that the suitor must pay the costs of the irregularity, but have them over against the registrar; and in case of his death, his executor would be liable. *James v. Phillips*, 2 P. W. 658.

#### 9. Six clerks.

Six clerks are to certify when a cause is ready for hearing. *Beame's Orl.* 46. 48. 50. 104. 287.

What such certificate is to contain. *Id.* 47.

No charge to be made for it. *Id.* 47. 109. 287.

Are not to make, &c. any process, &c. grounded on an affidavit not first filed and registered. *Id.* 57.

Are not to make commissioners *ad examina. testes*, to be executed in or near London. *Id.* 00.

Are the only proper attorneys of the court. *Id.* 74. 108. 196.

Are continually to acquaint themselves of the state of their client's causes. *Id.* 74. 196.

Are not to leave the care thereof to their under clerks. *Id.*

Cannot refuse to offer to set down cause, if attended in due time. *Id.* 75. 196.

Are not to take any fee for same. *Id.*

Must come prepared to inform court of the nature, &c. of the cause. *Id.*

Are to sign their clients' petitions before presented. *Id.* 84.

Are not to take any fee for signing same. *Id.*

Their dispute with the examiners. *Id.* 87.

After every term, shall examine the titling book with the filing book, and correct them. *Id.* 100.

Must sign copies before they leave the office. *Id.* 108. 140. 186. 229.

No *subpoena ad audiendum judicium* shall be sued, without a note under their hand. *Id.* 109. 241.

To see that all common rules and attachments are entered in house book and with register. *Id.* 110.

Their hands to be to pleadings before copied. *Id.* 111. 229.

So to decrees, &c. before presented for chancellor's, &c. signature. *Id.* 112. 206. 229.

Fined for non-attendance. *Id.* 120.

Left to their remedy at law for their fees against sixty clerks. *Id.* 131.

Bill, &c. to be filed with them before hearing. *Id.* 135.

Are to transmit certain proceedings to petty bag, &c. *Id.* 136. 252. 268.

Their dispute with the sworn clerks. *Id.* 130. 138. 224.

To retain custody of records, as anciently. *Id.* 141.

Clerks in their office not to appear on counterfeit writs of subpoena. *Id.* 143.

Not to make writs of *duces tecum* to examine in perpetual memory, or to shew cause. *Id.*

All bills, &c. to be filed with them. *Id.* 140, 144. 168. 231.

Their rights to enrol warrants for patents, &c. *Id.* 158.

Business in office to be done according to division of letters. *Id.* 161.

That regulation reversed. *Id.* 222.

But differences arising therefrom to be settled by rest of six clerks. *Id.* 163.

Each six clerk limited to twelve clerks. *Id.* 164.]

Not to antedate bills. *Id.* 168.

All pleadings, &c. must be filed with them to be of record. *Id.* 168.

All pleadings, &c. which they are entitled to receive, to be delivered to them. *Id.* 190.

Nor any depositions, &c. to be opened before so delivered. *Id.* 190. 230.

Are entitled to custody of all bills, warrants, &c. *Id.* 191. 231.

Are to be attended, and are to certify before motion, to suppress depositions as irregularly taken. *Id.* 196.

For which purpose, a rule for their attendance shall be entered. *Id.*

May allege their fees unpaid, in stay of hearing of a cause. *Id.* 197.

Are to keep a public book for entering all decrees and dismissions. *Id.* 206.

Are to sign process of contempt for plaintiff pauper, before sent to great seal. *Id.* 217.

To take care such process be not vexatious. *Id.*

To make out commission to examine, directed by master after hearing. *Id.* 220.

Which shall be returned unopened to six clerks, who are to keep it until publication passed. *Id.* 221.

What examinations are to be kept by them. *Id.*

Under clerks to account with them. *Id.* 229.

No commission whereby answer is returned to be broken open but in their presence. *Id.* 230.

All commissions whereby depositions are taken, to be returned to them to be kept until publication. *Id.* 230. 236.

Are to have one or more deputies constantly attendant in office for signing writs, copies, &c. *Id.* 230.

Are to be paid by under clerks, or receive a note from them of client's residence. *Id.* 231.

No commission to be published, but in their presence. *Id.* 241.

When they sign copies, are to write thereon the date, number of sheets, and subscribe same. *Id.*

The hours of their attendance. *Id.* 242.

Are themselves to sign decrees and dismissions, and

not by their deputies, unless in case of sickness, &c. *Id.* 242.

\*When they sign decrees, they are to write thereon day of month and year of signing. *Id.*

Appointment of a deputy six clerk in place of one resigned. *Id.* 274.

Order for punishing certain young clerks, &c. *Id.* 276.

Certain supernumerary or licentiary clerks not admitted as under clerks, discharged, &c. *Id.* 279.

Two waiting clerks allowed to each six clerk. *Id.* 279, 298.

None permitted to dispatch business, &c. as clerks in their office, but six clerks sworn, under clerks and their clerks servants. *Id.* 281.

Not to deliver any bill, &c. to any but a sworn clerk, or waiting clerk. *Id.* 283.

The time their office is to be open. *Id.* 297.

Not to take as waiting clerks any but such as have been articulated to sworn clerks. *Id.* 298.

Each six clerk to keep a book to enter all rules concerning publication. *Id.* 336.

When publication is enlarged, it is to be entered in the same book. *Id.* 336.

No fees to be taken for such rules so entered. *Id.* 336.

No cause to be set down for hearing, unless six clerk certifies he hath seen depositions published. *Id.*

Their fees under order 28th Nov. 1743. *Id.* 387.

The six clerks formerly the only attorneys of the court, establishment of the sixty clerks under them. *Twort v. Dayrell*, 13 Ves. 197.

Petition to compel a six clerk to sign a certificate of the time of filing replication, who objected until paid his fee, which, however, had been already paid by the client to the six clerk, who had absconded. The matter was compromised, but the chancellor seemed to think that the six clerk was not bound to do what he was required, until paid his fee, and that the security of the six clerk could not be changed by changing the sixty clerk. *Taylor v. Lewis*, 2 Ves. 111. 3 Atk. 727.

Solicitor's fees not to be paid until he has paid clerk in court's bill. *Stevens v. Avery*, Dick. 224.

Senior six clerk not towards cause, usually assigned guardian to infant. *Smith v. Edvardson*, *id.* 234.

Six clerk fined 40s. for making mistake in subpoena. *Frankblank v. Metham*, Cary. 77.

#### 10. Under clerks.

Oath of under clerk. Beame's Ord. 68. 164. 225. May carry from six clerks office to Rolls, decrees, &c., in order that parchment may be allowed them. *Id.* 68. 302.

Formerly they attend not in court. *Id.* 74. 196.

Are not to enter any rule in house book, &c., until same first entered with six clerk. *Id.* 110.

Are not to take any record, &c. out of office to copy. *Id.* 111. 289.

When they have copied, are to return them to their master or the six clerk. *Id.* 111.

Are disabled to sit in office, if they violate order as to records. *Id.* 124.

Sixty in number. *Id.* 130.

Their power in managing causes. *Id.*

Are to have free access to records of court, and power to copy same, &c. *Id.* 131.

Their dispute with six clerks. *Id.* 130. 138.

Their number increased to twelve to each six clerk. *Id.* 164.

Six to write chancery letter. *Id.*

Are not to keep any bill by them, but deliver same to six clerks. *Id.* 168.

To be admitted clerks of court. *Id.* 224. 282.

The number reduced to sixty. *Id.* 226.

To serve seven years, and have certain qualifications. *Id.* 226. 282.

May be deprived, and by Ch. or Master of the Rolls, &c. *Id.*

What fees they are to retain. *Id.* 227. 282.

To account with six clerks, &c. *Id.* 229. 282.

To pay six clerks, or give notice of client's residence. *Id.* 231. 282.

If they make any agreement as to their client's causes, it must be in writing, and signed. *Id.* 236. 308.

Clerks in court on either side, to attend hearing at Rolls. *Id.* 267.

Their number increased to ninety. *Id.* 280.

To be sworn and admitted by the masters of the Rolls. *Id.* 280. 281.

Their nomination by six clerk for that purpose. *Id.* 281.

None of their (then) seats to be altered without their consent. *Id.*

Not to deliver any, &c. but to their own clerks, for whom they are answerable. *Id.* 283.

Orders concerning young clerks. *Id.* 295. 297.

Sworn clerk to have but one articulated clerk at a time. *Id.* 298.

Exception. *Id.* 298. 299.

To employ none but articulated clerks in copying records. *Id.* 299.

May resort to books kept by registrars, and six clerks to enter rules for publication. *Id.* 336.

Their fees, under Order 28th Nov. 1743. *Id.* 389.

Certain rules and regulations they are to observe. *Id.* 395.

By virtue of their offices entitled to act as solicitors. *Id.* 466.

Their fees under Lord Erskine's Order. *Id.* 473.

#### 11. Usher.

Order vacating place of usher. Beame's Orders, 222.

His fees under Order, 28th Nov. 1743. *Id.* 417.

#### 12. Waiting clerks.

Two waiting clerks to each six clerk. Beame's Ord. 279. 293.

Six clerks only to take as such those articulated to worn clerks. *Id.* 298.

Their fees, under Order 28th Nov. 1743. *Id.* 389.

Certain rules and regulations they are to observe. *Id.*

By virtue of their offices entitled to act as solicitors. *Id.* 466.

Their fees under Lord Erskine's Order. *Id.* 473.

#### 13. Warden of Fleet.

The warden's certificate of a prisoner being in his custody for contempt for non-payment of costs taxed, is sufficient to found a motion for a sequestration without any affidavit of demand, and refusals to pay. *Phillips v. Stephenson*, 11 Price, 473. PR. SEQUESTRATION.

Inquisition finding two negligent escapes, per warden of the Fleet, is forfeiture of the office, though but for small sums. So is one voluntary escape a forfeiture. *Col. Leighton's Case*, 2 Vern. 173.

Warden of the Fleet is but tenant for life; on his forfeiture, the office belongs to the reversioner and not to the crown. *Id.* *ib.*

In case of an inquisition finding a forfeiture by the warden of the Fleet, whether it ought to find what estate the warden had in the office? *Id.* 174.

Court cautious how they pass a patent for the warden



of the Fleet, because it may occasion a general escape for the prisoners. *Id. ib.*

Warden of Fleet attends courts of chancery and exchequer by two deputies; and therefore, no attachment will lie against him, because he is supposed to be always personally in court. It is common to suspend clerks of court and the warden of the Fleet, and in this case upon a motion, the court granted an order for a sequestration, which is a kind of suspension nisi. *Anon. Mos. 236.*

Escape lieth not against the warden of the Fleet for escape of one in execution for breach of a decree. *Anon. 2 Freem. 146. JURISDIC.; PR. DECREE.*

## LXII. ORDER.

1. General orders concerning orders.
2. Construction and effect of.
3. Entry and drawing up of.
4. Showing cause against, suspension or discharge of.
5. Service of.
6. Amendment of.

### 1. General orders concerning.

Orders are ineffective when made without the court being informed of the last material order. *Beane's Order, 19.*

And not to be explained on private petitions. *Id. 20. 215.*

Are to be set down by registrar as pronounced. *Id. 20.*

Are to be explained on public motion only. *Id. ib.*  
No draught of order to be delivered by registrar to parties without his keeping a copy. *Id. ib.*

Order of reference to contain opinion of court. *Id. ib.*

Special orders, contrary to general rules of court, to contain their particular grounds. *Id. 22.*

None for confirming report, without day given. *Id. ib.*

When final, not to be made upon petition. *Id. 35. 215.*

Not to be altered, &c. on petition. *Id. 36. 215.*

When to be stayed on petition. *Id. 36.*

For setting down cause, pleas, &c. to be carried to registrar in due time. *Id. 254.*

Orders on petitions to be ineffective, unless drawn up and entered within a certain period. *Id. 274.*

Within what periods to be entered. *Id. 290.*

Form of order when full costs are given on allowance of demurrer, under *Ld. Rosslyn's order*, 6th Feb. 1792. (*Beame's Order, 456.*) *Pilkington v. Wignall, 2 Mad. 348. PR. REG. GEN. C. OF; PR. COSTS.*

### 2. Construction and effect of.

Generally speaking, an order takes effect from the time it is made. *Jones v. Roberts, 1 M'Clel. & Y. 567.*

Order of dismissal does not take effect till drawn up, and then it acts retrospectively from time of making. *Verlander v. Codd, 1 S. & S. 94.*

Where one of the terms of staying decree till after trial of appeal in House of Lords, was that defendants should give security for the amount of certain rents and profits decreed to be paid by them to plaintiff: Held, that it lay upon defendant to verify that amount by affidavit, and to propose and perfect security to master's satisfaction, without any previous steps to be taken by plaintiff, otherwise, the decree to be carried into execution. *Edwards v. Morgan, id. 258. PR. DECREE, STAYING EXECUTION OF.*

Where an order was made for payment into court of 50 per cent., on subscriptions of the parties, this was

held to mean not a payment of half the gross amount of the subscriptions, without regard to the parties contributing, as a condition of continuing the injunction, but a separate payment of one moiety of his individual subscription by each subscriber, and that the injunction was to be dissolved against such parties only as did not pay it, and to be retained in favour of such as did. *Marryatt v. Noble, 1 M'Clel. & Y. 101.*

Plea and answer cannot be filed until demurrer actually taken off file, after order for that purpose. *Cust v. Boode, 1 S. & S. 21. PR. PLEA; PR. ANSWER; PR. FILING PLEADINGS; PR. DEMURRER.*

Held that "the costs of and occasioned by the application," include the costs of an interlocutory order made in pursuance of part of the application. Costs of the day can only be obtained by a special order at the time. *Exp. Green, 1 G. & J. 188. BANKCY. COSTS.*

Order to dismiss a bill for want of prosecution, operates from the time of its being pronounced, and therefore a replication filed afterwards, though before service of the order, does not prevent its effect; but the practice not being previously settled, the bill was restored on terms and payment of costs. Some orders made on motions of course, e. g. that to answer amendments and exceptions together, operate from the time of service only. *Lorimer v. Lorimer, 1 Jac. & W. 284.*

Exceptions to a report of impertinence may be taken after an order to expunge, until that order has been acted upon, not necessary to take objections before the master previous to excepting to a report of impertinence. Under the circumstances of the case, the defendant was at liberty to take a general exception, without setting out the particulars in which he alleged the report to be erroneous. *Norway v. Rowe, 1 Mer. 135. PR. EXCEPTIONS TO REPORT OF IMPERTINENCE.*

On a plea to a bill of discovery, the V. Ch. being of opinion that a *cestui que trust* could not file such a bill without the trustee in whom the legal estate was vested, directed a case for the opinion of a court of law, on the question where the legal estate actually was, and ordered the plea to stand over till the return of the judge's certificate. The parties not being able to agree on the case, a motion for leave to amend the bill by adding the trustee as a plaintiff, pending the V. Ch.'s order, refused. *Cholmondeley v. Clinton, 2 Mer. 71. PR. AMENDMENT; PR. PLEA.*

Though order be made on petition in bankruptcy, directing costs to be paid to the petitioner personally, solicitor does not lose his lien for his costs. *Exp. Bryant, 1 Mad. 49. SOL. & CTR.; LIEN.*

Upon order that defendant shall be released from Fleet prison, on paying costs of contempt, or tender of the same, the warden of Fleet must release him on affidavit of tender of costs. *Anon. 1 Mad. 109. PR. PRISONER, DISCHARGE.*

Exceptions to report of impertinence cannot be taken after impertinence is expunged, nor without special order, while the order to expunge remains in force. A report of impertinence having been obtained by surprise, the master was ordered to abstain from acting on order to expunge until exceptions had been argued. *Mortimer v. West, 3 Swan. 228. PR. EXCEPTIONS; PR. IMPERTINENCE.*

Exceptions to report of impertinence cannot be taken, nor be set down for argument after an order to expunge, without special leave. *Wadman v. Birch, id. 230. EXCEPTIONS; IMPERTINENCE.*

After an order in bankruptcy for liberty to bring an action, with special direction for a production of papers, and not to set up the bankruptcy, a bill of discovery cannot be filed. *Cooke v. Marsh, 18 Ves. 209. BILL OF DISCOVERY.*

An order for a cause to stand over, with liberty for

the plaintiff to amend his bill by adding parties, is in its nature an order by consent, and therefore cannot be appealed from. *Beresford v. Adair*, 2 Cox, 156. PR. APPEAL.

Practice as to reference of an answer for impertinence, after an order nisi to dissolve an injunction. *Jennings v. Walker*, 1 Cox, 178. PR. REFERENCE FOR IMPERTINENCE.

An order for appearing gratis, implies that the defendant shall pay no day over. *Servoise v. O'Carroll*, 2 P. W. 368.

If the defendant is in contempt for not answering, and on motion he obtains time to answer, if it be not expressly ordered that all contempts in the meantime shall be stayed; the plaintiff may go on and prosecute the defendant for not answering. *Anon.* 1 Vern. 104. PR. CONTEMPT.

### 3. Entry and drawing up of.

The vendor may confirm an order nisi obtained by the purchaser, if the latter neglect to do so. *Chillingworth v. Chillingworth*, 1 Sim. 291. VENDOR & PURCHASER.

Where by mistake of registrar in the name of the cause, the order to dismiss was drawn up by defendants after plaintiff had undertaken to speed cause, the plaintiff must indemnify defendant against costs of the order. *Hibberton v. Cooke*, 4 Mad. 248. PR. COSTS; PR. OFFICERS OF COURT, MISTAKE BY.

Order on peremptory undertaking to speed the cause entered *nunc pro tunc* of course, on motion, without notice, about two years afterwards. *Dixon v. Shum*, 18 Ves. 520. PR. ORDER.

Order of a preceding Id. Ch. not to be reheard upon minutes, but must first be drawn up. *Taylor v. Popham*, 15 Ves. 72.

After motion to amend the bill, and that amendments and exceptions shall be answered together, if the exceptions are answered before the order is drawn up, it is regular. *Partridge v. Haycroft*, 11 Ves. 578. PR. EXCEPTIONS.

To enter an order *nunc pro tunc*, is a motion of course, where the party entitled to it comes recently; but after a length of time there ought to be notice of such motion. *Anon.* 3 Atk. 521.

As the manner of drawing up orders is of long standing, *Ld. Hardwicke* said he would not alter them; but wished they were framed with the same simplicity as orders made by the courts of law. *Baker v. Hart*, 2 Atk. 488.

Orders must be drawn up and entered by the registrar before they bear authority; for the registrar's minutes are only a warrant for an order. *Anon.* 2 Frec. 46.

A motion cannot be made upon a decretal order till it is passed with the registrar. *Smith v. Reynolds*, Mos. 69. PR. MOTION.

### 4. Shewing cause against, suspension or discharge of.

Time for shewing cause against conditional orders. Gen. Rule, 18th June, 1803, 1 Scho. & L. 178.

Where an order had been obtained, that service of a subpoena on the attorney of the defendant, who resided abroad, and had brought an action at law against the plaintiffs, should be good service, but such order was obtained, and the subpoena issued and served two days before the filing of the bill, the court refused to discharge the order for irregularity, holding that the irregularity, if any, had been waived by a subsequent appearance of the defendant. *Royal Exchange Assurance Corp. v. Short*, 1 Y. & J. 570. WAIVER.

Second order to dismiss cannot be obtained on day

on which former order to dismiss is discharged. *Fox v. Morewood*, 2 S. & S. 325.

Where, under order made in a creditor's suit, supplemental bill is filed by a creditor, not a party to original suit, on behalf of himself and other creditors, to have the benefit of the decree in that suit, the propriety of the order which authorised creditor to file supplemental bill cannot be questioned at hearing of supplemental cause. *Houlditch v. Marq. Donegal*, 1 S. & S. 491. PR. CREDITOR'S SUIT; BILL SUPPLEMENTAL.

Applications to discharge orders for irregularity, must be made without delay. The court of exchequer, like chancery, is always open. *Joseph v. Simpson*, 10 Price, 25. PR. IN EXCH.

Order discharged, on ground that costs of two previous applications, which were refused with costs, had not been paid. *Killing v. Killing*, 6 Mad. 68. PR. COSTS.

If, however, costs are not taxed, non-payment is no objection. *Id. ib.* note (6).

An order, dismissing a bill for want of prosecution, obtained after an injunction had been granted, restraining the defendant from proceeding in an action at law, on the plaintiff's undertaking to give judgment, to be dealt with as the court should direct, and not to bring any writ of error, was discharged. *James v. Bion*, 3 Swan. 234.

Order to dismiss bill, not served before bill is amended, is a nullity, and it is not necessary to move to discharge it. *Tanner v. Dean*, 4 Mad. 176. PR. ORDER TO DISMISS; PR. AMENDMENT.

Application to suspend an order of the court, till an appeal of which notice had been given should be determined, would be more properly made to the court of appeal, particularly where that court has already interfered in the cause; but the court will suspend their order for a given period, and to a certain extent, on motion, for the purpose of giving the party an opportunity of applying to the appellate court. *Lewis v. Morgan*, 5 Price, 468. PR. APPEAL.

Order to dismiss for want of prosecution, after an abatement, although irregular, not to be regarded as a nullity; consequently, that order must be discharged, before the plaintiff can obtain an order to revive the suit. *Boddy v. Kent*, 1 Mer. 361. PR. ABATEMENT & REVIVAL.

Order to dismiss for want of prosecution, after the regular time elapsed, and an injunction having issued on the merits, not to be discharged for irregularity, although obtained, upon motion, by the defendant without notice. *Hannam v. South London Waterworks Comp.*, 2 Mer. 61.

On motion to set aside proceedings, as *infra dignitatem*, on affidavit that demand does not exceed 40s., court will not enquire into amount, if affidavit be put in, on showing cause against rule, that demand exceeds that sum, but will at once discharge the rule with costs. *Branker v. Massey*, 2 Price, 8. JURISDICT. INFRA DIGNITATEM.

Order to dismiss the bill for want of prosecution, though regular according to the present practice, not requiring notice, if before replication, nor the six clerks' certificate at the time of making the motion, discharged, without costs, upon the defendant's laches. *Browne v. Byne*, 1 V. & B. 310. LACHES.

The subsequent order, extending an injunction against proceeding at law to stay trial, not discharged separately, but the injunction, as extended, must be dissolved generally upon the answer by the usual order nisi, subject to shewing exceptions for cause, or the undertaking to shew cause on the merits. *Earnshaw v. Thornhill*, 18 Ves. 485. PR. INJUNCT.

After an order for confirming the report nisi, filing exceptions, and making the deposit with the registrar, are no cause to prevent that order being made abso-

lute, unless an order for setting down the exceptions to be argued is obtained, which may be done either by the plaintiff or defendant. The order confirming the report, was discharged on payment of costs. *Gildart v. Moss*, 4 Ves. 617. **PR. CONFIRMATION OF REPORT; PR. EXCEPTIONS.**

An order to examine a defendant as a witness, saving just exceptions, is an order of course, and cannot be discharged upon a suggestion that the defendant, by his answer, appears to have an interest: the objection must be reserved until the deposition be offered to be read in evidence. *Lee v. Atkinson*, 2 Cox, 413. **EVID.; PARTY DEFT.**

Decretal order cannot be discharged upon motion, though made by consent, and surprise alleged. *Anon.* 1 Ves. J. 93.

An order was made that the plaintiff should set down his cause to be heard within a limited time, or that the bill should be dismissed without further order: in the mean time, the suit abated by the death of a defendant. This abatement suspends the effects of the former order. *Gregson v. Oswald*, 1 Cox, 343. **PR. ABATEMENT & REVIVOR.**

Motion to discharge an order, to refer an answer for impertinence, obtained after notice of motion to dismiss, refused. *Kinworthy v. Allen*, 1 Bro. C.C. 400. **PR. NOTICE OF MOTION TO DISMISS.**

It is a known and established rule, that an appeal does not lie against an order made by the consent of parties. *Toder v. Sansam*, 1 Bro. P. C. 468. **PR. APPEAL.**

Motion is proper step to discharge order for commission to examine on master's certificate. *Chaffin v. Wills*, Dick. 377.

Orders made on petition not discharged on motion. *Bishop v. Willis*, 2 Ves. 113.

The master of the rolls may discharge an order made by the chancellor ex parte, or on a motion of course. *Davy v. Seys*, Mos. 71. **PR. JURISDICT.; MASTER OF ROLLS.**

A party may move to discharge an order, though he is in contempt for not obeying it. *Hill v. Hissel*, Mos. 258. **PR. CONTEMPT.**

### 5. Service of.

An order on two solicitors, as partners, is not duly served by serving it on one of them, and leaving a copy at the place where the partnership business is carried on. *Young v. Goodson*, 2 Russ. 25. **PARTNERS.**

When a party absents himself to avoid personal service of an order to pay money, or a subpoena for costs, the court will substitute service at his dwelling house, and on his clerk in court; but an order for service at the dwelling house only is irregular. *Farrow v. White*, 1 Jac. & W. 643. **SERVICE, SUBSTITUTED.**

Order to dismiss bill, not served before bill is amended, is a nullity, and it is not necessary to move to discharge it. *Tanner v. Dean*, 4 Mad. 176. **PR. MOTION TO DISCHARGE ORDER; PR. AMENDMENT.**

Service of order to pay money ordered, under circumstances, on defendant's clerk in court. *Anon.* 4 Mad. 462.

Order to dismiss bill obtained, but not served till eight months after; meanwhile, order to amend bill obtained: Held, order was regular. *Young v. Smith*, 3 Mad. 196. **PR. ORDER TO AMEND; LACHES.**

Service of order of court on servant of party not at his dwelling house, held insufficient. *Anon.* 2 Price, 4.

Service of all process, intended to bring a party into contempt, should be personal, if possible: in what case personal service dispensed with. *Weston*

*v. Faulkner*, 2 Price, 2. **PR. CONTEMPT, SERVING PROCESS OR.**

Service of an order, without producing the original, not good, unless that production is waived. *Wallis v. Glynn*, 19 Ves. 380. **S. C. Coop. 282.**

For the purpose of commitment under short order to pay money, the person serving the order must have authority to receive the money. *Wilkins v. Stephens*, 19 Ves. 117. **PRIN. & AGENT; AUTHORITY; PR. COMMITMENT.**

Depositions of a defendant examined, without service of the order for liberty so to do, cannot be read, being a surprise on the other party. *Mulvany v. Dillon*, 1 Ball & B. 413. **PR. EVID.**

Upon an application for the writ of *ne exeat regno*, no subpoena is served; but, upon personal service of the writ, the party is bound to appear, and to put in his answer, and then he may apply to supersede the writ, but not upon his affidavit. *Russell v. Asby*, 5 Ves. 96. **NE EXEAT REGNO; PR. SUBPENA.**

Exceptions being allowed to an answer in an injunction cause, plaintiff obtained an order to be at liberty to amend, and that the defendant might answer the exceptions and amendments at the same time; if the answer to the exceptions be filed any time before the order to amend, &c., is served, the order must be discharged. *Paty v. Simpson*, 2 Cox, 392. **LACHES.**

An order having been made against the defendant for a sequestration for non-performance of the decree, an application was made to discharge the order for irregularity, the defendant, by his affidavit, positively denying that he had been served with the order nisi: the court would not discharge the order, but stayed the sequestration for a fortnight, to give the defendant an opportunity of complying with the directions of the decree, by executing certain deeds, &c. *Shuttleworth v. Lonsdale*, 2 Cox, 47. **PR. SEQUESTRATION.**

Answer reported insufficient: plaintiff obtained order to amend, and that defendant may answer amendments and exceptions at same time. Defendant may answer exceptions alone, if put in before this order is served. *Bethuen v. Bateman*, Dick. 296.

An order which is made on hearing counsel on both sides, need not be served. *Bambridge v. Castel*, Mos. 199.

No contempt for disobedience of an order, unless the party is served with a writ of execution of it. *Moyser v. Peacock*, 3 C. R. 22. **PR. CONTEMPT.**

A receiver need not be served with a writ of execution of a decretal order, but only with a copy; and if he disobeys, shall be committed. *Macarty v. Gibson*, Mos. 40. **PR. RECEIVER.**

### 6. Amendment of.

Misnomer in order to dismiss for want of prosecution, replication filed after such order drawn up and served, will not be taken off file. *Verlander v. Codd*, 1 S. & S. 94. **PR. TAKING PLEADINGS OFF FILE.**

Order of dismissal does not take effect till drawn up, and then it acts retrospectively from time of making. *Id. ib.*

Court will not, on motion, after an order for reference, direct master to enquire (if he have found that good title can be made to premises, the subject of suit for specific performance,) when such good title could be first made. Such direction should have been applied for at hearing. *Lubin v. Lightbody*, 8 Pri. 606. **PR. INQUIRY BEFORE MASTER.**

Mistake in title of order for sequestration, by omission of the words "and others," allowed to be rectified by amendment, inserting the words omitted. *Louten v. Mayor, &c. of Colchester*, 2 Mer. 395.

Order for time to answer, not corrected by extend-

ing it to the usual order for time to plead; answer, or demur, not demurring alone. *Philips v. Gibbons*, 1 V. & B. 184.

A mistake in the title of an order amended, though to charge a surety, that gave a recognizance to abide the order for hearing. *Sparring v. Lynn*, 2 Vern. 376. S. C. Prec. Chan. 115.

## LXII. OUTLAWRY.

See also tit. OUTLAWRY.

Plea of outlawry need not be on oath. *Masters v. Bush*, 1 Ch. Ca. 258. 2 Freem. 143. *Prat v. Taylor*, id. 237. *Contrà, Hulst v. Hulst*, Toth. 73. *Parry v. Bowden*, 2 Vern. 37. It need not, it seems, be on oath, if there be only the common averment of the identity of the person. *Took v. Took*, 2 Vern. 198. To avoid pleas of outlawry, you may make all they that have outlawries against plaintiff, defendants. S. C. For precedents of pleas of outlawries, see Curs. Canc. 196.

If after plea of outlawry allowed, outlawry be reversed, plaintiff having paid costs of plea, may take out new subpoena to answer. Exch. Ord. (11), O'Keefe's Ed. 7.

Plea of outlawry is bad where plaintiff sues as executor or administrator. *Arnold v. Arnold*, Toth. 76. *Swan v. Porter*, Hard. 60. *Killigrew v. Killigrew*, 1 Vern. 184. Or as *prochain ami*. Mitf. Pl. 186. *Beame's Pleas*, 104.

So if it be any suit for that duty, touching which relief is sought by the bill. *Beame's Ord.* 175. *Philips v. Gibbons*, 1 Ves. & B. 114. S. P.

And in such case it will be disallowed of course, as put in for delay. *Beame's Ord.* 175.

Plea of outlawry had, because the outlawry was before the last general pardon. *Trion v. Brocas*, Toth. 142. But plaintiff in such case ought to reply, so as to make himself capable to have the benefit of the pardon, by showing that he was not a person excepted. *Swan v. Porter*, Hard. 60.

Outlawries must be pleaded all at one time, or the plea will be overruled. *Whitney v. Strachey*, Toth. 142.

No plea of outlawry to be allowed without pleading the record *sub pede sigilli*. *Beame's Ord.* 27. Wy. Pr. Reg. 326. Mitf. pl. 185. And therefore it need not be set down with the register, unless the plaintiff conceive it, through mispleading, or otherwise, to be insufficient. *Id.* 175; in which case the plea must be set down, in chancery, by plaintiff; in the exchequer, by defendant. *Chapman v. Lansdown*, 2 Anst. 554.

Plea by defendant that plaintiff has been outlawed, is good. *Orrell v. Banks*, Toth. 142. So long as the outlawry remains in force. *Beame's Ord.* 175. *Venables v. Foyle*, 1 Ch. Ca. 12. Outlawries overruled. *Spry v. Coryton*, Toth. 143. *Kingston v. Pritchard*, id.

PARTY, see PR. PRODUCTION OF PARTY.

## LXIII. PARTY PLAINTIFF AND DEFENDANT.

See also, PR. EVID. 18; 28. (j); 28. (k).

1. Party plaintiff, rights, duties, &c.
2. Party defendant, rights, duties, &c.
3. Strangers, when they may be heard, &c.

### 1. Party plaintiff, rights, duties, &c.

The names of persons made plaintiffs in a bill, without their authority, ordered to be struck out with

costs to be paid by the solicitor, their application after they were apprised of the fact, having been made without delay. Where persons who have been made plaintiffs without their consent have, after the fact has come to their knowledge, acquiesced for a considerable period, their names will not, on their application, be struck out of the bill. *Semble. Wilson v. Wilson*, 1 Jac. & W. 457.

Motion by some of several plaintiffs to have bill dismissed against them with costs, granted on terms. *Holkirk v. Holkirk*, 4 Mad. 50. PR. MOTION TO DISMISS.

Co-plaintiff, as next friend, struck out, his evidence being necessary; but as a general rule, giving security for the costs incurred. *Witts v. Campbell*, 12 Ves. 493.

Order that the name of an infant plaintiff may be struck out that he may be made a defendant. *Tappen v. Norman*, 11 Ves. 563. INFANT.

Order to strike out names of two plaintiffs, on giving security for costs made without consent. *Lloyd v. Makeam*, 6 Ves. 145.

Evidence of a plaintiff being necessary, and defendant refusing to consent to his examination, the bill on motion amended by making him a defendant, and replication withdrawn on terms of costs, amending defendant's copy, and requiring no further answer. *Motteux v. Mackreth*, 1 Ves. 142. PR. EVIDENCE; PR. AMENDMT.

Defendant at liberty to examine plaintiff as witness. *Troughton v. Getley*, Dick. 382. *Sed quere*, overruled, Dick. 799.

Application that plaintiff may be examined as witness, refused. *Ly. Kilbury v. Crew*, id. 60.

If heir at law is plaintiff to bill to subvert will, and he fails, he pays costs; otherwise if defendant to bill, to support will. *Johnson v. Gardiner*, id. 313. S. P. *Gough v. Botel*, id. 306.

Bill by two plaintiffs dismissed as to one. *Cemmel v. Black*, id. 513.

Bill by trustee in nature of a bill of interpleader, court gave leave to one of the defendants to examine one of the plaintiffs as a witness. *Armiter v. Swanton*, Ambl. 393. WITNESS, COMPETENCY OF.

The court cannot make an order to examine a plaintiff *de bene esse*, saving just exceptions, though they will make such order to examine a defendant; but the defendant ought to have demurred to such immaterial plaintiff; if a corporation would make use of one of their own members as a witness, they must disfranchise him. *Mayor, &c. of Colchester v. —*, 1 P. W. 695. PR. EXAMON. DE BENE ESSE; WITNESS, COMPET. OF.

A plaintiff in a cause cannot be made a witness, but a defendant may, because he is forced into the suit. *Casey v. Beachfield*, Prec. Chan. 411. S. C. Gilb. Eq. Rep. 98. PR. EVID. WITNESS, COMPET. OF.

A co-plaintiff though but a trustee, cannot be examined as a witness for the other plaintiff. *Phillips v. Dk. of Bucks*, 1 Vern. 230. PR. WITNESS, COMPET. OF.

### 2. Party defendant, rights, duties, &c.

See also, EVIDENCE, 18; 28. (k).

Defendant not being the party seeking relief, therefore is not entitled to apply for an interlocutory order for his own security or relief as to the subject matter of the suit, unless the object of his motion may be imposed as a condition on an order applied for by the plaintiff. *Wynne v. Griffith*, 1 S. & S. 147. PR. INTERLOCUTORY ORDER.

There being no issue joined between two co-de-

endant, answer of one cannot be read against the other, even as to costs, other than as a suggestion, on which the court may direct an enquiry before master. *Cherret v. Jones*, 6 Mad. 267. COSTS; EVIDENCE; ANSWER.

If one of two defendants sets down cause, he need only serve plaintiff with subpoena to hear judgment, and not his co-defendant. *Clarke v. Dunn*, 5 Mad. 474. PR. SUBPOENA TO HEAR JUDGMENT. SERVICE OF.

Order for examining a defendant by a co-defendant, on the allegation of no interest in the matter, to be examined to; that being the true construction of the general form, that he is not interested, or not in the matters in question in the cause; and any objection to his evidence must be taken at the hearing. *Murray v. Shadwell*, 2 V. & B. 401. PR. EXAMON.

Ground of permitting defendant to be examined for a co-defendant, that the plaintiff might unite distinct claims, with the view of depriving the parties of each other's evidence. Ground of practice, requiring for the examination of a defendant by a co-defendant a general allegation of no interest, or none in the matters in question in the cause, that though he may have no direct interest in the subject of examination, he may in the result, have an interest in the subject, the effect, perhaps, of that examination. *Id.* 405.

A decree made between co-defendants, upon evidence arising from pleadings and proofs between plaintiffs and defendants. *Cowry: Caulfield*, 2 Ball & B. 255. DECREE.

Defendant not entitled to an issue or enquiry to establish a cause relied on by his answer, but omitted in proof. *Savage v. Carroll*, 1 Ball & B. 548. PR. ISSUE AT LAW.

Order by one defendant to examine another, not of course after, as before a decree. In a special case to ascertain who actually received money, all the trustees having signed the receipt, the court refused to discharge the order made two years before, but required the examination without delay. *Franklyn v. Colquhoun*, 16 Ves. 218. PR. EVIDENCE.

A defendant, by decree confirming the master's report, entitled to balance reported due to him, with interest, though no offer, by bill praying an account, to pay it. Defendant may enforce a decree confirming a report in his favour. *Bodkin v. Clancy*, 1 Ball & B. 216, 217. DECREE.

Defendant cannot revive, except after a decree to account, or where the defendant has some interest in the further prosecution of the suit, not therefore where his only object was to dissolve an injunction, and proceed at law. *Horwood v. Schmides*, 12 Ves. 311. PR. ABATEMENT. & REVIVOR.

After decree suit may be revived by defendant, or by his representatives, if dead. *Williams v. Cooke*, 10 Ves. 406. PR. ABATEMENT. & REVIVOR; PR. DECREE.

Costs as between defendants to interpleading bill. *Cowton v. Williams*, 9 Ves. 107. COSTS; INTERPLEADER.

An order to examine a defendant as a witness, saving just exceptions, is an order of course, and cannot be discharged upon a suggestion that the defendant by his answer appears to have an interest, the objection must be reserved until the deposition be offered to be read in evidence. *Lee v. Atkinson*, 2 Cox, 413. EVIDENCE; PR. ORDER.

Defendant examined as a witness, bill dismissed as to him with costs. *Weymouth v. Boyer*, 1 Ves. J. 417. WITNESS; COSTS.

An order for payment of money against a person not a party to the cause, is to be enforced, not by attachment, but by another order directing the payment within a short definite time, or in default that the party do stand committed. *Vickery v. Stocker*, 3 Bro. C. C. 372. PR. STRANGER TO CAUSE.

No defendant by his answer can affect the rights of other parties. *Southcot v. Watson*, 3 Atk. 232.

Plaintiff may examine defendant as a witness, if there is a suggestion in the order that the defendant is not interested in the cause. *Moudbury v. Isdall*, 9 Mod. 438. PR. EVID.; WITNESS, COMPETENCY. OF.

A defendant cannot revive, but in one instance, and that is after a decree to account, because in that case he is considered as an actor, for till the account is taken, it is not known on which side the balance lies. *Anon.* 3 Atk. 691. PR. ABATEMENT. & REVIVOR.

A defendant having been examined under the usual order as a witness, plaintiff may have a decree against him upon other matters to which he was not examined. *Nightingale v. Doid*, Amb. 583. S. C. Mos. 229. PR. WITNESS.

Co-defendants are not deprived of the evidence of each other by being so joined in suit; but plaintiff, except in case of trustees, cannot examine defendant. *Gibson v. Albert*, 10 Mod. 19. *Sed quere*, 9 Mod. 438. PR. EVID.; WITNESS, COMPETENCY OF.

A necessary defendant being beyond sea, upon affidavit thereof, and that plaintiff knew not whether he was living or dead, he had an order upon motion to proceed against the other defendants, without prejudice, and afterwards had a decree without bringing such defendant to hearing. *Walley v. Walley*, 1 Vern. 487.

### 3. Strangers, when they may be heard, &c.

#### See also PL. PARTIES.

The court has no jurisdiction to order, upon motion, a person not a party to the cause to pay into court the arrears of an annuity granted by him to a defendant against whom a sequestration had issued for want of a sufficient answer, unless the grantor has, by his conduct, waived the objection to the jurisdiction. But he may notwithstanding, and without applying for the leave of the court, obtain from the grantees a release of the annuity. *Johnson v. Chippindale*, 2 Sim. 55. PR. SEQUESTRATION; CHOSE IN ACTION.

Injunction may be obtained on motion to restrain purchaser, under decree, not party to cause, who has not paid his purchase money, from committing waste on the property purchased. *Casamajor v. Strobe*, 1 S. & S. 381. INJUNC.; VEND. & PURCH.

Plaintiff in title cause, lessee of vicar, ordered on motion of defendant, to bring in, &c. books, &c. stated to be in his possession by affidavit, and to belong to vicar who was not a party to cause. *Fareman v. Cooper*, 11 Price, 515. PR. PRODUCTION OF DEEDS; PL. PARTIES.

On motion by trustees to dissolve injunction obtained against them, *cestui que trusts* not parties to suit cannot be heard. *Ball v. Tunnard*, 6 Mad. 275. TRUSTEES AND CESTUI QUE TRUSTS.

Person, not party in cause, may petition to have deeds belonging to him, and which had been brought into master's office under decree, delivered out to him. *Marriott v. White*, 1 S. & S. 17. PR. DELIVERY UP OF DEEDS.

Order made, that A B who had received monies on behalf of plaintiff before institution of suit, but who was not a party thereto, might be at liberty to pay money into court in trust for cause. *Frances v. Collier*, 5 Mad. 75. PR. PAYMENT INTO COURT.

Stranger to record cannot move to refer bill for scandal. *Anon.* 4 Mad. 252. *Sed quere*, see 6 Ves. 514, and id. note. PR. REFERENCE FOR SCANDAL.

Creditor, who has not shewn himself to be such, cannot petition to supersede. *Anon.* 2 Mad. 281. (See table of errata there). BANKCY., SUPERSADING COMMISSION.

Commission of lunacy in a proper case, granted, upon the application of a stranger; and without regard to his motive: the lunatic being a natural child; and his mother opposing it. *Exp. Ogle*, 15 Ves. 112. LUNACY, COMMISSION OF.

Where an answer is required as evidence upon a trial, the court, except in a criminal case, does not permit the record itself to go; but an office copy, unless proof of the signature is necessary; not granted, where the action is by a stranger, unconnected with the suit in equity. *Jarvis v. White*, 8 Ves. 313. PR. EVIDENCE; ANSWER.

Proceedings under a commission of bankruptcy in the secretary's office, not permitted to be used as evidence in actions, by strangers unconnected with the commission. *Id.* 314. EVIDENCE.

There is no decided case, that guardians can be appointed for a child, by a stranger, during the life of the parent; but the law will take care that the child shall be educated according to his expectations. A legacy by a stranger to a female infant, not adceded by his paying a marriage portion, and other provisions for her and her husband. A deposit of bank notes with the executors, for the depositor's sister and her children, is a gift of the money among them. *Powel v. Cleaver*, 2 Bro. C. C. 500. JURISDIC.; PARENT AND CHILD; GUARDIAN, TESTAMENTARY.

Under what circumstances an appeal may be brought from an old decree, by a person who was neither party or privy to the suit in which the decree was made. No appeal lies to the house of lords in Ireland, from the judgment or decree of any court in that kingdom. The statute of 6 G. 1. c. 5. did not introduce any new law, but is only declarative of what the law was before: but this act is now repealed by the statute 22 G. 3. c. 53. *Vernon v. Vernon*, 1 Bro. P. C. 440. PR. APPEAL.

Specific performance decreed at the instance of a person entitled to the benefit of an agreement, though not a party to it. *Hook v. Kinnear*, 3 Swan. 417. SPEC. PERF.; PL. PARTY.

A mortgagee of part of estate in Ireland files his bill of foreclosure in court of chancery, in England, and obtains the usual decree: a mortgagee of other part of same estate files his bill of foreclosure in court of chancery in Ireland, and on hearing of cause, desired that decree of English chancery might be read, to intent that decree in Irish chancery might be made agreeable thereto; but refused, because present plaintiff, though defendant in former cause, was not brought to a hearing on that cause, and consequently was no party to that decree. *Everard v. Ashton*, 3 Bro. P. C. 561. PR. DECREE.

#### LXIV. PAUPER.

See also PR. COSTS, 10. (cc).—PR. EVID. 11. (h).

Any man may defend in *formâ pauperis* upon oath. *Beame's Ord.* 44.

But except in special cases, plaintiff is to be referred to court of requests, &c. *Id.*

Not admitted to sue without certificate from a master. *Id.* 60.

Not so admitted without certificate from counsel. *Id.* 284.

Pays no fees for sealing writs. *Id.* 156. 234. 413. After admittance, no fee to be taken from by counsel or solicitor. *Id.* 215.

Nor any contract for recompence afterwards. *Id.*

A pauper so contracting to be dispaupered. *Id.* 216. So if it appear to court, he has contracted for the benefit of the suit. *Id.*

Counsel, &c. assigned to pauper by court, may not refuse, &c. *Id.*

How counsel are to move for them. *Id.* 217.

Before process of contempt be sent to great seal for plaintiff pauper, it must be signed by six clerk. *Id.* 217.

When a pauper plaintiff obtains a decree for payment of money, it is to be drawn up on stamps as in a *dives* suit. *Hansard v. Kemneys*, 1 Jac. & W. 189. DECREE; STAMP.

An appeal may be prosecuted in *formâ pauperis*. *Bland v. Lamb*, 2 J. & W. 402. APPEAL.

Proceedings are stayed until costs of former suit, same party suing in *formâ pauperis*, in cases only of great vexation. *Wild v. Hobson*, 2 V. & B. 112. PR. COSTS; PR. VEXATION; PR. STAYING PROCEEDINGS.

Bankrupt permitted to petition against commission in *formâ pauperis*. *Exp. Northam*, 2 V. & B. 124. BANKCY. PETITION.

Notice of motion by a party in *formâ pauperis*, must be signed by the clerk in court. *Gardener v. —*, 17 Ves. 387. PR. NOTICE OF MOTION, SIGNATURE OF.

Plaintiff a pauper; costs of impertinence expunged from the answer, ordered to be taxed as *dives* costs to be paid into court. *Rattray v. George*, 16 Ves. 232. PR. COSTS; PR. IMPERTINENCE.

Costs to a pauper whether more than out of pocket; *Qu. Frost v. Preston*, 16 Ves. 160. PR. COSTS.

Improper and vexatious conduct in a former suit, or a subscription, though liable to be impeached as maintenance, no ground for dispaupering. *Corbett v. Corbett*, 16 Ves. 407.

The privilege of paupers for obtaining justice, not to be perverted to injustice; the court tender as to dispaupering; costs against a pauper, upon that ground, not pressed on the recommendation of the court. *Whitelocke v. Baker*, 13 Ves. 511.

A pauper is liable to be committed for filing an improper bill. *Pearson v. Belcher*, 4 Ves. 630.

One of the defendants was admitted to sue in *formâ pauperis*; the decree ordered generally, that the costs of all parties should be taxed and paid out of the estate; the costs of the pauper defendant shall be taxed as *dives* costs. *Wallop v. Warburton*, 2 Cox, 409. COSTS.

If a trustee defendant is in the situation of being sued in *formâ pauperis*, but is clearly entitled to his costs out of estate, his costs will be ordered to be taxed as *dives* costs. *Id.* 411. PR. COSTS; TRUSTEE.

Next friend cannot sue in *formâ pauperis*, but ought not to be discharged for poverty; dangerous to displace him, though perhaps there may be a case gross enough for it. *Anon.* 1 Ves. J. 410. PROCHAIN AMT.

Pauper shall not dismiss without costs. *Pearson v. Belcher*, 3 Bro. C. C. 87. PR. DISMISSAL OF BILL.

Plaintiff suing in *formâ pauperis*, shall not amend, by leaving out defendants, without paying their costs. *Willinson v. Belcher*, 2 Bro. C. C. 272. PR. COSTS; PR. AMENDMENT.

Pauper claims as heir at law: defendant claimed under unproved will and deed disputed; bill retained with liberty to bring action; tenant ordered to pay plaintiff 150*l.* to enable him to go to trial. *Perishal v. Squire*, Dick. 31.

Indulgence of suing in *formâ pauperis*, extends only to persons suing in their own right. *Paradice v. Sheppard*, *id.* 136.

Pauper can only have pauper's costs. *Dean v. Russel*, *id.* 427.

A person having been examined *pro interesse suo*, was permitted to prosecute, and make out her right in *formâ pauperis*. *James v. Dore*, *id.* 788. PR. EXAMINATION. PRO INTER. SUO.

In a pauper cause, to save expense, and where the matter is clear, the court will refer it to the registrar, instead of a master, to compute the interest of arrears of rent. *Holder v. Chubbury*, 3 P. W. 258.

Where the plaintiff, a pauper, had a decree for the

duty and costs, and the master taxed full costs, yet on motion, ordered plaintiff and his solicitor to make oath before a master of what they had paid, or were to pay, and that to be allowed, but no further. *Angell v. Smith*, Prec. Chan. 219. Pr. Costs.

Defendant, in pauper cause, pays costs on overruling plea and demurrer. *Scatchmer v. Foulkard*, 1 Eq. Ab. 125. Id.

Plaintiff allowed to bring a bill of review, without paying the costs decreed in the original cause, upon making oath he was not worth 40l. besides the matter in question. *Fitton v. Macclesfield*, 1 Vern. 264. Pr. Bill of Review; Pr. Costs.

A pauper is liable to costs precedent to his admission. *Anon. Mos. 66*. Pr. Costs.

#### LXV. PAYMENT, ORDER FOR.

Where an order is made for the payment of money forthwith, and a short order is afterwards obtained in order to ground an attachment for non-payment, a demand must be made under the short order, and a demand under the first or general order, is not sufficient, no time for payment being fixed by it. *Lamb v. Withers*, 1 Y. & J. 453. DEMAND.

In a creditor's suit instituted by simple contract creditors, in which the assets, after the payment of the costs being insufficient for the discharge of the specialty debts, are apportioned among the specialty creditors, these specialty creditors are entitled, without contributing to the extra costs of the plaintiffs, to the use of the order for the payment of the money, and of the report founded upon it, so as to enable them to get the fund out of court. *Lechmere v. Brazier*, 1 Russ. 72. Pr. PAYMENT OUT OF COURT; CREDITOR'S SUIT.

Where legacy was, by order, directed to be paid to A B, and he dies, leaving executors, and one executor dies, on application to court, order made to pay legacy to surviving executors, without acquittance from executor of deceased co-executor. *Moodie v. Bainbridge*, 6 Mad. 107. EXECUTOR.

When order to pay costs is made on person not party to suit; motion for four-day order or commitment requires notice. *In re Partington*, id. 71. Pr. NOTICE; Pr. MOTION.

Receiver, not paying in a balance under an order, may be proceeded against personally, by commitment; a previous order, in the alternative, that by a certain day he shall pay or stand committed, is necessary, though he was under an order for payment by a certain day upon his appearance by counsel, praying time. *Davis v. Cracraft*, 14 Ves. 143. RECEIVER, DUTIES OF.

Order, under circumstances, to pay dividends to trustees or one of them. *Shortbridge's Case*, 12 Ves. 28. TRUSTEES, PAYMENT TO.

Legacy of stock at a particular age: order made upon the petition of one legatee having attained the age for a transfer of his share to his attorney. *Hill v. Chapman*, 11 Ves. 239. LEGATEE; TRANSFER.

After an order upon a party in the cause for payment of money, the proper course is an attachment, and upon the return to that, an order for commitment. *Boyes v. Id. Strathmore*, 12 Ves. 325. Pr. ATTACHMENT.

An order for payment of money against a person not a party to the cause, is to be enforced, not by attachment, but by another order directing the payment within a short definite time, or in default, that the party do stand committed. *Vickery v. Stocker*, 3 Bro. C. C. 372. Pr. STRANGER TO CAUSE.

Order to pay money out of a particular fund, gives the party a specific lien thereon. *Smith v. Everett*, 4 Bro. C. C. 64. LIEN.

Under the stat. 40 G. 3. c. 56. repealed and re-

enacted 7 G. 4. c. 46. enabling a tenant in tail of land to be purchased, to take the money without a recovery, the court will take care that the fund is clear. But to obtain an order under the act in term time, the application must be made in time sufficient to admit of a recovery being suffered. *Exp. Frith*, 8 Ves. 609. See Chit. Stat. 237. and notes. MONEY TO BE LAID OUT IN LAND; TENANT IN TAIL.

#### LXVI. PAYMENT INTO COURT.

See also Pr. INJUNCTION, 12 (f).

1. On admissions.
2. By and in cases of executors, &c., trustees and receivers.
3. On interpleader.
4. On obtaining and continuing injunction against proceedings at law and commission to examine abroad.
5. In cases of partners.
6. In cases of vendor and purchaser.
7. In other cases, and generally.

##### 1. On admissions.

See also post, subdiv. 2.

Where defendant in title cause sets up modus, and is desirous of protecting himself from costs, he should move for an order that plaintiff accepts sums admitted due by answer, or proceed at peril of costs, and court will notice such tender by minute. Notice of such motion is not necessary, nor need money be paid into court. *Davis v. Moseley*, 9 Price, 211. TITHES; MODUS; Pr. COSTS.

Though defendant in answer makes admissions which would entitle plaintiff to decree, plaintiff cannot move for payment of money into court. *Peucham v. Daw*, 6 Mad. 98. Pr. ANSWER; Pr. MOTION.

Admission by an executor, that the whole amount of the property is near 40,000l. and that the whole is invested in India on public securities, either in his name or in the name of the house in which he is a partner and subject to his disposal, unless some part is in the hands of the said house at interest, which he believes may be the case; not a sufficient admission of money in his hands to order the payment into court, of any part of it. *Freeman v. Fairlie*, 3 Mer. 39. EXOR.; ADMON. OF ASSETS.

Practice settled to move on examination, admitting money due for payment in court before the cause is set down for further directions. *Ilitch v. —*, 19 Ves. 117.

After the usual decree for an account, order on motion to pay into court the amount of the principal sums, admitted to be due by examination upon interrogatories, not extended to interest. *Wood v. Downes*, 1 V. & B. 49. INTEREST.

Order on motion to pay into court a principal sum, with interest; admitted by the answer to have been made to a greater amount. *Id. ib.*

Motion for payment of money into court, not admitted to be due even upon the examination of the defendant, but appearing due by his schedule, according to the plaintiff's calculation, refused. For such a purpose, the result of the schedule ascertaining the sum due, must clearly appear, verified by affidavit. *Quarrell v. Beckford*, 14 Ves. 177. Pr. SCHEDULE TO ANSWER.

Motion to pay money into court upon the affidavit of an accountant, that from the schedule to the answer, the examination, and the books of account, such a balance was due, refused. *Mills v. Hanson*, 8 Ves. 68. Pr. ANSWER.

Money may be ordered into court, on motion upon the ground of admission, as, by schedules or books, containing an account of receipts and payments, and referred to, so as to be part of the answer or examination. *Id. ib.*

A motion to compel a defendant to pay money into court on casting up books, must be upon the ground of admission, by reference sufficient to make them part of the examination, as much as schedules to an answer: in this instance it failed, the plaintiff going upon certain books, and the reference being generally to all. *Id. 91.*

Present practice to order payment of money into court upon admission, in the defendant's answer. *Strange v. Harris*, 3 Bro. C. C. 365.

## 2. In cases of executors, &c. trustees and receivers.

See also ante, subdiv. 1.

The purchase money of timber belonging to a lunatic's estate permitted to be paid to the receiver, in order to be by him paid into court. *In mre. Starkie*, 1 Russ. 476. **PR. RECEIVER OF LUNATIC'S ESTATE.**

Where defendant admits by answer that there is trust fund in his hands, court will always on interlocutory application, order payment into court; so where executor is debtor of testator at latter's death. *Rothwell v. Rothwell*, 2 S. & S. 217. **PL. ANSWER; ADMISSION; TRUST.**

Defendant who has covenanted to pay a sum of money to trustees of his marriage settlement, but had omitted so to do, ordered on motion in suit for performance of trusts to pay money into court. *Id. ib.* **MARRIAGE SETTLEMENT.**

The court will, in certain cases, permit an executor to transfer a principal sum of stock standing in bank in his name, and purchased out of estate of testator a considerable time before, without the dividends which have accrued in the mean time. *Della Caine v. Haywood*, 1 McClell. 16.

Money admitted by executor to be in hands of his partner, is in his own hands sufficient for the purpose of being ordered into court. *Johnson v. Aston*, 1 S. & S. 73. **ADMISSION OF ASSETS; PARTNERS.**

On a bill by an executor to recover a fund belonging to the testator, it appearing that the testator's debts were paid, and that the fund was bequeathed to infants, the court refused to have it transferred to the executor, but secured it in court for the benefit of the infants. *Orrock v. Binney*, 1 Jac. 523. **INFANT.**

Auctioneer being mere stakeholder, ordered to pay deposit money into court, after retaining his own claims out of it without prejudice. *Yates v. Farebrother*, 4 Mad. 239. **VENDOR & PURCHASER; STAKEHOLDER.**

Executor by schedule to answer, acknowledging that he had received money and lent it on promissory note (which is an improper use, though at interest) ordered to pay money into court. *Vigniss v. Henfield*, 3 Mad. 62.

Executor admitting a balance due from him to the testator upon an unsettled account, ordered to pay the amount into court, notwithstanding there were debts of the testator still outstanding, the testator having died three years before. *Mortlock v. Leathes*, 2 Mer. 491.

If attorney (being concerned as well for mortgagor as mortgagee) has been appointed receiver of rents and profits of mortgaged estates, and on order made for delivery of possession there is found to be a balance remaining in his hands, beyond what is sufficient to satisfy the mortgagee, he will be ordered to pay such balance into court, notwithstanding the general report has not yet been made, on which there may possibly be found due to him a greater sum of money than the

balance in his hands. *Lewis v. Morgan*, 5 Price, 42. **SOLICITOR & CLIENT, LIEN.**

A clear and strong case must be made out, for court to order administrator to bring personal estate unapplied into court. *Scott v. Becher*, 4 Price, 346. **ADMINISTRATOR.**

Executor not called on to lodge money, except upon affidavit of his insolvency, or an admission by him of a balance in his hands after payment of debts. *Rutherford v. Dawson*, 2 Ball & B. 17.

Court refused to order dividends received before bill filed of stock, purchased by the old government of Switzerland, to be paid into court by the trustees on application of the present government, without having the attorney-general made a party. *Dolder v. Bk. of England*, 10 Ves. 352. **PL. PARTY; ATT. GEN.**

Personal property in the hands of a testamentary guardian and executor ordered into court, there being no particular purpose to be answered by leaving it outstanding. *Blake v. Blake*, 2 Scho. & L. 26.

In bill by legatees against executor, if he admits balance due on his examination and claims no interest, court will order him to pay it into court before report. *Curgeven v. Paters*, 3 Anst. 751.

An executor having admitted a large balance of the personal estate to be in his hands, was ordered to pay the whole into court, although he stated that an action at law was depending against him for a debt to a considerable amount due from the testator, but with liberty, in case the plaintiff in the action should recover, to apply to the court to have a sufficient sum paid out again. *Yare v. Harrison*, 2 Cox. 377. **PR. PAYMENT OUT OF COURT.**

Widow being, as administratrix, possessed of property of intestate consisting of bank stock; motion to restrain her from disposing of it, and payment into court was refused; but being clearly entitled to her third, ordered to pay the two-thirds into court. *Rogers v. Rogers*, 1 Anst. 174. **INJUNCTION.**

Trust fund, which under a power in marriage settlement had been lent, decreed to be paid into court, the trustees representing it to be in danger. *Payne v. Collier*, 1 Ves. J. 170.

Testator having a debt secured on lands, gives the mortgage money to the mortgagor, and desires that he will give a reversionary interest therein to a third person, the mortgagor, selling the estate, shall bring the mortgage money into court for the use of the devisees subject to the life estate. *Lewis v. King*, 2 Bro. C. C. 600. **WILL, C. OF; MORTGAGOR & MORTGAGEE.**

Money in the funds belonging to wards of the court cannot be transferred into the name of the accountant general, to the credit of the cause, until the account is taken by a master and his report made. This does not mean that such a transfer cannot be made, but that it could not operate as an acquittance and discharge of the trustees, until they had passed their accounts. *Benerust v. Rich*, 1 Bro. C. C. 56. note (b) there. **WARD OF COURT; PR. ACCOUNT BEFORE MASTER.**

Executor ordered to pay in 1000*l.* he has collected of testator's money into the bank, in the name of the accountant general, and a receiver appointed of the whole estate, to pay in from time to time what he receives whilst the will is contesting in ecclesiastical court. *Montgomery v. Clark*, 2 Atk. 378.

## 3. On interpleader.

No affidavit is necessary to support a motion by a plaintiff in an interpleading suit for liberty to pay the money into court, and for an injunction. *Walbanke v. Sparkes*, 1 Sim. 385. **PR. AFFIDAVIT IN SUPPORT OF MOTION.**

Where two parties claim fund in hands of stakeholders, the former may make motion by consent, to



avoid expence of bill on interpleader, that stakeholders may pay money into court; but stakeholders cannot make such motion, they not being parties to the suit. *Belbee v. Belbee*, 6 Mad. 28. **STAKEHOLDERS.**

Upon an interpleading bill, *qu.* whether the money ought not to be actually brought into court before the motion for an injunction, though the practice seems to have been, that it was time enough if brought in upon shewing cause against the motion to dissolve the injunction. *Dingay v. Angove*, 3 Bro. C. C. 36. See sequel of S. C. 2 Ves. J. 304.

Tenants filing a bill of interpleader against annuitants, and bringing rents into court, paid their costs out of the rents. *Aldridge v. Thompson*, 2 Bro. C. C. 149. **LANDLORD & TENANT; PR. COSTS.**

In a bill of interpleader it is not necessary that the plaintiff should bring the money into court, unless the other side require it; but the plaintiff should by his bill offer to bring in the whole of the demand. *El. Thonet v. Paterson*, Barn. 251.

On interpleader, tenant paying money into court, is discharged. *Alnett v. Bittam*, Cary, 46.

#### 4. On obtaining and continuing injunction against proceedings at law, and commission to examine abroad.

In insurance cases it is always a question of circumstances whether, on granting commission abroad, the party obtaining it shall be required to bring the whole or any part of the money alleged to be due into court. *Marryatt v. Nobre*, 1 McClel. & Y. 101. *S. P. Jackson v. Strong*, 13 Price, 309.

A party against whom a verdict has been obtained at law, must pay money recovered into court before he can entitle himself to an injunction to stay execution, though he has since obtained a rule requiring plaintiff to shew cause why there should not be a new trial. *Austen v. Thompson*, 11 Price, 1. **VERDICT.**

Money paid into court upon an injunction and laid out, is security, and not payment. *Broughton v. Pitchford*, 6 Mad. 295. **PAYMENT, WHAT CONSTITUTES.**

Where injunction is granted against proceedings at law on instrument obtained, either as a gift or purchase in fraud of fiduciary situation of donee or purchaser, the court will not impose terms of paying money into court, if the relationship be that of attorney and client. *Goddard v. Carlisle*, 9 Price, 169. **SOLICITOR & CLIENT; FRAUD, FID. SIT.**

Plaintiff, on bill of discovery in aid of defence to action against him at law, may have on motion at sittings after term a commission to examine abroad, on payment of considerable part at least of demand of plaintiff at law into court, where the cause at law is at issue, and was entered for trial the term before the term immediately preceding the sittings, and a case of sufficient defence has been made out by bill, although the affidavit on which it has been moved is in the common form, the delay in staying trial not being sufficient ground of opposition to such an application. *Ebden v. Prince*, 8 Price, 290.

Injunction granted and continued on terms of paying demand into court, to restrain defendant from proceeding at law on a security given to defendant's testator, the latter having agreed to accept another security in lieu of it, though still remaining executory. *Dolly v. Catchlowe*, 4 Price, 147. **AGREEMENT, EXECUTORY.**

Where four of many actions against the various underwriters on policies on several ships (individually) had been tried, and verdicts passed for plaintiffs at law, the court granted an injunction to restrain plaintiffs at law from proceeding further in a

case where there was a strong suspicion of fraud in the assured, or the money being paid into court, on the ground of answer of defendants not having been put in. *Keyington v. White*, 3 Price, 164. **FRAUD.**

Court will not order plaintiff, who has obtained injunction to stay proceedings at law on bill filed for discovery, by which he seeks to establish a case of goods being charged at a much greater price than the one agreed on, to pay even the price acknowledged to be just into court, to abide the result of the action. *Parnell v. Nesbitts*, 2 Price, 149.

Plaintiff cannot amend bill to enjoin further proceedings at law after verdict, without first paying into court the sum recovered at law, although the original bill was filed before verdict. But he may be allowed to amend on paying in money by a certain day. *Harrison v. Belmont*, 1 Price, 118. **AMENDMENT OF BILL.**

Order for a commission to examine witnesses abroad, returnable without delay, pending an injunction against an action, without paying the money into court. *Cock v. Donovon*, 3 V. & B. 76.

Plaintiff having obtained injunction to restrain proceedings at law, cannot be called upon to pay into court the sum demanded at law on an affidavit of equitable grounds by one of the defendants, the answers of the others not having come in; nor will the court alternatively dissolve the injunction. *Menzies v. Rodrigues*, 1 Price, 133.

Where there have been various dealings between landlord and tenant, so as to produce an account too complicated to be taken at law, and the landlord has brought ejectment for non-payment of rent, the tenant may file a bill, before judgment at law, for an account on the foot of those dealings, and to have the balance applied to the rent claimed to be due. And the tenant need not bring in the rent under stat. 4 G. 1. c. 6. *O'Connor v. Spaight*, 1 Scho. & L. 305. **LANDLORD & TENANT; ACCOUNT.**

The plaintiff, as mortgagee, got possession of the estate, sued at law on the covenant for non-payment, and brought his bill to foreclose; this is regular, and the court will not stop the proceedings at law, unless the defendant brings in the money. *Rees v. Parkinson*, 2 Anst. 497. **MORTGAGOR & MORTGAGEE.**

Where an injunction against proceeding at law is obtained till the coming in of the answer of one defendant, who resides abroad, the plaintiff is not compellable to bring the money into court, unless on special circumstances. *Sholbred v. Macmaster*, 2 Anst. 366.

Where a verdict has been obtained at law, and an injunction bill is filed while the plaintiff at law is out of the kingdom, and an injunction obtained against him for want of his answer, the court will direct the plaintiff in equity to pay into court the money recovered, and in default thereof, will dissolve the injunction. *Potts v. Butler*, 1 Cox, 330.

Where a defendant has obtained a verdict at law, and an injunction bill is filed against him while he is out of the kingdom, the plaintiff in equity shall be put upon terms of paying the money in question into court, or otherwise his injunction be dissolved. *Sherwood v. White*, 1 Bro. C. C. 452. *S. P. Acton v. Market*, 2 Bro. C. C. 12. *Culley v. Hickling*, id. 182.

#### 5. In cases of partners.

Order for a partner to pay into court partnership money received by him contrary to good faith; but in general, a partner insisting that the balance of the account is in his favour, is not obliged to bring

into court what is in his hands, unless the other partners do the same. *Foster v. Donald*, 1 Jac. & W. 252.

Under a decree for account of proceeds of a joint adventure, on bill by one party on behalf of himself and the others, and inquiry who are concerned with the plaintiff, the master having by advertisement as usual declared those who should not come in excluded, reported several persons who had not come in to claim entitled to shares; further advertisements directed, but payment into court of those shares refused, and the decree not to be executed as to those who should not come in. *Good v. Blewitt*, 19 Ves. 336. *PR. MASTER'S REPORT; PR. DECREE TO ACCOUNT.*

Court of equity will order funds of annuity company into court, where the members are about to abuse their trust. *Cartland v. Iyster*, 1 Ridg. L. & S. 580. *PUBLIC COMPANY.*

#### 6. *In cases of vendor and purchaser.*

Purchase money paid into court is the property of vendor. *Gell v. Watson*, 2 N. & S. 402.

Court will not compel vendor to pay deposit money into court, though he retains possession of the estate, if the delay in the completion of the contract is occasioned by purchaser. *Wynne v. Griffith*, 1 S. & S. 147. *LACHES.*

Purchaser taking possession without consent or privity of vendor, ordered, on motion, before answer, to pay purchase money into court. *Blackburn v. Stace*, 6 Mad. 69. *PR. ANSWER.*

The vendor dying intestate, and having an infant heir, the purchase money being paid into court in a suit for a specific performance instituted after his death, will be retained till the heir attains twenty-one, and conveys. *Bullock v. Bullock*, 1 Jac. & W. 603. *INFANT HEIR; CONVEYANCE.*

Purchaser in possession, and objecting to title on the ground of a claim to dower, ordered to pay the purchase money into court, on the objection being removed by the widow consenting to accept an equivalent from the vendor. *Mole v. Smith*, 1 Jac. & W. 665.

Purchaser having taken possession, and exercised ownership, although good title was to be made before purchase money paid, which was not done, must nevertheless pay purchase money into court. *Wickham v. Ewered*, 4 Mad. 53.

Purchaser in possession having made alterations and improvements on estate, ordered to pay purchase money into court. *Bramley v. Teal*, 3 Mad. 219.

But otherwise where he objects to title. *Gell v. Watson*, id. 225.

Defendant being in possession, and having exercised acts of ownership, payment of the money ordered, although an infant heir was a necessary party to the conveyance. *Bradshaw v. Bradshaw*, 2 Mer. 492. *INFANT.*

Purchaser (a trustee acting on behalf of himself and others, his co-trustees, and of the cestuique trust) ordered to pay purchase money into court, the agreement having been entered into in the name of himself alone, upon affidavits that the plaintiffs (the vendors) had no notice of his acting for others, and of acts of ownership committed since possession given to him under the agreement, in opposition to the answer alleging notice, and denying any act of ownership by himself, or by any other person to his knowledge. *Crutchley v. Jerningham*, 2 Mer. 502. *TRUSTEE.*

Generally a purchaser shall not be allowed both to retain possession of the estate, and to keep his purchase money; but in a case where he was willing to give up possession, which he had taken under the

agreement, and it was a question whether there was or not a subsisting contract, the Ld. Ch. refused to order payment of the purchase money into court. *Morgan v. Shaw*, 2 Mer. 138.

Auctioneer, on motion of vendor, ordered to pay deposit into court, minus his charges and expenses; and purchaser restrained by injunction from proceeding in his action against the auctioneer for the deposit, in which action he had obtained a judgment for the whole amount of the deposit. *Annesley v. Muggridge*, 1 Mad. 593. *AUCTIONEER; DEPOSIT.*

Vendor permitting purchaser to take possession before completion of title, without stipulation as to purchase money, cannot, on motion, have purchase money paid into court. *Clarke v. Elliott*, 1 Mad. 606.

On bill by vendor for a specific performance, the court will not, before answer, make an order for payment of the purchase money, by the defendant in possession, unless under special circumstances, such as unreasonable delay, committing acts of ownership in alteration of the property, &c. In this case, the defendant being in possession, not under the agreement to purchase, but as tenant to the plaintiff at the time of the purchase, no order was made. *Bonner v. Johnston*, 1 Mer. 366.

Possession by a purchaser, according to the contract, not a ground for payment of the money into court, on objections to the title; acts of alteration or destruction against the nature of the contract, are; and slighter acts after the objections discovered effectual for that purpose, than if done with an understanding on one side that there is a title, on the other that there is not. *Dixon v. Astley*, 19 Ves. 564. *S. C.* 1 Mer. 133.

Acts of ownership amounting to waste, by alteration and conversion of property, sufficient to induce the court to order payment of purchase money into court, upon the ground that a vendor has a lien on the estate for the amount, and might have filed his bill to restrain the purchaser in possession from committing such acts of ownership. Though the bill contained no charge of such acts having been committed, the order was made on affidavit supplying the fact, the defendant not having answered, nor being in contempt, nor under any decree for time. *Cutler v. Simons*, 2 Mer. 103.

Motion against purchasers in the master's office, to pay the purchase money, refused; the estate sold being copyhold limited for life, and then in remainder, and the remainder-man man being abroad, he not having surrendered. *Noel v. Weston*, Coop. 138. *COPYHOLD.*

Motion by one tenant in common, who had agreed to sell to the other, that the latter should pay his purchase money into court, refused, where such purchaser had been before and at the time of the purchase in possession of the whole, with the approbation of the other tenant in common. *Freebody v. Perry*, Coop. 91.

Purchaser in possession objecting to title, ordered to pay purchase money into court. *Smith v. Lloyd*, 1 Mad. 83.; and though possession not admitted by answer, and only shewn by affidavit. *Boothby v. Walker*, id. 197.

Motion, for a purchaser in possession to pay money into court, refused, under the circumstances of possession given independently of the agreement to purchase, and laches on the part of the vendor in completing his title. *Fox v. Birch*, 1 Mer. 105. *LACHES.*

Vendee in possession, objecting to title, required to pay his purchase money into court, although the fact of possession appeared, not upon the pleadings, but upon affidavit only. *Burroughs v. Oakley*, 1 Mer. 52.

Order on a purchaser before conveyance to pay into court instalments due, and interest, according to the contract, the subject being a coal mine, and the purchaser in possession and working it. *Buck v. Lodge*, 18 Ves. 450.

Purchaser having taken possession, but objecting to the title, required to pay in the purchase money, or deliver up possession. *Clarke v. Wilson*, 15 Ves. 317.

A purchaser may be committed for disobeying an order to pay in his money. *Lansdown v. Elderton*, 14 Ves. 512. CONTEMPT.

In sales under a decree, it is irregular to pay the purchase money to the party: it ought to be paid into court. *Bennett v. Hamill*, 2 Sch. & L. 581. SALES JUDICIAL.

Where two purchase one lot jointly, one party will not be permitted to pay into court his moiety of the purchase money. *Durkin v. Marye*, 1 Anst. 22.

### 7. In other cases and generally.

The court has no jurisdiction to order, upon motion, a person not a party to the cause to pay into court the arrears of an annuity granted by him to a defendant against whom a sequestration had issued for want of a sufficient answer, unless the grantor, as, by his conduct, waived the objection to the jurisdiction. But he may notwithstanding, and without applying for the leave of the court, obtain from the grantee a release of the annuity. *Johnson v. Chippindale*, 2 Sim. 55. PR. SEQUESTRATION; CHOSE IN ACTION.

Where order has been obtained for payment into court by given day, a motion to rescind it will not be entertained by court till money shall have been paid in; motion refused with costs. *Dacie v. John*, 13 Pri. 117.

A solicitor cannot obtain the taxation of his agent's bill without bringing the amount into court. *Ostle v. Christian*, 1 Turn. & R. 324. PR. TAXATION; SOL. & AGENT.

If sum be reported due, and exceptions are taken to report, the money cannot be ordered to be paid into court on motion. *Creak v. Capell*, 6 Marl. 114. PR. EXCEPTIONS TO MASTER'S REPORT; PR. MOTION.

Where courts of Scotland have power to preserve property *pendente lite* instituted there, the court has no jurisdiction to that end. *Cruikshank v. Pokans*, id. 104. SCOTCH COURTS; JURISDICTION.

Where debt is ascertained, though court can only order payment by decree, it will secure money in court upon interlocutory application. *Lingen v. Simpson*, id. 290.

Order made that A B, who had received monies on behalf of plaintiff before the institution of the suit, but who was not a party thereto, might be at liberty to pay money into court in trust for cause. *Francis v. Collier*, 5 Mad. 75. STRANGER.

A sequestration having issued for non-payment of money into court, an individual in possession of a sum claimed by the party against whom the sequestration issued, and by a stranger, was ordered to pay that sum into court. *Franklyn v. Colhoun*, *Franklyn v. Thornhill*, *Rucker v. Pinney*, 3 Swan. 276. PR. SEQUESTRATION; BAILEE.

Leave given to except to master's report of costs on payment of taxed costs into court. *Exp. Leigh*, 4 Mad. 394. PR. EXCEPTIONS TO MASTER'S REPORT.

Estates being conveyed, among other purposes, to secure a debt of comparatively small amount, the court will not direct a release upon payment into court of the largest sum to which the debt can, in probability, amount; the incumbrancer being entitled

to retain the security till the debt is discharged. *Pastlethwaite v. Blane*, 3 Swan. 256. SECURITY, DISCHARGE OF.

After injunction and order for payment into court at a future time, on threat of going abroad, the court orders instant payment of money, or dissolves the injunction. *Whitehouse v. Partridge*, 3 Swan. 375. PR. INJUNCTION; PR. NON EXEAT REGNO.

General rule as to payment of money into court is, that the plaintiffs must be solely entitled, or have such an interest jointly with others as to entitle them on behalf of themselves and of those others to have the fund secured. *Freeman v. Fairlie*, 3 Mer. 29.

The court refused to order money to be paid into court, appearing upon books deposited in the master's office. *Roe v. Gudgeon*, Coop. 304.

After judgment and execution in ejectment for non-payment of rent, a bill does not lie at the suit of the tenant for an account, and to be restored to the possession on payment of what shall appear due without bringing the rent and costs into court, if the question appears to be merely whether so much rent was due and not to be of too complicated a nature, to be tried at law. The account sought in this case consisting only of three disputed items, admitted to have been paid, if at all, on account of rent, and being such as a jury might easily have investigated: the bill was dismissed with costs. It would have been otherwise, sensible, if there had been a ground of defence which could not be set up in the ejectment, but which it was unconscionable in the landlord not to admit, or if the account had been so complex that it could not properly have been taken at law. *O'Mahony v. Dickson*, 2 Scho. & L. 400. LANDL. & TEN.; ACCOUNT.

Motion for payment of money into court in future to name a day. *Higgins v. —*, 8 Ves. 581. MOTION, FORM OF.

Defendant ordered to pay money into court before answer, in a case of gross fraud appearing by affidavit of plaintiffs, and by defendant's affidavit in answer. *Jervis v. White*, 6 Ves. 738.

Defendant, on motion, ordered to pay in a balance ascertained by the report. *Gordon v. Rothly*, 3 Ves. 572.

In suit for account of tithes, defendant cannot pay money into court before answer. *Hill v. Mathews*, 2 Anst. 444. TITHES.

Upon bill by son, committee of his father, a lunatic, to set aside a voluntary settlement by him, motion for defendant to let the house, sell the furniture, &c. and bring the whole into court, refused; plaintiff not consenting. *Colman v. Croker*, 1 Ves. J. 160. DEEDS, VOLUNTARY SETTLEMENT.

Estate ordered to be sold for debts; money raised under sequestration paid into court, though contempt cleared. — *v. Bennett*, id. 89. PR. CONTEMPT; PR. SEQUESTRATION.

Where money is directed, by act of parliament, to be paid to the accountant-general, he is bound by the act to receive it; and the court will not make an order for that purpose. *Anon.* id. 56. ACCOUNTANT-GENERAL.

Before report, court refused to order balance of charges allowed against defendant upon account, and the whole alleged in his discharge, to be paid into court upon certificate by the master and defendant's examination before him: but also refused a motion take the certificate off the file. *Fox v. Mackreth*, id. 69. PR. MASTER'S REPORT.

Solicitor's bill taxed without bringing the money into court as formerly. The judgment not afterwards opened for the client to have an account taken in respect of monies due to him. *Anon.* 2 Ves. 452. PR. TAXATION OF COSTS.

On the client's neglecting to attend the master on

the taxation of the bill, the chancellor would not order him to bring the money into court, but only that the order of reference should not be discharged if he did not procure a report in a fortnight. *Anon. Mos. 68.* PR. ATTENDANCE, BEFORE MASTER; PR. TAXATION OF COSTS.

If plaintiff bring 223l. into court, execution stayed for the rest. *Stanebridge v. Hales, Cary, 47.*

#### LXVII. PAYMENT OUT OF COURT.

A sum of stock, claimed as a legacy by A, was ordered by the decree to be carried over to the account of A, "subject to the further order of the court," with a direction that it should not be sold or transferred without notice to B: Held, that the court might upon petition, and without rehearing the former decree, order the money to be paid to B, if his title appeared to be the better of the two. *Barksdale v. Abbott, 3 Russ. 186.*

In a creditor's suit, instituted by simple contract creditors, in which the assets after the payment of the costs, being insufficient for the discharge of the specialty debts, are apportioned among the specialty creditors; these specialty creditors are entitled without contributing to the extra costs of the plaintiffs, to the use of the order for the payment of the money, and of the report founded upon it, so as to enable them to get the fund out of court. *Lechmere v. Brazier, 1 Russ. 72.* CREDITOR'S SUIT; PR. ORDER FOR PAYMENT.

In a suit instituted to restrain proceedings on bill, of exchange alleged to have been given for monies lost at play, an injunction until the hearing of the cause or further order was obtained upon the answer of the defendant; the plaintiff paying into court the amount of the bills and interest; but at the hearing, the plaintiff having no evidence in support of his case, and the defendant in his answer denying all knowledge of the gambling transaction, out of which the bills were said to have originated; and, having sworn that he gave valuable consideration for them, though as to the particulars of that consideration, his statements were vague, and not very satisfactory, the bill was dismissed with costs. Under such circumstances the decree ought to direct the fund in court to be paid to the defendant without putting him to the further prosecution of the action, or awaiting its result. *Wynne v. Jackson, 2 Russ. 351.*

Where assignee of money in court to credit of cause, claiming under an assignment from the party entitled to it, petitions to have it paid out to him, he must show that party, or (if dead) his personal representatives, has had due notice of the petition. *Hurd v. Davenport, 13 Price, 735.* PR. PETITION; PR. NOTICE.

Taking money out of court of law, paid in there by rule of court, is breach of common injunction against proceedings at law. A motion for that purpose was refused. *Parke v. El. Shrewsbury, 1 M'Clel. 103.* S. C. 13 Price, 289. PR. INJON. BREACH OF.

Where legacy is given for permanent charitable purposes to trustees not having corporate character, court will not transfer fund to them without reference. *Wellbeloved v. Jones, 1 S. & S. 40.* PR. REFERENCE; CHARITY; TRUSTEE; LEGACY.

A fund carried to a separate account, paid out on motion by consent, the title to it being clear. *Heathcote v. Edwards, 1 Jac. 504.*

Money, belonging to the wife, paid to the husband, the parties being subjects of Denmark, and the law of that country not requiring a settlement. *Cayple v. Cudell, 1 Jac. 544.* HUSB. & WIFE; SETTLEMENT BY COURT; FOREIGNER.

A fund paid out to persons entitled to it, subject to the contingency of a female of advanced age having children, on their recognizance to refund in case of that event happening. *Leng v. Hodges, 1 Jac. 585.*

INTEREST, CONTINGENT.

Order for payment of money to the solicitor of the party, refused. *Edwards v. Lane, 6 Mad. 315.* SOLICITOR & CLIENT.

Sums below 10l., payable out of court to a number of persons, paid to their solicitor to save the expence of powers of attorney. *Brandling v. Humble, 1 Jac. 48.*

The court will not, under any circumstances, suffer money paid in by a purchaser of an estate sold under its order, to be paid out to a mortgagee, until a proper conveyance shall have been executed to purchaser. *Rex v. Adam, 9 Price, 660.* VENDOR & PURCH.

Where a gross sum is required to be paid out of hands of court, it is to be done by petition; but where interest only is sought, a motion is sufficient. *Anon. 4 Mad. 228.* But see *Shipbrooke v. Hinchinbrook, 13 Ves. 394.* PR. MOTION; PR. PETITION.

Court will dissolve injunction granted on ground of fraud, to restrain proceedings by assured against assurer, on terms of latter paying sums claimed into court, to await event of answer not come in, if the amount of the losses claimed be not paid into court; and they will not permit money so paid in to be taken out on ground of great lapse of time between the filing bill and putting in the answer, unless it clearly appear that the delay was gross and wilful on the part of the defendant, and that he was plainly not disposed to answer at all. *Kensington v. White, 3 Price, 164.*

Arrears of annuity ordered to be paid to widow and executrix, although no report of debt had been made, it being stated by her answer, that there was no deficiency of assets. *Skinner v. Sweet, Coop. 54.* PR. MASTER'S REPORT AS TO DEBTS; ANNUITY, ARREARS OF.

Order after the bill dismissed for payment of money out of court. *Wright v. Mitchell, 18 Ves. 293.* PR. DISMISSAL OF BILL.

Money not paid out of court on motion. *Id. Shipbrooke v. Id. Hinchinbrook, 13 Ves. 394.* But see *Anon. 4 Mad. 228.* PR. MOTION.

To get money out of the court, however small the amount, a prerogative probate is necessary. *Thomas v. Davies, 12 Ves. 417.* PROBATE; EXECUTOR.

Payment in part of a legacy, ordered on motion with consent; the funds admitted to be ample. *Pearce v. Baron, 12 Ves. 459.* LEGACY; PR. MOTION.

The rule of evidence in the accountant-general's office ought to be the same as in the court; therefore upon marriage of woman entitled to interest of fund for separate use, an affidavit was required beyond that of the marriage and identity, that there was no settlement, or agreement for settlement; without prejudice to future cases. *Clayton v. Gresham, 10 Ves. 288.* PR. ACCOUNTANT-GENERAL'S OFFICE; PR. EVIDENCE.

To obtain payment to representatives, mere production of probate is not sufficient, proof of death is now required, and that testator was the party in the cause. *Id. 289.* REPRESENTATIVES; EXECUTORS; PR. EVIDENCE.

Order for transfer, and payment out of court though cause abated, the right being clear. *Roundell v. Currer, 6 Ves. 250.* PR. ABATEMENT.

A legacy of 100l. was ordered to be paid to a person having a general power of attorney from the legatee, without any power authorizing him to receive this legacy specifically. *Carr v. Eastbrook, 2 Cox, 390.* POWER OF ATTORNEY.

In a suit for payment of creditors, the real estates of testator were ordered to be sold. A, being reported

the purchaser of one of the estates for 14,480*l.*, entered into possession, and accepted the title, and proper conveyances were executed on application by the creditors to have the purchase money paid out. The purchaser stated that the tenants of the estate had been served with a writ of right at the suit of a person who claimed the whole estate under an adverse title; but the court thought that the purchaser, having accepted the title, &c., could not prevent the money being paid out of court, and ordered accordingly. *Thomas v. Powell*, 2 Cox, 394. VENDOR & PURCH.; TITLE.

An executor, having admitted a large balance of the personal estate to be in his hands, was ordered to pay the whole into court, although he stated that an action at law was depending against him for a debt to a considerable amount, due from the testator; but with liberty in case the plaintiff in the action should recover, to apply to the court to have a sufficient sum paid out again. *Yare v. Harrison*, 2 Cox, 377. EXECUTOR; PR. PAYMENT INTO COURT.

Money devised to be laid out in land for feme covert in tail, with reversion to her in fee; she chose to have it paid to her husband: not paid without affidavit by the husband and wife that there is no settlement. *Binford v. Bawden*, 2 Ves. J. 38. HUSB. & WIFE; SEPARATE ESTATE.

Court will retain monies decreed to parties, on the applications of persons having claims upon them. *Dk. Bolton v. Williams*, 4 Bro. C. C. 430.

Where money was in court decreed to be laid out in land, the court refused it to be paid out to the person first entitled to an estate tail in it, with the ultimate remainder in fee, if any intermediate remainders should be found to exist. *Hardcastle v. Shafto*, 1 Anst. 67. MONEY DECREED TO BE LAID OUT IN LAND; TENANT IN TAIL.

Prerogative probate necessary for the accountant general to pay money out of court. *Dicker v. Horner*, 3 Bro. C. C. 240. Vide S. C. Dick. 746. WILL, PROBATE OF.

Interest ordered to be paid to wife, husband being in a state of imbecility of mind. *Bird v. Lefevre*, 4 Bro. C. C. 100. HUSB. & WIFE; IMBECILITY OF MIND.

A sum of money being in court to be laid out in lands which, when purchased, would be subject to the bond debts of testator, the debts decreed to be paid out of the fund in court. *Cattell v. Money*, 3 Bro. C. C. 256.

The court will not direct money to be paid out to an infant executrix, but will refer it to the master to enquire whether there are any debts or legacies, and to consider of a maintenance. *Cumport v. Cumport*, 3 Bro. C. C. 195.

Upon a second verdict the same as the first, but for a less sum, the last sum recovered only, and the costs of the last trial ordered to be paid out of money in court, upon an injunction to stay execution on the first, the costs of which are to be returned. *Waddle v. Johnson*, 1 Ves. J. 30.

Though a cause be abated, money may be ordered to be paid out of court, without reviving the cause, upon the consent of all the parties actually interested. *Beard v. El. Powis*, 2 Ves. 399. PR. ABATEMENT & REVIVOR.

On motion for application of money placed in bank by a former order, you must not only have a certificate that the money was paid in the bank, but that it is actually there at the time of the motion. *Anon.* 1 Atk. 519. PR. MOTION.

The court will order money out of court to person entitled to it by decree, notwithstanding death of some of the parties. *Finch v. Id. Winchelsea*, 1 Eq. Ab. 2. PR. ABATEMENT.

PERPETUATING TESTIMONY, see PR. BILL TO PERPETUATE.

## LXVIII. PETITION.

See BANKCY. XVI. 3 (b); XVII.—CHARITY, IV

1. General orders concerning.
2. What effected by.
3. Proceedings on, generally. See further, BANKCY. PETITIONS.

### 1. General orders.

No injunction to be granted, revived, dissolved, or stayed upon petition. Deame's Ord. 12. 35. 214.

Exception. *Id.* 35. 215.

No sequestration, dismissal, retainer, or final order, to be granted upon. *Id.* 35. 215.

No former order to be altered, &c., upon. *Id.* 36. 215.

But it may be stayed for small matter until court moved. *Id.* 36.

No commission for examination to be discharged upon. *Id.* 36.

Nor depositions suppressed upon. *Id.* 36.

Except on point of course first referred. *Id.* 36.

No demurrer to be overruled upon. *Id.* 36.

No commission of bankrupt to issue upon. *Id.* 43.

No commission of delegates. *Id.* 43.

Petitions, before presented, to be signed by six clerk. *Id.* 84.

Exceptions. *Id.* 84.

For subpoena returnable immediate to the master of the rolls, not to issue on. *Id.* 102.

To be filed and order entered on, before any process grounded upon shall issue. *Id.* 114.

Otherwise, process void. *Id.* 114.

Orders are ineffective, unless drawn up, &c., within certain time. *Id.* 274.

Petition to rectify minutes, to be presented within what time. *Id.* 325. 338.

Within what time a petition for rehearing must be presented. *Id.* 334. 338. 339.

### 2. What effected by.

See 52 G. 3. c. 131. as to CHARITIES.

Every direction or order of court of chancery, exchequer, &c. or by lord chancellor, &c. under authority of act to be made upon petition. 6 G. 4. c. 74. s. 8. LUNATIC TRUSTEE; INFANT TRUSTEE.

Where bill is filed merely to obtain transfer of stock standing in name of trustee, who is out of jurisdiction of court, order must be made at hearing of cause, and cannot be obtained on petition. *Burr v. Mason*, 2 S. & S. 11. TRUSTEE; TRANSFER OF STOCK.

Where object is to restrain bankrupt from harassing assignees by disputing validity of commission, it should be done by petition. *Kirkpatrick v. Dennett*, 1 S. & S. 411. PR. STAYING PROCEEDINGS; ASSIGNEES OF BANKRUPT.

Where decree directs issues to try the validity of moduses, and the plaintiff wishes to have them tried in different county from that wherein lands lie, an order for that purpose cannot be inserted in decree, but must be obtained by petition. *Sparke v. Pratt*, 1 S. & S. 366. DECREE; ISSUE AT LAW; VENUE.

Adjournment of hearing of petition in bankruptcy can only be obtained by petition in bankruptcy. *In re Hardy*, 6 Mad. 252. PR. ADJOURNMENT OF CAUSE; BANKCY. PETITION.

Bill, though against bankrupt and assignees, and praying, if it be not set aside for leave to prove what should appear to be due, is not the proper mode to try validity of commission; it should be by petition. *Bailey v. Vincent*, 5 Mad. 48. BANKCY. COMMISSION, SUPERSEDING; PR. BILL.

Reference for maintenance and appointment of guardian of an infant, ordered on petition without suit; property 200l. per ann. *Exp. Myerscough*; 1 Jac. & W. 151. *PR. REQ. FOR MAINTENANCE; INFANT MAINTENANCE; GUARD. APPOINTMENT OF.*

All applications to rectify decree must be made by petition. *Grey v. Dickenson*, 4 Mad. 464. *PR. DECREE, AMENDMENT OF.*

Where solicitor became liable to costs of taxation, but without deducting them, brought an action for taxed costs; on petition, action was staid and referred to master to tax costs of taxation, after deducting which, solicitor was ordered to be paid his costs. *Bellott v. Lingard*, 4 Mad. 379. *PR. COSTS OF TAXATION; PR. STAYING PROC. AT LAW.*

Where a gross sum is required to be paid out of hands of court, it is to be done by petition; but where interest only is sought, a motion is sufficient. *Anon.* 4 Mad. 228. But see *Shipbrooke v. Hinchinbrook*, 13 Ves. 394.

The jurisdiction under the stat. 52 G. 3. c. 101. substituting petition for information in cases of abuse of trusts for charity, and 40 G. 3. c. 56. as to money entailed, discretionary. *Exp. Rees*, 3 V. & B. 11. *JURISDICTION; STATUTES, C. OF.*

Relief for charities by petition, instead of information, under the stat. 52 G. 3. c. 101. being limited to questions of abuse of trust as between the trustees and the objects of the charity, not applicable to an adverse claim to land, as having formerly belonged to the charity. *Id. ib.* 10. *STATS. C. OF.*

Charity regulated on petition, instead of information, under 52 Geo. 3. c. 101. *Exp. Berkhamstead Free School*, 2 V. & B. 134. *CHARITY; STATUTES, C. OF.*

Decree, on default, setting aside a lease of a charity estate, with covenant for perpetual renewal, and directing an account of the actual rent; rehearing permitted on paying costs, not disturbing proceedings before the master to the draft of a report of what was due, but the money not to be paid into court before the report made: petition, not motion, the proper application. *Att. Gen. v. Brooke*, 19 Ves. 319. *PR. REHEARING; PR. MOTION.*

Tenant of a lunatic's estate restrained, on petition, from committing waste, no bill being filed. *In mre. Creagh*, 1 Ball & B. 108. *LUNACY; INJUNC. TO STAY WASTE.*

Order for the appointment of a person to act as guardian, (the father being living), and for a reference as to maintenance, but not for a receiver, upon a petition, without any suit instituted. *Exp. Mountfort*, 15 Ves. 445. But see the note, *id.* *PR. APPOINTMENT OF GUARDIAN.*

Where property of a minor is small, a guardian may be appointed, and maintenance allowed, on petition; when considerable, or it be necessary to take accounts in the master's office, or when trustees are called on to allow a maintenance, a bill must be filed. *Corbet v. Tottenham*, 1 Ball & B. 60. *GUARDIAN, APPOINTMENT OF.*

Maintenance allowed in case of children and grandchild, though the interests were contingent with reference to case of survivorship, though accumulation was directed, and no express authority for any application during minority, except for younger children surviving the eldest, in the event of his death under twenty-one, without issue. The court, however, refused to make the order, on petition, and directed a bill to be filed. *Fairman v. Green*, 10 Ves. 45. *WILL, C. OF; INFANT MAINTENANCE; INTEREST, CONTINGENT.*

A special jurisdiction under an act of parliament, must be strictly followed, therefore under an act pre-empting the necessity of recovery by tenant in tail of — to be purchased, each party must petition. *Baynes*

*v. Baynes*, 9 Ves. 462. *JURISDIC.; TEN. IN TAIL; STAT., C. OF; MONEY TO BE LAID OUT IN LAND.* If court of Exchequer will interfere at all in case of commissioners of audit investigating accounts of public functionary, it will not in a summary way on petition and motion, but on bill only. *Exp. Colebrooke*, 7 Price, 87. *PUBLIC ACCOUNTS.*

Court will not determine in whom is the right to appoint a steward, on petition for delivery of deeds, &c. to the appointee of one of the parties. *Mott v. Burton*, 7 Ves. 201. *PR. DELIVERY UP OF DEEDS; TITLE.*

An infant trustee ordered to convey an estate in Calcutta, under the stat. 7 Ann. c. 19. (6 Geo. 4. c. 74.) Order upon petition, under the stat. 7 Ann. c. 19. for an infant trustee to convey to the persons absolutely entitled, or as they shall appoint, but not to convey to a new trustee, upon trusts to be executed without a bill. *Exp. Anderson*, 5 Ves. 240. *INFANT TRUSTEE.*

Specialty creditor of uncle of bankrupt, from whom real estate descended to bankrupt through elder brother, seeking to follow real assets in hands of assignees, and an inquiry as to specialty debts outstanding, and the assets, allowed to be by petition, the property being small. *Exp. Morton*, 5 Ves. 449.

Where the question of interest is not reserved by the decree, it cannot be given on petition; the object being only to carry on what is directed by the decree. *Cruise v. Hunter*, 2 Ves. J. 157. 4 Bro. C. C. 157. *INTEREST.*

Exceptions are not regularly taken to the master's report for costs only, but should be by petition. *Pitt v. Mackreth*, 3 Bro. C. C. 321. *PR. EXCEPTIONS TO MASTER'S REPORT; PR. COSTS.*

A decree, though obtained by fraud, cannot be set aside by petition. *Musset v. Morgan*, *id.* 74. *PR. DECREE, SETTING ASIDE; FRAUD.*

Under a private act of parliament, money to be paid to certain parties; upon petition to the court Ld. Ch. refused to make an order to pay the money to persons deriving title from the original parties, and ordered them to file a bill. *Exp. King*, 2 Bro. C. C. 158. *STAT.; C. OF; EXORS. & ADMORS.*

Petition that a guardian may be assigned to consent to a marriage, (unless to carry on a suit to protect an interest), must be pursuant to the stat. 26 G. 2. c. 33. *Exp. Becher*, 1 Bro. C. C. 556.

Habeas corpus to bring up infant arrested for necessities, to have guardian assigned him, must be by motion, and not petition. *Horne v. Lanoy*, *id.* 170.

By prior consent of defendant, on petition, sergeant at arms sent, in case he did not answer. *Cs. Londonderry v. Cornthwaite*, *id.* 285.

Quare? if surviving testamentary guardian declines charge, can it be referred to master to appoint, and upon petition only, without bill. *Exp. Chumpley*, *id.* 350.

The court upon ex parte applications may allow maintenance for an infant when no cause is depending. The jurisdiction the court exercises as to idiots and lunatics is a particular one. *Exp. Whitfield*, 2 Atk. 315. *INFANT RECEIVER.*

A writ *de ventre inspiciendo* is always applied for by petition. *Exp. Billett*, 1 Cox, 297. *PR. WRIT DE VENT. INSPIC.*

### 3. Proceedings on generally.

See also *BANCY. XVI. 3. (b).; XVII.*

Petitioner not appearing, respondent is entitled to costs on producing his own affidavit of having been served. *Exp. Garth*, 2 G. & J. 392. *PR. COSTS.*

Where assignee of money in court to credit of cause claiming under an assignment from party entitled to it, petitions to have it paid out to him, he must show that party (or if dead his personal repre-

ventative) has had notice of petition. *Hurd v. Davenport*, 13 Pri. 735. PR. PAYMENT OUT OF COURT; PR. NOTICE.

A party who is served with a petition, but who has no interest in the order to be made upon it, is not entitled to the costs of appearing on the hearing of that petition. *Carey v. Whittingham*, 1 Turn. & R. 405. But see note, *id.* 407. PR. COSTS.

Petition in the matter of a person found an idiot, must be served on the Attorney-General. *Exp. Watson*, 1 Jac. 161. LUNACY; ATT. GEN.

Affidavit of personal service of petition must be filed before it can be read. *Exp. North*, 4 Mad. 395. PR. SERVICE, AFFIDAVIT OF.

On petition for transfer of stock standing in the name of the accountant-general, subject to the order of the court, under a power in an act of parliament, the facts alleged being disproved, the petition is not dismissed, but an order made for the transfer to the persons appearing to be entitled. *Exp. Williams*, 1 Jac. & W. 89.

Copy of petition for third order for time to answer ought to be served on plaintiff, or it is invalid. *Newcombe v. Rawlings*, 3 Mad. 246. PR. TIME TO ANSWER.

Proof under commission refused, party cannot petition to prove a larger sum. *Exp. Fry*, *id.* 132. BANKCY. PROOF.

On a petition for the sale of mortgaged premises by an equitable mortgagee, under a written agreement for a mortgage, the petitioner is entitled to costs. *Exp. Brightwen*, 1 Swan. 3. S. C. Buck, 148. EQUITABLE MORTGAGE; PR. COSTS.

Service of petition to expunge proof, ordered on creditor's agent who had produced the affidavit of debt. *Exp. Dunlop*, 3 Mad. 279. BANKCY. EXPUNGING PROOF.

Order made that service of petition in bankruptcy on attorney of person abroad whose debt was sought to be expunged, should be deemed good service. *Exp. Palon*, 3 Mad. 116. BANKCY. PETITION TO EXPUNGE PROOF.

On a reference in a petition under stat. 52 G. 3. c. 101. the master may receive affidavits in evidence. *Exp. Greenhouse*, 1 Swan. 60. STATUTES, C. OF; PR. EVIDENCE.

Petition, under stat. 52 G. 3. c. 101., must have the signature of the attorney-general, or of the solicitor-general, in case only of there being no attorney-general at the time. Such signature not to be affixed without the same deliberation, as in the case of an information regularly filed. *Exp. Skinner*, 2 Mer. 453.

Under the act of parliament giving jurisdiction upon petition in charity cases, the trustees, not appearing, ordered to shew cause why the order prayed should not be made. *Exp. Seagears*, 1 V. & B. 496. STAT. C. OF.

Ordered that no petition to stay certificate should be withdrawn without leave of court. *Exp. Gibson*, 6 Ves. 6. cited. BANKCY. PETITION TO STAY CERTIFICATE; WITHDRAWING.

Petition to supersede commission of lunacy should be in the quondam lunatic's name. *Exp. Stanley*, 2 Ves. 26.

PLAINTIFF, see PR. PARTY, &c., 1.

## LXIX. PLEA.

See also PR. COSTS, 10. (p).

1. General orders relating to.

2. When proper, filing, and leave to plead when necessary.

3. Joint of, attestation and signature of.

4. Setting down, and argument of.

5. Withdrawing, and waiver.

6. Allowance and overruling when, and effect of.

7. Amendment of.

8. Of former suit, reference on.

9. Where ordered to stand for answer, practice on.

See PL. PLEA, 19.

### 1. General orders.

Pleas tending to discharge suit, how to be heard. Beame's Ord. 26.

Definition of plea. *Id.* 26.

Instances of. *Id.* 26.

What pleas may be put in without oath. *Id.* 26.

What not without oath. *Id.* 27.

Plea of outlawry not allowed, unless record pleaded *sub pede sigilli*. *Id.* 27.

Plea of excommunication not allowed, unless under seal of the ordinary. *Id.* 27.

Pleas grounded on body, &c., of matter, to be heard in open court. *Id.* 77. 173.

Pleas not to be entered in paper, unless order carried to register two days before the hearing. *Id.* 121.

To the jurisdiction, &c., under counsel's hand to be received, though not delivered in person. *Id.* 172.

Or by commission. *Id.* 173.

But if plea returned on commission be overruled, defendant to pay costs. *Id.* 173.

But if allowed, defendant not to have costs. *Id.* 173.

To be entered by defendant within eight days after filing. *Id.* 174.

Or to be disallowed, defendant paying costs, &c. *Id.* 174.

Plea of outlawry not to be allowed, if in suit for duty the bill seeks relief concerning; otherwise, a good plea whilst outlawry subsists. *Id.* 175.

But when reversed, defendant to answer. *Id.* 175.

Plaintiff may set such plea down. *Id.* 176.

But if he does not enter it within eight days after it is filed, defendant to pay costs. *Id.* 176.

The dependency of former suit a good plea. *Id.* 176.

Not necessary for defendant to set it down. *Id.* 176.

Unless plaintiff procures reference of such bill, to stand dismissed, with costs. *Id.* 177.

So a depending suit at law, or in an inferior court, may be pleaded. *Id.* 177.

No plea to be admitted, party being in contempt, without motion and affidavit. *Id.* 178.

Costs on allowing, or overruling, or re-arguing a plea, *5l.* *Id.* 320. 456.

But parties liable to such further costs as court shall order. *Id.* 457.

All pleas to be signed by those swearing to them, in the presence of the master or the commissioners. *Id.* 452.

### 2. When proper, filing, and leave to plead when necessary.

See also PL. PLEA, 18.

Plea may be filed after return of simple attachment. *Hamilton v. Hibbert*, 2 S. & S. 225. PR. ATTACHMENT.

After demurrer overruled, defendant cannot plead without leave of court. *Rowley v. Eccles*, 1 S. & S. 511. PR. DEMURRER.

After the return of the writ of attachment with proclamations, defendant cannot put in plea and answer. *Saunders v. Murney*, 1 S. & S. 225. PR. ATTACHMENT WITH PROCLAMATIONS; PR. ANSWER.

Plea and answer cannot be filed until demurrer actually taken off file, after order for that purpose. *Cut v. Boode*, 1 S. & S. 21. **PR. ANSWER; PR. FILING PLEADINGS; PR. DEMURRER; PR. ORDER TO TAKE DEMURRER OFF FILE.**

Party in contempt obtaining order for commission to take "plea, answer, or demurrer," may put in plea. *Barber v. Crawshaw*, 6 Mad. 284. **PR. COMMISSION; PR. CONTEMPT.**

Where demurrer has been overruled, and the time allowed by court for defendant to plead has expired meanwhile, court will give leave to plead, and allow further time to plead. *Duncan v. Manchester Water-works Comp.*, 8 Price, 698. **DEMURRER.**

Plea taken by commission need not be signed by counsel. *Simms v. Smith*, 4 Mad. 366. **PR. SIGNATURE OF COUNSEL; PR. PLEA, SIGNATURE OF.**

Plea of payment to bill of discovery overruled as issue triable at law. *Hindman v. Taylor*, Dick. 651.

Putting in a plea is a sufficient compliance with orders for time to answer. *Roberts v. Hartley*, 1 Bro. C. C. 36. S. C. 2 Dick. 554. **PR. TIME TO ANSWER.**

Defendant must put in plea before he applies for prohibition. *Walker v. Tunderheide*, Dick. 336.

Plea put in after time to answer obtained, discharged. *Newton v. Dent*, Dick. 234.

On time given to answer, the defendant may put in a plea, for that is as an answer and on oath, but he cannot put in demurrer. *Anon.* 2 P. W. 464. and see notes there. **PR. TIME TO ANSWER.**

Defendant cannot plead after proclamations returned, nor can plea be taken upon a general commission to take the answer only. *Lloyd v. Gunter*, 1 Vern. 275. See 1 Sim. & S. 226. **PR. PROCLAMATION; PR. COMM. TO TAKE ANSWER.**

Wrong party sued; advantage must be taken by plea, not by motion. *Harrison v. Haule*, Cary, 61.

### 3. Jurat, attestation and signature of.

A plea may be put in without oath, in a case where the matter of the plea appears on record; but if it be any thing that does not appear on record, the plea must be in on oath. *Beame's Ord.* 26.

Pleas in disability of the person, or to the jurisdiction of the court under the hand of counsel, shall be received and filed, although defendant does not deliver the same in person, or by commission. *Beame's Pleas*, 315, apprehends this has been considered to imply, that it was not necessary to swear the parties to such particular pleas; and he refers to *Curs. Canc.* 181. *Wy. Pr. Reg.* 324. *Mitt. Pl.* 239. *Newl. Har.* 230. *Newl. Pr.* 42.

All pleas and answers, as well those taken by commission as those sworn before a master, to be signed by the parties swearing the same in the presence of the master, or of the commissioners before whom the same shall be taken respectively. *Beame's Ord.* 452. 2 Atk. 289.

Plea taken by commission need not be signed by counsel. *Simms v. Smith*, 4 Mad. 366. **PR. SIGNATURE OF COUNSEL; PR. COMMISSION TO TAKE PLEA.**

Plea of matter of record, with averments of matters in *pais*, must be filed upon oath; therefore, plea of the stat. 32 Hen. 8. c. 9. against selling pretended titles, with the necessary averments of want of possession, &c., not being on oath, ordered to be taken off the file, though set down by the plaintiff for argument; this irregularity not admitting waiver. *Wall v. Stubbs*, 2 V. & B. 354. **BUYING OF TITLES; STAT. C. OF.**

Plea of mere matter of record not filed on oath, being proved by production of the record. *Id.* 367. **OATH.**

Plea, without oath, of plaintiff's conviction for felony, to a bill by the residuary legatee for an account of the personal estate for a testatrix, who died after the conviction but before sentence of transportation completed, allowed: the conviction proved by the record alone, and not necessary to state even the identity upon oath. — *v. Davis*, 19 Ves. 81. **PL. PLEA.**

A plea of the plaintiff's bankruptcy must be put in upon oath. *Joseph v. Luckey*, 2 Cox, 44. **PL. PLEA OF BANKCY.**

Plea of outlawry, with the common averment of the identity of the person, need not be upon oath. *Took v. Took*, 2 Vern. 198. See *Mitt. Pl.* 243.

Plea of privilege ought to be upon oath. *Gibson v. Whitacre*, id. 83.

Plea of outlawry to be on oath. *Parrot v. Bawden*, id. 37.

Plea of a former suit depending for the same matter, is put in without oath. *Urtin v. Hudson*, 1 Vern. 332.

An answer and plea taken by commission was returned, "this answer was taken upon oath," &c. so the plea was not on oath, and therefore rejected; but without costs; because the court apprehended it to be the fault of the commissioners who took it. *Jefferson v. Dawson*, 2 Ch. Ca. 208.

Plea of outlawry, or plea of privilege by a scholar resident at an university, need not be upon oath. *Pratt v. Taylor*, 1 C. C. 237. *Anon.* id. 258.

Plea put in by husband, in the names of himself and his wife, who refuses to swear to it: ordered to be accepted as the plea of the husband only. *Pain v. —*, 1 C. C. 296. *Husb. & Wife.*

Defendant put in a foreign plea, without swearing it: ordered, that he be sworn to it, or else a *nil dicit* to be returned. *Conners v. Savil*, Cho. Ca. Ch. 164. *Yelverton v. Burton*, Toth. 148.

### 4. Setting down, and argument of.

Demurrers and pleas which tend to discharge the suit shall be heard first upon every day of orders. *Beame's Ord.* 26.

No plea or demurrer to be entered in the paper at the instance of any person, or warrant for setting down the same on any certain day, unless the suitor shall bring such order or warrant to the registrar to be entered at least two days before the day appointed for hearing such demurrer or plea; and no addition or alteration to be made in paper after it shall have been made and set up in the registrar's office. *Id.* 121.

Such pleas as are grounded on the substance and body of the matter, or extend to the jurisdiction of the court, shall be determined in open court; and for that purpose defendant must enter the same within eight days after the filing, or in default it shall be disallowed of course as put in for delay, and shall not afterwards be admitted to be set down and debated, unless by order of court. *Id.* 174. If defendant does not enter his plea within the eight days, he must be presumed to have abandoned it. *Jordan v. Sawkins*, 3 Bro. C. C. 372. Costs, on allowing or overruling a plea, to be 5*l.* *Beame's Ord.* 320. And if this be inadequate, such further costs as the court shall think fit. *Id.* 456.

Where defendant puts in a plea, he must set it down by the Wednesday se'nnight following, or it is to stand overruled. If so overruled, or if overruled at the hearing, defendant is forthwith to pay 40*s.* costs; if it be ordered to stand good, plaintiff to pay 30*s.* costs. If defendant will put in an answer two days before the day appointed for the hearing of the plea, or give notice thereof to plaintiff's attorney, he is to pay plaintiff 20*s.* costs. *Ord. Exch.* (10.) *Kirkby's Ord.* 6.



Whenever a plea is filed so late in or after the term that it cannot be argued by the sittings after that term, or if filed before the seal day after term, it shall be put down to be argued in the first Wednesday of the succeeding term. *Id.* 38.

If plaintiff shall, two days before a plea is appointed to be heard, give notice to defendant that he will reply thereto, plaintiff shall then reply thereto within a week without costs, or in default defendant to be dismissed with 30s. costs. If two days before the hearing plaintiff will give notice that he admits the plea, he may do so on payment of 20s. costs. *Id.*

All pleas, &c. to be set down to be argued on every Wednesday in the term, and whenever a term begins on a Wednesday, all pleas filed on or previous to the last day of the preceding sitting of the court to be argued on such Wednesday; and all pleas filed on a Wednesday in term, to be set down for that day se'night, if within the term. Ord. Exch. 10th May, 1777. 1 Fowl. 39.

When a plea is filed to a bill, the defendant should not only set down the plea, but give a rule for arguing it. *Parker v. Alcock*, 1 Y. & J. 195.

A plea had been set down, but at the hearing plaintiff declined arguing it, stating his intention to amend. By desiring to amend, plaintiff admits the validity of the plea; it must therefore be allowed with usual costs. *Lopes v. De Tustet*, 3 Mad. 183.

When a plea is directed to stand for an answer, with leave to except, plaintiff is entitled to costs. *Houling v. Butler*, 2 Mad. 245.

Plea set down by defendant, if he does not appear when plea called on, and affidavit of plaintiff having been served with order to set down, plea will be overruled; and if no such affidavit made, will be struck out of paper, and will not be restored but on affidavit accounting for delay. *Mazarrado v. Maitland*, id. 38. PR. HEARING, DEFAULT, APPEARANCE.

A plea of outlawry ought to be set down for argument by the defendant. *Chapman v. Lansdown*, 2 Anst. 554. PLEA OF OUTLAWRY.

After a plea was set down, plaintiff obtained an order of course to amend the bill, which he served on defendant. When the plea came on to be argued he did not appear, whereupon it was allowed with costs. The Ld. Ch. said, he much doubted whether an order to amend does, without more, strike the plea off the record. *Jennings v. Pearce*, 1 Ves. J. 447.

A plea of another suit depending for the same matter is referred to the master of course without being set down. *Anon.* id. 484.

If plaintiff should not obtain a reference within a month, defendant may move to dismiss the bill, notwithstanding he should have erroneously set the plea down. *Baker v. Bird*, 2 Ves. J. 672.

Plea must be set down within eight days. *Jordan v. Sawkins*, 3 Bro. C. C. 372.

Plaintiff having referred a plea for impertinence, afterwards set the plea down for argument. This is a waiver of the reference for impertinence, notwithstanding the defendant had attended the master upon it. *Dixon v. Olmuis*, 1 Cox, 412. WAIVER; IMPERTINENCE.

Bill for relief and discovery, answer to relief; plea to discovery; argument of plea not necessary before exceptions taken to answer. *Pigot v. Stace*, Dick. 496. S. P. *Sidney v. Perry*, id. 602.

If upon plea of former decree or another suit depending, the master reports the fact true, plaintiff may except to the master's report, and bring on the matter before the court. *Durrand v. Hutchinson*, Mitf. Pl. 247.

Bill amended after plea set down, on payment of 20s. costs, and 5l. for the plea. *Vernon v. Cue*, Dick. 358.

When a plea is put in, the bill cannot be dismissed

for want of prosecution, until the plea is argued. *Anon. Barn.* 208.

After a plea put in there can be no motion for an injunction till the plea is argued. *Humphreys v. Humphreys*, 3 P. W. 396. PR. INJUNCTION.

A defendant in a plea of a purchase for a valuable consideration omits to deny notice; if the plaintiff replies to it, all the defendant has to do, is to prove his purchase, and it is not material if the plaintiff proves notice, for it was the plaintiff's own fault, that he did not set down the plea to be argued, in which case, it would have been overruled. *Harris v. Ingledew*, 3 P. W. 94. VEND. & PURCH.; NOTICE.

Defendant pleaded pendency of a former suit, and answered to other part. Plaintiff replied generally to the answer, without taking notice of the plea. Witnesses were examined on both sides, and the cause was heard, and a trial directed, which went against defendant, who then petitioned for a rehearing, and insisted that plaintiff ought to have set down the plea. But the court held that defendant, by his proceedings, had waived the plea. *Lucas v. Holder*, 1 Eq. Ab. 41.

Where a defendant pleads to part, and answers to the residue of the bill, the plaintiff cannot except to the answer till the plea is argued, or an order obtained that it shall stand for an answer, with liberty to except. *Darnell v. Reyney*, 1 Vern. 344. PR. EXCEPTION TO ANSWER.

Wherever there is a plea put in to a bill, though there is an answer likewise, the bill cannot be dismissed for want of prosecution till the plea is argued. *Anon. Barn.* 280. PR. DISMISSAL OF BILL FOR WANT OF PROSECUTION.

If the defendant pleads in bar, the plaintiff is not obliged to elect till the plea is argued, for the plea denies the right to sue in equity. *Anon. Mos.* 304. *Vaughan v. Welsh*, id. 210. PR. ELECTION.

#### 5. Withdrawing and waiver.

Plea to bill of review of length of time since enrolment of decree, under which part of the estate had been sold to *bona fide* purchasers, who had possession for twenty-seven years; on argument of plea, and on appeal, leave was given to withdraw plea, with liberty to plead and demur, answer or demur alone, without introduction of new matter. *Gorman v. McCulloch*, 5 Bro. P. C. 597. BILL OF REVIEW; PL. PLEA; LENGTH OF TIME.

In what manner and case defendant may waive his plea. *Lucas v. Holder*, 1 Eq. Ab. 41.

#### 6. Allowance and overruling, when, and effect of.

After plea allowed to part of bill, plaintiff cannot amend his bill without special order to be obtained on notice of motion, stating proposed amendments. *Taylor v. Shaw*, 2 S. & S. 12. PR. BILL; AMENDMENT.

After plea of settled account allowed to part of bill, motion to amend bill by stating facts which tended to shew that there was no settled account, or that plaintiff ought to be allowed to surcharge and falsify, was refused with costs. *Id. ib.* PR. BILL; AMENDMENT.

Defendant who has pleaded to bill cannot demur to it *ore tenus* on his plea being overruled, because there is no demurrer on the record. *Hook v. Dorman*, 1 S. & S. 227. PR. PLEADING, &c. ORE TENUS; PR. DEMURRER.

After a plea overruled, an order for time to answer obtained as of course, is irregular. *Ferrand v. Pelham*, 1 Turn. & R. 404. PR. TIME TO ANSWER.

Plaintiff wishing to amend bill after plea is set down,

admits plea, and on payment of usual costs of 6l., plaintiff is at liberty to amend. *Lopes v. De Taster*, 3 Mad. 183. **PR. AMENDING BILL.**

On plea found false, plaintiff is entitled to decree, and if discovery is necessary, to examine defendant on interrogatories. *Wood v. Strickland*, 2 V. & B. 158. **PR. EXAMON. OF DEFT. ON INTERROGATORIES.**

The plea was overruled on a ground of form. The defendant pleaded the same matter again more formally. This is irregular. *Semble. Freeland v. Johnson*, 2 Anst. 407.

After plea set down, order obtained of course by plaintiff to amend the bill, and served on defendant, plaintiff not appearing when the cause came on to be argued, it was allowed of course with costs. *Jennings v. Pearce*, 1 Ves. J. 447. **LACHES.**

Amended bill is out of court by allowance of plea posterior to the date of the bill; otherwise, if prior. *Id.* 448. **PR. AMENDED BILL.**

A defendant to a bill of revivor cannot plead to that suit a plea which had been pleaded by the original defendant and overruled. *Samuda v. Furtado*, 3 Bro. C. C. 70. **PR. PLEA; PR. ABATEMENT AND REVIVOR.**

Amending bill after plea, is not allowing of plea. *Vere v. Glynn*, Dick. 441.

When plea is allowed, injunction is dissolved absolutely. *Philips v. Langhorn*, *id.* 148.

A demurrer may be put in after a plea is overruled. *E. I. Comp. v. Campbell*, 1 Ves. 246. **PR. DEMURRER.**

Where plaintiff replies to plea, he admits it to be a good bar, if the facts alleged therein are true; and, therefore, he cannot afterwards complain of the order made for allowing the plea, but must proceed to examine witness to falsify it. *Dunsany v. Shaw*, 5 Bro. P. C. 267. **PR. REPLICATION.**

If plaintiff replies to defendant's plea, he thereby admits the plea to be good, if it be true, and the validity of the plea can never after be considered, but only the truth of it, as he proves it, or the plaintiff disproves it. *Parker v. Blythmore*, *Præc. Chan.* 58. *Id.*

Though a plea in bar be allowed, yet the plaintiff may reply and put the defendant to the proof of it. *Anon. Gilb. Eq. Rep.* 184. *Id.*

If a plea or demurrer be overruled, the defendant must answer the whole bill, and the ordinary process of contempt issues to compel an answer as in other cases; but if an answer was filed with the plea or demurrer, the defendant, upon his plea or demurrer being overruled, need not put in another answer till the plaintiff has taken exceptions. *Cotes v. Turner*, *Bunb.* 123. **PR. EXCEPTIONS TO ANSWER; PR. ANSWER; PR. DEMURRER, OVERRULING.**

#### 7. Amendment of.

Where to an information for discovery against an army agent under the stat. 45 G. 3. c. 58. s. 25., which empowers the secretary at war, &c. to call for the accounts of army agents which have not been finally settled, the defendant pleaded a stated account by clearing warrants, which plea was overruled by the court, and afterwards the documents upon which the clearing warrants were founded were produced, and the defendant deposed, that by the course of the war office, the clearing warrants amounted to a stated account, the court refused to permit the defendant to amend his plea by embodying the accounts, being of opinion, that they would not amount to a plea of a stated account. *Att. Gen. v. Brooksbank*, 2 Y. & J. 37.

Amendment of plea allowed where error was occasioned by clerk of outlawries, and did not affect sub-

stance. *Waters v. Mayhew*, 1 S. & S. 220. **PR. OFFICER OF COURT; MISTAKE.**

When plea is supported by answer, no amendment of plea will be permitted. *Tompson v. Wild*, 5 Mad. 82.

Where defendant had described their farms by so many acres, and an objection was taken at hearing to want of sufficient description of local situation, the court permitted the cause to proceed, suggesting, that if the objection was insisted on, leave would be given to defendant to file interrogatories for the purpose of enlarging the description. *Wright v. Southwood*, 5 Price, 607. **TITHES.**

Defendant was permitted to go into evidence of his right to tithes, where his title appeared likely to be clearly established, although he had inaccurately stated the subject matter of his defence in his answer. *Wilmot v. Lillaby*, 5 Price, 355. *Id.*

Where defendant states in his answer, that modus has been immemorially paid to vicar in lieu of tithes, and vicarage is shewn to have been endowed within time of legal memory, court will allow modus to be re-stated so as to take issue to try modus. *Prece v. Bennett*, 1 Price, 236. *Id.*

Leave to amend plea not of course; amendment must be stated. *Wood v. Strickland*, 2 V. & B. 150.

Plea good in substance but bad in form, allowed to be amended. *Merrewether v. Mellish*, 13 Ves. 435.

Not usual to refuse leave to amend a plea; but defendant must be tied down to a very short time; and where it seemed incapable of amendment he had leave to withdraw and plead *de novo* in a fortnight. *Nobkissen v. Hastings*, 2 Ves. J. 85. **S. C.** 4 Bro. C. C. 252.

Bill to set aside agreement and release on ground of fraud, &c.; plea of the agreement and release to the whole: no answer put in, nor any denial of fraud; leave to amend refused, and plea overruled. *Freeland v. Johnson*, 1 Anst. 276.

In *Pope v. Bish*, 1 Anst. 59., the bill charged an award to have been corruptly obtained; defendant put in a plea setting up the award, and denying the specific charges of fraud. The court overruled the plea, as not bringing the cause to a single point, but gave leave to amend it by striking out the special averments.

The plea having been once amended, the court refused to allow any further amendment or liberty to plead anew. *Nabob of Arcot v. E. I. Comp.* 3 Bro. C. C. 292. **Vide S. C.** 1 Ves. J. 371.

Though there have been cases in which the court has permitted pleas to be amended, where there has been an evident slip or mistake, and the material ground of defence seemed to be sufficient, yet the court always expects to be told precisely what the amendment is to be, and how the slip happened, before they allow the amendment to take place. *Newman v. Wallis*, 2 Bro. C. C. 147.

#### 8. Of former suit, reference on.

Plea of another suit for the same matter referred to master. *Wild v. Hobson*, 2 V. & B. 110. **PR. REFERENCE TO MASTER.**

Plea of a former suit depending for the same cause set down by the defendant, was struck out; but the plaintiff not having procured a reference to the master within a month, the bill was upon motion dismissed under the standing order. *Baker v. Bird*, 2 Ves. J. 672. **PR. DISMISSAL OF BILL; GEN. ORDER.**

Plea of another suit, depending for the same cause, referred to the master of course without being set down. *Daniel v. Mitchell*, 1 Ves. J. 484. **S. C.**

3 Bro. C. C. 544. PR. SETTING DOWN CAUSE TO BE ARGUED.

Where, on plea of former decree, plaintiff sets down cause, he waives his right to reference to master as to such decree. *Morgan v. Morgan*, 1 Atk. 63. WAIVER; REFERENCE TO MASTER.

9. Where ordered to stand for answer, practice on.

See PL. PLEA, 19.

When plea is ordered to stand for answer with liberty to except; plaintiff is entitled to costs. *Howling v. Butler*, 2 Mad. 245. PR. COSTS.

The defendant pleaded to the whole bill, and on arguing the plea, it was ordered to stand for an answer without saying one way or the other, whether the plaintiff might except; the plaintiff not allowed to except, for that by an answer was meant a sufficient answer; an insufficient answer being as none. *Sellon v. Leven*, 3 P. W. 239.

If a plea is to stand for an answer without liberty to except, the plaintiff may except to the rest of the answer. *Coke v. Wilcocks*, Mos. 73. PR. EXCEPTIONS TO ANSWER.

If a plea is ordered to stand for an answer the defendant cannot move to dissolve the injunction absolutely, but only nisi. *Osborn v. Couper*, id. 133. PR. MOTION TO DISSOLVE INJUNCTION.

LXX. PRIORITY OF SUIT.

See also PR. CROSS BILL.

Plaintiff, in original bill, loses his priority of suit, and his right to have an answer to the original bill before he is called upon to answer cross bill, by amending original bill; though such amendment be after the order for time to answer the cross bill, until after answer to original bill. *Johnson v. Freer*, 2 Cox, 371. PR. BILL; AMENDMENT; PR. CROSS BILL.

Bill abated by marriage of plaintiff, and not revived till after cross bill filed, loses priority. *Smart v. Floyer*, Dick. 260.

Original bill must be answered first; but if after cross bill filed, plaintiff materially amends, he loses his priority. *Long v. Burton*, id. 82.

R, and his wife, filed an original bill, to which the defendant, D, put in his plea, and it was allowed; D filed a cross bill against R and his wife, to which they put in their answer, and exceptions were taken; then B and his wife filed their amended bill against D, who appeared and prayed six weeks time to put in his answer to the amended bill, after R and his wife shall have answered the cross bill; the plaintiff in the cross bill, having procured a report that the answer of R to it was insufficient, R, by that means, lost the priority of suit. *Ratray v. Darley*, 3 Atk. 724. PR. CROSS BILL.

If, after a cross bill filed, plaintiff, in original bill, will amend it in material parts, and thinks fit to compel an answer to the amendments, at the same time with the original bill, he waives his priority of answer to the original. *Long v. Burton*, 2 Atk. 218. PR. AMENDMENT; PR. CROSS BILL.

LXXI. PRISONER.

See also PR. ATTACHMENT, 5.—PR. HABEAS CORPUS.

As to persons in custody refusing to be served with a copy of the decree, 5 G. 2. c. 25. s. 3.

Where a messenger has been sent upon a return of *corpus*, and the defendant is in K. B. prison upon *mesne process*, a *habeas corpus* must next be obtained. *Nadine v. Wagstaff*, 1 Sim. 389. PR. PROCESS.

Where party is in custody of warden of Fleet under process from the C. P. and is detained by attachment from chancery, he must be brought up by *habeas corpus* to bar of this court and turned over to warden of Fleet before sequestration can issue. *Const v. Barr*, 2 S. & S. 452. PR. SEQUESTRATION.

Where an attachment issues against a defendant in custody in the K. B. prison, it is to be lodged with the marshal, and an *habeas corpus* may then be moved for before return of the attachment. *Trotter v. Trotter*, 1 Jac. 533. PR. ATTACHMENT.

An order that defendant shall be released from Fleet prison on payment or tender of costs of contempt, warden must release him on affidavit of such tender. *Anon.* 1 Mad. 109. PR. ORDER, C. OF.

Process to obtain decree *pro confesso* not applied to prisoner in Newgate under criminal sentence, who, if brought up by *habeas corpus*, must be remanded immediately, and cannot as in a civil cause be turned over to Fleet *cum causis*, subject to further process by *alias habeas corpus*. *Moss v. Brown*, 1 V. & B. 306. PR. PROCESS; PR. DECREE PRO CONFESSO.

Order, that defendant, a prisoner in Newgate under sentence for forgery, being brought up for want of answer, should be turned over to the Fleet; and then carried back to Newgate with his cause. S. C. id. 78. PR. CONTEMPT.

Defendant, in Newgate, under a criminal sentence, having been brought up by *habeas corpus* for not putting in his answer, and remanded to Newgate, as to the farther proceeding; *quære?* *Lloyd v. Passingham*, 15 Ves. 179. PR. HABEAS CORPUS; PR. ANSWER.

Plaintiff, by an order of the secretary of state confined, and to be removed out of the kingdom under the alien act, ordered on motion after appearance and before answer, to give security for the costs according to the practice where the plaintiff is resident abroad. *Seiluz v. Hanson*, 5 Ves. 261. PR. SECURITY FOR COSTS; ALIEN.

Special return to an attachment for not appearing, that defendant was imprisoned for felony, the plaintiff must proceed in the usual way by *habeas corpus*. *Rogers v. Kirkpatrick*, 3 Ves. 471. PR. ATTACHMENT; PR. HABEAS CORPUS.

Sequestration only goes where defendant is in custody of warden of Fleet, not of sheriff. *Markham v. Wilkinson*, 2 Anst. 579. PR. SEQUESTRATION.

On an injunction obtained, the court will not discharge the party out of custody, if taken on legal process. *Willis v. Daniel*, 1 Anst. 36. INJUNCTION.

Defendant in contempt and in custody, must be turned over to Fleet before sequestration can issue. *Kinsey v. Yardley*, Dick. 265.

A defendant, a prisoner in the K. B. prison under a criminal prosecution, brought up by *habeas corpus*, and turned over to the prison of the Fleet *pro forma* (to ground an order for a sequestration) and from thence carried back to the K. B. with his cause, and immediately a sequestration was moved for and granted. *Bowes v. Cs. Strathmore*, Dick. 711. PR. PROCESS.

LXXII. PRIVILEGE FROM ARREST.

See also BANKRUPTCY VII. 2 (a).—WRIT. 7.

Privilege from arrest extends to attendants on the court. *Id.* Beame's Ord. 38.

To suitors and witnesses *eundo, redeundo, et morando*. *Id.*

Discharge only an arrest on first process. *Id.*

Person arrested on return from attending without before master at master's office, to produce papers, discharged. *Franklyn v. Colghoun*, 1 Mad. 580.

Privilege of a witness from arrest, as a person going to make an affidavit before a master. *List's Case*, 2 V. & B. 374. ATTENDANCE ON MASTER.

The application to discharge must be to the court, of which the proceeding is a contempt. *Id. ib.* PR. DISCHARGE.

Witness, attending arbitrators upon an arbitration under an order of court, protected from arrest. *Exp. Temple*, 2 V. & B. 395. ARBITRATION; WITNESS.

Protection from arrest during attendance through an interval of adjournment to another period of the same day, at the same place. *Id. ib.*

A person attending commissioners of bankruptcy, without a summons, swearing, that he was a material witness, and not contradicted, protected from arrest, while remaining, though having left the room by order for the purpose of separate examination; and while returning; whether while going. *Qu?* Order to be discharged immediately, by the party in the first instance; if disobeyed, to be extended to the officer, with costs. Application at the bar without a petition, the proper form in such a case; and time to answer the affidavit refused. *Exp. Ryne*, 1 V. & B. 316. S. C. 1 Rose, 451. BANKRUCY; WITNESS.

Protection from arrest of persons attending commissioners of bankruptcy, for the purpose of aiding them in the administration of justice *eundo, morando et redeundo*, not by having a summons, but upon principle applying to a witness or party. *Id.* 319.

A solicitor arrested on his way from his residence to Lincoln's-inn Hall, without deviation, for the purpose of attending a bankrupt petition as solicitor, discharged on personal examination by the Ld. Ch., the oath administered by the register, but to be entitled in the bankruptcy. *Castle's Case*, 16 Ves. 412.

A solicitor arrested upon his return, direct from attending his client's business in Lincoln's-inn Hall to his own house without delay or deviation, discharged, upon examination *rius vice* of him and the officer, taken, and the oath administered, personally by the Ld. Ch., sitting in the bankruptcy; the register therefore not being present. *Cascone's Case*, 14 Ves. 183.

Solicitor arrested in his return from attending the master, discharged in the original action and subsequent detainers, the proper course is an order upon all the plaintiffs to discharge him. *Exp. Sedwich*, 8 Ves. 698. CONTEMPT OF COURT; PR. ATTENDANCE BEFORE MASTER.

Plaintiff in action and detainers on arresting defendant returning from examination before master, ordered to discharge him. As to deviations from straight road. *Sidgier v. Birch*, 9 Ves. 69. PR. EXAMINATION BEFORE MASTER.

Plaintiff in his return from attending a motion against him in this cause was arrested, and a detainer lodged against him in another action: he was discharged from both; the court examining the parties personally, not by affidavit. *Bromley v. Holland*, 5 Ves. 2. CONTEMPT OF COURT.

A party attending an arbitrator under an order of the court, is privileged from arrest. *Moore v. Booth*, 3 Ves. 350. ARBITRATOR.

Where order nisi for sequestration is obtained against a privileged person, he is not in contempt, unless he neglects to obey the order nisi. *Smallbrook v. Ld. Donegal*, 3 Anst. 647. CONTEMPT; SEQUESTRATION.

Such order nisi may be served on clerk in court of defendant. *Id. ib.* PR. SERVICE OF SEQUESTRATION.

Where a party is taken after he has obtained an injunction, but before notice given of it, the detaining him after notice is no contempt. *Willis v. Daniel*, 1 Anst. 36. PR. INJUNCTION; PR. CONTEMPT.

Where plaintiff is under protection of foreign ambassador, he must give security to costs. *Adderly v. Smith*, Dick. 355.

Arresting servant of foreign minister; not lodging in his house, was breach of privilege within 7th Anne. *In mre. Count Haslang*, Dick. 274.

Defendant coming for the purpose of putting in his answer, was arrested at the plaintiff's suit, and detainers lodged against him. He was discharged, being a breach of the privilege of the court. *Alisbury v. Troughton*, 1 C. R. 92.

Order upon the sheriff to discharge a defendant, arrested while attending his suit in chancery, and an order upon the party to discontinue an action against the sheriffs for the escape. *Meynel v. Cooper*, 1 C. R. 217.

### LXXIII. PROCESS.

See also LETTER MISSIVE.—PR. ATTACHMENT.—PR. COMMITMENT.—PR. CONTEMPT.—PR. COSTS, 10. (aa)—PR. HAB. CORP.—PR. WRIT.

Where serjeant at arms is resisted, sequestration may go. Beame's Ord. 16.

After an order for the serjeant, the registrar is to draw it up and deliver it to him only, he paying for it. *Id.* 246, 264, 303.

No such order to be discharged, nor contempt thereupon, without serjeant's fees first paid him, and his certificate thereof. *Id.*

No private agreement between the parties shall avail without such satisfaction and certificate. *Id.*

On motion for a serjeant, counsel to deliver to the registrar the commission of rebellion, and tell who is clerk in court. *Id.* 304.

No sequestration against estate of person not to be found but on serjeant's return of *non est inventus*. *Id.* 323.

The serjeant to take certain contemnors, and bring them to the bar, or to return *non est inventus* to ground a sequestration. *Id.* 324.

To be a part of all orders for giving time to answer, &c. that party do consent, serjeant shall go against him, as on commission of rebellion, &c. *Id.* 324.

His fees under order, 28th Nov. *Id.* 430.

Where a messenger has been sent upon a return of *cepi corpus*, and the defendant is in K. B. prison, upon mesne process, a habeas corpus must next be obtained. *Neame v. Wagstaff*, 1 Sim. 389.

Defendant residing in county palatine was attached for want of answer, and *cepi corpus* was returned by sheriff; next proceeding is to move for a messenger upon return of *cepi corpus*, and afterwards for a sequestration. *Holme v. Cardwell*, 3 Mad. 114.

Order made that defendant should, within four days, answer interrogatories, or in default, that serjeant at arms should go against him. Insufficient answer put in; serjeant ordered to take him. *Weston v. Jay*, 1 Mad. 527. ANSWER; INSUFFICIENCY; ANSWER TO INTERROGATORIES.

The right to process under an undertaking for a serjeant at arms, &c. immediately on exceptions to the report of an insufficient answer disallowed, is waived by plaintiff's taking out a subpoena for a better answer, and excepting to the report, entitling defendant to eight days after the exceptions are disposed of. *Algar v. Regent's Canal Comp.* 19 Ves. 379. S. C. Coop. 221. WAIVER; PR. EXCEPTIONS TO REPORT; ANSWER, INSUFFICIENCY OF.

Process to obtain decree *pro confesso*, not applied to prisoner in Newgate, under criminal sentence, who, if brought up by habeas corpus, must be remanded immediately, and cannot, as in a civil cause, be turned over to Fleet *cum causis*, subject to farther process by *alias* habeas corpus. *Mass v. Brown*, 1 V. & B. 306. **PR. DECREE PRO CONFESSO; PR. PRISONER.**

Defendant in custody for want of his examination, discharged immediately on putting it in; but, if on reference it proves insufficient, the plaintiff not having accepted the costs, may proceed from the last process. *Bonus v. Flack*, 18 Vcs. 287. **PR. CONTEMPT, DISCHARGE; PR. COSTS.**

After process to a serjeant at arms issued, but not executed, answer and exceptions submitted to by a note between the clerks in court, but no further answer being put in, the serjeant at arms ordered to go. *Waters v. Taylor*, 10 Vcs. 417.

Serjeant at arms not granted under a four-day order to bring in books, &c. before the master, until made absolute by a subsequent order upon the master's certificate of the same date. *Carleton v. Smith*, 14 Vcs. 180.

The practice of personal service as a foundation for process of contempt, dispensed with where the party has had notice, as upon being in court on making a short order for execution of a decree. *Riderv. Kidder*, 12 Vcs. 202. **S. P. De Manneville v. De Manneville**, id. 203. **PR. CONTEMPT; PR. NOTICE.**

After *cepi corpus*, the plaintiff cannot move until the sheriff may bring in the body, but for a messenger, and afterwards a serjeant at arms. *Wilkinson v. Belsher*, 2 Bro. C. C. 161.

Sequestrators on mesne process will not be ordered to make leases. *Ray v. —*. **PR. SEQUESTRATION; LEASE.**

If after *fi. fa.* executed, other effects are discovered, another *fi. fa.* may issue, or a *ca. sa.* *Hopkins v. Adcock*, Dick. 443.

After *ca. sa.* executed, *fi. fa.* cannot issue, but after *fi. fa.*, *ca. sa.* may. *Id. ib.*

Executing sequestration on mesne process improper. *Heather v. Waterman*, Dick. 335.

After return of *cepi corpus*, messenger sent to bring up body, defendant not to be found, serjeant at arms sent. *Sambroke v. Ekins*, id. 68.

Goods sequestered being insufficient to answer duty decreed, serjeant at arms revived. *Barnesley v. Powell*, id. 130. **S. P. Hopkins v. Adcock**, id. 443.

By prior consent of defendant, on petition, serjeant at arms sent, in case he did not answer. *Ca. of Londonderry v. Cornthwaite*, id. 285.

The whole line of process having been gone through against the plaintiff's husband, who had not appeared, is equal to the proceeding to outlawry at law, and there may be a decree for transfer of her separate property against the other defendants who did not appear. *Vaneusen v. S. S. Comp.*, 1 Vcs. 395. **S. C.** Dick. 140. *quod vide.* **HUSB. & WIFE.**

The court will not order a serjeant at arms against a defendant in contempt for disobedience of an order, without an affidavit of service. *Whitehead v. Thistlethwait*, 3 Ark. 619.

A feme covert is liable to be arrested by the serjeant at arms, for not putting in a separate answer, pursuant to an order obtained at her own request. *Powell v. Prentice*, Ridgw. 258. **PR. ANSWER; HUSB. & WIFE.**

Defendant brought up on *alias pluries* habeas corpus, for contempt in not answering, bill taken *pro confesso*. *Man v. Parkinson*, 9 Mod. 266. **PR. CONTEMPT; PR. BILL PRO CONFESSO.**

The plaintiff gets judgment in the petty bag, after which he is stopped by an injunction; the year and day pass; the plaintiff, though hindered by the injunction, yet cannot sue out execution without a writ.

*fa. Hiden v. El. Worthington*, 3 P. W. 36. but see *id.* note (x).

A sequestration *nisi* is the first process against a peer, or member of the house of commons, though this is some hardship; but if there be a sequestration *nisi* against a peer for want of an answer, and the peer puts in an answer which is insufficient, yet the order for sequestration shall not be absolute, but a new sequestration *nisi*. *Ld. Cliford's case*, 2 P. W. 385. **PEER.**

Sequestration cannot issue till return of *non est inventus* by serjeant at arms. *Exp. Jephson*, *Proc. Chan.* 549. **PR. SEQUESTRATION.**

First process of contempt against a menial servant of a peer of the realm, was a sequestration *nisi*. *Anon.* 1 P. W. 535. By stat. 10 Geo. 3. c. 50. menial servants of peers are placed on the same footing as other persons.

A person is not party to a suit unless process is prayed and served on him. *Reilly v. Ward*, 5 Bro. P. C. 495. **PR. PARTY.**

The court will not suffer a man to be sued at law for executing the process of the court, though it is sued irregularly. *Bailey v. Devereux*, 1 Vern. 269. **INJUNCTION AGAINST PROCEEDINGS AT LAW; JURISDICTION.**

Defendant cannot plead after proclamation returned; nor can plea be taken upon a general commission to take the answer only. *Lloyd v. Gunter*, 1 Vern. 275. See 1 Sim. & S. 226. **PR. PLEA; PR. COMMISSION TO TAKE ANSWER.**

Costs allowed defendant, being taken on commission of rebellion. *Morgan v. George*, Cary, 109.

Commissioners of rebellion have discretion to take bail. *Ingle v. Vaughan*, Dick. 7.

If the goods sequestered are not sufficient to answer the duty decreed, the plaintiff may move to revive the order for a serjeant at arms. *Barnesley v. Powell*, 1 Dick. 130. *Hopkins v. Adcock*, Dick. 443. *Anon.* Mos. 246. **PR. SEQUESTRATION.**

All process of contempt must issue out in course to a serjeant at arms, before an injunction or writ of assistance to put the party in possession under a decree. *Venables v. Foyle*, 1 C. R. 178. **PR. PROCESS OF CONTEMPT.**

A defendant, a prisoner in the K. B. prison, under a criminal prosecution, brought up by habeas corpus, and turned over to the prison of the Fleet *pro forma*, (to ground an order for a sequestration) and from thence carried back to the K. B. with his cause, and immediately a sequestration was moved for, and granted. *Bowes v. Strathmore*, Dick. 711. **PR. PRISONER.**

PROCEEDINGS AT LAW. See **PR. INJUNCTION**, 12.

LXXIV. PROCHAIN AMI.

See also **PR. COSTS**, 10 (x).

The court will remove a next friend, and appoint a new one, where the former is so connected with a defendant having an interest adverse to that of the infants, as to make it probable that their interest will not be properly protected by him. *Payton v. Bond*, 1 Sim. 390.

A suit being instituted on behalf of infants by a solicitor wholly unconnected with the family, it was, on the motion of the defendant, referred to the master to inquire whether it would be for the infant's benefit that the suit should be prosecuted; the defendant undertaking to render to the master the accounts prayed for by the bill. *Richardson v. Miller*, 1 Sim. 133. **INFANT; PR. REFERENCE OF SUIT FOR INFANT'S BENEFIT.**

Prochain ami becoming insolvent, and receiving costs after answer filed, motion that he might be removed, and another appointed, refused as informal, but leave given to apply to stay proceedings, and to be changed, or security given for costs. *James v. Alvin*, 1 S. & S. 264. **MOTION; COSTS; SECURITY FOR; INSOLVENCY.**

Circumstances of proposed prochain ami not to be inquired into, though suggested that he was indigent. *Davenport v. Davenport*, 1 S. & S. 101.

Prochain ami withdrawing himself, ordered, on substitution of new prochain ami, to give security for costs already incurred. *Id. ib.* **PR. COSTS.**

Prochain ami of feme plaintiff being dead, she was ordered to appoint new one in two months, or bill dismissed with costs out of fund in court. *Barlee v. Barlee*, 1 S. & S. 100. **PR. ABATEMENT AND REVIVOR.**

The court will not, upon petition of an infant party, direct an enquiry whether the cause has been properly conducted; but if the next friend or guardian does not do his duty, he will be removed. *Russell v. Sharpe*, 1 Jac. & W. 482. **INFANT.**

Prochain ami cannot remove himself from that situation without reference to master. *Melling v. Melling*, 4 Mad. 261. **PR. REFERENCE TO MASTER.**

Infant on coming of age may dismiss bill filed for him, but cannot make prochain ami pay costs, unless he prove suit improperly instituted. *Anon.* 4 Mad. 461. **INFANT; COSTS.**

Prochain ami plaintiff dying after decree, reference to master to appoint another directed on motion of defendant. *Pracey v. Sandiford*, 3 Mad. 468. **PR. ABATEMENT & REVIVOR.**

No reference, upon an application by the next friend of an infant, to see whether a suit which he himself has instituted, is for the infant's benefit. *Jones v. Powell*, 2 Mer. 141. **PR. REFERENCE OF SUIT, IF FOR INFANT'S BENEFIT.**

Prochain ami of infant plaintiffs not permitted to act as receiver. *Stone v. W'ishart*, 2 Mad. 64. **PR. RECEIVER, WHO.**

The court will change a next friend upon his not proceeding with a cause; solicitor is not to attach without orders from his client, but where the client is next friend of an infant, and moves to discharge the attachment on that ground, although otherwise regularly issued, it seems that the court will refer it to the master, to see whether it is for the interest of the infant, that the next friend should be continued. *Ward v. Ward*, 3 Mer. 706.

Trustee or next friend of infant is entitled to fair expenses beyond taxed costs, under the head of just allowances. *Fearn v. Young*, 10 Ves. 184. **PR. COSTS; TRUSTEE.**

Bill by infant dismissed with costs, upon facts which, though not known when the bill was filed, might have been with reasonable diligence; the next friend not allowed the costs out of the infant's estate; but whether they shall be repaid, and from what fund, or by whom, was reserved until the hearing. *Peauce v. Pearce*, 9 Ves. 548. **INFANT; PR. COSTS.**

Court refused prochain ami the costs beyond taxed costs. *Osbrye v. Denuc*, 3 Ves. 424. **PR. COSTS.**

Writ of *ne exeat regno* obtained by a resident here against a resident in the West Indies, upon a demand arising there, when the answer came in, was discharged under the circumstances, with costs against the prochain ami of the infant plaintiff, but upon the admissions in the answer, the defendant was ordered to give security to abide the decree. *Roddam v. Hetherington*, 5 Ves. 91. **NE EXEAT REGNO; RESPONDER; COSTS.**

After answer plaintiff not compelled to change next friend, on affidavit that she was worth nothing, and not found till after answer contradicted by her, swearing to 44l. a year; defendant ought not to have answered, but should have said he could not find her. *Anon.* 1 Ves. J. 409. **PL. ANSWER.**

Next friend cannot sue *in forma pauperis*, but ought not to be discharged for poverty; dangerous to displace him, though perhaps there may be a case gross enough for it. *Id.* 410. **PR. PAUPER.**

A master's report on a reference to inquire whether a suit instituted in the name of an infant, by a prochain ami, was necessary, is not a subject for exceptions; but any objection to it must be made on the motion to confirm the report. *Whitaker v. Marlar*, 1 Cox, 285. **PR. MOTION; PR. EXCEPTIONS TO MASTER'S REPORT.**

Nothing short of a dishonest intention will be sufficient to fix a prochain ami personally with costs; no degree of mistake nor misapprehension will be sufficient. *Id. ib.* **PR. COSTS.**

Reference, which suit by prochain amis most advantageous to infant, one ordered to prosecute, other not restrained further, it being at his peril to proceed. *Owen v. Owen*, Dick. 310.

On death of prochain ami, and plaintiff refusing to name new prochain ami, defendant, after ten day's notice, to be at liberty to name one. *Lancaster v. Thornton*, id. 346.

Motion on infant's behalf to restrain defendant's executor receiving more of personal estate, and rents and profits of real estate, and for receiver; prochain ami ordered to pay costs of motion refused. *Buckley v. Buckeridge*, id. 395.

Order to appoint a new prochain ami in the room of the deceased prochain ami. *Lancaster v. Thornton*, Amlbl. 398. **S. C. 1 Dick. 346.**

The next friend of an infant allowed costs, though the bill had been dismissed, the master having previously reported the suit for the infant's benefit. *Tanner v. Ivie*, 2 Ves. 466. **S. C. Dick. 168. PR. COSTS.**

The deposition of the prochain ami of the plaintiff cannot be read for the plaintiff, he being liable to costs. *Head v. Head*, 3 Atk. 511. **PR. EVID.**

The depositions of a wife of a prochain ami cannot be read, as the husband is liable to costs. *Id.* 547. **PR. EVID. WITNESS, COMPETENCY; HUSB. & WIFE.**

A prochain ami need not be a relation, but he must be a person of substance, because liable to costs. *Anon.* 1 Atk. 570.

A feme covert was permitted to change her prochain ami, after a considerable progress in the cause, the new one entering into a recognizance to answer the costs, and abide the order. *Linsley or Halpen v. Halpen*, Bunb. 310. **FEME COVERT.**

An infant, by prochain ami, brings a bill, and never stirs in it after he comes of age, and the bill is dismissed; the infant and prochain ami are both liable to pay costs. *Turner v. Turner*, 2 P. W. 297. **Sel. Ca. in Ch. 49. 2 Stra. 708. INFANT; COSTS.**

Any person may, as prochain ami, exhibit a bill in the name of an infant, without his leave, but cannot in the name of a feme covert. *Andrew v. Craddock*, Prec. Chan. 376. **S. C. Gilb. Eq. Rep. 38.**

Where it appears upon affidavit that the prochain ami is insolvent, he must give security for costs. *Wale v. Salter*, Mos. 47. *Anon.* Mos. 66. **PR. SECURITY FOR COSTS.**

A prochain ami shall not be obliged to give security because he is a privileged person. *Anon.* id. 86. **PR. SECURITY FOR COSTS.**

## LXXV. PRODUCTION OF DEEDS.

See also PR. INSPECTION OF DEEDS.—PR. INSPECTION.  
ORDER FOR.

The master may order what books and papers shall be produced, and when and how long they are to be left in his office. 60th Gen. Ord. 3rd April, 1828.

The court does not usually compel a party to produce his title deeds as evidence, but where a party produces them to defeat his adversary, the opposite side is entitled to an inspection of them. *Grange v. Cass*, 2 Y. & J. 241. TITLE DEEDS; PR. INSPECTION OF DEEDS.

In a suit by a vicar against occupiers for tithes, a motion was made by the plaintiff for production of deeds, papers, and writings admitted by the answer of one of the defendants to be put in his possession or power. The defendant resisted the application on the ground that several of such documents related to and showed his title as lay impropriator to some of the tithes in question, the court held that the plaintiff was not entitled to the production of such of them as related to the title of the defendant to the tithes in question. *Collins v. Gresley*, 2 Y. & J. 490.

A party ordered to produce books, &c. before the master, is bound to leave them if the master thinks fit so to direct. *Sidden v. Liddiard*, 1 Sim. 38.

Where an information was filed by the attorney general under the 43 G. 3. c. 58. s. 25. against an army agent for a discovery of accounts from 1792 to 1802, who pleaded a settled account by clearing warrants, and the plea having been overruled, afterwards moved to amend the plea, and for the purpose of so doing that the attorney general or the secretary at war might be ordered to produce certain vouchers, accounts, &c. rendered annually during that period by the defendant to the war office, and there deposited, and which the defendant swore were material to his defence; the court under the particular circumstances ordered the proceedings upon the information to be stayed until the documents were produced. *Att. Gen. v. Brookbank*, 1 Y. & J. 439.

Where by arrangement between parties in cause to save time, it was agreed that deeds should not be read but should be entered as read, and an abstract thereof delivered to court, and plaintiff to be allowed to compare abstract with deeds: Held that plaintiff was only entitled to compare them as though read, and take minutes, but not to take copies or extracts therefrom. *Brasier v. Mytton*, 1 M'Clel. & Y. 613.

Under the general charge in a bill that the defendant has divers papers, writings, &c. in his possession or power, relating to the matters in the bill mentioned, the plaintiff is entitled to the production of cases submitted for the opinion of counsel admitted by the answer of the defendant to be in his possession, but not to the opinions given upon those cases. Though a plaintiff is generally speaking, entitled to the production and discovery of all papers relating to the matters in the bill mentioned in the defendant's possession or power, yet it seems that he is not entitled to the production of letters stated by the answer of the defendant to have been received by him since the filing of the bill in answer to enquiries made by him in respect to some of the matters in question, with a view to his proofs in the cause, nor to any particulars respecting such letters which would disclose the names of the witnesses or the facts likely to be proved by them. *Preston v. Carr*, 1 Y. & J. 175.

A party interested in documents in the custody of his adversary is entitled to their production. *Imman v. Hodgson*, 1 Y. & J. 28.

Under an order for production and inspection, it is not sufficient to leave the box containing the deeds

in the hands of clerk in court locked, but the key must also be left, though party undertakes to attend with key when called on. *Preston v. Carr*, 1 M'Clel. 457.

Where defendant referred to his schedule as containing all deeds, &c. in his custody, &c. the plaintiff is entitled to the inspection of all such deeds, &c. as of course, unless it appeared by description of any particular instrument in schedule, or by affidavit that it was evidence not of the title of plaintiff but of the defendant, or that plaintiff had otherwise no interest in its production. *Tyler v. Drayton*, 2 S. & S. 309. PL. ANSWER.

Production of deed in plaintiff's possession ordered on motion, and affidavit that defendant believed instrument to be forged; and that he could not fully answer bill before he inspected it. *Jones v. Lewis*, 2 S. & S. 242.

It does not establish sufficient interest in a title deed relating to real estate, to warrant an order for its production, that if its effect be such as is sworn to by the party claiming the estate under it, legatee will lose the benefit of legacies bequeathed to them by that party's ancestor, from whom he immediately derives title. *Wilson v. Forster*, 1 M'Clel. & Y. 274.

As to how far vicar, plaintiff in title cause, is compellable to produce for inspection, &c. vicar's books and those of predecessors admitted by him in his answer to cross bill by defendant to be in his possession; and to contain entries relating to payments of sums of money as compositions corresponding in amount with the money payments set up by defendant as modus relied on. The costs of all proceedings had for the obtaining the discovery by such means, must be paid by party so acquiring it. *Firkins v. Lowe*, 13 Price, 193. S.C. 1 M'Clel. 73. PR. COSTS; TITHES, EVIDENCE.

Where partnership has expired by efflux of time, and in a suit for an account, &c. a receiver has been appointed before decree, the court will not compel defendant (the former managing partner) to deliver up to receiver for the purpose of making out bills of costs, partnership books and accounts which have remained in his hands, and title deeds belonging to a third person which came into possession of co-partners as solicitors, such defendant offering the receiver free access thereto, and to assist in making out such bills. *Dacie v. John*, 1 M'Clel. 206. S.C. 13 Pri. 446. PARTNERSHIP.

Where a party has a pressing necessity for papers in the hands of his solicitor, the court will order them to be delivered up, upon a deposit being made sufficient to cover the amount of the solicitor's bill and the costs of the taxation. *Chilton v. Pardon*, 1 Turn. & R. 304. SOL. & CLIENT; LIEN.

In a suit instituted against a solicitor who had also acted in the capacity of steward, for an account and for delivery of title deeds, the court upon motion ordered the deeds to be delivered up to the plaintiff upon payment into court of so much of the balance claimed by the answer as was not covered by any security. *Batch v. Symes*, 1 Turn. & R. 87. See *Tyler v. Drayton*, 2 S. & S. 309. SOL. & CLIENT.

Where a deed is sought to be impeached, the plaintiff is entitled to have it produced, and the defendant cannot resist the production upon ground of lien. *Id. ib.* IMPEACHMENT OF DEEDS; LIEN.

A solicitor has no lien upon the will of his client, and cannot refuse to produce a deed executed by the client in his favour, containing a reservation of a life interest, and a power of revocation. *Id. ib.* SOL. & CLIENT; LIEN.

Where a defendant admits books in the West Indies to be in his possession, custody or power, the court will order him to bring them here within a rea-

reasonable time, and if they are not brought, will consider it the same as if he had them here in the first instance, and refused to produce them. *Ferguson v. Balfour*, 1 Turn. & R. 190.

A solicitor who has declined to proceed with a cause, will be ordered, though his bill of costs are not paid, to deliver up the papers to the present solicitor of the party, the latter undertaking to hold them subject to the former solicitor's lien, for what shall be found due to him on the taxation of the bills. An offer on the part of the former solicitor, after the motion is made, to proceed with the cause, will not prevent the court from ordering him to deliver up the papers on the terms above mentioned. *Colegrave v. Manby*, 1 Turn. & R. 400. SOL. & CLIENT; LIEN; DECLINING TO ACT.

Covenant to produce title deeds remains with land for benefit of purchasers, but not for benefit of vendors. *Barclay v. Raine*, 1 S. & S. 449. COVENANT.

Solicitor refusing to allow deed in his possession to be proved on behalf of plaintiff because he had lien on it for costs due from defendant, ordered to produce it at his own expence and pay costs occasioned by his refusal. *Brassington v. Brassington*, 1 S. & S. 455. SOL. & CLIENT; LIEN.

Plaintiff in title cause, lessee of vicar ordered on motion on part of defendant to bring in and deliver to clerk in court, books, papers, &c. stated in affidavits to be in his possession and to belong to vicar who was not a party to suit. *Foreman v. Cooper*, 11 Price, 515. PARTY.

Defendants setting up defence of title in landlord, and producing in evidence on hearing certain deeds belonging to landlord, ordered on petition to produce such deeds on trial of issue, or that they should admit facts which, as alleged by other parties, deeds would establish, although landlord was no party to suit. *Pulley v. Hilton*, 10 Price, 118. LANDLORD & TEN.; PL. PARTY; PL. ADMISSION BY ANSWER.

The court leaves it to the discretion of the master to determine under the usual order for production of books, whether they are to be merely produced from time to time or to be deposited with the master. *Hennu v. Dunn*, 6 Mad. 340.

A solicitor discharged by his client or his representatives, is not bound to produce the papers in his possession for the purpose of the cause, his bill of costs not being paid. *Lord v. Wormleighton*, 1 Jac. 580. SOL. & CLIENT.

Person interested in issue *disaiti vel non*, refusing to be party to it, is yet allowed to attend trial by counsel, and ordered to produce deeds, &c. except those she held as mortgagee. *Pindar v. Smith*, 6 Mad. 48. PR. ISSUE AT LAW.

A document which is stated in the bill, and which the answer admits and refers to, cannot be read from the bill at the hearing, but must be produced. *Cox v. Allingham*, 1 Jac. 339. PR. EVID.

A party ordered to produce papers which are in the hands of his solicitor, must pay his bill of costs if he cannot otherwise procure them. *Exp. Shaw*, 1 Jac. 272.

Rule that there must be schedule before court will order production of deeds and papers, applies only in cases of discovery. *Anon.* 6 Mad. 97. PL. DISCOVERY; PR. ANSWER; SCHEDULE.

The court will make interlocutory orders for production, only for security or discovery, and will not anticipate the decree. *Lingen v. Simpson*, 6 Mad. 290. PR. INTERLOCUTORY ORDERS.

It is not by the practice of exchequer required of a party charged by a bill to have deeds and documents &c. in his possession, material to the case on the other side, that he should protect himself from producing them by plea. The court will take care that he be

not called on without good reason to produce his securities, for they watch with jealousy proceedings instituted for that purpose, and will require an unnecessary case to warrant their interference in making an order for their production. *Vansittart v. Barber*, 9 Price, 641. PL. PLEA.

Solicitor claiming lien on deeds cannot be compelled to produce them at hearing of cause, without *subpoena duces tecum*. *Busk v. Lewis*, 6 Mad. 29. SOL. & CLIENT; LIEN; PR. SUBPOENA DUCES TECUM.

On a motion for a defendant to produce a deed before the examiner, affidavits cannot be read to prove the fact of its being in his possession; it must appear upon his answer. Leave given though the cause was at issue, to amend the bill for the purpose of obtaining that admission. *Barnett v. Noble*, 1 Jac. & W. 227. PL. ANSWER; PR. BILL, AMENDMENT.

If the original writ is required, the motion cannot be made without producing it. *Ellerton v. Thirk*, 1 Jac. & W. 376.

Production of deed unconnected with plaintiff's title and which destroys defendant's title, refused. *Sampson v. Sweettenham*, 5 Mad. 16.

The court has jurisdiction in bankruptcy to order the papers deposited by the bankrupt with his attorney, in actions commenced before the bankruptcy, to be delivered up to the assignees, provided they are necessary to the administration of the estate. But where assignees wanted such papers for the purpose of instituting criminal proceedings against the bankrupt, the court refused to make the order, and dismissed the petition with costs. *Exp. Innes*, Buck. 337. BANKRUCY, JURISDICTION.

After an order that the defendants should have a fortnight's time to answer, after the plaintiff had produced an instrument stated in the bill, fifteen months having elapsed without production, the plaintiff was ordered to produce the instrument on or before a day named, and production not being made, the bill was dismissed with costs. *Princess of Wales v. El. Liverpool*, 3 Swan. 567. PR. TIME TO ANSWER.

Order to registrar of ecclesiastical court should be directed "To the registrar of the court," and security for return of a will to him should be approved of by master. *Quiley v. Quiley*, 4 Mad. 213.

Court will not order plaintiffs (where cause has been referred to commissioners) to produce and leave documents, &c. in their possession in the hands of their clerk in court for inspection of defendants. *Governor, &c. of Shrewsbury School v. Muddock*, 7 Price, 655.

The court will not, on bill for tithes praying discovery of documentary evidence, order production of a tithe book of former rector shown to have been in the possession of defendant's attorney, unless it clearly appear from admissions in the answer that it would assist plaintiff's case. But if there be enough shown to give colour for the application, court will not give costs to defendant. *Bligh v. Benson*, 7 Price, 205. TITHES; EVID.

Admission in answer that defendant some time past had deed in possession, not sufficient to warrant order for its production. *Heenan v. Midland*, 4 Mad. 391. PL. ANSWER; ADMISSIONS.

The plaintiff is entitled to the production of documents referred to in the answer, and admitted to be in the custody of the defendant, although an injunction obtained by the plaintiff has been dissolved on the ground that the contract which he seeks to enforce is illegal. *Erans v. Richardson*, 1 Swan. 7. ADMISSION IN ANSWER.

In ordering the production of documents, the court proceeds on the principle, that they are by reference incorporated into the answer, and become a part of it. *Id.* 8.



The master's certificate in support of a motion for an absolute order for production of books, &c. or commitment, must bear date on the day of the motion. *Hopkinson v. Leach*, 3 Swan. 98. **PR. MASTER'S CERTIFICATE.**

A defendant ordered to deliver a copy of a deed, and refer to it in her answer as a true copy. *Ld. Pelham v. Ds. Newcastle*, 3 Swan. 284.

Sequestration for non-production of deeds, discharged on payment of the costs, the party having been examined and denied knowledge of them. *Id.* 293. **PR. SEQUESTRATION.**

Under a *scire facias* *duces tecum*, the party may, in court, object to produce the documents; but if the objection is overruled, production will be compelled. *Field v. Bedmont*, 1 Swan. 209.

Whether, after a verdict at law, in an action of trespass, the court will grant an injunction against future trespasses, in favour of parties who refused at the trial to produce documents necessary to a fair decision, *qu?* *Id.* 210. **VERDICT AT LAW; INJUNCTION AGAINST TRESPASS.**

A clerk in court and solicitor refusing to continue the conduct of a cause until his fees are paid, ordered to produce an office copy of the bill to be marked. *Mayne v. Haukey*, 3 Swan. 93. **PR. OFFICERS OR COURT; SOL. & CLIENT, LIEN.**

An agent, defendant to a bill for an account by his principal, ordered, on motion, to give with his clerk in court, documents in his possession, containing entries relating to the cause, sealing up entries on other subjects, and making affidavit that he has sealed such entries only. *Gerard v. Penswick*, 1 Swan. 533.

Production of books, &c. referred to in answer, ordered, though it was contended that answer shewed plaintiff was not entitled to relief. *Unsworth v. Woodcock*, 3 Mad. 432. **PR. ANSWER.**

Motion, on the part of a plaintiff, for the production of a deed alleged to be in possession of the defendant as tenant in common with the plaintiff, refused, it appearing by the answer that the defendant had sold his share, and was in possession of the deed in question, only as mortgagee to the purchaser. A mortgagee has no right to show the title of his mortgagor. *Lambert v. Rogers*, 2 Mer. 489. **MORTGAGE & MORTGAGEE.**

On a bill to set aside a partition on the ground of inequality, and for a new partition, stating a valuation and estimate, the gross result of which, without the particulars, was contained in a schedule to the bill, the answer denying the accuracy of the valuation, but alleging that the defendant was unable to set forth in what particulars it was inaccurate, a reason of such omission; a motion by the defendant for production of the valuation, and papers, &c. relative thereto, refused with costs. *Micklethwait v. Moore*, 3 Mer. 292.

Where a defendant seeks the production of deeds, &c. stated to be in the plaintiff's possession, the usual course is by filing a cross bill; but such a case as the present would not, even if a cross bill were filed, suffice to obtain an order for the purpose. *Id. ib.*

General rule as to the deposit of papers and writings is, that an executor must deposit them for the benefit of the parties interested, unless there are purposes which require that he should retain them. *Freeman v. Fairlie*, 3 Mer. 30.

Attorney, submitting to produce title deeds of his client in his possession as the court shall direct, may be called upon to produce them if the principal could himself have been called upon to do so. *Fenwick v. Reed*, 1 Mer. 114. **SOL. & CLIENT.**

On a motion for an attachment for refusal of production and inspection of documents, pursuant to order, or for immediate inspection, the defendants ob-

jecting that the documents contained passages improper for inspection, the lord chancellor refused the application, but directed the defendants to pay the costs of it. *Id. v. Piddell*, 1 Swan. 535. **PR. ATTACHMENT.**

Order for production of papers on a trial at law, limited to those referred to by the answer of the particular defendant, and not extended to any other answer, except upon a trial directed by the court, when the production is more general. *Marsh v. Sibbald*, 2 V. & B. 375.

Solicitor is bound to produce papers of his client for him, or in bankruptcy for his assignees, though not employed by them in the cause for the purposes for which he received them, but not bound to deliver them up, or produce them in any other business without payment. *Ross v. Laughton*, 1 V. & B. 349. **SOL. & CLIENT, LIEN.**

Motion by defendants, to a bill for partnership account for a production of the accounts before answer, refused. *Pickering v. Rigby*, 18 Ves. 484. **PR. ANSWER; PARTNERSHIP.**

Whether an attorney's lien upon papers extends to the original will of his client, *qu?* Order to produce it before the examiner, and for the hearing of the cause without prejudice. *Georges v. Georges*, 18 Ves. 204. **SOL. & CLIENT, LIEN.**

Plaintiff appealing from a decree, dismissing the bill, entitled to the usual order for the production and inspection of deeds. *Church v. Barelay*, 16 Ves. 435. **PR. APPEAL.**

The object of a bill being to set aside deeds, the court will not, on motion, go beyond the usual liberty to inspect, &c. and for production at the hearing, by an order to deposit them with the master for safe custody, without a special case establishing danger, that they may not be produced; therefore, where most of the circumstances relied upon, viz. variations in two deeds, appeared upon the answer, the order was limited to production at the hearing. *Beckford v. Aldman*, *id.* 438.

Bill by a widow, devisee in fee, impeaching a mortgage by her while covert, for want of a fine; answer, admitting possession of the will, and the title under it, alleging the loss of the settlement, stating it differently from the bill, by the addition of a power of revocation and appointment of new ones, by the exercise of which a fine was not necessary, production of the will not being offered by the answer, ordered on motion. *Bird v. Harrison*, 15 Ves. 408. **PR. ANSWER.**

Motion for production of deeds and papers, referred to as in defendant's possession, but not described by the answer or schedule, and without an offer to produce them, as the court shall direct, refused. *Aikens v. Wright*, 14 Ves. 211. *Id.*

The master not ordered to certify whether he was satisfied with the production of the papers by a party. *Cotton v. Harey*, 12 Ves. 391. **PR. ORDERING MASTER TO CERTIFY.**

The defendant refusing to produce the office copy of the bill, the draft could not be read; but a specific performance was decreed upon inspection of the record. *Huddleston v. Briscoe*, 11 Ves. 583. **SPEC. PERF.**

Whenever a client is bound to produce a deed for the benefit of a third person, so also is his solicitor, though the latter may have a lien on it for costs against his client. *Furlong v. Howard*, 2 Sch. & L. 115. **SOL. & CLIENT, LIEN.**

Under a suspected title to a lease granted by a corporation, a trust being set up against the lessee, motion to compel the corporation to produce surrendered leases, counterparts of renewed leases, &c., no order was made. *Cock v. St. Bartholomew Hosp.* 8 Ves. 138.

Defendant cannot be ordered to produce deeds, &c. unless stated in a schedule to his answer, or at least described with certainty. In Ireland it is still the practice to pray in bill a schedule. *Anon. v. Smith*, 117. PL. ANSWER.

Answer admitting the execution of an instrument, and craving leave to refer to it, when produced, is not a ground to move for the production; not admitting that it is in the possession or power of the defendant. *Darwin v. Clarke*, 8 Ves. 158. PL. ANSWER.

Motion by defendant, for inspection of letters, referred to by plaintiff's depositions as exhibits, refused with costs. *Wiley v. Pistor*, 7 Ves. 411.

Order made upon registrar of consistory court, that an original will may be produced for hearing on giving security. *Hodson v. —*, 6 Ves. 134. S. P. *Ford v. —*, id. 302.

Where bill seeks relief, as well as discovery, the court will not, on motion, aid the plaintiff in proceeding at law without authority and controul of court; any such proceeding must be under a decree; therefore, in such a case, a motion that defendant should produce deeds, &c. at the trial of ejectment, was refused. *Aston v. Id. Easter*, 6 Ves. 288. S. P. *Hilton v. Morgan*, id. 293.

Motion to compel attorney to produce papers of his client, refused with costs. *Wright v. Mayer*, 6 Ves. 200. ATT. & CLIENT.

No subpoena duces tecum upon attorney to produce papers of client. *Id. ib.*

Court will not direct ecclesiastical court to deliver out original will to be produced here merely to save expence of copy. *Wells v. Corbyn*, 3 Anst. 648. JURISDICTION.

Bill for discovery and delivery of a settlement under which plaintiff claimed, and other title deeds, and possession of the estate, demur to all the relief, and all the discovery except of the settlement for want of equity, and answer admitting the settlement, and offering to produce it, and denying that defendant had any other relative to plaintiff's title, the title being legal, the court would only order the settlement to be produced at the trial; the demurrer therefore, going to all the relief, the defendant had leave to amend. *Benison v. Ashley*, 2 Ves. J. 459. PL. ANSWER, AMENDMENT OF DISCOVERY.

Defendant referring to deed in his answer, as in his possession, bound to show the whole deed. *Potts v. Adair*, 1 Anst. 259.

Defendants put in separate answers; one of them moved that the other might leave with his clerk in court certain deeds mentioned in his answer, for the inspection of the defendant moving. Motion refused, with costs. *Dussaux v. Sheppard*, 2 Fowl. 60.

In an abstract of a vendor's title, a will which formed part, was represented as having been proved in the spiritual court, which afterwards appeared not to have been done. The purchaser filed his bill, praying that the defendants might either be decreed to prove the will, or that it might be deposited in the hands of the master for safe custody. It appeared that two other persons were interested under the will, and they were added as parties; and they not objecting, the will was directed to be deposited with the master for safe custody: the vendors having by their misrepresentations occasioned the suit, were ordered to pay all the costs. *Harrison v. Coppard*, 2 Cox, 318, 319. VEND. & PURCH.; TITLE; PROOF OF WILL.

To a bill of discovery, praying amongst other things, a discovery of the correspondence between the parties defendants in the schedules to their answer, set forth a list of all letters, &c. in their possession, and also extracts from the correspondence, stating in the body of the answer, that such extracts were the only parts

which related to the matters in question, and that many of such letters related also to other matters; on a motion for the production of such letters, the court refused the application, the defendant undertaking, that on the trial, the plaintiff might read the extracts from the schedules, without reference to the body of the answer. *Campbell v. French*, 2 Cox, 286.

A plaintiff claiming under a deed, not stated particularly by him, and not particularly and explicitly admitted by the defendant, cannot be entitled to a judgment or decree founded upon such deed, against such defendant, without producing and proving such deed. *Berney v. Moore*, 2 Ridg. P. G. 323. PR. EVID.

Upon what terms a party is to be excused, the production of books of account and papers which are out of the kingdom, and necessary to his business. *Gabbett v. Carendish*, 3 Swan, 267.

A plaintiff is entitled to the production of maps, rentals, &c. in the possession of, and belonging to the defendant, which elucidate the right of the plaintiff. *Potts v. Adair*, id. 268.

The plaintiff is entitled to a production of such papers only in which he has a common interest with defendant. *Burton v. Neville*, 2 Cox, 242.

On an issue from chancery, original answer not sent down to the trial, whether between same parties, or not, till after refusal of the office copy as evidence. *Anon.* 1 Ves. J. 154. PR. EVID.

The statement of a defendant by his answer, of the contents of an instrument, is not a sufficient ground for an order for the production, without an express admission of the instrument being in the defendant's custody or power. *Erskine v. Biss*, 2 Cox, 226. PL. ANSWER.

Whenever a defendant wants a discovery of a deed in the hands of the plaintiff, he must file a cross bill for the purpose, although the deed be referred to by the original bill, as being in the plaintiff's custody, and ready to be produced, as the court should direct. *Spragg v. Corner*, id. 109. PL. DISCOVERY; PL. CROSS BILL.

Whenever a plaintiff has established an interest in any instrument in the hands of the defendant, he is in general entitled to a production of it; and in this case the court thought the plaintiff had established a sufficient interest in the documents required, and ordered a production of them. *Smith v. Dk. Northumberland*, 1 Cox, 363.

Bill filed against a steward for an account of monies received in that capacity, and of the interest made by him of it. By his answer he admitted he received this money, and mixed it with his own, and used it accordingly. This admission will induce the court to direct a production of his banker's books, though they may contain many other private matters. *El. Salisbury v. Cecil*, id. 277. PL. ANSWER.

Deed is made to two severally; possessor of deed bound to produce it for advantage of other. *Cary*, 15.

Commission of partition, and parties to produce deeds, defendant in contempt for not producing, &c. Sequestration finally ordered. *Trig v. Trig*, Dick. 325.

Order was made on registrar of Breen to deliver a will to defendant's attorney, to be produced at the hearing of the cause, on giving security to return it. *Williams v. Floyer*, Amb. 343.

It is not enough to entitle an heir at law to inspection of deeds, that at the close of an answer admitting the ancestor's will, he introduces an allegation that he is heir. *Potter v. Potter*, 3 Atk. 719.

A jointress is not obliged to bring her jointure deed into court, unless the party requiring will confirm it, but she must deliver in a schedule of the deeds she has. *Petre v. Petre*, id. 511. JOINTURE.

A jointress had her own part of the marriage set-

element in her custody, and became possessed of her husband's, as his executrix; on motion, she was ordered to produce it to the clerk in court, but refused to deliver it up, that being the very end of the matter. *Aston v. Aston*, 3 Atk. id. 302.

A jointress or purchaser ought to produce their deeds, to see if the lands they claim are comprised therein. S. C.

Where a son, remainder-man in tail, under a settlement made by his grandfather, in which the father was tenant for life, without impeachment of waste, preferred a bill to have the title deeds brought into court, Ld. H. refused to direct it, observing that some third person, and a secure place agreed upon by the parties, would be a much more proper repository than a master; and he added, that the relief prayed, was the first application of the kind. *Pyncent v. Pyncent*, 3 Atk. 571. TENANT FOR LIFE, AND REMAINDER-MAN.

If bill impeaches account, and charges that plaintiff has no copy, defendant in pleading stated account, must annex a copy. *Hankey v. Simpson*, id. 303.

Motion that plaintiff might be at liberty to inspect the books of the East India company at Bombay, in relation to a transaction respecting certain bills, and that the factor might produce them on oath; the company had put in answer, alleging that the entries specified in their answer were all which related to the transaction, as they were informed by their factor; but this was not satisfaction enough to plaintiff, as companies do not answer upon oath, and did the factor swear that these were all the entries. Motion refused, first, because duplicates of the books had been transmitted to England, and the motion should have been to inspect the entries here; secondly, because the books contained other matters besides those relating to private trade, and plaintiff had not named particularly in his notice what particular entries or papers were to be examined; and thirdly, because plaintiff might have made some of the members of the company defendants, and got their answer on oath. *Steward v. E. I. Comp.* 9 Mod. 387.

If a defendant submits to produce a deed, he will be obliged to do so before the hearing, if the court shall think fit to order it. *Stanhope v. Roberts*, 2 Atk. 214.

The plaintiff claimed, by virtue of a remainder in tail expectant on the tenant in tail's dying without issue, and was the heir male of the family; the defendants were sisters and heirs general of the tenant in tail, and by their answer shewed that their brother, the tenant in tail, suffered a recovery, declaring the use to himself in fee, and referred to the deeds in their custody; the court ordered before the hearing, the defendants to leave with their clerk in court the deeds making the tenant to the præcipe, and leading the uses of the recovery. *Bettison v. Farrington*, 3 P. W. 363.

The defendant's witness proves a deed, and refers to it in his depositions; the plaintiff cannot compel the defendant to produce the deed at the hearing, the reference therein not making it part of the depositions. *Hodson v. E. Warrington*, id. 34.

Plaintiff had proved a deed in the cause, and defendant had got an order at the Rolls for leave to inspect it, on the ground that the deposition referring to the deed, had made it part of the deposition. Order discharged per Ld. Ch., because defendant is not before the hearing to see the strength of the cause, or any deed to pick holes in it. *Davers v. Davers*, 2 P. W. 410. 2 Stra. 764. S. C. *Ogle v. E. Gower*, 2 Fowl. 57. And the rule extends equally to letters referred to as exhibits by the depositions. *Wiley v. Pistor*, 7 Ves. 414. S. P.

Plaintiff filed a bill for discovery and account against defendant, who lived at Constantinople. Defendant set forth the particulars of all the books, ac-

counts, &c. and offered to produce them at Constantinople to any person plaintiff would appoint. On exceptions to the answer, this was held sufficient, defendant to produce the book, &c. upon an affidavit to be sworn by the master, and sworn before the consul or ambassador abroad; plaintiff to be at liberty to take copies at his own expence. *Hornby v. Pemberton*, Mos. 57.

Bill by one co-heir against another, who set up testator's will in his favour, but acknowledged the deeds to be in his hands. He shall produce the deeds to plaintiff, though the validity of the will has not yet been tried at law. *Floyer v. Sydenham*, 9 Mod. 99. 2 Ch. Ca. 4. Sel. Ch. Ca. 2.

A peer disinherited by his ancestor is entitled to the favour of the court, and on bill, and answer to have the family deeds brought before the master, in order to see whether anything can be discovered for his advantage. *El. Suffolk v. Howard*, 2 P. W. 177. PEER; HEIR AT LAW.

Bill for a discovery whether in a mortgage made by A to B, which had been assigned to the defendant, there was not some trust declared for the benefit of the plaintiff; defendant by answer, denied that there was any trust declared for the plaintiff; the answer being replied to, the question at the hearing, whether the defendant should be obliged to produce the deed, the court would not compel him to do it; *qu?* *Hall v. Atkinson*, 2 Vern. 463. DISCOVERY; TRUST.

It is not sufficient that a party swears he has no books, &c. to his knowledge, concerning the matters in question, but those produced; he must swear without the qualifying words "to his knowledge." *Hertford M. v. Hertford Poor*, 4 Vin. Ab. 440. 2 Eq. Ab. 14. Bridg. Prac. Dig. 423.

A peeress ordered to produce deed confessed in her answer on honour only, not on oath. *Hamilton v. Gerrard*, Prec. Chan. 92. PEERS.

Deed in favour of volunteer ordered into court at his suggestion. *Brookbank v. Brookbank*, 1 Eq. Ab. 168.

A corporation as trustees for a charity shall not be obliged to produce their books relating to the trust, though they submitted by their answer to produce them as the court shall direct. *Att. Gen. v. City of Coventry*, Bun. 290.

Bill setting forth a settlement, and to compel the execution of it by defendant, a trustee; defendant, by answer, said that he believed there was such a deed as in the said deed is set forth. At the hearing, plaintiff would have read this deed, though not proved, supposing it to have been confessed by the answer; but the court would not permit it, because the confessing went no farther than what was set forth in the bill, and would not warrant the reading of the deed produced, though it had such clauses in it. *Anon.* 2 Vent. 361.

## LXXVI. PRODUCTION OF PARTIES.

Party examining witness is bound to keep him in town forty-eight hours after his production at seat of adverse clerk in court, and if cross-interrogatories are left with examiner within forty-eight hours, party must keep him in town till cross-examination finished, and if witness departs, party must bring him back at his own expence, or examination in chief will be suppressed. *Whitlock v. Lysaght*, 1 S. & S. 446. PR. CROSS-EXAMINATION.

Proceeding under the act of 6 Ann. c. 18. to compel production of certain *quæ sit*. *Exp. St. Aubyn*, 2 Cox, 273.

Father detaining infant to prevent his being served

with subpoena. Father ordered to discover where infant was. *Hobbs v. Lukin*, Dick. 359.

### LXXVII. PROHIBITION.

See also COURTS, INFERIOR.

Only one writ of prohibition in the same cause. Beame's Ord. 37.

No writ of prohibition to pass without warrant under the Ld. Ch.'s hand. *Id. ib.*

Prohibition to the prize court for proceeding after treaty of peace with America, refused. *Case of the ship Harmony*, Coop. 325.

Prohibition to injoin, judge of prize court from proceeding in question of prize or no prize, refused. *Exp. Lynch*, 1 Mad. 15. JURISDICTION.

Proceeding upon bail bond in Marshalsea court assigned according to the practice of that court to one of its officers, is not a proceeding against a prohibition restraining the original action so as to incur a contempt. *Iveson v. Harris*, 7 Ves. 251. PR. CONTEMPT.

A writ of prohibition may be had in the court of chancery in the vacation, the court being always open. *Id.* 257.

But in *Montgomery v. Blair*, 2 Sch. & Lef. 136, Ld. Redesdale was of opinion, that when the other courts are open, this court should not entertain an application for a prohibition; and his Lordship directed the application to be made to a court of law.

Prize jurisdiction extends to question whether a person, who received and sold the property, received it as consignee for valuable consideration, or as prize agent. A prohibition, therefore, against a monition to bring in the property or the proceeds, was refused. *Noysonhed*, *Case of the Danish ship*, 7 Ves. 593.

Motions for prohibition must be founded on affidavit, not suggestion. *Corp. of Worcester v. Bennett*, Dick. 143.

Prohibition issues of course on proper affidavit, but defendant must plead before he applies for it. *Walker v. Fianderheide*, Dick. 336.

Where a custom for a church rate is pleaded in the ecclesiastical court, and the plea admitted, they may proceed to try the custom, but, if denied, a prohibition lies. *Dunn v. Coates*, 1 Atk. 289. PR. ECCLESIASTICAL COURT.

A prohibition to the ecclesiastical court cannot be granted upon petition; but by motion and a proper suggestion, it may. *Hill v. Turner*, 1 Atk. 516. ECCLESIASTICAL COURT.

If a party be sued in an inferior court in vacation, for a matter out of jurisdiction, a prohibition lies in chancery, or an affidavit to that effect; but no affidavit is necessary where, on the face of the declaration, the matter appears to be out of the jurisdiction. *Anon.* 1 P. W. 476. JURISDICTION.

Prohibition to an inferior court for holding plea of a matter out of their jurisdiction. *Newhouse v. Milbank*, 1 Vern. 276.

Prohibition lies not to an inferior court after the defendant has pleaded there, for by pleading the defendant submits to the jurisdiction; but at the suit of the king prohibition lies, though the defendant has pleaded. But if a prohibition has been granted, the court will grant a supersedeas if there is an affidavit that the cause arose within the jurisdiction. *Anon.* 1 Vern. 301. JURISDICTION; WAIVER; CROWN.

If the spiritual court go about to compel an executor to pay a legacy without security to refund, a prohibition shall go. *Noel v. Robinson*, 1 Vern. 93. 8. 2 Vent. 359. 2 Ch. Ca. 145. 2 Ch. Rep. 248.

Prohibition granted for arresting in the marshal's court for matters arising out of their jurisdiction, which being disobeyed, an attachment issued against the persons disobeying the same. *Keale v. Sutton*, 2 Rep. Ch. 301.

PRO INTERESSE SUO, see PR. EVID. 28. (g).

PUBLICATION, see PR. EVID. 30.

### LXXVIII. RECEIVER.

See also BANKRU. X. 3. (b).—MORTGAGE, III. 2. (b); IV. 1.—PR. COSTS, 10. (hh).—PR. PAYMENT INTO COURT, 2.

1. Generally.

2. Appointment.

(a) Generally.

(b) Before answer.

(c) Who may be.

(d) Against executors, administrators, and trustees.

(e) Over infant's estate.

(f) Against joint tenants and tenants in common.

(g) Against mortgagor or mortgagee, and other incumbancers.

(h) In partnership.

(i) Pendente lite.

(j) Against vendor and purchaser.

(k) In other cases.

3. Powers, duties, and liabilities.

4. Security by, and liabilities and rights of sureties for.

5. Accounts and allowances to.

6. Discharge and removal.

#### 1. Generally.

The purchase money of timber belonging to a lunatic estate permitted to be paid to the receiver, in order to be by him paid into court. *In re Starkie*, 1 Russ. 476. PR. PAYMENT OF MONEY INTO COURT.

Where a receiver is in possession, other persons not permitted, without the leave of the court, to enter under a claim of a right of common not previously exercised. *Johns v. Cloughton*, 1 Jac. 572.

Receiver granted in default of payment into court, on an equitable charge and a judgment, but execution prevented by the circumstances of the title. The right not affected by a subsequent variation of circumstances, and established over the whole estate, though of great value compared with the debt, as a reasonable part may be tendered as security, or the debt may be paid into court. *Curling v. Townshend*, 19 Ves. 628.

The possession of a receiver or sequestrator is not to be disturbed without leave of the court. *Brooks v. Greathel*, 1 Jac. & W. 178. SEQUESTRATOR.

A mortgagee of a term created for raising portions, and expired, is not entitled to an account of rents and profits in the hands of a receiver, accrued before the expiration of the term. *Gresley v. Adderly*, 1 Swan. 573. MORTGAGEE; ACCOUNT.

A mortgagee of a term is not entitled to a retrospective account of rents and profits. *Id.* 579. MORTGAGEE; ACCOUNT.

Plaintiff suing for equitable relief, part of which

only could be had at law, is not entitled to elect, but can proceed at law only by leave of the court. A receiver, appointed at his instance, who, though an officer, ought, as indifferent, to restrain him, not aided by an order for liberty to distrain without his undertaking to proceed no farther at law. *Mills v. Fry*, 19 Ves. 277. PR. ELECTION, LAW, OR EQUITY.

Creditor going into possession as quasi mortgagee, not entitled to receiver's fees. *Trimleston v. Hamill*, 1 Ball & B. 384. DEBTOR & CRED.; MORTGAGEE & MORTGAGEE ALLOWANCE TO.

After a bill of foreclosure filed by mortgagee, and a receiver appointed, tenant for life of the mortgaged premises, with leasing power, makes leases. A bill is filed by a judgment creditor, who moves to set the premises pending the cause. Ordered to set, without prejudice, to any right of the tenants against their lessor, and they, as tenant from year to year to the receiver, being entitled to notice to quit. *Id. Mansfield v. Hamilton*, 2 Scho. & L. 28. TENANT FOR LIFE; LEASE.

Where a receiver is in possession, an ejectment cannot be brought without leave of the court. *Angel v. Smith*, 9 Ves. 335. PR. EJECTMENT.

Upon motion that receiver may be at liberty to defend an ejectment, the parties interested being adults, and consenting, a reference was made whether it was for their benefit. *Ames v. Ves.* 287. EJECTMENT.

Court will order person to be examined *pro interesse suo*, as well against receiver as sequestrator. *Gomme v. West*, Dick. 472.

The course of the court is, that if a receiver is appointed, and the owner of the estate is in possession of part of the premises, application should be made to the court that the owner should deliver possession to the receiver, who cannot distrain on the owner in possession as he is not tenant to him. If, therefore, loss arises, it was the parties' fault in not applying for that. *Griffith v. Griffith*, 2 Ves. 401.

Tenants directed to pay their rents in a given time on the first application, or to stand committed, or the receiver to be at liberty to distrain on one tenant. *Mitchel v. Dr. Manchester*, Dick. 787.

A receiver will be continued until deeds of sale under the decree are executed for the purpose of collecting arrears of rent. *Quin v. Holland*, Rigdw. 295.

The court will not allow a mortgagee more than his principal and interest, notwithstanding the mortgagor has agreed he shall be paid for his trouble of receiving the rents. *French v. Barr*, 2 Atk. 120. MORTGAGEE; ACCOUNT.

A receiver need not be served with a writ of execution of a decretal order, but only with a copy; and if he disobeys, shall be committed. *Macarty v. Gibson*, Mos. 40. PR. SERVICE OF DECRETAL ORDER.

## 2. Appointment.

(a) Generally.

(b) Before answer.

(c) Who may be.

(d) Against executors, administrators, and trustees.

(e) Over infant's estate.

(f) Against joint tenants, and tenants in common.

(g) Against mortgagor or mortgagee, and other incumbents.

(h) In partnership.

(i) Pendente lite.

(j) Against vendor and purchaser.

(k) In other cases.

## (a) Generally.

Where a receiver is appointed in a suit for specific performance, if the purchaser is compelled to take the title, the receiver is to be considered as his receiver. *Boehm v. Wood*, 1 Turn. & R. 345. SPEC. PERF.; VEND. & PURCH.

A receiver appointed by the court, is appointed on behalf of all parties. *Davis v. Marlborough*, 2 Swan. 118.

Application for injunction and appointment of receiver, should be made the subject of two successive motions. *Lawson v. Morgan*, 1 Price, 303. PR. INJUNC.; MOTION.

To maintain an exception to the master's appointment of a receiver, a strong case of disqualification is necessary. *Sharpe v. Sharpe*, 12 Ves. 317. PR. EXCEPTIONS TO REPORT.

Exceptions to the master's appointment of a receiver, disallowed. *Wilkins v. Williams*, 3 Ves. 588. EXCEPTIONS TO REPORT.

The court will not control the master's appointment of a receiver, without a special case. *Anon.* 3 Ves. 515.

Appointment of a receiver in the place of the sequestrators, discharges the sequestration. *Shaw v. Wright*, 3 Ves. 23. STAT. 36 Geo. 3. c. 90. WAS PASSED IN CONSEQUENCE OF THIS CASE. PR. SEQUESTRATION.

Exception will not lie to a master's report of the appointment of a receiver, without shewing that the person appointed is improper. *Thomas v. Dawkin*, 3 Bro. C.C. 508. S.C. 1 Ves. 452. PR. EXCEPTIONS TO MASTER'S REPORT.

Exceptions to a master's report of a proper person to be receiver, overruled, as the report ought to stand till the party approved is impeached as an improper person. *Cruise v. Pop. of London*, 2 Bro. C.C. 253. S.C. Dick. 687. PR. EXCEPTIONS TO REPORT.

A commission of bankruptcy cannot supersede a decree for a receiver, which is discretionary in the court, and as useful a power as any that belongs to it, and it is provisional only, not affecting the rights of the parties. *Skipp v. Harwood*, 3 Atk. 564. BANKCY. COMMISSION.

The court has not a jurisdiction to appoint a receiver, unless a cause be depending. *Exp. Whitfield*, 2 Atk. 315. PR. PETITION.

The appointing a receiver is not in all cases a turning the party out of possession where a receiver is appointed of an infant's estate; in such case, the receiver's possession is the possession of the infant; but on the appointing a receiver in an adversary's suit, as where the plaintiff in ejectment has recovered a verdict, here the receiver's possession seems to be the possession of him that has the right to it. *Sharp v. Carter*, 3 P.W. 379.

## (b) Before answer.

Motion by simple contract creditors of one who had been a trader, but ceased to be so, and was not a trader at the time of his death, for a receiver, upon affidavit before answer, refused, not being within the stat. 47 G. 3. sess. 2, c. 74. *Keene v. Riley*, 3 Mar. 436. DEBT. & CRED.; TRADER; STAT. C. OF.

Receiver granted before answer upon the bill of a purchaser *pendente lite*, viz., a suit instituted by the wife of the vendor, claiming under a settlement voluntary, as being after marriage. *Metcalf v. Pulvertoft*, 1 V. & B. 180. ALIENATION, PENDENTE LITE; PR. ANSWER.

Receiver appointed before answer in a case of a devise to four trustees, of whom two declined to act,

all parties being before the court, and consenting. *Bradie v. Barry*, 3 Mer. 696.  
Receiver appointed, on affidavits before answer. *Duckworth v. Trafford*, 18 Ves. 283.  
Motion for a receiver, in a strong case of waste, granted before answer. *Vann v. Barnett*, 2 Bro. C.C. 168. WASTE.

(c) *Who may be.*

Prochein ami of infant plaintiffs not permitted to act as receiver. *Stone v. Wishart*, 2 Mad. 64. PR. PROCIN. AMI.

Solicitor under a commission of lunacy not to be appointed receiver of the estate of the lunatic. *Exp. Pincke*, 2 Mer. 452. LUNACY, SOL. UNDER COMMISSION.

Peer not to be a receiver. *Att. Gen. v. Gee*, 2 V. & B. 208. PEER.

General rule, that a trustee shall not be the receiver, with emolument. *Sutton v. Jones*, 15 Ves. 584. TRUSTEE.

Trustee not to be receiver, unless a special case, and without emolument. *Sykes v. Hastings*, 11 Ves. 363. TRUSTEE.

The trustee cannot be receiver. *Anon.* 3 Ves. 515. TRUSTEE.

The master's judgment is conclusive in appointing a receiver, unless some substantial objection is shewn. It is no objection to a receiver, that he is a practising barrister; but the solicitor in the cause cannot be receiver. *Garland v. Garland*, 2 Ves. J. 137.

(d) *Against executors, administrators, and trustees.*

Executor and trustee becoming bankrupt, a receiver was appointed, though testator knew the commission had issued. *Langley v. Hawk*, 5 Mad. 46. EXECUTOR.

Court will appoint receiver of intestate's personal estate, if admor is sworn to be insolvent, before his answer is come in, although fact of his being abroad (stated in plaintiff's affidavit) be denied. *Scott v. Becker*, 4 Price, 346. INSOLVENCY; ADMOR.

Receiver will not be appointed, on mere ground of executor being poor. *Howard v. Papera*, 1 Mad. 142. EXECUTOR.

A receiver having been appointed, the executor being out of the jurisdiction, on administration afterwards taken out, it was referred to the master to reconsider the appointment of receiver, regard being had to the administration granted. *Faith v. Dunbar*, Coop. 200. ADMOR.

Receiver ought not to be appointed where there is a trustee with power of entry and distress. *Buxton v. Monkhouse*, Coop. 41.

Though this court will appoint a receiver upon misconduct of the executor, it will not, upon the single ground that he is in mean circumstances. *Anon.* 12 Ves. 4. EXECUTOR.

Receiver appointed before answer, upon affidavit of misapplication, and danger to the property, in the hands of an executor, the co-executors consenting to the order. A strong case necessary against an executor. *Middleton v. Dodswell*, 13 Ves. 266. EXECUTOR.

Where an heir had, by decree, been substituted as trustee to execute a devise to charity, upon his laches, an account was decreed, and receiver appointed. *Att. Gen. v. Bowyer*, 3 Ves. 714. ACCOUNT; HEIR AT LAW.

The court will not appoint a receiver of assets in the hands of executor, merely because the executor is not of affluent fortune. *Nathornthwaite v. Russell*, 2 Atk. 126. EXECUTOR.

An executor is under no obligation to give security; nor is it usual for a court of equity to compel him to give any, unless upon affidavit of insolvency or misconduct; but where an executrix, appointed guardian of her three children by her first husband, marries a second husband in necessitous circumstances, the court will appoint a receiver. *Dillon v. Ly. Mount-Cashel*, 4 Bro. P. C. 312. EXECUTOR.

Where it is probable there will be a misapplication and wasting of the effects of an intestate, by a limited administrator, who is only trustee for an infant, the court will appoint a receiver. *Havers v. Havers*, Barn. 23. ADMOR.

The court refused to appoint a receiver of a charity estate, against a corporation as trustees. *Att. Gen. v. Mayor of Stafford*, Barn. 33. CHARITY; TRUSTEES.

(e) *Over infant's estate.*

Court will not order receiver of infant's estate to keep down interest of mortgage debt, unless master reports it due. *Anon.* 6 Mad. 9. INFANT.

Bill for sale of real estate for payment of debts. The heir at law being an infant, the parol demurred. The court will appoint a receiver as in other cases. *Sweet v. Partridge*, 1 Cox, 433. S. C. Dick. 696. DEMUR, PAROL.

Receiver appointed of infant's estate immediately on filing bill. *Pitcher v. Helleur*, Dick. 680.

The court will not appoint a receiver of an infant's estate where there is no bill filed. *Anon.* 1 Atk. 489. 578. INFANT.

(f) *Against joint tenants, and tenants in common.*

Vice chancellor entertained a doubt whether in any case of one tenant in common excluding actually the other from enjoyment, &c. of estate, this court would grant a receiver. *Tyson v. Fairclough*, 2 S. & S. 144. TENANT IN COMMON; EXCLUSION.

Motion made by a tenant in common for a receiver against his co-tenant in possession, refused; it not amounting to a case of exclusion. *Millbank v. Retett*, 2 Mer. 405. *Id.*

Tenant in common in possession ordered to give security for payment of the proportion of rents to his co-tenant; otherwise a receiver. *Street v. Anderton*, 4 Bro. C. C. 414. TENANT IN COMMON.

(g) *Against mortgagor or mortgagee, and other incumbrancers.*

The grantor of an annuity secured by an equitable charge on certain lands which are subject to a prior charge, goes to reside abroad, but by his agent continues in receipts of the rents and profits. The court, on the application of the annuitant, will appoint a receiver, though the grantor has not appeared to the suit. *Tunfield v. Irvine*, 2 Russ. 149. PR. APPEARANCE; ANNUITY.

Motion for receiver on mortgage of mines who had become partner by purchasing shares in them, on ground of mismanagement, and excluding mortgagor from interference, refused: the parties having regulated their rights by subsequent agreement, and mortgagee denying his mortgage was satisfied. The rights and duties of persons in that situation are not to be governed solely by principles applicable to one standing simply in character of mortgagee or partner, and to deprive him of possession on ground of mismanagement, it must be of a clear and specified nature. *Rowe v. Wood*, 2 J. & W. 553. MORTGAGE; PARTNERS.

On motion for receiver against mortgagee insisting

by answer, he is not fully paid, court will not try that fact on affidavit. *Id.* 557. MORTGAGE.

The management of the estates, and misapplication of the rents, and collusion with the mortgagee, are not grounds for a motion, before answer, to take possession from him. *Berney v. Sewell*, 1 Jac. & W. 647. *Id.*

When the first mortgagee is not in possession, a receiver may be appointed at the suit of a subsequent incumbrancer without prejudice to the first mortgagee's taking possession. *Id. ib.*

A mortgagee who has the legal estate cannot have a receiver. *Id. ib.*

When a first mortgagee is in possession, a receiver will not be appointed against him, except on his confession that he has been paid off, or his refusal to accept what is due to him. *Id. ib.*

The appointment of receiver is for benefit of incumbrancer only so far as expressed to their benefit, and they choose to avail themselves of it. *Gresley v. Adersley*, 1 Swan. 579. INCUMBRANCER.

A third incumbrancer on a rectory having obtained a sequestration, a receiver was appointed at the instance of a second incumbrancer. *White v. Ip. Peterborough*, 3 Swan. 109. CHARGE ON BENEFICE.

Receiver upon a mortgagee in possession who cannot ascertain the debt due to him. *Codrington v. Parker*, 16 Ves. 469. MORTGAGE.

A receiver cannot be appointed without mortgagee's being before the court, if a mortgage appears upon the face of pleadings. *Pratt v. Williams*, Coop. 31. PL. PARRY; MORTGAGE; & MORTGAGE.

A second mortgagee (the plaintiff) applied for receiver, this was opposed by a defendant who had purchased from plaintiff part of mortgage and was in possession as tenant of a part of estate of which the rent was equal to the interest of his share of the mortgage. The court held, the two characters of tenant and mortgagee could not be united, and, therefore, granted the receiver. *Archdeacon v. Fowes*, 3 Anst. 752. MORTGAGE.

The court will appoint a receiver of the rents of lands in mortgage, pending a bill to foreclose. *Crowe v. Halliday*, 2 Ridgw. P. C. 58. MORTGAGE, FORECLOSURE OF.

When a mortgagee is not in possession, the court will, upon application of creditors, appoint a receiver of the mortgaged premises, but without prejudice to the right of the mortgagee to obtain possession. *Bryan v. Cornick*, 1 Cox, 422. MORTGAGE.

Second mortgagee, the mortgagor living, cannot have receiver without consent of first mortgagee. *Phipps v. Ip. Bath & Wells*, Dick. 608.

#### (h) In partnership.

Receiver of the debts due to a business appointed at the suit of persons to whom a share of the profits had been assigned, against a subsequent assignee of the debts. *Candler v. Candler*, 1 Jac. 225.

Receiver appointed of mines in which several persons were interested, the concern, from the nature of the subject, being a species of trade, and not a mere tenancy in common in land. *Jeffereys v. Smith*, 1 Jac. & W. 298. MINES.

The court will not, upon motion, appoint a receiver of a partnership, unless it appears that the plaintiff will be entitled to a dissolution at the hearing. *S. P. Chapman v. Beach*, *id.* 594.

Where some members of a partnership, either in the ordinary course of trade, or in closing the transactions after a dissolution, seek to exclude others from a just share in the management, the court appoints a receiver. *Wilson v. Greenwood*, 1 Swan. 401.

Motion for a receiver in a mining concern, refused upon a claim of partnership in the equitable interest, not raised until the concern, at a great expence, became prosperous, and denied by the answer. *Norway v. Hays*, 19 Ves. 144. ACCOUNT.

Receiver not ordered merely on a dissolution of partnership. Order on breach of the duty of a partner, or of the contract, as by continuing trade with joint effects on the separate account. *Harding v. Glover*, 18 Ves. 281. PARTNERSHIP, DISSOLUTION.

Court will not appoint receiver of effects of subsisting partnership, unless on gross abuses of some of the partners. *Oliver v. Hamilton*, 2 Anst. 453.

In a cause for an account of a partnership, both partners being dead, a receiver shall be appointed, secus, in the case of surviving partner. *Philips v. Atkinson*, 2 Bro. C. C. 272.

#### (i) *Pendente lite*.

Chancery will appoint receiver pending suit in ecclesiastical court to recall probate on a case of strong presumption. *Rutherford v. Douglas*, 1 S. & S. 111. JURISDICTION.

The profits of the office of clerk of the peace being assigned for payment of creditors, a receiver was appointed, pending the question of the validity of the assignment. *Palmer v. Vaughan*, 3 Swan. 123. PUBLIC OFFICER; ASSIGNMENT.

Demurrer lies to bill, *inter alia*, for a receiver till letters of administration granted, where no reason is shown why they cannot be immediately taken out. *Jones v. Frost*, 3 Mad. 1. DEMURRER; ADMON.

Pending a question whether estates devised were subject to a bond executed by the testator for making a settlement on his wife and children, the court refused to appoint a receiver, the devisees in trust consenting to pay the rents into court. *Prebble v. Boghurst*, 1 Swan. 313.

Jurisdiction of a court for an account of personal estate and a receiver, pending a litigation for probate, though an administration, *pendente lite*, might be obtained in the ecclesiastical court. *Atkinson v. Hewshaw*, 2 V. & B. 85. S. P. *Bull v. Oliver*, *id.* 96. JURISDICTION; ADMON.

The court of chancery will not interfere by appointing a receiver upon the mere ground that two wills are in controversy in the spiritual court; and no special case that the property is in danger and cannot be secured by administration *pendente lite*. *Richards v. Chare*, 12 Ves. 462. SPIRITUAL COURT.

The court will not appoint a receiver on bill by heir against a devisee to convert the will unless there are strong circumstances. *Knight v. Deplassis*, 1 Ves. 324.

The court is not to appoint a receiver on account of a dispute in court ecclesiastical concerning the probate. *Id. ib.*

Whilst will is contesting in ecclesiastical court on the ground of insanity of testator, receiver appointed of the whole estate to pay in from time to time what he receives. *Montgomery v. Clark*, 2 Atk. 379. INSANITY; EXOR.

#### (j) Against vendor and purchaser.

On a bill to set aside a purchase, the answer of the defendants, the devisees of the purchaser, admitting great inadequacy of price, and stating their ignorance as to other circumstances of fraud alleged, a receiver appointed. *Stilwell v. Wilkins*, 1 Jac. 280. PL. ANSWER.

Receiver appointed on the motion of the vendor pending a reference of title. *Boehm v. Wood*, 3 Jac. & W. 236. **VEND. & PURCH.; PR. REP. AS TO TITLE.**

If a purchaser of the legal estate in lands, subject to an equitable rent-charge, refuse to pay the rent-charge, a receiver will be appointed. *Pritchard v. Fleetwood*, 1 Mer. 54. **VEND. & PURCH.; RENT-CHARGE.**

Receiver appointed after answer of purchaser under circumstances. *Hall v. Jenkinson*, 2 V. & B. 125. **VEND. & PURCH.**

(k) In other cases.

Where a tenant in tail in remainder had agreed to pay a sum of money after the death and failure of issue of his brother, the tenant in tail in possession, and had secured the money by a mortgage of the estate, and covenanted to levy a fine and suffer a recovery to give effect to the mortgage, but on coming into possession of the estate refused to perform this covenant, the court appointed a receiver of the rents. *Freer v. Hinde*, 2 Sim. 7. **POST OBIT BOND.**

The commissioners of a canal make an agreement for letting the tolls not warranted by the act under which they derive their authority, and prejudicial to an interest expressly reserved by the act to the public. This agreement is acquiesced in for forty-seven years without complaint on the part of any of the share holders, and during that period the lessee remains in undisturbed possession of the tolls: the court will not, at the suit of the share-holders, disturb his possession by the appointment of a receiver. *Gray v. Chaplin*, 2 Russ. 126. **ACQUIESCENCE; LENGTH OF TIME.**

A court of equity will not appoint a receiver of rates which are to be assessed by commissioners, and collected at a future period. *Drewry v. Barnes*, 3 Russ. 94.

Where, on answer itself, there is strong presumption against defendant's title, and which is impeached by bill, court will grant a receiver. *Stitwell v. Williams*, 6 Mad. 49. **TITLE; PR. ANSWER.**

Receiver of a lunatic's estate appointed when no one would act as committee. *Exp. Radcliffe*, 1 Jac. & W. 639. **LUNATIC.**

In favour of equitable creditors the court will appoint a receiver on property, against which a legal creditor might obtain execution. *Davis v. D. Marlborough*, 2 Swan. 132. **EXECUTION; EQUITABLE CREDITORS.**

On advance of money defendant agreed to execute mortgage, but failed. Arrears of interest of advance due. On bill for specific performance, receiver granted. *Shahel v. D. Marlborough*, 4 Mad. 463.

Receiver granted against tenant for life subject to a term to raise portions, he refusing to produce title deeds necessary for raising such portions. *Brigstocke v. Mansel*, 3 Mad. 47. **TITLE DEEDS.**

Quære whether master can propose a receiver, or an application should be made to the court when parties neglect to propose one before the master. A stranger cannot propose a receiver. In this case the neglect being accounted for, master was directed to review his report and receive proposal for receiver. *Att. Gen. v. Day*, 2 Mad. 246.

A receiver appointed of the profits of a rectory under sequestration, and an injunction granted against enforcing sequestrations. *Silber v. Bp. Norwich*, 3 Swan. 112. **CHARGE ON BENEFICE; SEQUESTRATION.**

Motion for a receiver against the legal estate upon evidence in a cause which had not been heard, refused. *Lloyd v. Passingham*, 3 Mer. 697.

The court has not jurisdiction to appoint a receiver upon petition in bankruptcy. *Exp. Tupper*, 1 Rose, 129. **BANKRPT. JURISDICTION.**

A receiver may be appointed against the legal title in a strong case of fraud upon affidavits; but under the circumstances of this case, an application after answer for that purpose, an injunction against committing waste and disposing of the estate was refused. *Lloyd v. Passingham*, 16 Ves. 59. **FRAUD.**

A receiver appointed, on application of a plaintiff over the estate of a defendant who absconded, to avoid being served with a subpoena to answer. *Magurie v. Allen*, 1 Ball & B. 75.

Receiver upon motion against the legal estate under a conveyance upon a strong suspicion of abused confidence arising upon the answer. *Huguenin v. Baseley*, 13 Ves. 105.

Where no one could be procured to act as committee of lunatic, a receiver was appointed with a salary, but to be considered, and give security as committee. *Exp. Warren*, 10 Ves. 622. **LUNATIC, COMMITTEE OF.**

Where it appears by the answer that the real estate must be responsible (as that there is no personal estate to be first applied to debts), a receiver will be granted in the first instance. *Williams v. McNamara*, 8 Ves. 71. **PR. ANSWER.**

The court will not order a receiver of an estate where the matters in dispute depend on a mere legal title, except strong ground of title is shown and the rents are in danger. *Mordaunt v. Hooper*, Ambl. 311.

Receiver not appointed on behalf of heir at law as against a devisee. The heir must try the question at law. *Knight v. Duplessis*, 2 Ves. 360. **HEIR AT LAW.**

Committee of the person and estate of lunatic, with restriction not to receive any part of the estate. Receiver appointed of the estate. *Exp. Billingham*, Ambl. 104. **COMMITTEE OF LUNATIC.**

### 3. Powers, duties, and liabilities.

In orders directing the appointment of a receiver, there shall be a discretion to manage as well as let and set. 64th Gen. Order, 3rd April, 1828.

A receiver, though he passes his accounts and pays his balances regularly, is not entitled to make interest for his own benefit of monies which come into his hands in his character of receiver during the intervals between the times of passing his accounts. *Shaw v. Rhodes*, 2 Russ. 539.

Receiver, who is solicitor, will not be permitted to bring actions against tenants for arrears of rent, with the approbation of the master, in the name of a trustee of the estate, but in opposition to his wishes. Nor in such circumstances will the court refer it to the master to see whether it would be proper for receiver to proceed in his own name. *Della Caine v. Hayward*, 1 M'Clel. & Y. 272.

Court will not empower a receiver to sue for debts due to the estate, where the proceeding would be oppressive to creditors, or it is unlikely any advantage would be derived from it. *Dacie v. John*, 1 M'Clel. 575.

Receiver may distrain for rent due one year without an application to the court. *Brundon v. Brundon*, 5 Mad. 473.

No instance of power being given by court to receiver to grant lease which would bind infant remainder-man. *Gibbins v. Howell*, 3 Mad. 469.

Receiver of the personal estate of the testator, not passing his accounts and paying in the balances, deprived of his salary and charged with interest, not upon cash from the time it was received,



according to the strict rule, applicable to a receiver of annual profits and rents, but as an executor would be charged. *Potts v. Leighton*, 15 Ves. 273.

Receiver not permitted to lay out more than a very small sum at his discretion. *Waters v. Taylor*, 15 Ves. 26.

Appointment of a receiver of an estate in India; the receiver to be in England, acting by an agent. Inquiry directed what should be the term, beyond which he should not be permitted to let. — *v. Lindsay*, 15 Ves. 91. E. I. ESTATE.

Receiver, not paying in a balance under an order, may be proceeded against personally by commitment. A previous order, in the alternative, that by a certain day he shall pay or stand committed, is necessary, though he was under an order for payment by a certain day upon his appearance by counsel, praying time. *Davies v. Cracroft*, 14 Ves. 143. PR. ORDER FOR PAYMENT.

Receiver charged with a loss by the failure of the banker, having made the remittances to his own credit and use, and not to a separate account for the trust. *Wren v. Kirton*, 11 Ves. 377. INVESTMENT.

Receiver is not to lay out money in repairs at his own discretion; but under circumstances an inquiry was directed, and the report stating that expenditure was for lasting benefit of estate, and by directions of trustees, order for that allowance was made. *Bunt v. Clitherow*, 6 Ves. 791. REPAIRS.

Executors of a receiver admitting assets, bound to answer what was upon a subsequent inquiry found due for interest. *Honey v. Blakeman*, 4 Ves. 606. INTEREST.

Receiver not liable by the failure of the testator's banker at Bristol, with whom the receiver, when going to London to pass his accounts, deposited the money, intending to draw for it. *Rowth v. Howell*, 3 Ves. 566. INVESTMENT.

Motion by a remote remainder-man and tenants to restrain receiver from ejecting tenants, refused with costs, their interest not being sufficient. Receiver is to let the estate to the best advantage, but he cannot raise the rents upon slight grounds, nor turn out tenants, nor let even for one year without application to the master. *Wynne v. Ld. Newborough*, 1 Ves. J. 164, 165. EJECTMENT; INJUNCTION.

Receiver here gives security duly to account; not for faithful management. He cannot set and let, nor make expenditures, without application to court: manager in West Indies, may. *Morris v. Elme*, 1 Ves. J. 139. MANAGER OF W. I. ESTATE.

A receiver appointed by the court has a power to distrain for rent, and need not apply for a particular order for that purpose, unless there be a doubt who had a legal right to the rent. *Pitt v. Snowden*, 3 Atk. 750.

A receiver appointed by the court shall not make good a loss which was not owing to his own default; for where the rents in hand were large, it is a necessary precaution on his part to remit them by bills to London, rather than in specie. Where a receiver pays money to a tradesman, and takes bills for the sum, if he was in credit at the time, though he failed soon after, it shall not affect the receiver. But if the money had been lost by his wilful default in placing it in hands notoriously improper, he shall make good the loss. *Knight v. Ld. Plymouth*, 3 Atk. 480. INVESTMENT.

A receiver during the infancy of plaintiff (who had no guardian), was decreed to place out the surplus of the rents, when the same should amount to a competent sum, at interest, on government or other securities, which he neglected to do. The court, therefore, directed that he should pay interest

at four per cent. from the time of the default till the infant came of age; and it is no excuse for the receiver that the master did not give any directions about it, for it was his duty to remind the master to lay out the surplus rents when they should amount to a competent sum. That buildings and farms were in a ruinous condition, and tenants often breaking, will not justify a receiver's keeping the balance in his hands, for it is not to be supposed he could exhaust the whole money received from the rents of the estate. So where a receiver settles his accounts, and delivers the vouchers to the infant, only two days after he came of age, it shall have no weight, though the infant admitted the balance, and received it without objection. *Hicks v. Hicks*, 3 Atk. 274. Vide *Lonsdale v. Church*, 3 Bro. C. C. 41. *Adams v. Gale*, 2 Atk. 106. INTEREST, WHEN PAYABLE.

#### 4. Security by, and liabilities and rights of sureties for.

A receiver, who had omitted to account regularly, became bankrupt, being indebted to the trust estate in a large sum, and for some time no steps were taken to have the accounts duly passed: Held, that under the particular circumstances of the case, his sureties were not liable to pay interest on the balance found due from him, though he himself, if solvent, would have had to pay such interest. *Sebble*. That in general the sureties of a receiver are answerable for such interest as well as for such principal as the receiver himself is liable to pay. *Dawson v. Raynes*, 2 Russ. 466. PRINCIPAL & SURETY.

Receiver appointed, on application of executor, to collect assets in India; but receiver to find sureties resident in England. *Cockburn v. Raphael*, 2 S. & S. 453. EXECUTOR.

Recognizance of surety for receiver being forfeited, and action brought against surety. On application, reference directed as to what was due, and payment by instalments ordered, and injunction to stay proceedings granted by consent, on payment of costs of application and proceedings consequent to order. *Walker v. Wild*, 1 Mad. 528. INJUNCTION TO STAY PROCEEDINGS AT LAW.

A surety for a receiver is entitled to stand in the place of the receiver, to be paid sums ordered to the receiver out of funds in court, in respect of disbursements made by him, the money for making such disbursements having been advanced by the surety, and the same giving him therefore a lien on the money ordered to be paid to the receiver. *Glossop v. Harrison*, Coop. 61. S. C. 3 Ves. & B. 134.

Receiver appointed with salary on his own recognizance by consent. *Cs. Carlisle v. Ld. Berkeley*, Amb. 599.

Sureties of receiver not discharged at their own request. *Griffith v. Griffith*, 2 Ves. 400.

The course of the court requires a security by the receiver, and two sureties in a recognizance; and taking the assignment of a mortgage belonging to a receiver instead, is very improper, and ought not to be done. *Mead v. Ld. Orrery*, 3 Atk. 237.

Surety in recognizance of receiver discharged; fresh recognizance entered into; time for enrolment elapsed; entered *nunc pro tunc*. *Vaughan v. Vaughan*, Dick. 90. S. P. *Blois v. Betts*, id. 336.

A receiver appointed to collect in assets, and to bring actions in the name of an executrix, must give security to indemnify the executrix on account of such actions. *Taylor v. Allen*, 2 Atk. 213. EXECUTOR.

Persons named by parties appointed receivers on their own recognizances only. *Ridout v. Ld. Plymouth*, Dick. 68.

## 5. Accounts and allowances to.

Master may order settlement of receiver's accounts at intervals of less or more than a year, at discretion. 63rd Gen. Order, 3rd April, 1828.

General order that the master shall annually, at the second seal after Trinity term, certify to the court the state of the several receiver's accounts in their respective offices. Gen. Order, 1792, 2 Ves. J. 39. GEN. ORDER.

Receivers ought annually to account and pay in their balances. Beame's Order, p. 454.

The masters are annually to certify state of receiver's accounts. *Id. ib.*

And are to fix the days upon which receivers are to deliver their accounts to the master. *Id.* 462.

As also the days on which they are to pay their balances. *Id. ib.*

Receivers neglecting to deliver accounts and pay balances at such times, are not to be allowed their salaries, but to be charged with 5l. per cent. on such balances. *Id. ib.*

Are annually to pass their accounts before the master within a certain time. *Id.* 463.

Masters to certify defaults. *Id. ib.*

A master's report of receiver's account does not require confirmation, and cannot be excepted to. But the court will enter into the consideration of objections to the general principle on which the master has proceeded in taking such account, but not of objections to particular items of it. *Shewell v. Jones*, 2 S. & S. 170. PR. MASTER'S REPORT, CONFIRMATION OF.

Formerly a receiver was not entitled to any allowance for sums of money laid out by him on the estate, without a previous order. But according to the present practice, a reference is directed to the master to inquire whether the transaction is for the benefit of the parties interested. *Tempest v. Ord*, 2 Mer. 55.

A receiver is not entitled to any compensation for his trouble in attending a survey of the minor's estate, there being no order for his attendance. *In re Ormsby*, 1 Ball & B. 189. COMPENSATION.

Guardians and receivers obliged to account on application by petition or motion, being bound by recognition to account regularly, or when called on, and are considered as officers of the court, which is not the situation of executors. *In mre. Burke*, *id.* 74. GUARDIAN.

General order, that receivers shall annually pass their accounts, and pay in their balances; or less their salaries, and be charged with interest at five per cent. Gen. Order, 23rd April, 1796. 15 Ves. 278. ACCOUNT.

Receivers and committees not to apply the trust fund in repairs to any considerable extent without previous application. Upon a receiver's application to be allowed for repairs done, an inquiry was directed whether repairs were reasonable. *Att. Gen. v. Vigor*, 11 Ves. 563. REPAIRS.

Receiver who does not pass his accounts regularly, not to be allowed poundage. *White v. Ly. Lincoln*, 8 Ves. 371. POUNDAGE.

Receiver not passing his accounts shall always pay interest upon the balances in his hands. — *v. Jolland*, *id.* 72. INTEREST.

Receiver must pay in his money yearly, and must pay nothing out without an order; he shall pay interest for money kept in his hands, even a quarter of a year as if it ought to have been paid in. Inquiry directed as to that, though he had passed his accounts, and all parties had declared themselves satisfied. *Fletcher v. Dodd*, 1 Ves. J. 85.

A receiver of a public trust having a salary, making interest of balances in his hands, is accountable to the trustees for interest made ultra, notwithstanding prior accounts settled without demanding it. *El. Lonsdale*

*v. Church*, 3 Bro. C. C. 41. See 7 Pri. 45. INTEREST WHEN PAYABLE; ACCOUNT.

Not usual to have reports of receiver's accounts confirmed. *Cowper v. El. Cowper*, 2 P. W. 729. PR. CONFIRMATION OF REPORT.

A receiver to the guardian of an infant who has his account allowed him by the guardian, shall not be obliged to account over again to the infant when he comes of age. *Clavering's Case*, Prec. Chan. 535. GUARD. & WARD; ACCOUNT.

## 6. Discharge and removal.

Receiver allowed costs of his application to be discharged. *Richardson v. Ward*, 6 Mad. 266. PR. COSTS.

Receiver of rents of estates conveyed to secure an annuity, discharged on acceptance of the price of the annuity with interest, deducting the part payments. *Davis v. Dk. Marlborough*, 2 Swan. 108.

The order for a receiver obtained by the plaintiff, discharged on payment of the sum due to him, although defendants prior incumbrancers, opposed the discharge. *Id.* 168.

Petition to change a receiver. The master's judgment not absolutely conclusive, but the court interferes with reluctance. The recommendation of the testator, and the respect due to a considerable family, are to be attended to in the appointment. The circumstances of the person proposed, (in this instance, a relation of the family) a resident, distant from the estate, being in parliament, and a practising barrister in town, though no absolute disqualification, are to be considerably regarded. Distinction with reference to such circumstances, between an auditor and a receiver with powers to let and manage, &c. *Wynne v. Id. Newborough*, 15 Ves. 283.

Bill filed by creditor on behalf of himself and other creditors, and a receiver appointed; the receiver shall not be discharged upon the consent of the plaintiff, against the consent of an incumbrancer, who is a party defendant. An allegation that such incumbrance was satisfied, referred to the master. So, although an incumbrancer were not a party, nor had proceeded in the suit, and was obliged to file a new bill, yet ssemble, the court would not discharge the receiver, and would direct that such bill should be taken as filed at the same time with the former. *Largan v. Bowen*, 1 Scho. & L. 296.

When a receiver is appointed, and has given security, he must shew a reasonable cause to entitle himself to be discharged. *Smith v. Vaughan*, Ridgw. 251.

REFERENCE, See PR. MASTER, REFERENCE.

REFERENCE FOR SCANDAL, &c. See PR. ANSWER, 18. — PR. MASTER, REFERENCE, 1. (d).

REGISTRAR, See PR. OFFICERS OF COURT, 8.

## LXXIX. REHEARING.

See also PR. HEARING, &c.

Any person served with a copy of decree *pro confesso*, or any person not being so served petitioning a rehearing within seven years, and giving security for costs, admitted to answer, and the cause to be reheard

again. 5 Geo. 2. c. 25. s. 6. PR. BILL PRO CONFESSED.

No rehearing without a deposit with the registrar of 5l. Beame's Order, 266. 468.

Not to stop proceedings on decree or order, appealed from, without special order. *Id.* 266.

Two days before rehearing, party to furnish court with copy of decree, and copy of petition. *Id.* 287.

Party making default, or suffering decree nisi to be made absolute, on what costs he shall rehear. *Id.* 316.

Such party must before end of next term procure an order to rehear, or be precluded. *Id.* *ib.*

Deposit on rehearing of cause, 10l. *Id.* 316. 459.

Deposit of exceptions, 5l. *Id.* *ib.*

Party also liable to such further taxed costs as court shall order. *Id.* *ib.*

Petition for rehearing, to be within a fortnight after order pronounced. *Id.* 334. 338.

Petition of appeal from rolls, within what time. *Id.* 334. 338. 339.

New evidence admitted on a rehearing, and a petition of rehearing permitted to be amended to state the discovery of such new evidence. *Wyld v. Ward*, 2 Y. & J. 381. PR. EVIDENCE.

Where in order to save time of the court, it is arranged between the parties that evidence should be entered as read, if parties, on examination, could arrange to admit it; and afterwards the parties cannot agree, the court will not permit the cause to be reheard on merits, but only on that evidence. S. C. 1 Y. & J. 536.

On a rehearing, evidence in the cause may be read which was not read at the original hearing. *Williams v. Goodchild*, 2 Russ. 91. PR. EVIDENCE.

A rehearing will in no case be granted after six months of decretal order. *Bowyer v. Bright*, 13 Pri. 316.

A rehearing will not be granted where the object is not to correct an error in decree, but to remedy a grievance consequent upon it, resulting from circumstances *post facto*, not making part of the case as it originally stood. *Id.* *ib.*

Where defendants at law file bill for discovery and relief by cancellation of deeds, and bill is dismissed with costs, they having a good defence at law, and they succeed at law, and afterwards petition for a rehearing on account of costs, on ground that they were substantially entitled to such cancellation of deeds. The order was made, but without costs. *Duncan v. Worrall*, 10 Price, 31. COSTS; DELIVERY UP OF DEEDS TO BE CANCELLED.

Application by defendant for liberty to file a supplemental bill in aid of a rehearing, to put in issue evidence discovered during and since the hearing, refused the evidence discovered, being a deed and proceedings in suits to which the defendant was a party, and must have been apprized of their nature, and by negligence lost the benefit of them as a defence, and the object of the supplemental bill being to abandon the original defence and rely on a new one. *Blake v. Foster*, 2 Ball & B. 457. SUPPLEMENTAL BILL IN NATURE OF REVIEW; LACHES.

Injunction not revived pending a rehearing of order allowing exception to report that answer was insufficient. *Scott v. Mackintosh*, 1 V. & B. 503. INJON. REVIVAL OF; PR. ANSWER, EXCEPTIONS TO.

After the order, permitting the defendant to rehear the decree made on his default, setting aside the charity lease, and directing an account of the rents; he was ordered to give security for the sum reported due. *Att. Gen. v. Brooke*, 18 Ves. 496. PR. SECURITY.

After great lapse of time, and the deaths of the parties, from the residence abroad of the defendant, and upon an affidavit by him and his solicitor, that they had not discovered deeds material for his defence

until after issue joined, leave was given to file a supplemental bill to put them in issue, and they were admitted to evidence upon a rehearing. *Burrington v. O'Brien*, 3 Ball & B. 140. SUPPLEMENTAL BILL IN NATURE OF REVIEW; LENGTH OF TIME; EVIDENCE.

On appeal and rehearing, additional evidence permitted in some instances. If the rule is so, it must be subject to costs. *White v. Russell*, 1 V. & B. 153. PR. EVIDENCE, FURTHER; PR. APPEAL.

Decree on default, setting aside a lease of a charity estate, with covenant for perpetual renewal, and directing an account of the actual rent. Rehearing permitted on paying costs, not disturbing proceedings before the master to the draft of a report of what was due, but the money not to be paid into court before the report made: petition, not motion, the proper mode of application. *Att. Gen. v. Brooke*, 18 Ves. 319. PR. PETITION; PR. MOTION.

Rehearing of course on the certificate of counsel. *Id.* 325.

Petition of rehearing after an appeal from the rolls, dismissed. *E. I. Comp. v. Boddam*, 13 Ves. 421. PR. APPEAL FROM ROLLS.

Rehearing granted on terms after a decree nisi made absolute. *Fowles v. Young*, 9 Ves. 172.

A rehearing will not be granted, though one only of several defendants, has signed and enrolled the decree of dismissal. *Gore v. Pardon*, 1 Scho. & L. 234.

A rehearing is the proper mode of impeaching a decree not signed and enrolled for error. *Bolger v. Mackell*, 5 Ves. 510. PR. DECREE, IMPEACHMENT OF.

Rehearing refused after decree to account, exceptions taken and disallowed, acquiescence of party therein, and final report made up. *Macartney v. Blackwood*, 1 Ridg. L. & S. 602.

There shall not be an appeal or rehearing for costs only. *Newton v. Bennett*, 1 Bro. C. C. 140. S. C. Dick. 594. PR. COSTS; PR. APPEAL.

An appeal from the rolls to the Ld. Ch. cannot be reheard. *For v. Muckreth*, 2 Cox, 158. APPEAL.

An original and two supplemental bills considered but as one cause, and therefore but one deposit necessary. *Couper v. Scott*, 1 Eden, 17. S. C. 1 Bro. C. C. 141.

Decree nisi, made absolute two years afterwards, ordered to be reheard on terms. *Cunyngham v. Cunyngham*, Ambl. 89. S. C. Dick. 145.

On a rehearing, depositions taken on part of defendant may be read, though not read at original hearing. *Id.* 90. PR. EVIDENCE.

After a decree has been signed and inrolled, it is too late to apply for a rehearing of the cause. *Chetwynd v. Fleetwood*, 1 Bro. P. C. 306. PR. ENROLMENT OF DECREE.

A decree must be complete against a defendant, though he have made default before there can be a petition for a rehearing. *Baxter v. Wilson*, 2 Atk. 152.

Supplemental bill, in nature of review, cannot be heard until petition to rehear original cause is presented. *Moore v. Moore*, Dick. 66.

Decree nisi. Defendant sets down cause to shew cause against it; makes default. Decree absolute. Rehearing granted him afterwards on terms. *Hankwitz v. Occarel*, *id.* 109.

Decree nisi made absolute, and proceedings before master. Defendant at liberty to rehear upon terms. *Fry v. Prosser*, *id.* 298.

Bill against husband and wife taken *pro confesso*. Husband died. Reheard on wife's petition. *Took v. Clark*, *id.* 350.

Court cannot give interest unless reserved by decree; but cause reheard for that purpose. *Herle v. Greenbank*, *id.* 370.

A cause upon rehearing must be opened as a case. *Anon.* 2 Ark. 50.

An agreement was signed by the parties, and by consent made an order of court to submit to such decree as the court should make, and neither party to bring his appeal; yet, the cause was allowed to be reheard. *Duck v. Faucett*, 3 P. W. 242. AGREEMENT.

A decree was made *ex parte* against A, to pay one moiety of a sum of money said to be due from A and B to C, upon a stated account between B and C, but to which A was neither party nor privy. Some years passed before A knew of this decree, but on being informed of it, he applied by petition for rehearing. On appeal a rehearing was directed. *Hamilton v. Manby*, 6 Bro. P. C. 347.

It is in the discretion of the court whether or no to grant a rehearing. *Mills v. Banks*, 3 P. W. 8.

Where a decree is obtained by default, and upon petition a rehearing is granted, if the person in the possession of the decree does not attend at the rehearing, the bill will be dismissed with costs to the petitioner. *Wilson v. Dabbs*, Sel. C. C. 50. PR. BILL, DISMISSAL OF; PR. DEFAULT, APPEARANCE AT HEARING.

A cause reheard after thirty years, the enrolment being lost. *Devering v. Cooper*, 3 C. R. 27. PR. ENROLMENT OF DECREE LOST; LENGTH OF TIME.

After a rehearing by Judge Rainsford for the Lord Keeper Bridgeman, and afterwards a rehearing before the lord keeper, the cause was again reheard. *Porter v. Hubbard*, 2 C. R. 65. 3 C. R. 78.

If the petition of rehearing be against the decree in general, the whole cause is open, otherwise if it be only in respect of particular parts of it. *Colchester v. Colchester*, Sel. Ch. Ca. 13.

Omission in a bill of review to make one defendant a party is no cause of rehearing, the proceedings having been in the said defendant's name. *Peachey v. Vintner*, 1 C. R. 252.

If a fact be mistaken at the hearing the decretal order, it must be rectified by rehearing, and not by bill of review. *Combs v. Proud*, 1 C. C. 54. 2 Free. 182. PR. BILL OF REVIEW.

#### LXXX. REJOINDER.

Rejoinder not to be stuffed with repetitions of deeds *in hec verba*. *Deane's Ord.* 69.

Only to contain effect, &c., avoiding useless tautologies, &c. *Id.* 70.

If immoderately long, party, &c. to pay costs. *Id.* Before subpoena to rejoin, replication must be filed, &c. *Id.* 109.

Otherwise, the other side to pay costs. *Id.* 109. 183.

To subpoena to rejoin of force, unless replication filed. *Id.* 183.

To be filed with six clerk. *Id.* 231.

Every defendant taking out or craving a commission, is to rejoin gratis. *Ord. Exch.* 2 Fowl. 48. So if after exceptions allowed, and defendant putting in his answer within eight days. *Id.*

From M. 1815, it shall not be necessary to enter any side bar rule, to substitute service of the subpoena to rejoin, but that service thereof on defendant's six clerk and solicitor at his registered lodgings, shall in all cases be good service. *Ord. Ch. Irel.* 27th Jan. 1815. O'Keeffe's Ed. 112.

It is not the practice of the exchequer to issue subpoenas to rejoin. *Johnson v. Mackaness*, 9 Price, 213.

Order, that defendant might be at liberty to rejoin

*de novo*, giving notice of his intention to dispute the bankruptcy; allowed to be retained only on his consenting to admit as evidence the depositions of a deceased witness, as being necessary to prove the act of bankruptcy. *Brickwood v. Miller*, 1 Mer. 4. S. C. Coop. 270.

Defendant permitted to withdraw rejoinder, and rejoin *de novo*, giving notice of his intention to dispute the bankruptcy; but subject to costs. S. C. 2 Rose, 216. Not, however, if plaintiff's witnesses to prove commission are dead. S. C. *Id.* 340. BANKCY. NOTICE OF INTENT. TO DISPUTE.

Order to withdraw rejoinder and rejoin *de novo*, for the purpose of giving notice of intention to dispute act of bankruptcy under statute 49 G. 3. c. 121. By analogy to practice at law, to permit plea to be withdrawn according to practice in exchequer, the affidavit to state the deponent's information and belief, that it is essential to the justice of the case. *Berks v. Wigan*, 1 V. & B. 221.

After rejoinder, a defendant cannot move to dismiss a bill for want of prosecution. *Tozer v. Tozer*, 1 Cox, 288. PR. DISMISSAL FOR WANT OF PROSECUTION.

If plaintiff replies, defendant may rejoin gratis, and after the next term may give rule to produce witnesses. *Flower v. Herbert*, Dick. 349.

A rejoinder is only a fiction of the court, and is never actually filed. *Rodney v. Hare*, Mos. 296.

The defendant, though he is not served with a subpoena, may rejoin gratis; but plaintiff cannot compel him to rejoin with a subpoena. *Anon.* Mos. 123.

If plaintiff reply to an answer, and bring the cause to a hearing without giving subpoena to rejoin, the answer shall be taken for true, as if there had been no replication, for the opportunity which defendant had to prove his answer is taken from him. *Anon.* 2 Ch. Ca. 21. But see *ante*.

#### LXXXI. REPLICATION.

After replication filed, plaintiff shall not be permitted to withdraw it and amend bill, but on special application. 15th General Ord. 3d April, 1828.

A replication filed in discharge of an order of dismissal is not to be withdrawn without special motion, on notice to defendant's solicitor. *Ord. Exch.* 11th June, 1788. Kirkby's Rules & Ord. 43.

Replication of immoderate length subjects party, &c. to fine. *Deane's Ord.* 25. 70.

After replication answer cannot be excepted to as insufficient. *Id.* 28.

Must contain no new matter. *Id.* 29. S. P. O'Keeffe's Ord. 19.

Exception. *Id.* 29.

Not to be stuffed with repetitions of deeds *in hec verba*. *Id.* 69.

Only to contain the effect, &c. briefly, avoiding useless tautologies, &c. *Id.* 70.

No more points to be replied to than necessary. *Id.* 70. 180.

Must be filed before subpoena to rejoin issues. *Id.* 109. 183.

To be filed with six clerk. *Id.* 231.

Replication allowed to be withdrawn and bill amended by striking out the name of a plaintiff and making him a defendant, and by stating such facts and circumstances relating to certain transactions between that plaintiff and the defendant as were material to show that the other plaintiffs were not, and ought not to be bound by the facts or misrepresentation of that plaintiff respecting the property in the pleadings mentioned, or the purchase thereof, and as were material to show, that such acts and misrepresentation

of the said plaintiff were evidence against the defendants, the plaintiffs who made the application giving security for costs to the satisfaction of the master, and undertaking to amend within a given time, paying the costs of the application, the usual costs of the amendments, and withdrawing the replication. The extra costs of the amendments to be costs in the cause. *Small v. Attwood*, 2 Y. & J. 512. PR. AMENDMENT.

Under special circumstances leave given to withdraw replication, and file exceptions *nunc pro tunc*. *Evans v. Veysey*, 1 M'Clel. 341.

Motion to withdraw replication (filed in the same term, and without much previous delay to save a bill,) and amend, granted on payment of costs, and undertaking to amend within a week, although it did not appear that the matter sought to be introduced had come to the party's knowledge subsequently to filing the replication. *Callanan v. Salwey*, 1 M'Clel. 598. S. C. 13 Price, 799.

Semhle. Where replication is filed, defendant cannot dismiss bill for want of prosecution, but should set down the cause. *Atkinson v. Hutton*, 13 Price, 6. PR. DISMISSAL OF BILL.

Where the plaintiff is misnamed in an order to dismiss a bill for want of prosecution, in consequence of an error in the six clerks' certificate, a replication filed after service of the order will not be irregular. Semble. *Verlander v. Codd*, 1 Turn. & L. 9. S. C. 1 S. & S. 94. PR. ORDER TO DISMISS MISNOMER.

The application for leave to withdraw the replication and amend the bill, is not of course in the exchequer, but must be moved on an affidavit of the nature and materiality of the proposed amendment. *Markham v. Smythe*, 9 Price, 163.

Notice was given of motion to dismiss on same day that motion was made, and subsequent thereto replication was filed: Held bill not dismissed, and defendant not entitled to costs of motion. *Reynolds v. Nelson*, 5 Mad. 60. See Obs. 10 Ves. 404. DIVISION OF TIME; DISMISSAL FOR WANT OF PROSECUTION; FILING PLEADINGS, &c.

It is a motion of course to withdraw a replication and amend a bill, unless some further proceeding has been had in the cause, or plaintiff has undertaken to speed the cause. In the Exchequer, the Vice Ch. observed, it was not a motion of course, but a special case must be made. In this case, rules had been given to produce witnesses; and the motion was to withdraw the replication and the rules to produce witnesses, and for leave to amend, which his Honor said was a motion that required a special case. *Ld. Kilcoursy v. Ley*, 5 Madd. 210.

Replication filed after notice thereof, & before the motion to dismiss; motion not sustainable. Defendant entitled to costs. *Spurrier v. Bennett*, 4 Mad. 39. PR. NOTICE; PR. MOTION TO DISMISS; PR. COSTS.

After plaintiff has twice amended his bill, and filed a replication for cause against a second order nisi to dismiss, as against a defendant who has not caused delay, the court will not permit the replication to be withdrawn for the purpose of further amending the bill, by striking out the name of such defendant, and in other respects. *Turner v. Calvert*, 3 Price, 161.

Replication filed on day cause is shown against dismissal of bill, ordered to be taken off file as irregular. *Christie v. De Tastet*, 1 Price, 242. PR. FILING PLEADINGS; DISMISSAL OF BILL.

Order to withdraw the replication on payment of 20s. costs of course: the General Order, 27th of April, 1748, giving a discretion to exceed 40s. costs; in case of dismissal on bill and answer. *Cowdell v. Taillock*, 3 V. & B. 19. Otherwise in Exch. *Markham v. Smythe*, 9 Price, 163. REG. GEN., CONSTRUCTION OF; PR. COSTS.

The plaintiff in a bill of interpleader is not entitled,

after replying to the answers, to move for his costs, but must set down the cause for hearing. *Jones v. Gilham*, Coop. 49. PR. COSTS; PR. INTERPLEADER.

After the usual undertaking to speed his cause, plaintiff filed his replication, and rested for three terms more; and upon another motion to discontinue, he again undertook to speed the cause, and afterwards obtained an order for leave to withdraw his replication and amend. The Register denying this practice to be regular, the court discharged the order with costs. *Pitt v. Watts*, 15 Ves. 126.

In the Exchequer, where plaintiff applies to withdraw a replication (filed to save a bill) and amend, he must satisfy the court, not only that the amendments sought to be made are material, but that the circumstances came to his knowledge subsequent to the time of filing the replication. *Turner v. Chalvin*, Forrest's Ex. R. 23.

In the Exchequer, on moving for leave to withdraw the replication and amend the bill, plaintiff must show the materiality. *Longman v. Calliford*, 3 Anstr. 807.

Leave obtained to withdraw the replication and amend the bill, by striking out certain parts, on undertaking to reply immediately. *Turner v. Williams*, 2 Fowl. 46. But this motion is not of course, but must be supported by affidavit of the materiality of the amendments. *Markham v. Smythe*, 9 Price, 163.

After an undertaking to speed a cause, plaintiff will not be allowed to withdraw his replication and amend the bill as of course, but must move specially. *Ryan v. Stewart*, 1 Cox, 397.

Replying to answer and serving subpoena to rejoin, will not prevent defendant from moving to dissolve, unless cause, an injunction granted till answer. *Molineux v. Luard*, Dick. 684.

Defendant cannot be examined after his answer is replied to. *Winter v. Kent*, id. 595.

To plea in bar, plaintiff may reply generally, and examine at large. *Ord v. Huddleston*, id. 510.

If plaintiff replies, defendant may rejoin gratis, and after the next term may give rule to produce witnesses. *Flower v. Herbert*, id. 349.

Orders for leave to withdraw replications are very rarely granted, unless some reasonable ground be shown, as that plaintiff be thereby enabled to amend his bill; because otherwise it may be a contrivance of plaintiff to defeat defendant of his full costs, by getting the bill dismissed at the hearing with 40s. costs only. *Pitt v. Reynolds*, 3 Atk. 565. In M. 1747, the Ld. Ch., after mentioning this case, directed the Register to frame a general order, to prevent similar applications for leave to withdraw the replication in order to set down the cause on bill and answer only; but his lordship would not make any order that should affect this particular case. See Beame's Ord. 450.

After witnesses have been examined, the replication cannot be withdrawn. *Gascogne v. Chandler*, 3 Swan. 420.

If plaintiff who is of age does not reply, it is an admission of the facts in answer. But an infant can admit nothing, and therefore, his replying does not affect him. *Legard v. Sheffield*, 2 Atk. 377. INFANT.

After publication, plaintiff cannot amend without withdrawing his replication. *Anon.* 1 Atk. 51. PR. BILL AMENDMENT.

Where plaintiff replies to plea, he admits it to be a good bar, if facts alleged therein are true; and therefore, he cannot afterwards object to order for allowing plea, but must proceed to examine witnesses to falsify it. *Dunsany v. Shaw*, 5 Bro. P. C. 267. PR. PLEA.

After cause set down to be heard on bill and answer, plaintiff may, on payment of costs, reply. *Ld. Donegall v. Warr*, 1 Eq. Ab. 43.

If plaintiff replies to defendant's plea, he thereby

admits the plea to be good, if it be true, and the validity of the plea can never after be considered, but only the truth of it as he proves it, or the plaintiff disproves it. *Parker v. Blythmore*, Free. Ch. 58. PR. PLA.

Though a plea in bar be allowed, yet the plaintiff may reply and put the defendant to the proof of it. *Anon. Gilb. Eq. R. 184. Id.*

Where there is a plea and answer, the replication must be to the answer as well as to the plea. *Niccol v. Wiseman*, 2 Vern. 46.

In *Nosworthy v. Bussett*, 1 Vern. 351., the court refused to give any opinion whether, after a plea or demurrer to a special replication allowed, plaintiff may put in a general replication.

In *Cock v. Arnold*, Finch, 426., the question was, whether the replication was not a departure from the bill. But special replications, with all their consequences, are now out of use. See Mitf. Pl. 260.

If plaintiff replies to an answer, and without rejoining and giving rules for publication, brings the cause to a hearing, the answer shall be taken wholly true, as if there had been no replication; for the opportunity for defendant to answer is taken from him. *Grosvenor v. Cartwright*, 2 Ch. Ca. 21. See *Hampton v. Spencer*, 2 Vern. 288. *Legard v. Sheffield*, 2 Atk. 377.

In drawing a replication, the counsel neglected to put in issue a material fact; but as it was the case of an infant, the court would not hold him concluded by a mere slip in the pleading. *Savage v. Whitebread*, 3 Rep. Ch. 24.

Plaintiff put matter into his replication which was not contained in the bill, and which matter plaintiff knew of at the exhibiting the bill. Demurrer to the replication allowed. *Goodfellow v. Marshall*, 1 Ch. Rep. 259.

Where witnesses have been examined and no replication, the court at hearing, or even after a decree, will order a replication to be filed *nunc pro tunc*. A cause is at issue by the replication, and a rejoinder is never actually filed. *Rodney v. Hare*, Mos. 296.

Bill charged defendant with tearing a bond. Defendant by his answer denied having done so. Plaintiff by way of replication shewed it was an indenture of covenants. Defendant demurred that this was a departure from the bill; but defendant ordered to rejoin, and join in commission. *Passmore v. Ford*, Cho. Ca. Ch. 147.

Plaintiff, for putting in a long replication, fined 10*l.* and imprisoned, and a hole to be made through the replication, and to go from bar to bar with it hung round his neck. *Mitward v. Wollen*, Tolt. 101.

REPORT, see PR. MASTER, REFERENCE, &c.

RESTORING CAUSE, see PR. CAUSE.

RETAINING BILL, see PR. CAUSE.

REVIEW, see PR. BILL OF REVIEW.—PR. COMMISSION OF REVIEW.

REVIVOR, see PR. ABATEMENT & REVIVOR.—PR. SEQUESTRATION; 1.

## LXXXII. SALES JUDICIAL.

See also BANKCY., X. 6.—MORTGE., VII.—PARTICULARS OF SALE.—PR. COSTS, 10. (kk.)

1. *Sale when directed, and where to take place.*
2. *Who may purchase.*
3. *Vendors' liabilities, and duties.*
4. *Purchasers' rights, liabilities, and duties, and herein of the title.*
5. *Sale when completed, and letting purchaser into possession.*
6. *Discharge of first, and substitution of another purchaser.*
7. *Opening biddings.*  
(a) *Generally.*  
(b) *Deposit on.*
8. *The Conveyance.*
9. *Setting aside.*

### 1. *Sale when directed, and where to take place.*

Master may order a sale to take place in the country. 75 Gen. Ord. 3d April, 1828.

Land not to be put up to sale until a true state of the title with counsel's opinion thereon be produced, the title deeds deposited with the master, &c. Gen. Ord. June 17, 1805. 2 Scho. & T. 738.

On bill for arrears of annuity charged on lands. court has jurisdiction to decree amount to be raised by sale or mortgage of estate. *Cupit v. Jackson*, 13 Price, 721. S.C. 1 M'Clel. 495. JURISDICTION; CHARGE ON LAND.

An estate descended to an infant heir cannot be sold at the suit of creditors, on the ground that from circumstances of the property, a sale will be beneficial to the infant. *Brookfield v. Bradley*, 1 Jac. 634. INFANT.

Where real estate is devised to infants charged with payment of debts, if personal insufficient, sale of real not decreed till master report personal insufficient; though infants admit it so at the hearing. *Birch v. Glover*, 4 Mad. 376. PR. MASTER'S REPORT; INFANTS, WHEN BOUND BY; ADMISSIONS; TRUST TO PAY DEBTS.

In a suit instituted for the dissolution of a partnership, it being clear on the bill and answer, that some party is entitled to a dissolution, a sale of the partnership property may be directed on motion. *Cranshay v. Maule*, 1 Swan. 506. PARTNERSHIP DISSOLUTION.

In the instance of a trading partnership actually dissolved, the court orders a sale on motion. S.C. id. 523. PARTNERSHIP DISSOLUTION.

The court will not, sitting in bankruptcy, on behalf of the sureties of a bankrupt, direct a sale of mortgaged premises for payment of the debt secured by recognizance or for payment of any other security except a mortgage. *Exp. Usher*, 1 Ball & B. 197. SURETIES; BANKCY.

Court refused to make an order under act of parliament for sale of estate upon opinion of conveyancer merely approving the conveyance, without reference to master. *Exp. Dr. Newcastle*, 6 Ves. 454. PR. REF. TO MASTER.

The lord chancellor cannot upon a petition in lunacy order part of the lunatic's real estate to be sold for payment of his debts to prevent a bill by the creditors. *Exp. Smith*, 5 Ves. 566. JURISDICTION; LUNACY.

Bill for an account taken and confessed against surviving executor, and devisee of testator and leasehold estates taken under a sequestration for want of answer, the court would not order the sequestrator to sell, but directed them to apply the profits. *Shaw v.*

*Wright*, 3 Ves. 22. Stat. 36 G. 2. c. 90. was passed in consequence of this case. PR. SEQUESTRATION.

The court will sell perishable commodities, rents paid in kind or the natural produce of a farm under a sequestration. *Id.* 23. PR. SEQUESTRATION.

Goods sequestered on mesne process cannot be sold. *Hales v. Shafto*, 2 Cox, 224. S. C. 1 Ves. J. 86. 3 Bro. C. C. 72. PR. SEQUESTRATION ON MESNE PROCESS.

Estate devised away from the heir charged with payment of debts ordered to be sold in aid of the personal estate where the devisee was insane and the heir abroad. *Williams v. Whingates*, 2 Bro. C. C. 399. LUNATIC DEVISEE; ADMON. OF ASSETS.

Mortgagee may pray a sale of the mortgaged premises in the first instance where the heir and personal representative are the same person, and the personal estate is clearly deficient. *Tweddell v. Tweddell*, 2 Bro. C. C. 155. MORTGAGE.

He devised his estate to trustees to pay yearly rents and profits in discharge of his wife's jointure, his sister's annuity, and in payment of his debts and the interest thereof; then to certain uses. The creditors file a bill praying a sale, but this court cannot under such a devise decree the estate to be sold. *Jingard v. Derby*, 1 Bro. C. C. 311. WILL, C. OF; DEBTOR & CRED.

Sale of plantation decreed for money charged on it. *Gascoigne v. Douglas*, Dick. 431.

Decree for a sale, direction, are to pay creditor's whole demand according to nature and priority. *Rowe v. Bunt*, Dick. 151.

Sale of moiety of debtor's real estate decreed for satisfaction of judgment and costs. *Id.* 150.

Tenant for life subject to mortgage is not entitled to pray sale; though mortgagee may if security be scanty. *El. Kennell v. Money*, 3 Swan, 208. note. MORTGAGE; TEN. FOR LIFE.

Rents and profits of real estate descended to be applied before inheritance is sold. *Rowe v. Beavis*, Dick. 178.

The court will not oblige a judgment creditor to wait till he is paid out of the rents; but will accelerate the payment by directing a sale. *Stileman v. Ashdown*, 2 Atk. 610. But the sale cannot be of more than a moiety. *Id.*

Where debts and legacies are by will directed to be raised by perception of rents and profits, or by leasing or mortgaging of the land, this restrains it merely to a payment out of rents, and the court cannot decree a sale. *Ridout v. El. Plymouth*, 2 Atk. 105. TRUST FOR PAYMENT OF DEBTS.

In the above cases *Ld. H.* recommended it to the parties to apply for a private act of parliament to obtain a sale of the testator's real estates. *Id. ib.*

In case of judgment recovered against an heir who has a reversion in fee, which is only assets *cum acciderit*, court will not decree a sale of the reversion, but the creditor must wait till it falls. *Fortrey v. Fortrey*, 2 Vern. 134. REVERSION.

Land settled on trustees for raising portions for daughters; on a bill for a sale, court will decree the heir to join in the sale though he has no legal interest. *Roll v. Roll*, 2 Vern. 40. HEIR AT LAW.

Where debts are directed by will to be paid out of rents and profits, the court, if it is necessary, will decree a sale. *Berry v. Ashham*, 2 Vern. 26. WILL; DIRECTION TO PAY DEBTS.

Money devised to be raised out of profits, and the profits will not raise it in a convenient time, the court will decree a sale. *Heycock v. Heycock*, 1 Vern. 256.

Where land is devised to pay debts and legacies out of rents and profits, the land may be sold other-

wise if out of annual rents and profits: But if such trust is by deed, the land cannot be sold in either case. *Smith v. Vernon*, 104. WILL, C. OF.

Where portions were directed to be raised "as soon as conveniently may be," court decreed a sale of the lands. *Ashton v. —*, 10 Mod. 401. PORTIONS NOW RAISED.

## 2. Who may purchase.

Residuary legatee, tenant for life, or reversioner, may become the purchaser of an estate sold in the master's office. *Williams v. Attenborough*, 1 Turn. & R. 76. FRAUD, FID. SIT.

A mortgagee who was sole assignee and principal creditor, there being only one other creditor to a small amount permitted to bid for the estates subject, &c. *Anon. Buck*, 245. MORTGAGE & MORTGEE; FRAUD; FID. SIT.; BANKRU. ASSIGNEE.

Mortgagee of premises to be sold under the general order permitted to bid at the sale. *Cap. Ducane*, Buck, 18. MORTGAGOR & MORTGAGEE; FRAUD, FID. SIT.

## 3. Vendors, liabilities and duties.

Upon sale in court of copyhold. Vendor coming for aid is compelled to surrender in person if conveniently it can be done. *Noel v. Weston*, 6 Mad. 50. VENDOR & PURCH.; COPYHOLD SURRENDER.

## 4. Purchaser's rights, liabilities and duties, and herein of the title.

A purchaser under decree is entitled to his costs where master reports against title though no fund in court. *Smith v. Nelson*, 2 S. & S. 557. COSTS.

Order directing timber to be sold before master, and purchase-money to be paid by instalments. Purchaser desirous of paying purchase-money immediately on allowance of discount, the same ordered on consent of defendant. *Sitwell v. Sitwell*, 4 Mad. 183.

Purchaser under decree of two-sevenths of estate in one lot is not obliged to take one-seventh to which only title can be made. *Roffey v. Smalleross*, 4 Mad. 227. TITLE.

Purchaser who is dissatisfied with deputy remembrancer's report of title of premises sold, under decree of court must move for leave to file exceptions thereto, otherwise the motion to confirm may be made absolute in the first instance, but on moving if prepared, he may show exceptions instant. *Eyton v. Dicken*, 4 Price, 303. PR. EXCEPTIONS TO REPORT.

Title reported good by deputy remembrancer in creditor's suit, purchaser not bound to take it if only *prima facie* title. *Id. ib.* TITLE.

Purchaser having employed the vendor's agent who had notice of an incumbrance, charged with notice, notwithstanding the purchase was made under the sanction of the court, and an infant was interested in it. *Toulmin v. Steere*, 3 Mer. 210. PRIN. & AGENT; NOTICE.

The court of chancery does not warrant the title of an estate which is purchased under its directions. *Id.* 223. TITLE.

A purchaser under a decree shall not be affected by error in the decree: *ex gratia* in its not having given a day to an infant defendant to shew cause, or in decreeing a sale of lands to satisfy judgment debts without an account of the personal estate. *Bennett v. Hamill*, 2 Scho. & L. 566. VENDOR & PURCH.; DECREE, ERROR ON.

A purchaser has right to presume that the court

has taken the steps necessary to investigate the rights of the parties, and that on that investigation it has properly decreed a sale, but he ought to see that all proper parties to be bound are before the court, and that he does not take a title which can be impeached, *alioquin*. *Id. ib.*

In sales under a decree it is irregular to pay the purchase-money to the party; it ought to be paid into court. *Id.* 581. PAYMENT OF PURCHASE MONEY.

Motion that a person reported best purchaser, should complete his purchase by a certain day, refused, the report not being absolutely confirmed. *Anon.* 2 Ves. J. 335.

It is no objection on the part of a purchaser of land sold by a master, that more land is sold than is necessary for the purpose of the testator's will. *Lutwyche v. Winford*, 2 Bro. C. C. 248.

Conveyances made under a decree are to be settled by the like rule as men of judgment among conveyancers would direct. *Lloyd v. Griffith*, 3 Atk. 267.

A reversion expectant on an estate for life is decreed to be sold, B is confirmed the best purchaser, and the order made absolute 1st Jan. 1724. On the day of Jan. 1726, B is ordered to bring his money into the bank, the life drops; if the life had dropped, the next day after the report of B's being the best purchaser made absolute, the purchase must have stood, and as from that time the life was wearing so from that time, the purchaser ought to pay interest. *Exp. Manning*, 2 P. W. 410.

Whilst conditional orders for attachments are depending against plaintiff and defendant for not executing the deeds of conveyance to the purchaser; the creditors who came in under the decree, cannot be paid out of the purchase-money though the purchaser has gone into possession, but the court will give them leave to proceed on their securities. *Ormsby v. Nicholson*, Vern. & Scriv. 115. DEBTOR & CRED.; PR. DECREE FOR SALE.

#### 5. Sale when completed, letting purchaser into possession.

Sale of an annuity before the master, takes effect from the confirmation of the report and the sale being on the 11th of August, and the report confirmed in Michaelmas term, interest was given upon the purchase-money from the first day on which the report could have been confirmed, viz. the first seal before the term. *Twigg v. Fifeild*, 13 Ves. 517. ANNUITY; INTERMEDIATE PROFITS.

Purchaser under a decree of the court is not entitled upon an affidavit that he has had his money lying ready for some time, to be let into possession of estate, and receipt of rents for all such time so passed. *Barker v. Harper*, Coop. 32. DELIVERY OF POSSESSION.

A purchase before the master is not complete before confirmation of the report, therefore, a loss by a fire after the report, but before confirmation, falls upon the vendor, and the circumstance that the sale had been delayed by the purchaser having opened the biddings was not attended to. *Exp. Minor*, 11 Ves. 559.

Purchaser under decree considered only as owner, from time he pays the purchase-money, and not from confirmation of report by which he is declared the best bidder, he having taken objections to title. *Mackrell v. Hunt*, cited 2 Mad. 34.

#### 6. Discharge of first, and substitution of another purchaser.

Purchaser of estates sold under a decree, discharged, on motion, from his purchase, upon error in the de-

gree being shewn, though the parties are proceeding to rectify it. Whether he is entitled to his costs, *quære?* *Jechmere v. Brasier*, 2 Jac. & W. 287.

Consent of owner of property sold under decree, is necessary to a motion to vacate a bidding. *Re v. Brickdale*, 8 Price, 630. CONSENT.

The court refused to discharge the solicitor in the cause from a purchase before the master, with the view of preventing a sale at under value. *Nethorpe v. Pennyman*, 14 Ves. 517. PUFFER; SOLICITOR.

Court will not discharge purchaser, and substitute another in his place, even upon paying in the money, without affidavit that there is no under-bargain. *Rigby v. M'Namara*, 6 Ves. 615. S. P. *Vale v. Davenport*, 6 Ves. 615.

One reported, the highest bidder compelled to complete his purchase. *Cunningham v. Williams*, 2 Anst. 344. SPEC. PERF.

One purchaser substituted for another upon motion, with consent. *Matthews v. Stubbs*, 2 Bro. C. C. 391.

Purchaser before a master submitting to forfeit his deposit not bound to proceed to the purchase. *Seville v. Seville*, 1 P. W. 745. But see note (c), *id.* 747. SPEC. PERF.

#### 7. Opening Biddings.

- (a) Generally.
- (b) Deposit on.

##### (a) Generally.

Biddings opened on the application of a person who was present at the sale, though the advance offered was less than five per cent. on the price. *Leffroy v. Leffroy*, 2 Russ. 606.

A purchaser for B, but without authority, an estate sold under a decree; B died, without adopting the purchase; the order nisi was nevertheless obtained. The court refused to order B's executor to pay the purchase money, and on the heir declining the purchase, discharged the order nisi, and directed a re-sale. *Lord v. Lord*, 1 Sim. 503. HEIR AT LAW; EXECUTORS.

If the executors of a purchaser under a decree refuse to pay the purchase money they cannot be compelled to pay it, unless a suit be instituted by the heir. *Id. ib.*

Purchaser who has confirmed his report nisi cannot after notice, to open biddings confirm absolutely. *Vunsittart v. Collier*, 2 S. & S. 608. CONFIRMATION OF REPORT; VENDOR & PURCH.

Biddings for an estate allowed to be opened by a person who had attended the former sale by an agent, he offering an advance of 500*l.* in 8950*l.* the best bidding reported. *Pearson v. Collett*, 1 M'Clel. 82. S. C. 13 Price, 213.

The rules which regulate the practice of opening biddings upon a sale of landed estate, do not apply when a colliery is the subject of sale. *Williams v. Attenborough*, 1 Turn. & R. 70. COLLIERIES.

Upon an offer to give 10,000*l.* for a colliery sold for 8,850*l.* a motion to open the biddings was refused. *Id. ib.*

The rule is not universal, that biddings shall not be opened in favour of parties present at the sale; *Id. ib.*

The person who opens the biddings is discharged, if he is outbid at the sale. *Id. ib.*

Biddings not opened, even on creditor's suit, upon an advance of 350*l.* being less than 10 per cent. *Garr-ton v. Edwards*, 1 S. & S. 20.



Upon advance of 500*l.* though less than 10 per cent., court will act. 1 S. & S. 20.

Biddings not opened, under advance less than 40*l.* *Brookfield v. Bradley*, id. 23.

Two lots ordered to be re-sold in one, where advance on smaller lot under 40*l.* *Id. ib.*

Where several lots have been purchased by the same person, and the biddings are opened as to some of them, which were first purchased, the purchaser will be allowed option of opening biddings as to remainder. *Price v. Price*, id. 386.

In a similar case, upon an affidavit of the purchaser that he had bid for the lot in consequence of having been declared the best bidder for the prior lot, the bidding was opened. *Fidler v. Fidler*, cited id.

A person present at the sale allowed to open biddings, but a larger advance expected from him. *Tynedale v. Warre*, 1 Jac. 525.

There is no general rule that a party present at the sale shall not open biddings; each case must depend on its own circumstances. A party who neglects to bid, in consequence of the auctioneer declaring that a person may open the bidding, if he comes within eight days after the report, cannot allege surprise as a ground for opening the biddings, if he does not come within that time. *Thornhill v. Thornhill*, 2 Jac. & W. 347.

At a sale by order of the court, a reserved bidding allowed to be made one of the conditions. The master to fix the amount, and to use his discretion in communicating it to the parties, or their solicitors. *Jervoise v. Clarke*, 1 Jac. & W. 389.

One party having moved to open biddings, although he has not drawn up the order, nor paid his deposit, another person cannot open biddings without notice to the first. *Gibbons v. Howell*, 4 Mad. 52.

Biddings not opened, unless advance of 40*l.* is offered. *Farlow v. Weildon*, 4 Mad. 460.

Costs of former purchaser, see id. note. Costs.

Where two lots are purchased together, biddings cannot be opened as to one lot only, unless the first purchaser choose to keep the one remaining lot alone. *Exp. Tilsley*, 4 Mad. 227. note.

Person present at sale not allowed to open biddings. *McCulloch v. Colbatch*, 3 Mad. 314. *See quere.*

In a creditor's suit bidding opened on an advance of 500*l.* upon 10,000*l.* paying the advance into court, and the expenses of the discharged purchaser. *Brooks v. Smith*, 3 V. & B. 144.

A re-sale, on opening biddings, producing considerable increase of price, is no ground for giving party his costs of opening biddings. *Tregusis v. Clinton*, 1 V. & B. 361. PR. COSTS.

Biddings opened upon a second application by the same person, the purchaser not appearing upon notice. *Preston v. Barker*, 16 Ves. 140.

In bankruptcy application to open biddings when deed executed, and purchaser put in possession too late. *Exp. Partington*, 1 Ball. & B. 209. BANKCY. SALE IN.

General rule not to open biddings, after confirmation of the report, upon negligence, surprise, the circumstances of the estate, &c. without something unconscious on the part of the purchaser. No rule, fixing the advance on opening biddings at 10 per cent.; more or less will be required, according to circumstances. *White v. Wilson*, 14 Ves. 151.

A person who opened biddings not being the purchaser, allowed his expenses on the circumstances against the general rule, having interposed at the instance, and for the benefit of the family. *West v. Vincent*, 12 Ves. 6. Costs.

Biddings will not be opened after confirmation of the report, unless fraud is shown in purchaser, or fraudulent negligence in agent, &c. or other special cir-

cumstances. *Morice v. Br. Durham*, 11 Ves. 57. PR. CONFIRMATION ON MASTER'S REPORT.

After a sale regularly confirmed, the court cannot open the bidding, merely on a suggestion of there being persons ready to bid in advance, without first setting aside the order confirming the sale; and that order ought not to be set aside, but on grounds of fraud. *Executors of Fergus v. Gore*, 1 Scho. & L. 350.

Person who opened biddings, but was not the purchaser, allowed his costs, on the special circumstances, having opened them not on his own account, but for the benefit of the family. *Owen v. Foulks*, 9 Ves. 348. PR. COSTS.

A person who opened biddings, but was not the purchaser, the estate upon the resale going considerably higher, cannot on that ground have his costs. *El. Macclesfield v. Blake*, 8 Ves. 214. COSTS.

Person opening biddings, though not purchaser, not entitled, in any case, to costs. *Rigby v. McNamara*, 6 Ves. 466. PR. COSTS.

Biddings opened by person who was present at sales. S. C. *Id.* 117. S. P. *Tait v. Id. Northwick*, 5 Ves. 655.

Bidding opened on advance of 50*l.* on 380*l.* and paying the expense. 10 per cent. not sufficient on a small sum. *Upton v. Id. Ferrers*, 4 Ves. 700.

Biddings opened after the report confirmed simply upon an advance of 61*l.* on 305*l.* 35*l.* not sufficient. *Chetham v. Grugeon*, 5 Ves. 86.

Biddings opened on advance of 200*l.* upon 3200*l.*, but 100*l.* was held too little. *Anon.* 5 Ves. 148.

Increase of price offered is not alone a reason to open biddings after the report confirmed. *Boyer v. Blackwell*, 3 Anst. 656.

Where a person is reported purchaser of several lots before the master, if the biddings are opened as to one, he shall have an option to open them as to all. *Semble. Id.* 657. VENDOR & PURCH.

Biddings opened on advancing 100*l.* on 800*l.*, and 200*l.* on 1200*l.* *Anon.* 2 Ves. J. 487.

Biddings opened after confirmation of the report on circumstances, as where the owner of the estate who joined in the motion was in prison at the time of the confirmation, and a fourth of the original price was offered in advance; but a deposit of the whole advance was required. *Watson v. Birch*, 2 Ves. J. 51. S. C. 4 Bro. C. C. 172.

\*On opening biddings, the court, in the reference of costs of the purchaser, will not give a particular direction for a specific expense. *Anon.* 2 Ves. J. 286. PR. COSTS.

The bidding on a lot sold in this court may be opened upon a proper offer, even a second time, if the master's report has not been confirmed, but shall not be opened at all after confirmation. *Scott v. Nesbit*, 3 Bro. C. C. 475.

Bidding opened on terms of paying the former bidder all costs, charges, and expenses, to be settled by the master. *Watts v. Martin*, 2 Bro. C. C. 113.

Biddings are opened for the benefit of the suitor and estate, not of the purchaser; as where he was too late, and the overbidding is small. *Anon.* 1 Ves. J. 453.

Estate sold before the master for payment of debts, and A reported the best bidder. Before the report was confirmed, it was discovered that A was insane at the time of the bidding. It was moved on behalf of all the parties in the cause, that B, the next best bidder might be reported the purchaser at the sum bidden by him, and B consented; but the court thought this was irregular, and directed the estate to be re-sold generally. *Blackbeard v. Jandigren*, 1 Cox, 205.

The court has always discretion to open biddings,

resting wholly on circumstances of the case. *Ryder v. Gower*, 6 Bro. P. C. 386.

Where applications to open biddings are frivolous or litigious, and grounded only on application of the owner, and especially where value of estate is but little more than will satisfy incumbrances, court are well justified in refusing such applications. *Baillie v. Chaigneau*, 6 Bro. P. C. 313.

Biddings opened after confirmation of the master's report, upon a considerable advance, there having been a mistake made in a particular of the estate left with master: and one of the parties who confirmed the report having been steward of the family, and knowing more than he communicated. *Cs. Gower v. El. Gower*, 2 Eden. 340. FRAUD; PR. CONFIRMATION OF MASTER'S REPORT.

Person opening biddings setting up sham bidders, who are reported best bidders, ordered himself to be best bidder at price he opened biddings. *Molesworth v. Opie*, id. 289.

#### (b) *Deposit on.*

Where biddings have been re-opened, and party opening them does not become the purchaser, he cannot have his deposit repaid, till report of re-sale is confirmed. *Rex v. Hilton*, 1 M'Clel. 595.

On opening biddings, ten per cent. to be deposited. *Anon.* 3 Mad. 494.

Upon opening biddings, the court refused to dispense with deposit, or order a trifling one to be taken upon particular circumstances. *Anon.* 6 Ves. 513.

Where a person, who has made a deposit upon being declared the highest bidder at a sale under a decree, is outbid at a subsequent setting up of the lands to sale, he is entitled to have his deposit back immediately, but for his interest and costs he must wait until the same shall have been completed. *Archibald v. Montgomery*, Vern. & Scriv. 302.

A deposit made on opening a bidding having been laid out in the public funds, this deposit is considered as part of the purchase money paid, and therefore the depositor is not entitled to the dividends accruing between the time of the deposit and the completion of the purchase; but only interest on the deposit at four per cent. *Doyley v. Cs. Powis*, 1 Cox, 206. S. C. 2 Bro. C. C. 33. INTEREST; INVESTMENT, DIVIDENDS ON; VEND. & PURCH.

The deposit made upon opening a bidding is considered as part of the purchase money paid, although, on the event of the depositor not being reported the best bidder, it must be returned to him, and therefore, where the deposit is laid out in the public funds, which rise between the time of the deposit and the purchase being completed, the estate will have the benefit of the rise. *Ambrose v. Ambrose*, 1 Cox, 194. ACCRETION; VEND. & PURCH.

#### 8. *The conveyance.*

No objection to sale in court, under a will, that infants interested under will cannot join in conveyance. *Powell v. Powell*, 6 Mad. 53. DEEDS, PARTIES TO; INFANTS; VEND. & PURCH.; TITLE.

Where confirmed purchaser of estate under decree died before conveyance made, having, in mean time, devised his interest therein to trustees, court ordered conveyance to be made to them, without consent of heir at law, who was an infant. *King v. Gregory*, 4 Price, 380. PL. PARTIES; HEIR AT LAW.

#### 9. *Setting aside.*

Lands in strict settlement, with power to grant leases, being subject to prior incumbrances, are, by

decree in a suit instituted by incumbrancers, directed to be sold subject to charges prior to deed of settlement. Pending the suit, the tenant for life, under settlement, grants leases not authorised by the power, and raises money upon annuities for his life, which he charges upon the lands, and they are sold subject to those charges. Held, (reversing decree of court below) on suit by remainder-man in tail, that the sale subject to charges not warranted by decree, is void. *Coleclough v. Sterum*, 3 High, 181. DECREE.

A sale under a decree, all necessary parties being before the court, not set aside after a lapse of time, though the surplus of the purchase money was directed to be paid to the tenant for life, there being no surplus, and the sale appearing to be properly conducted. *Lightburne v. Swift*, 2 Ball & B. 207. LENGTH OF TIME.

An estate being sold before a master, where the purposes of the decree did not require it, the sale shall be set aside, although the reports of the several purchasers were confirmed; but the purchasers must be fully reimbursed all their expenses out of pocket. *Prideaux v. Pringleaux*, 1 Cox, 34. S. C. 1 Bro. C. C. 287; where stated to have been reversed.

Sale declared to be made subject to the trusts of the testator's will, where, under a decree that his real estate (which was devised in strict settlement, subject to debts) should be sold, the sale had been effected by collusion between the creditors and tenants for life. *Manaton v. Molesworth*, 1 Eden, 18. TRUST.

SCANDAL, see PR. ANSWER, 18.—PR. MASTER, REFERENCE, 1, (d).

#### LXXXIII. SEAL AND SEAL DAY.

No motion for an injunction can be made the day on which a seal day is continued, if the party were not in a condition to make it on the seal day. *Rome v. Jarrold*, 5 Mad. 45.

Strictly, no motion can be made at a seal, the brief for which was not delivered to counsel at least on the first day of the seal; and a motion being made where this had not been done, the court discharged the order with costs, for the irregularity. *Sharp v. Ashton*, 2 Ves. & B. 412. 413. *Anon.* 2 Mad. Pr. 213. S. P.

Instruments not considered as sealed, for the purpose of proceeding on them, while remaining in the Ld. Ch.'s hands; but are so considered, from the moment of delivery to the party. *Exp. Freeman*, 1 V. & B. 39.

Writ of supersedeas and second commission of bankruptcy considered as sealed, from delivery to the messenger. *Id. ib.*

Order to amend, upon petition, at the rolls, after notice of motion to dismiss for want of prosecution; for the seal, the day on which the order was obtained, and the motion, could not be made regular. *White v. Hall*, 14 Ves. 208. PR. MOTION TO DISMISS; PR. ORDER TO AMEND.

#### LXXXIV. SEQUESTRATION.

1. *Issuing, service of, and returning against heir, &c.*
2. *Execution and effect, and what liable to.*
3. *Abatement and discharge of.*
4. *Sequestrator.*

1. *Issuing, service of, and returning against heir, &c.*
- Sequestration to be granted when defendant stands out all process of contempt. *Beame's Ord.* 15.

Or resists serjeant at arms. *Id.* 16.

Or makes rescue. *Id.* 16.

Only of the lands, &c., in question. *Id.* 16.

To be granted where there is a decree for rent, or for money to be levied out of land. *Id.* 17.

Not to issue on petition. *Id.* 35. 215.

No sequestration against estate of person not to be found, but upon serjeant at arms' return of *non est inventus*. *Id.* 324.

Upon such return, sequestration to issue. *Id.* 324.

*Qu.*, Whether it is regular to issue a sequestration against the property of a party who is in the Fleet, under process from the common pleas, and is detained also upon an attachment from the court of chancery, but who has not been brought up by habeas corpus to the bar of the court in order to be turned over to the custody of the warden? *Const. v. Barr*, 2 Russ. 161.

The irregularity of a sequestration is waived, if the party against whom it is issued gives the sequestrators directions how to deal with his property. *Id. ib.* PR. WAIVER OF IRREGULARITY.

Where party is in custody of warden of Fleet, under process from the common pleas, and is detained by attachment from chancery, he must be brought up by habeas corpus to bar of this court, and turned over to warden of Fleet, before sequestration can issue. S. C. 2 S. & S. 452. PR. PRISONER.

The warden's certificate of a prisoner being, in his custody for contempt, for non-payment of costs taxed, is sufficient to found a motion for a sequestration, without any affidavit of demand and refusal to pay. *Phillips v. Stephenson*, 11 Price, 473. PR. WARDEN'S CERTIFICATE.

Order for sequestration made upon the return to a single distringas, issued under a decree for payment of costs; such an order is only an order nisi in the first instance. *Jowther v. Mayor, &c., of Colchester*, 3 Mer. 543. PR. DISTRINGAS.

Form of distringas regular, being to appear and answer contempt merely; (not *ad comparandum et solvendum*) but the cause for which it issued being specified by indorsement. *Id. ib.*

Sequestration for want of answer can only be obtained upon order nisi, and not absolute in the first instance. *Bernal v. Marq. Donegal*, 11 Ves. 43.

Sequestration for not performing the decree, upon the return to an attachment that the defendant was in custody of the warden of the Fleet. *Errington v. Ward*, 8 Ves. 314.

Construction of the General Order, 23rd January, 1794, in the case of a peer defendant, that in the cases specified, upon application for time to answer, the defendant enter his appearance, and undertake, that if the answer is not put in, a sequestration, i. e., a sequestration absolute. *Gregor v. Ld. Arundel*, 8 Ves. 87. GEN. ORDER, C. OF; PEER; PR. TIME TO ANSWER.

Sequestration will issue against defendant for contempt, in not putting in examination to interrogatories before master. *Lupton v. Hescott*, 1 S. & S. 274. PR. CONTEMPT.

Also in not producing papers. *Trigg v. Trigg*, and *Detilen v. Gale*. *Id. ib.* note.

Service of an order of sequestration nisi upon the clerk in court good, the plaintiff having tried in vain to serve it personally. *Mary. Lothian v. Garforth*, 5 Ves. 113. PR. SERVICE SUBSTITUTED.

Sequestration only goes where defendant is in custody of warden of Fleet, not of sheriff. *Markham v. Wilkinson*, 2 Anst. 579. PR. PRISONER.

Where order nisi for sequestration is obtained against privileged person he is not in contempt, unless he neglects to obey the order nisi. *Smallbrook v. Ld. Donegal*, 3 Anst. 647. PR. CONTEMPT; PRIVILEGE.

Such order nisi may be served on clerk in court of defendant. *Id. ib.* PRIVILEGE.

Order nisi for sequestration against privileged person, may be served on clerk in court; but order absolute must be served personally. *Id. ib.* PRIVILEGE.

The course against a M. P. for non-payment of money is, first, to move for a sequestration nisi, upon notice. *Crawley v. Clarke*, 3 Bro. C. C. 373. PR. MEMBER OF PARLIAMENT.

Form of order for sequestration. *Pope v. Ward*, 1 Cox, 194.

Sequestration nisi granted for not returning papers according to order. *In mrs. Hussenclaver*, 1 Bro. C. C. 434.

A decree and sequestration for a personal duty against one who dies: this shall not be revived against his heir or real estate, though it were for money payable on the behalf of a charity. *University College v. Foxcroft*, 2 C. R. 244. 1 Vern. 166. PR. ABATEMENT & REVIVOR; HEIR AT LAW.

Chancery has jurisdiction in case of sequestration of tithes during a vacancy, by reason of general jurisdiction of court in matters of trust. *Birch v. Bygrave*, 6 Mad. 158. JURISDIC.; TITHES.

A receiver having been appointed, with the usual directions for the tenants to attorn, and a tenant having been served with a writ of execution of the order, and arrested upon an attachment, and turned over to the Fleet, sequestration refused. *Att. Gen. v. Tancréd*, 2 Dick. 798, and see *Rouley v. Ridley*, Dick. 622.

Defendant, in contempt and in custody, must be handed over to the Fleet before sequestration can issue. *Kinsey v. Yardley*, Dick. 265.

Commission of partition and parties to produce deeds. Defendant in contempt for not producing, &c., sequestration finally ordered. *Trig v. Trig*, Dick. 325.

Sequestration is first process against peer or member of parliament. *Rushleigh v. Butler*, Dick. 152.

Putting in answer good cause against sequestration nisi against peer, &c.; but if answer insufficient, plaintiff must move again for sequestration nisi. *Id.*

Mistake in title of sequestration and commission of rebellion rectified, defendant, by putting in answer, having acquiesced. *Bennet v. Button*, Dick. 135.

The court of chancery in England may grant a sequestration against the defendant in Ireland, but it must be after a sequestration taken out here, and *nulla bona* returned. *Fryer v. Bernard*, 2 P. W. 261. Sel. Ca. in Ch. 5. JURISDIC.

Sequestration cannot issue till return of *non est inventus* by serjeant at arms. *Exp. Jephson*, Proc. Chan. 549. PR. SERJEANT AT ARMS.

Plaintiff producing copy of sequestration only, on motion to take bill *pro confesso*, court refused it; but sequestration not being under seal, nor executed, was held no objection. *Anon.* 10 Mod. 431. PR. EVID. COPIES; PR. BILL PRO CONFESSO.

A sequestration may issue against an infant. *Anon.* 2 Ch. Ca. 163. INFANT.

If a sequestration for a personal duty may be revived against the heir? *University Coll. Oxon. v. Foxcroft*, 1 Vern. 166. S. C. 2 Ch. Rep. 244. HEIR AT LAW.

Sequestration against the heir, for a personal duty decreed against the father. *Witham v. Bland*, 3 Swan. 276. HEIR AT LAW.

Bill by a vicar against a sequestrator for an account of profits during the vacancy: the bishop must be a party. *Jones v. Barret*, Bun. 192. PL. PARTY; BISHOP.

A sequestration will be granted in chancery or exchequer for a personal duty; for the court hath authority to see its decrees executed. *Guavens v. Fountaine*, 2 Free. 99. H. C. C. 91: 2 Free. 125. 168.

All decrees in chancery, as well for personal as for real things, shall be executed by sequestration. *Beddingfield v. Zouch*, 2 Free. 168. *Hide v. Pettit*, 1 C. C. 91. 2 Free. 125. 168.

A sequestration, which is a kind of suspension nisi, &c., was granted against the warden of the Fleet for not answering: no attachment lies against him, because he is supposed to be always in court; and though it is directed to the sheriff, the body, when brought in, is turned over to the Fleet. In C. B., if the warden will not appear, they forejudge him his office. *Anon.* Mos. 238.

Defendant, in contempt for disobedience of a decree, was brought from Bristol by habeas corpus *cum causa*, and turned over to the Fleet, and a sequestration issued. *Eldard v. Warren*, 2 C. R. 151.

On the return of an attachment for non-performance of an order against one in the Fleet, the next process is a sequestration. *Anon.* Mos. 301.

Sequestration against an infant lord for not appearing. *Anon.* 2 C. C. 163.

## 2. Execution and effect of, and what liable to.

The court has no jurisdiction to order, upon motion, a person not a party to the cause, to pay into court the arrears of an annuity granted by him to a defendant, against whom a sequestration had issued for want of a sufficient answer, unless the grantor has by his conduct waived the objection to the jurisdiction; but he may notwithstanding, and without applying for the leave of the court, obtain from the grantee a release of the annuity. *Johnson v. Chippindale*, 2 Sim. 55. **PR. JURISDICTION; CHOICE IN ACTION.**

A sum of money in the hands of the banker of a party against whom a sequestration had issued, sequestered. Proceeding for ascertaining the interest of a third person. Power of sequestrators to open boxes, &c. *Id. Pelham, v. Dr. Newcastle*, 3 Swan. 290. **BAILEE.**

No examination *pro interesse suo*, before the sequestrators have made a return. *Id. ib.* **PR. EXAMINATION PRO INTERESSE SUO.**

Whether copyhold lands are subject to sequestration; *quære?* *Marg. Caernarthen v. Hawson*, 3 Swan. 294. **COPYHOLD.**

Effect of sequestration against the heir. *Coulston v. Gardiner*, 3 Swan. 283. **HEIR AT LAW.**

A sequestration having issued for non-payment of money into court, an individual in possession of a sum claimed by the party against whom the sequestration issued, and by a stranger, was ordered to pay that sum into court. *Franklyn v. Colhoun, Franklyn v. Thornhill, Barker v. Pinney*, 3 Swan. 276. **BAILEE; PR. PAYMENT INTO COURT.**

Composition for tithes puts an end to lien on land, therefore where produce is taken and sold by sequestrators, tithe owners cannot demand payment thereof out of that fund. *Dickinson v. Smith*, 4 Mad. 177. **LIEN; TITHES; COMPOSITION.**

A sequestrator being in possession of a rectory, under a sequestration issued by a creditor of the rector, a subsequent creditor having obtained a second sequestration, is entitled to an account in equity against the first sequestrator, and payment of the surplus after satisfaction of the first creditor; nor are prior incumbents who have not obtained sequestration, necessary parties to the suit. *Cuddington v. Whithy*, 2 Swan. 174. **ACCOUNT.**

Under sequestration, landlord is entitled to be paid the arrears of rent without reference to master. *Dixon v. Smith*, 1 Swan. 457. **LANDLORD & TENANT; PR. REFERENCE TO MASTER.**

Sequestrators took possession of certain mortgaged premises, mortgages on petition, obtained order to have rents and profits of premises in hands of seques-

trators applied towards payment of mortgage money and possession of premises delivered up to them. *Walker v. Bell*, 2 Mad. 21. **MORTGAGE.**

A receiver appointed of the profits of a rectory under sequestration, and an injunction granted against enforcing sequestrations. *Silver v. Bp. of Norwich*, 3 Swan. 112. **CHARGE ON BENEFICE; PR. RECEIVER.**

Land and house in possession of sequestrators belonging to defendant, in contempt for non-payment of money into court, ordered to be let. *Dunkley v. Scribner*, 2 Mad. 443.

The Scotch acts of sequestration, many of which passed since the Union, support the general principle, passing all the property of a bankrupt to his assignees. *Exp. Cridland*, 3 V. & B. 100. **SCOTLAND.**

Execution of sequestration on mesne process, refused. *Knight v. Young*, 2 V. & B. 184. **EXECUTION.**

Where the goods of a third person are seized by sequestrators, an order to examine *pro interesse suo* will be made, and if the goods taken are found to belong to the party so applying, a reference to ascertain his damages will be granted. *Copeland v. Mupe*, 2 B. & B. 66. **PR. EXAMINATION PRO INTERESSE SUO.**

Dividends of bank stock being choses in action, cannot be sequestered. *McCarthy v. Gould*, 1 Ball & B. 387. **STOCK IN FUNDS; CHOSES IN ACTION.**

Sequestrators directed to receive a pension to A and his assigns, payable at the treasury in the hands of the assignee. *Id.* See *Davis v. Dr. Marlborough*, 1 Swan. 74. **PENSION FROM CROWN.**

It is contempt to disturb sequestrators in possession. If sequestration is executed, a judgment creditor, though prior, can only claim to be examined *pro interesse suo*; if not executed, he may take execution. *Angel v. Smith*, 9 Ves. 336. **PR. CONTUMPT; JUDGMENT CREDITORS.**

Motion to sell furniture under sequestration for not performing decree, must be on notice. *Mitchell v. Draper*, 9 Ves. 208. **PR. MOTION; PR. NOTICE.**

Decree for execution of a trust to pay debts against trustees only, the other defendant not appearing, though process of sequestration had issued against him. *Downes v. Thomas*, 7 Ves. 206. **PR. DECREE.**

Upon sequestration, mortgagee must come to be examined *pro interesse suo*. *Anon.* 6 Ves. 288. **PR. EXAMINATION PRO INTERESSE SUO; MORTGAGE & MORTGAGEE.**

Bill stating a sequestration for want of an answer, prayed a discovery and account of all money or other property of the defendant in the original cause, in the hands of defendants who were bankers at the time of service of the sequestration, or since. Upon demurrer, as to the money and answer as to the rest of the bill, the Ld. Ch. determined against the demurrer, upon the form, considering it over-ruled by the answer, and would not in that stage of the cause decide the two points: 1st. Whether a sequestration on mesne process can be executed further than to pay the expenses. 2ndly. Whether a chose in action is liable to sequestration. *Simmonds v. Kennaird*, 4 Ves. 735. **PR. DEMURRER; PR. ANSWER.**

Bill for an account taken *pro confesso* against surviving executor and devise in trust, and leasehold estates taken under a sequestration for want of answer, the court would not order the sequestrators to sell, but directed them to apply the profits. *Shaw v. Wright*, 3 Ves. 22. Stat. 36 Geo. 3. c. 90. was passed in consequence of this case. **PR. SALE, WHERE DIRECTED.**

The court will sell perishable commodities, rents paid in kind, or the natural produce of a farm under a sequestration. *Id.* 23. **PR. SALE.**

Estate ordered to be sold for debts; money raised

under sequestration paid into court though contempt cleared. — *v. Bennett*, 1 Ves. J. 89. **PAYMENT INTO COURT; PR. CONTEMPT.**

Sequestrator ordered to sell the goods where the party is in contempt for non-payment of money. *Cavil v. Smith*, 3 Bro. C. C. 362.

Sequestrators in mesne process can only sell sufficient of the goods to pay costs of contempt to be taxed. *Hales v. Shaftoe*, Dick. 711. *Semble*. S. C. 1 Ves. J. 86. 3 Bro. C. C. 72.

*Quare?* Whether there can be any sale of goods taken under a sequestration upon mesne process, farther than to pay the expences. *Semble*, not. *Id.* 1 Ves. J. 86. S. C. 3 Bro. C. C. 72. *Semble*. S. C. 2 Cox, 224. **PR. SALE.**

A salary to an equerry to one of the royal family is not a subject of sequestration. *Fenton v. Lowther*, 1 Cox, 315. **PUBLIC OFFICES.**

A sequestration to compel answer, may be executed, but no order will be made for the tenants to attorn, till the commission is returned. *Rowley v. Ridley*, 3 Swan, 306. **ATTORNMENT OF RENT.**

Lease of lands in Ireland made after the lessor's estate has been put under sequestration for contempt of court of exchequer in that kingdom, was held good, the lessee having no notice of such sequestration. *Vicars v. Coleclough*, 5 Bro. P. C. 31. **NOTICE.**

A sequestration on a decree runs against copyhold lands, though it cannot be revived against the customary heir. *Whitehead v. L. v. L.*, 1 Barn. 431.

Court will not order perishable goods, taken under a sequestration for want of an answer, to be sold before decree. *Wilcocks v. Wilcocks*, 2 Anbl. 421.

Executing sequestration on mesne process improper. *Heather v. Waterman*, Dick. 335.

Therefore the bill to be taken *pro confesso*, and sequestrators to account; costs reserved generally. *Id. ib.*

The master cannot inquire into the property in chattels sequestered, without an order. *Anon.* 3 Swan, 311. **PR. INQUIRY BEFORE MASTER.**

Proceedings under a sequestration for non-performance of a decree, after an assignment by the defendant for valuable consideration. *Bird v. Littlehales*, 3 Swan, 299. **ASSIGNMENT FOR VALUABLE CONSIDERATION.**

After goods or real estate are seized on sequestration for want of answer, the plaintiff may still proceed till he has got the bill *pro confesso*. *Davis v. Davis*, 2 Atk. 22. **PR. BILL PRO CONFESSO.**

Goods sequestered, being insufficient to answer, duty decreed; serjeant at arms revived. *Barnesly v. Pooel*, Dick. 130. S. P. *Hopkins v. Adcock*, Dick. 443.

A conveyance established against a sequestration, and the sequestrators who had obtained possession, ordered to account to the alienee for rents and profits. Another conveyance rescinded, but the alienee declared entitled to be reimbursed from the subsequent rents, the balance of payments for interest, taxes and repairs. *Hamblegh v. Ley*, 3 Swan, 301. **ACCOUNT; CONVEYANCE.**

*Semble*, that defendant after decree before execution, may by alienation prevent sequestration. *Cook v. Cook*, 2 Com. 712. **ALIENATION, PENDENTE LITE, PR. DECREE, EFFECT OF.**

In chancery, not only the body of the defendant, but also his lands and goods are liable to a sequestration; but no sequestration lies till the time for the return of the attachment is out, on which the body was taken. *Martin v. Kerridge*, 3 P. W. 241. **JURISDIC.**

After a decree for a personal duty, a sequestration issues, and then the defendant marries and dies; if the sequestration shall take place of the wife's dower: *Qu.?* *Burdett v. Rockley*, 1 Vern. 118. **DOWER.**

A sequestration binds from the time of awarding the commission, and not from the time of executing it only. S. C. *Id.*

A sequestration prevails against a prior conveyance designed to defeat it; not against prior conveyances for valuable consideration, or *bona fide*. *Coulston v. Gardiner*, 3 Swan, 279. **CONVEYANCE, PENDENTE LITE.**

Lands, when bound from the institution of the suits; when not bound till sequestration. *Crofts v. Oldfield*, 3 Swan, 278. **CHARGE ON LAND.**

Sequestration not defeated by a voluntary conveyance, *pendente lite*. *Witham v. Bland*, *Id.* 276. **CONVEYANCE, PENDENTE LITE.**

Sequestration defeated by revocation and new limitation of uses. *Id.* 277. *Id.*

If the goods sequestered are not sufficient to answer the duty decreed, the plaintiff may move to revive the order for a serjeant at arms. *Barnesly v. Pooel*, Dick. 130. *Hopkins v. Adcock*, *Id.* 443. *Anon.* 246. **PR. SERJEANT AT ARMS.**

A sequestration covers the personal estate, and the court will direct a sale for a duty; it also covers the rents and profits of the real estate, but not the land. *Hule v. Greenhill*, Dick. 107. And see *Athol v. F. Derby*, 1 C. C. 222.

### 3. Abatement and discharge of.

Whether a sequestration after decree is determined by the death of the defendant. *Mary Caermarthen v. Hawson*, 3 Swan, 294.

Sequestration for non-production of deeds, discharged on payment of costs, the party having been examined, and denied knowledge of them. *Id.* *Perham v. Ds. Newcastle*, *Id.* 293. **PR. PRODUCTION OF DEEDS.**

In general the amendment of a bill puts an end to all process of contempt for want of an answer, and the court will not allow a plaintiff to amend without prejudice to a sequestration, notwithstanding he undertakes not to require any answer to the amendments. *Symonds v. Ds. Cumberland*, 2 Cox, 411. **AMENDMENT; CONTEMPT.**

Appointment of a receiver in the place of the sequestrators discharges the sequestration. *Shaw v. Wright*, 3 Ves. 23. Stat. 36 G. 3. c. 90. was passed in consequence of this case. **RECEIVER.**

An order having been made against the defendant for a sequestration for non-performance of the decree, an application was made to discharge the order for irregularity; the defendant by his affidavit positively denying that he had been served with the order nisi, the court would not discharge the order, but stayed the sequestration for a fortnight to give the defendant an opportunity of complying with the directions of the decree by executing certain deeds, &c. *Shuttleworth v. Lonsdale*, 2 Cox, 47. **PR. SERVICE OR ORDER NISI.**

Sequestration on mesne process abates on death of plaintiff, and revives with suit. *Hyde v. Foster*, Dick. 132. *Wharam v. Broughton*, *Id.* 137.

Sequestration to compel performance of a decree, abated by death of plaintiff. *Wharam v. Broughton*, 1 Ves. 182. **PR. ABATEMENT AND REVIVOR.**

Also the suit abates, a further act being necessary; so that a bill of revivor must be filed; no *sub. sci. fa.* as the decree was not signed or enrolled. *Id. ib.*

*Fi. fa.* not abated by death of plaintiff, the right being vested; otherwise, of an extent, where a *liberate* is necessary; so for a sequestration, because a further act is necessary. *Id.* 183.

A sequestration which issues as a mesne process of the court, falls with the death of the person; but if for non-performance of a decree, the death of the party does not determine it. *Hawkins v. Crook*,

3 Atk. 594. *Burdett v. Rockley*, 1 Vern. 58. PR. ABATEMENT AND REVIVOR.

After sequestration, defendant dies, suit revived; discharge of sequestration refused. *Hyde v. Greenhill*, Dick. 106. *Sutton v. Stone*, id. 107.

Where a defendant has stood out the whole process of contempt to a sequestration for want of an answer, and the bill taken *pro confesso*; on a decree against him *ad computandum*, the court will not discharge the sequestration on paying the costs of the contempt only, but will keep it on foot as a security to the plaintiff for the defendant's appearing before the master to take the account. *Maynard v. Pomfret*, 3 Atk. 468.

A sequestration must be returned before a motion can be made to discharge it. *Anon.* Bun. 31.

Where lands of the husband, out of which an annuity to the wife issued, were sequestered, the husband dying, the sequestration was discharged as to the annuity. *Proctor v. Reynel*, 1 C. R. 247.

A sequestration which issues as mesne process, determines by the death of the party; otherwise, if it issues after a decree, though for a personal duty. *Burdett v. Rockley*, 1 Vern. 58. PR. ABATEMENT.

#### 4. Sequestrator.

Examination of sequestrator in master's office does not require counsel's signature. *Keene v. Price*, 1 S. & S. 98. PR. EXAMINATION; PR. SIGNATURE OF COUNSEL.

Proceedings against a sequestrator for abuse of his power. *Ld. Pelham v. Ld. Harley*, 3 Swan. 291.

Sequestrators forcibly dispossessed, restored by injunction. *Ld. Pelham v. Ds. Newcastle*, id. 289. INJUNCTION.

The possession of a receiver or sequestrator, is not to be disturbed without leave of the court. *Brooks v. Greathed*, 1 Jac. & W. 178. PR. RECEIVER.

It appears that the commissioners have authority to break open doors in discharge of their office, by comparison with the proceeding under a commission of rebellion. *Lowten v. Mayor, &c. of Colchester*, 2 Mer. 395.

Sequestrators, upon a decretal order, have the same power to sell as on a final decree. *Cudell v. Smith*, 3 Swan. 308. PR. SALE.

The court will not make an order for tenants of estates taken under a sequestration on mesne process to attorn. *Rowley v. Ridley*, Dick. 622. ATTORNMENT OF RENT; LANDLORD AND TENANT.

Court will not order that the sequestrators on mesne process should be at liberty to grant leases. *Bray v. Hooker*, id. 638.

Sequestrators on mesne process will not be ordered to make leases. *Ray v. —*, 3 Swan. 306. PR. MESNE PROCESS; LEASE.

Tenants ordered to attorn to sequestrator under sequestration for duty. *Wood v. Adams*, Dick. 576.

Sequestrators each allowed one shilling per day. *Prentice v. Prentice*, id. 388.

The court will not order a sequestrator his fees who has made no return of goods sequestered, and many years before application, delivered them over without making a demand; but if the plaintiff seeks an account of goods sequestered, the sequestrator may set off his fees at any time, if he has from time to time made returns of what he has seized under the sequestration. *Hawkins v. Crook*, 3 Atk. 594.

Under a sequestration for non-payment of money, the sequestrators may, on a motion with notice (not on a motion of course), be empowered to let real estate. *Neale v. Beating*, 3 Swan. 304. LEASE.

Notice is necessary of a motion for sequestrators to set and let. *Neal v. —*, *Ridgway*, 193. NOTICE.

Sequestrator is not entitled to a stated fee of 6s. 8d. a day for his fee. *Wood v. Freeman*, 2 Atk. 542.

Sequestrators on mesne process accountable for the profits, and can retain only so far as to satisfy for the contempts. *Gibson v. Seevengton*, 1 Vern. 247.

Sequestrators having, by virtue of an order, power to sell timber, they sell timber to the value of 7000*l.* and pay over but 2000*l.* to the plaintiff, for whose benefit the sequestration was taken out; plaintiff not chargeable with more than the 2000*l.* *Dacres v. Shute*, 1 Vern. 160. ACCOUNT.

SERVICE, *see* BANKCY. XVI. 3. (b) (1); XVII. 3. —PR. ATTACHMENT, 6.—PR. DECREE, 12.—PR. EVID. 11. (i); 11. (j). —PR. INJUNCTION, 7. —PR. ORDER, 5.—PR. SEQUESTRATION, 1.—PR. SUBPOENA, 2.—SOLICITOR, V.

#### LXXXV. SERVICE, SUBSTITUTED.

Service on clerk in court of subpoena to rejoin or to answer amended bill, or hear judgment, good. 20th Gen. Order, 3rd April, 1828.

Service on the solicitor of a person who is not represented by a clerk in court, good service. 44th Gen. Order, 3rd April, 1828.

A person keeping out of the way to avoid the service of an order made upon petition in bankruptcy. It was ordered, upon motion, that service at his office should be good service. *Exp. Anderson*, Buck. 38.

Where defendant cannot be found, nor his place of residence discovered, if his solicitor refuse to accept subpoena to hear judgment, the court will order that service on defendant's clerk in court be deemed good service. *Furquarson v. Theobald*, 13 Price, 130. PR. SUBPOENA TO HEAR JUDGMENT.

Either party at law is entitled to assistance of court of equity to obtain commission to examine abroad. Defendant retiring from jurisdiction, service of subpoena to appear to bill for that purpose on his attorney at law ordered good service. *Devis v. Turnbull*, 6 Mad. 232. PR. COMMISSION TO EXAMINE ABROAD.

Service of subpoena on persons who in one instance had acted as agents of the defendant, who resided in Ireland, ordered. *English v. Hendrich*, 6 Mad. 205. PRINC. & AGENT.

To support an application, that service of subpoena on bill of interpleader upon solicitor who conducts the action ought be deemed good service, it is not only necessary that party applying should state that he knows not where plaintiff at law is, and that solicitor has refused to appear, but that solicitor should be stated to have positively refused to inform them where plaintiff at law is to be found, and also that the process should have been previously formally tendered to him. *E. I. Comp. v. Collins*, 6 Price, 404. PR. INTERPLEADER.

Service of order to pay money ordered, under circumstances, on defendant's clerk in court. *Anon.* 4 Mad. 462. ORDER.

The affidavit of service of subpoena on a bill filed for obtaining an injunction to stay process at law in the exchequer, served on attorney of plaintiff at law, must state positively that neither the plaintiff in equity, nor his attorney, knew where to find defendant in equity, nor where he might be served with process, or it will be considered insufficient, on motion, for that purpose, however full it may be in all other respects. *Jardine v. Hayes*, 7 Price, 239. PR. AFFIDAVIT OF SERVICE.

One of two partners, the other being abroad, proves a debt and dies. Service of the petition to expunge the debt upon the attorney appointed to receive the dividends, ordered to be good service, upon motion. *Exp. Peyton*, Buck. 200. **BANKRUPT PETITION TO EXPUNGE.**

Substitution of service of subpoena to appear and answer, refused, where one defendant resided out of the jurisdiction, and the other admitted by his answer that he had received a power of attorney from him to receive the arrears (then due) of an annuity, which it was the object of the bill to set aside. *Rickford v. Redriff*, 2 Mer. 458.

Court will order solicitor of party residing abroad, who had been employed to commence actions at law, to accept subpoena on injunction bill, supported by affidavit of facts, and of subsistence of account between the parties. *Wattleworth v. Pitcher*, 2 Price, 5. **SOLICITOR & CLIENT.**

Bill against two partners, one abroad; service of subpoena against him, on motion, permitted on the other. *Coles v. Gurney*, 1 Mad. 187. **PARTNERS.**

Service upon the attorney, the defendant being abroad, only to compel appearance, not for the purpose of a special injunction in the first instance. *Anderson v. Darcy*, 18 Ves. 447.

Where a party is avoiding service, and the clerk in court is dead, the proper course is to move first that service of a subpoena to name a clerk in court on the solicitor may be good service; and if none is named, then that service on the solicitor may be good service. *Franklyn v. Colquhoun*, 12 Ves. 2. **PR. ABATEMENT & REVIVOR; PR. OFFICERS AFFIDAVIT, CLERK IN COURT.**

A defendant residing out of the jurisdiction, had given a power of attorney to P, to act for him in the management of his affairs. The court refused to allow substitution of service of subpoena to appear and answer on P. *Smith v. Hibern. Mine Comp.*, 1 Scho. & L. 238.

Service of a writ of execution upon the clerk in court, not good. *Ellison v. Pickering*, 8 Ves. 319. **PR. WRIT OF EXECUTION.**

Order, that service of subpoena to answer amended bill on clerk in court, or solicitor, may be good service, granted on special circumstances. *Gelidneki v. Charnock*, 6 Ves. 171.

Service on the defendant's wife ordered to be deemed personal service on the defendant, and upon that service ordered that he stand committed for breach of injunction. *Pulteney v. Shelton*, 5 Ves. 147. **HUSB. & WIFE.**

Service, by sending the subpoena to the defendant under cover to the person to whom he had directed his letters to be sent, ordered to be good service. *Hunt v. Lever*, 5 Ves. 147.

Service of an order of sequestration nisi upon the clerk in court, good, the plaintiff having tried in vain to serve it personally. *Mary. Lothian v. Garforth*, 5 Ves. 113. **PR. SEQUESTRATION.**

After final report of costs, &c., nothing remaining but application of the fund, ordered, that service on the clerks in court of the defendant should be good service, in order to confirm the report, on motion and affidavits, that some lived in the E. and W. Indies, and others in different parts of this country, though there were only five defendants. *Jackson v. —*, 2 Ves. J. 416. **PR. CONFIRMATION OF REPORT.**

A defendant having appeared and answered the original bill, the plaintiff afterwards amended it, at which time the defendant was out of the jurisdiction. The court will not order service on the clerk in court in the original suit to be taken as good service on the defendant of the subpoena to appear to and answer the

amended bill. *Roberts v. Worley*, 2 Cox, 389. **PR. AMENDED BILL.**

There are cause and cross-cause, and the plaintiffs in the original cause are many, several of whom are out of jurisdiction, others not to be found, and some peers of the realm. A motion, that service on the clerk in court should be good service, refused; but plaintiffs shall not pass publication in the original cause till they have answered the cross bill. *Anderson v. Lewis*, 3 Bro. C. C. 429. **PR. CROSS CAUSE.**

Where defendants are beyond the jurisdiction of the court, service of the subpoena on their clerk in court cannot be allowed to be deemed good service, though they have, by that clerk in court, filed a bill relative to the same subject. *Bond v. Dk. Newcastle*, 3 Bro. C. C. 385.

Orders for substituted service of process, discretionary. *Anon.* 2 Ves. 23.

Where neither the party nor her clerk in court, could be found, the court ordered that the service of a subpoena, to hear judgment, on her solicitor should be deemed good service, if accompanied by a copy of the order left at the last place of abode. *Id. ib.*

An infant having a day to shew cause against a decree of foreclosure after he attained twenty-one, attained that age, and left the kingdom, before he was served, to avoid his creditors. Application to serve his clerk in court with the subpoena. Lord Thurlow thought it must be personal service; but it being again moved upon strong affidavit, it was granted. *Elcock v. Glegg*, Dick. 764. **DECREE OF FORECLOSURE, DAY TO SHOW CAUSE; INFANT.**

A, while beyond the seas, sues B at law: B brings his bill against A. The court will order that service on A's attorney be good service, but not that such attorney shall put in answer without oath. *Anon.* 1 P. W. 523.

Qu., If the defendant were in an enemy's country, where no commission could go to take the answer? *Id. ib.*

SETTING DOWN CAUSE, see PR. DEMURRER, 5.—**PR. HEARING AND SETTING DOWN CAUSE.**

## LXXXVI. SIGNATURE OF COUNSEL, &c.

See also BARRISTER.

No counsellor to put his hand to any bill, answer, or other pleading, unless it be drawn, or at least perused, by himself in the draft, before engrossment, which they shall do well also for their own discharge to sign after perusal, and counsel are to take care that the same be not stuffed with repetitions in *hæc verba*; much less may any counsel insert therein matter merely criminal or scandalous, on penalty of good costs, to be paid by the counsel himself before he can be heard in court. Beame's Ord. 82. 83. 165. In *Nickman v. Clarke*, 2 Fowl. 478, an order is set forth from *Lib. Ordin.* in the exchequer, to disable a counsel from signing pleadings in that court, he having signed his name to long, frivolous, and scandalous answers. Bill dismissed because (amongst other reasons) without counsel's hand. *Bingham v. Warren*, Cary, 127.

An appeal to the lords must be signed by two counsel, and no person is to presume, as counsel, to sign any appeal, unless he have been of counsel in the courts below, or shall attend as counsel at the bar of the house, when the appeal shall come on to be heard. Ord. Dom. Proc. 3d March, 1697.

No person to deliver any printed case or cases to

any lord of the house, unless it be first signed by one or more of the counsel in the cause; in the court below, or on the appeal. Ord. 19th April, 1698. *Id. ib.*

If any pleadings be filed whereto a counsel's hand is put, and not signed by the counsel himself, the pleading shall be taken off the file. Ord. Ch. Irel. 7th Feb. 1705. O'Keeffe's Ed. 25.

Any counsel signing a bill that afterwards shall be found scandalous or impertinent, shall pay the costs thereof. Ord. Ch. Irel. 30th April, 1719. And if such counsel's name be put to such bill or answer without his knowledge or consent, if a bill, it shall stand dismissed, and plaintiff to pay the whole costs: if an answer, defendant to pay the costs. Ord. Ch. Irel. 27th May, 1719. O'Keeffe's Ed. 29. By the 10th Rule of the exchequer, (Ireland) How. Pr. Ex. Irel. 706, all pleadings are to be signed by counsel allowed to practise; and in *Wogan v. Jones*, id. the court of exchequer (Ireland) refused to accept an answer and plea signed by an English barrister, on the ground that his signature did not satisfy the words of the order.

Where draft of amended bill is signed by same counsel who signed original bill, and no new engrossment is necessary, counsel's name need not be repeated on the amendment. *Webster v. Threlfall*, 1 S. & S. 135. PR. AMENDED BILL.

Otherwise, if by different counsel. *Id. ib.*

Where neither draft, amendment, nor engrossment, signed by counsel, bill taken off file for irregularity. *Pitt v. Macklen*, 1 S. & S. 136.

Examination of sequestrator in master's office does not require counsel's signature. *Keene v. Price*, 1 S. & S. 98. PR. EXAMINATION; PR. SEQUESTRATOR.

Counsel's signature must be put to exceptions. *Chandler v. Partington*, 6 Mad. 102. PR. EXCEPTIONS.

Exceptions to an answer must be signed by counsel. *Yates v. Hardy*, 1 Jac. 223. PR. EXCEPTION TO ANSWER.

Exceptions not issued by counsel taken off the file, though the defendant had taken an office copy of them, and the plaintiff had obtained an order of reference. *Id.* WAIVER.

It is a good ground of demurrer that a bill is not signed by counsel. *Kirkley v. Burton*, 5 Mad. 278.

An order upon a petition for the relief of a charity under the 52 Geo. 3. c. 101. which has not been signed by the Attorney or Solicitor-general, is a nullity. *Att. Gen. v. Green*, 1 Jac. & W. 303. CHARITY PETITION.

Courts of law will not answer speculative questions; and therefore a case must state conveyances, &c. that may raise the question. A case sent for the opinion of a court of law must be signed by counsel on each side; and if either side refuse to sign, they are understood to waive the benefit of it. *Bliss v. Collins*, id. 426. CASE FOR OPINION OF COURT OF LAW.

The signature of counsel to a plea taken by commission is unnecessary. *Sines v. Smith*, 4 Mad. 366. PR. PLEA, SIGNATURE OF; PR. COMMISSION TO TAKE PLEA.

A petition of appeal from the Vice Chancellor's order in bankruptcy, must have the signature of a barrister. *Exp. Holt, Buck*, 429. PR. PETITION OF APPEAL.

The signature of counsel is necessary to an answer, the constant and undisturbed practice of the court is binding, as the law of the court, without positive order. The old practice on country commissions equivalent to a signature by counsel. *Brown v. Brown*, 2 Mer. 1. PR. ANSWER.

Signature of counsel to answer not appearing on record, defendant must apply for leave to amend.

*Harrison v. Delmont*, 1 Price, 101. PR. ANSWER, AMENDMENT OF.

Examination not to be signed by counsel. *Bonus v. Flack*, 18 Ves. 287. PR. EXAMINATION.

Bill by a former churchwarden against the parish officers, trustees of an estate for the poor of the parish and forty inhabitants, to be reimbursed money laid out on account of the trust under an order of vestry, his accounts being passed, and an order made for payment: upon demurrer, the Ld. Chancellor expressed a strong opinion against such a bill; and as it appeared not to be signed by counsel, ordered it to be taken off the file, and the plaintiff to pay the costs. *French v. Dear*, 5 Ves. 547. REIMBURSEMENT; CHURCHWARDENS.

Where counsel's name to an answer is forged, court will not order it off file to prejudice of innocent plaintiff. *Bull v. Griffin*, 2 Aust. 563. PR. ANSWER.

Opinion of counsel read as evidence. *Brown v. Yerronway*, Dick, 353.

Bill not signed by counsel taken off file and suppressed. *Dillon v. Francis*, id. 68.

Solicitor fined 20l. for forging counsel's signature to scandalous answer. *Whitlock v. Marriot*, id. 16.

Defendant not to answer till counsel's hand put to bill. *Farly v. Child*, Cary, 112.

Counsel not to be examined as to his knowledge as counsel. *Dennis v. Cudington*, id. 100.

Bill without counsel's hand or attorney retained, dismissed. *Bingham v. Warren*, id. 89.

Bill dismissed, counsel's signature counterfeited. *Gristing v. Howe*, id. 82.

Five pounds costs given on demurrer, and counsel who drew it prohibited from dealing any more in chancery. *Daniel Hill's case*, id. 27.

A counsel who sets his hand to a bill containing scandalous matter, is liable to costs. *Emerson v. Dallison*, 1 C. R. 104. PR. SCANDAL, COSTS OF.

SIX CLERK. See PR. OFFICERS OF COURT, 9.

SPEEDING CAUSE. See PR. CAUSE.

LXXXVII. STATE OF FACTS.

See also PR. MASTER, REPORT, &c.

If after defendant has put in his examination to the usual interrogatories before the master the plaintiff discovers that defendant has received sums not mentioned in his examination, the master is at liberty to receive a new state of facts, and further interrogatories founded upon them without an order of court. *Sidden v. Forster*, 1 S. & S. 335. PR. EXAMINATION; PR. FURTHER INTERROG.

Waiver of irregularity by examining before the master without a previous state of facts. *Willan v. Willan*, 19 Ves. 590. S. C. Coop. 291. See 2 Dow, P. Rep. 274. WAIVER; PR. EXAMON.

LXXXVIII. STAYING PROCEEDINGS.

Applications to stay proceedings must be to judge who made the decree or order. 46 Gen. Order, 3rd April, 1828.

Where object is to restrain bankrupt from harassing assignees by disputing validity of commission, it should be done by petition. *Kirkpatrick v. Dunnet*,



1 S. & S. 411. ASSIGNEES OF BANKRUPT; PR. PETITION.

On bill of foreclosure, defendant submitting to same decree as the plaintiff, according to the case made by the bill would be entitled to at the hearing, may at any time stay all further proceedings in the cause under 7 G. 2. c. 20. *Præd v. Hull*, id. 331. PR. MORTGAGE, FORECLOSURE OF; STAT. C. OF.

On a reference to the master to inquire whether proceedings at law and in equity are for the same matter, all proceedings are in general stayed in the mean time. *Amory v. Hedrich*, 1 Jac. 530. PR. REF. TO ENQUIRE IF SUITS ARE FOR SAME PURPOSE.

Motion to stay a suit commenced in the name of infants for accounts of their property, upon affidavits representing that the suit was for their benefit, refused. *Lyons v. Blenkin*, id. 259. INFANT.

A suit being properly instituted, the proceedings not to be stayed on the ground of the plaintiff's subsequently becoming imbecile. *Wartnaby v. Wartnaby*, id. 377. LUNACY.

Court will not permit its officers as such to be drawn into litigation which it cannot controul. *Kaye v. Cunningham*, 5 Mad. 406. PR. OFFICERS OF COURT, PRIVILEGE.

Whether after a decree for administration of assets, a legatee will be restrained on motion from suing for his legacy. *Qu.?* *Jackson v. Jenf*, 1 Jac. & W. 229. PR. MOTION; PR. DECREE FOR ADMIN.

Pending an appeal from an order, overruling a demurrer, the court will stay proceedings for enforcing an answer, where answering would, under the appeal, be useless. *Wood v. Milner*, id. 636. APPEAL.

There being two suits to take executors' accounts, the prosecution of first suit was, under circumstances, stayed, and prosecution of decree in second suit was given to plaintiff in the first suit. *Hawkes v. Barrett*, 5 Mad. 17. ACCOUNT; EXOR.

An order directing security to be given, omitted to direct all proceedings to be stayed till it should be given, and a motion, of course, obtained in the meanwhile before security given, was held to be regular. But in future such order to direct, in all cases, proceedings to be stayed till security given. *Fox v. Blew*, 5 Mad. 147. SECURITY.

Bill for specific performance of agreement to take lease, and action for rent of occupation, not allowed at same time. On motion, court will order rent to be paid. *Carriek v. Young*, 4 Mad. 437. PR. TWO SUITS FOR SAME MATTER.

Pending an appeal from the rolls, an application to stay further proceedings, or to stay a final decree, must be made to the Ld. Chancellor. *Macnughten v. Boehm*, 1 Jac. & W. 48. APPEAL.

Where a solicitor became liable to costs of taxation, but without deducting them brought an action for taxed costs; on petition, action was stayed, and reference made to master to tax costs of taxation, after deducting which solicitor was ordered to be paid costs. *Bellot v. Lingard*, 4 Mad. 379. PR. PETITION; PR. COSTS OF TAXATION.

On motion of defendant before answer, it was ordered that reference be made to master to ascertain debt, &c. claimed by the bill, the same to be paid by a given day, and the suit to be stayed; and if not paid, plaintiff's costs given him, and plaintiff at liberty to proceed in the cause. *Boys v. Ford*, id. 40. PR. REF. TO MASTER.

After an order for the taxation of a solicitor's bill, staying proceedings at law till the report, the solicitor having died before a report, and no measures having been taken for continuing the taxation, his administrative proceeding at law against the client, was held

not to have committed a contempt. *Houlditch v. Houlditch*, 1 Swan. 58. PR. CONTEMPT.

A reference to the master to inquire whether proceedings at law and in equity are for the same matter, stays all proceedings without the special order of the court, which will give or withhold leave to proceed according to the circumstances of each case. *Carwick v. Young*, 2 Swan. 239. PR. REFERENCE TO MASTER IF TWO SUITS FOR SAME PURPOSE.

Plaintiff in original bill amending after cross-bill filed loses his priority of answer. But in order to stay proceedings on original bill until cross-bill is answered, defendant in original must obtain order to stay proceedings. *Noel v. King*, 2 Mad. 392. PR. CROSS-BILL; PR. ANSWER, PRIORITY OF.

An appeal does not form a ground to stay process for costs previously commenced, viz. by subpoena. Distinction where the appeal is before any step taken. *Roberts v. Totty*, 19 Ves. 446. PR. APPEAL; PR. COSTS.

Order nisi to stay proceedings at law obtained on motion after the last seal in the vacation, the brief not having been delivered to counsel on the seal day, discharged with costs for irregularity. *Sharp v. Ash-ton*, 1 V. & B. 412.

Practice of staying proceedings till costs of former proceedings paid is not applied to the case of a suit, as ejectment at law, and a suit in the spiritual court by some of next of kin, disputing as paupers a will on the ground of incapacity, the plaintiff in equity being another next of kin. *Wild v. Hobson*, id. 105. JURISDICTION; PR. COSTS.

Proceedings stayed until costs of former suit by same party suing *in forma pauperis* in cases only of great vexation. *Id.* 112. COSTS; PAUPER; VEXATION.

Motion to open the inrollment of a decree, and to stay proceedings under it to give an opportunity of appeal, refused; the decree being made upon the merits at law: a judgment by default is vacated on motion, not a judgment on the merits. *Charman v. Charman*, 16 Ves. 115. PR. DECREE, INROLMENT OF; PR. APPEAL; PR. MOTION.

Order of the House of Lords made that proceedings under a decree of the court of equity shall not be stayed by an appeal, unless by special order upon application to the house or the court. Writ of error generally stays execution in civil cases, not in criminal. *Huguenin v. Barclay*, 15 Ves. 180. See *Leves v. Morgan*, 5 Price, 468. PR. APPEAL.

General rule that an appeal does not stay proceedings without a special ground, the decree being for the specific performance of a contract for purchase according to the answer; the execution only was suspended, the master to proceed to settle the conveyance, &c. *Gwynn v. Lethbridge*, 14 Ves. 585. PR. APPEAL.

This court will not, before a decree, interpose in favour of an executor against a creditor proceeding at law. *Rush v. Higgs*, 4 Ves. 638. EXOR.

The plaintiff filed his bill in chancery, and dismissed it after answer; he then filed another bill in exchequer for same matter. Proceedings stopped till costs in chancery paid. *Baldwyn v. Malo*, 3 Aust. 835. PR. COSTS.

The plaintiff, as mortgagee, got possession of the estate, sued at law on the covenant for non-payment, and brought this bill to foreclose: this is regular, and the court will not stop the proceedings at law unless the defendant brings in the money. *Rees v. Parkinson*, 2 Aust. 497. MORTGAGE. & MORTGEE.; PAYMENT INTO COURT.

Court will not stay proceedings on either of the two bills brought for the same purpose—one by the assignee of the party interested, and the other by the

party himself; but if they proceed to hearing, the court will dismiss that which is improperly brought. Court will not, on motion, stay proceedings on one of the two bills for the same purpose, unless both are brought by the same person, or on behalf of an infant. *Gage v. Bulkeley*, Ambl. 103. S. C. 1 Ves. 544.

Court will not stay proceedings in an original cause till the answer comes in to the cross-bill, but will stay publication only. *Ramkissenseat v. Barker*, 1 Atk. 21. PR. CROSS BILL.

STRANGER, see PR. PARTY, &c. 3.

### LXXXIX. SUBPOENA.

See also PR. EVID. 27. (a).

1. Form and nature, and of the amendment of.
2. Issuing, and service, and return of.
3. To hear judgment.
4. For other purposes.

#### 1. Form and nature, and of the amendment of.

Person forging subpoena, committed to Fleet. Beame's Ord. 160.

Unbaptised child, how to be described in subpoena. *Fley v. Broughton*, 2 S. & S. 183.

Subpoena cannot be altered after it has left the office sealed, though a practice has prevailed of permitting process to be altered by postponing the return day. Where plaintiff had obtained injunction for want of appearance to writ so altered, by changing the return day from the 30th June to 2d July, the court on motion quashed the subpoena, and set aside the attachment and injunction which had been granted thereon, on the ground of the irregularity. Where there appeared to have been undue advantage attempted to be obtained by so altering writ, the usual rule that the parties who move to set aside the process for irregularity, must apply in the first instance, was held not to preclude the party against whom the attempt had been made; the court, on granting the motion, ordering it with costs. *Parker v. Fawcett*, 9 Price, 441.

A subpoena no record, nor ought to be demurred unto. *Ward v. Luke*, 1 C. C. 50. 2 Free. 180. 3 C. R. 15. Gilb. Eq. Rep. 234. PR. DEMURRER.

Feme sole sues out subpoena, and same day is married; defendant dismissed with costs. *Peirs v. Cause*, Cary 98.

Six clerk fined 40s. for his mistake in making a subpoena. *Frankblank v. Methuen*, id. 74.

Subpoena against plaintiff, to show where he had his counterfeit writs, and answer misdemeanor, and pay costs. *Edward v. Jenkins*, id. 107.

Attachment discharged, subpoena counterfeit. *Baily v. Hawle*, id. 105.

Marriage of feme plaintiff abates effect of subpoena. *Hasting v. Jugges*, id. 36.

#### 2. Issuing and service, and return of.

See also PR. SERVICE SUBSTITUTED.

No subpoena to issue till after the bill is filed, except in cases of bills for injunction to stay wastes, or stay suits at law commenced, and a certificate thereof, for which certificate no fee to be taken. 4 Ann. c. 16. s. 22. (6 Ann. c. 10. s. 20. Irish.)

A subpoena may, in every case, be sued out, returnable immediately. 1st Gen. Ord. April 3. 1828.

A writ of subpoena shall be sued out for each defendant, except in case of husband and wife defendants. 2d Gen. Ord. April 3. 1828.

In the exchequer, from and after the last day of every term, until the end of the sittings after term, the clerks of the remembrancer's office are empowered to issue process of subpoena, returnable immediately, on any bill against any person or persons residing in London, or within five miles; a proper affidavit being first filed of the fact of such residence. In default of appearance in such cases, process of contempt shall issue, returnable the first return of the next term. Ord. Exch. 27th Nov. 1721. *Kirkby's Ed.* 29.

The bill was in the name of A B *et al.* C; the subpoena only *ad sectam* A B. Defendant got costs for want of a bill as he supposed; but the court ordered the costs and the attachment for non-payment thereof, to be discharged. *Anon. Prac. H. C. Ch.* 159.

Subpoena may be sued out without affidavit out of term to appear and answer returnable immediately, but no attachment until eight days after service. Gen. Ord. June 30, 1828, 2 Y. & J. 492. PR. VACATION; PR. ATTACHMENT.

Subpoena returnable immediately, not to be granted upon petition to the master of the Rolls. Deame's Ord. 102.

The clerks of this court not to issue any subpoena returnable immediately, without the special command of the lord keeper. *Id.*

John Hungerford, for forging subpoenas and counterfeiting the great seal, and Theophilus Aylmer for bespeaking and buying a forged subpoena of Hungerford, were on affidavit and examination, committed to the Fleet for their contempt. *Id.* 159.

No subpoena to be made returnable immediately, unless the party be at the time in Dublin or the suburbs, or within ten miles thereof (1d. Ch. Bolton's Ord. 1639; and no subpoena to answer to be made returnable in vacation, but within fifteen days before or after term, unless defendant be resident as aforesaid. *Primate Boyles' Ord. Ch. Ir.* O'Keefe's Ord. Ch. Ir. 1. App.

Service of subpoena issued on an injunction bill, though effected at eleven o'clock on night of return day, and at so great a distance from town as to render it impracticable for defendant to appear in time to prevent an injunction for want of appearance, is sufficient. *Nightingale v. Merryweather*, 1 Pri. 287. PR. INJUNCTION.

Subpoena served on Sunday irregular; attachment and injunction therefore set aside before appearance, on entering appearance with the register. *Macketh v. Nicholson*, 19 Ves. 367. Newl. Pr. 66, though contrary is stated in Gilb. For. Rom. 43. and Newl. Har. 103. SUNDAY.

Defendant in contempt, and some exceptions to his answer allowed, and some overruled. If plaintiff excepts to the master's report as to the exceptions overruled, and defendant to those which the master had allowed, defendant is entitled to a subpoena for a better answer, upon the specialties of the case. *Agar v. Regent's Canal Co. Coop.* 221.

Service of subpoena by leaving label at a counting house of defendant, is not sufficient, unless given to a partner, or some acknowledged clerk thereof. *Menzies v. Rodriguez*, 1 Pri. 92.

Defendant may move to dissolve injunction for insufficient service of subpoena, although he has not appeared. *Id. ib.* PR. INJUNC. MOTION TO DISSOLVE; PR. APPEARANCE.

Service of subpoena necessary in the case of special injunction, but the practice having been unsettled, the defendant was put to dissolve upon the merits, and the plaintiff permitted to show cause by affidavit.

*Att. Gen. v. Nichol*, 1 Ves. 338. PR. INJUNC. SPECIAT.

Service of subpoena upon the father in law of an infant good service. *Thompson v. Jones*, 8 Ves. 141. INFANT.

Upon an application for the writ of *ne exeat regno*, no subpoena is served, but upon personal service of the writ, the party is bound to appear, and to put in his answer, and then he may apply to supersede the writ, but not upon his affidavit. *Russell v. Asby*, 5 Ves. 96. NE EXEAT REGNO; PR. SERVICE OF ORDER.

Subpœnas not necessary to an amended bill. *Skelfington v. —*, 4 Ves. 66. PR. AMENDED BILL.

Attachment ordered where subpoena served abroad. *Scott v. Hough*, 4 Bro. C. C. 213. PR. ATTACHMENT.

In *Patrick v. Harrison*, 3 Bro. C. C. 476. and in *— v. Blackwood*, 3 Anst. 851. injunctions were moved for, to be served at the same time with the subpœnas, and granted.

Where there is but one defendant in exchequer, the subpoena itself must be served, and not a copy of it. *De Tillon v. Sidney*, 1 Anst. 79. PR. ATTACHMENT.

On amended bill it is not necessary to serve new subpoena on the original defendants. *Angerstein v. Clarke*, 1 Ves. J. 250. PR. AMENDED BILL.

Although a defendant has appeared and answered the original bill, if he cannot be found to be served with a subpoena to answer a bill of revivor, the plaintiff must proceed under 5 G. 2. c. 25. to have the bill taken *pro confesso*. *Henderson v. Meggs*, 2 Bro. C. C. 127. PR. BILL, PRO CONFESSED; PR. BILL OF REVIVOR; STAT. C. OF.

Service of label on solicitor and body of subpoena for costs at defendant's house, good under circumstances. *Tyffen v. Ward*, Dick. 166. See New Orders.

Where there is but one defendant, he must be served with the body of the subpoena, but where there are several, the labels only must be left with those first served, showing them the body of the subpoena, and the body itself must be left with the defendant last served; but entering appearance cures irregularity of service. *Anon.* 3 Atk. 567. But see the "New Orders."

Service of subpoena is sufficient on a mother where she secretes her children who are infants. *Smith v. Marshall*, 2 Atk. 70. INFANTS.

A subpoena returnable *immediatè* may be moved for against an officer without the usual affidavit, because presumed always to attend. *Anon.* Mos. 42.

Service on person holding power of attorney of defendant abroad, held good. *Hales v. Sutton*, Dick. 26.

Leaving a subpoena to appear and answer, at the lodgings of a defendant, who was not to be found, not good service, though an order was obtained for that purpose; it appearing afterwards the defendant had left his lodgings above a year before the subpoena served. *Parker v. Blackbourne*, 2 Vern. 369. PR. Ch. 99. S. C.

There can be no contempt without service of the subpoena. *Thomson v. Baskerville*, 3 C. R. 215. PR. CONTEMPT.

The plaintiff may move for a subpoena returnable immediately, without an affidavit against an officer of the court, for he is presumed always to attend. *Anon.* Mos. 41. PR. OFFICER OF COURT.

Ld. Ch. as one of the commissioners of oyer and terminer gave leave to serve a subpoena upon a defendant who was in confinement for murder, for which he was indicted, and a special verdict found. *Anon.* Mos. 237.

A subpoena out of chancery here may be made re-

turnable in chancery of Ireland. *Kildare v. Fustace*, 1 Vern. 406. But *said arguendū* in S. C. *Id.* 420. that if defendant will not appear on that subpoena, no attachment can be taken out upon it. So it may be made returnable in the mayor's court. *Id.* 406.

The bill was by *G alias R.* The subpoena omitted the *alias*. Attachment for costs obtained for want of a bill, discharged. *Gooding v. Yard*, Ch. Ca. in Ch. 159.

Affidavit must be made of service of subpoena on defendant to examine witnesses in *perpet. mem.* before they are so examined. *Hutcham v. Winchcombe*, Cary, 34. S. P. *Porter v. Baker*, *id.* *ib.*

Subpoena returnable *immediatè* against party maltreating officer serving writ. *Rore v. West*, Cary, 38.

Defendant 120 miles off, served with subpoena the day of return, not in contempt for non-appearance. *George v. Bolington*, *id.* 41.

Defendant bound in recognizance to chamberlain of London, escapes from jurisdiction; chancery granted subpoena for him to appear before mayor, &c. and perform their order. *Mayon, &c. of London v. Dormer*, *id.* 43.

Subpoena served at suit of person unknown, and no bill in court; server pays costs. *Anon.* *id.* 64.

Service of subpoena on servant at defendant's house, good. *Goodvine v. Sullyard*, *id.*

Service on wife of defendant at his house, sufficient. *Barlow v. Baker*, *id.* 54.

Hanging subpoena on defendant's door, where he resorts, good service. *James v. Morgan*, *id.* 56.

Performance of award enforced by subpoena. *Baker v. Baker*, *id.* 57.

Defendant appears, no bill in court; he loses subpoena, therefore no costs, but attachment is stayed. *Parry v. Morgan*, Cary, 69. See *vide* Cary, 74.

Costs for want of bill upon showing writ, but not delivering it. *Symont v. Pinsohby*, *id.* 72.

Service of subpoena on wife, good. *Pilgrim v. Read*, *id.* 78.

Costs for want of bill, though subpoena lost. *Methum v. Tye-hunk*, *id.* 74. See *vide* Parry v. Morgan, *id.* 69.

Defendant 140 miles off, served two days before end of term, attachment discharged. *Smith v. Weare*, *id.* 88.

Subpoena left in defendant's hall, good service. Cary, 91.

Maltreating server of suit, attachment issues. *Dastouines v. Apprice* *id.* 92.

Subpoena shown and offered, attachment for not appearing. *Peris v. Thomas*, *id.* 94.

Defendant's solicitor ordered to serve process on his client, because plaintiff could not find him. *Maserer v. Key*, Toth. 177.

If defendant cannot be found, or hath no house, then it is sufficient to give notice to the clerk in court. *Pollard v. Evelin*, *id.* 72.

### 3. To hear judgment.

Subpoena *ad audiendū. jud.* not to issue, but on note from register and certificate from *sic* clerk. *Beame's* Ord. 46. 48. 50. 104. 109.

No subpoena to hear judgment to be made without six clerk's certificate. *Id.* 241.

Subpoena to hear judgment shall be served in London or within sixty miles thereof, ten days before the day of hearing, as mentioned in the subpoena, and in more remote places fourteen days before such days of hearing, except in Trinity term, and then ten days only. Ord. Exch. 2 Fowl. 173.

On affidavit that defendant is beyond sea, the court will order service of the subpoena to hear judgment on the clerk in court, to be sufficient service; but the ser-

vice must be the term before the hearing. Ord. Ch. Irel. 17th April, 1706. O'Keeffe's Ed. 25.

All subpoenas to hear judgment, to be made returnable on the first hearing days in the terms next ensuing the issuing the same. Ord. Ch. Irel. 12th Nov. 1792. O'Keeffe's Ed. 85. Ord. 16th Nov. 1813. *Id.* 109.

Where defendant cannot be found, nor his place of residence discovered, if his solicitor refuse to accept subpoena to hear judgment, the court will order that service on defendant's clerk in court be deemed good service. *Farquharson v. Theobald*, 13 Price, 130. PR. SERVICE SUBSTITUTED.

Irregularity of subpoena to hear judgment waived, by appearing on a motion to advance the cause, and not then taking the objection. *Carriek v. Young*, 1 Jac. 524. WAIVER.

If one of two defendant's sets down cause, he need only serve plaintiff with subpoena to hear judgment, and not his co-defendant. *Clarke v. Dunn*, 5 Mad. 474. PR. PARTY; CO-DEFENDANT.

When cause is set down and subpoena to hear judgment served, and afterwards bill of revivor is filed, no new subpoena to hear, &c. is required. *Bray v. Woodran*, 6 Mad. 72. PR. BILL OF REVIVOR.

Decree by default made upon service of a subpoena, not indorsed to hear judgment, is irregular, and will be discharged on motion. *Powell v. Martin*, 1 Jac. & W. 292. DECREE BY DEFAULT.

Subpoena to hear judgment not being served, on account of other party undertaking to appear, but which he did not, bill could not be dismissed for want of affidavit of service thereof; but cause must be struck out of paper, and on application party breaking the undertaking, to pay costs occasioned thereby. *Ellis v. King*, 5 Mad. 21.

Where neither defendant nor his clerk in court could be found, the court ordered service of the subpoena to hear judgment on his solicitor to be deemed good service, a copy being also left at defendant's last place of abode. *Anon.* 2 Ves. 23. Substitution of service of the subpoena has been allowed, on an affidavit that defendant had absconded. *Anon.* 2 Mad. Chan. 451.

Service of subpoena to hear judgment necessary, though the cause was set down under the order upon a preceptory undertaking to speed the cause. *Dixon v. Shum*, 18 Ves. 520.

Plaintiff under an undertaking to speed his cause, obtained an order to withdraw his replication, and set down on bill and answer; but did not serve a subpoena to hear judgment; or appear, when the cause was called. The bill was dismissed with costs. *Rogers v. Goore*, 17 Ves. 130. PR. DISMISSAL OF BILL; PR. UNDERTAKING TO SPEED CAUSE.

The defendant dying after service of the subpoena to hear judgment, whether upon a bill of revivor, to a new subpoena to hear judgment is necessary; *Qr.?* *Burn v. Potter*, 5 Ves. 305. PR. ABATEMENT & REVIVOR; PR. BILL OF REVIVOR.

Service of subpoena to hear judgment on infant, not good, guardian *ad litem* must be served. *Freeman v. Carmock*, Dick. 439. INFANT.

If a cause is adjourned for want of parties, though the defendant is served with the order, he must be served with a subpoena to hear judgment. *Knowles v. Spence*, Mos. 225.

Where an infant is defendant, the service of the subpoena to hear judgment must be on the guardian, not on the infant. *Taylor v. Atwood*, 2 P. W. 643.

Subpoena to hear judgment delivered to defendant's brother, and the next day a ticket served on defendant himself; held good service. *Baines v. Wren*, Chb. Ca. Ch. 163.

#### 4. For other purposes.

Where plaintiff files a replication without having been served with any notice to dismiss the bill, plaintiff shall serve subpoena to rejoin within one week after. 17th Gen. Ord. 3rd April, 1828.

Subpoena *ad respondendum* may issue before bill filed. Beame's Ord. 168.

To answer, revive, review, rejoin, to testify or to hear judgment, how to be served. *Id.* 169.

No subpoena to rejoin of force, unless replication filed. *Id.* 183.

Subpoena to appear and rejoin is not necessary, to enable plaintiff to proceed to hearing, and no instance of such subpoena known. *Johann v. Mackenness*, 9 Price, 213. S. P. *Petre v. Wells*, *Id.* 670. PR. HEARING.

Process of subpoena *ad respondendum* may be issued out of the office of pleas, and it is not necessary that such process should be signed by the chief secondary, or a sworn clerk in the office of the king's remembrancer; rules made respecting thereof, in reigns of James and Car. 2nd, are obsolete. *Taylor v. Riley*, 9 Price, 385.

Solicitor claiming lien on deeds, cannot be compelled to produce them at hearing of cause, without subpoena *duces tecum*. *Busk v. Lewis*, 6 Mad. 29. SOLICITOR & CLIENT LIEN; PR. PRODUCTION OF DEEDS.

In exchequer it is sufficient (where only one defendant) that a copy of subpoena *ad respondendum* be left, and the original shown him *secus* in chancery. *Bland v. Buckley*, 6 Price, 34.

If copy of subpoena to answer be left with servant of defendant's brother (who is also his partner and co-defendant in suit), at whose house such servant acknowledged he resided, will be a good service, though party be out of kingdom at the time; and a rule for setting aside an attachment obtained on a representation, that the party was abroad at the time of service, will be discharged on cause shown, with costs. *Birdwood v. Hart*, 3 Price, 176.

Mistake of defendant's name in subpoena to answer an attachment, not sufficient to set aside proceedings, though defendant give notice of determination to take advantage of mistake and tenders plaintiff his demand. *Shaw v. Tyntherleigh*, 2 Price, 328. PR. ATTACHMENT; MISTAKE.

After a decree the master may examine witnesses, but ought not to do so by his six clerk; the same subpoena issues as to bring them before the examiner; which is the same as a subpoena to answer; but the label expresses the purpose upon an examination in the country, the body of the writ expresses, that it is to testify. *Parkinson v. Ingram*, 3 Ves. 603. PR. EXAMINATION BEFORE MASTER.

After subpoena to rejoin, a bill may be dismissed for want of prosecution. *Squirrel v. Squirrel*, 3 Swan. 250. PR. BILL, DISMISSAL OF.

If a cause has slept twelve months in court, there shall be no proceedings had upon it without first serving a subpoena *ad faciendum altornat*. *Anon.* 1 Vern 172. LACIES.

Husband and wife sue for an annuity in the right of the wife, the wife dies: upon a bill of revivor by the husband, the defendant must be served with a subpoena. *Cecil v. El. of Rutland*, Toth. 173.

A defendant to a bill of revivor must have an opportunity to show cause against the order to revive, but where the defendant had pleaded, the court upon overruling the plea, ordered the cause to be revived without a subpoena being issued. *Higgins v. York Building Company*, Barn. 83.

Plaintiff's father seized in fee with condition to re-entry, devised for life; subpoena *duces tecum* granted for evidences. *Cary, &c.*

## XC. TAKING PLEADINGS OFF FILE.

Answer taken off the file and entrusted to one of the baron's clerk's, for the purpose of being produced before the grand jury on an indictment for perjury preferred by the plaintiff, security in 20l. being given for the safe return of the record. *Thompson v. Crosthwaite*, 2 Y. & J. 512.

Affidavit verifying proceedings at law not evidence, and taken off the file with costs. *Exp. Barnes*, 1 Mont. & M. 27. PR. EVIDENCE.

Answer taken off the file for irregularity, on the grounds (*inter alia*) that insofar as to one defendant, a mistake had been made in the year 1817, being written for 1827, and that the answer had been affirmed by another of the defendants who was a quaker, under a commission issued to take the answer of that defendant upon his corporal oath. *Park v. Christey*, 1 Y. & J. 533. PR. ANSWER.

An answer however evasive, will not be ordered to be taken off the file, after the plaintiff has excepted to it. *Claxington v. Thwaites*, 2 Russ. 458. PR. ANSWER, EVASIVE; WAIVER.

Exceptions to an answer having been allowed, plaintiff obtained an order to amend, and for defendant to answer the exceptions and amendments at the same time; defendant put in an answer to the amended bill only. The plaintiff then moved for attachment; held that it was irregular, and a plaintiff ought to have moved to take the second answer off the file. *De Tastet v. Lopez*, 1 Sim. 11. PR. ANSWER TO AMENDED BILL; PR. ATTACHMENT.

Defendant demurring after process of contempt issued, demurrer ordered off file. *Mellor v. Hull*, 2 S. & S. 321. CONTEMPT; PR. DEMURRER.

Misnomer in order to dismiss for want of prosecution; replication filed after such order drawn up and served, will not be taken off file. *Verlander v. Codd*, 1 S. & S. 94. PR. ORDER TO DISMISS; MISTAKE.

Motion to take answer off file on account of erasures therein, and in jurat and alterations in commission refused, but without costs. *Gwynn v. Badmer*, 9 Price, 320. PR. ANSWER, ERASURES IN; PR. COSTS.

A bill may be taken off the file, if filed in the name of a plaintiff who is in a state of mental incapacity, sensible. *Wartnaby v. Wartnaby*, Jac. 377. LUNACY.

A suit being properly instituted, the proceedings not to be stayed on the ground of the plaintiff's subsequently becoming imbecile. *Id. ib.* PR. STAYING PROCEEDINGS.

Information amended without the sanction of the attorney general, ordered to be taken off the file, with costs. *Att. Gen. v. Fellows*, 1 Jac. & W. 254. PR. AMENDMENT.

Motion cannot be made to take answer off file, because it is delusive, exceptions must be taken. *Marsh v. Hunter*, 3 Muel. 437. PR. ANSWER TAKEN.

Defendants, after two orders for time, having filed an answer which was found in part illegible; a motion that it might be taken off file, resisted on affidavit that it was legible when sworn, was refused. *Att. Gen. v. Mayor, &c. of Fowey*, 3 Swan. 184. PR. ANSWER.

A demurrer and answer filed by a defendant, attached for want of an answer after orders for time to plead answer or demur, not demurring alone, ordered to be taken off the file. *Curson v. De La Zouch*, 1 Swan. 185. PR. TIME TO ANSWER; PR. DEMURRER; PR. ATTACHMENT.

The court refused to order an answer to be taken off the file, on the alleged ground that it was illusory, the defendant merely stating that he had no knowledge of any of matters in the bill mentioned, and left the plain-

tiff to except. *Olding v. Glass*, 1 Y. & J. 340. PR. ANSWER.

Exceptions to a report may be taken off the file, if filed after the report has been confirmed absolute. *Sterling v. Thompson*, Coop. 271. PR. REPORT, CONFIRMATION OF; PR. EXCEPTIONS TO REPORT.

Answer taken off the file, when the title omitted the words "to the bill of complaint of." *Pieters v. Thompson*, Coop. 249. PR. ANSWER; PR. INTITLING PLEADINGS.

An application to take an answer off the file, in order to prosecute the defendant for perjury, granted as a matter of right, being in furtherance of public justice. *Stratford v. Greene*, 1 Ball & B. 294. PERJURY.

Motion to take off the file for irregularity, a plea to a bill, amended under the usual order, after exceptions allowed, refused; as a case for a plea may arise either from the amendments themselves, or from their effect upon the original part of the bill. *Ritchie v. Aylwin*, 15 Ves. 79. PR. PLEA.

Defendant having applied and obtained an order for time to answer, cannot put in an answer and demur without a special case. As the demurrer being coupled with an answer could not be taken off the file, it was moved to be expunged or overruled. *Taylor v. Milner*, 10 Ves. 444. PR. TIME TO ANSWER; PR. DEMURRER.

Answer mis-naming plaintiff, ordered to be taken off file, as no answer; describing it as a paper writing, purporting to be an answer; a proper answer being put in. *Griffiths v. Wood*, 11 Ves. 62.

To prevent decree *pro confesso*, defendant should have not only the answer on file, but also a receipt for costs; the answer being actually filed without payment or tender of costs, the defendant was remanded to give an opportunity of moving to take it off the file for irregularity, but plaintiff having taken an office copy of answer, that course failed. *Sedgier v. Pyte*, 11 Ves. 202. PR. DECREE PRO CONFESSO; PR. COSTS; WAIVER.

A demurrer overruled for informality, but good in substance, taken off the file, with liberty for the defendant to demur again, as he shall be advised on payment of costs. *Devonsher v. Neenham*, 2 Scho. & L. 199. PR. INFORMAL DEMURRER.

Where an answer is required as evidence upon a trial, the court, except in a criminal case, does not permit the record itself to go, but an office copy, unless proof of the signature is necessary, not granted where the action is by a stranger unconnected with the suit in equity. *Jarris v. White*, 8 Ves. 313. PR. EVIDENCE AT LAW; STRANGER.

Bill and answer (the cause being agreed) ordered to be taken off the file by consent of plaintiff and defendant. *Tremaine v. Tremaine*, 1 Vern. 189.

## XCI. TERM TIME.

This court will not entertain a motion for prohibition in term. *Montgomery v. Blair*, 2 Scho. & L. 136. PR. MOTION FOR PROHIBITION.

Though the next day after the first day of the term be not in strictness part of the term, and therefore no motion can be made on the petty bag side, yet as to the other purposes it is part of the term, for which reason a motion made at the time to dismiss a bill for want of prosecution, on a certificate that there had been no prosecution within three terms, of which the last term was one, was denied. *Anon.* 1 P. W. 522. PR. MOTION TO DISMISS FOR WANT OF PROSECUTION.

So where the last seal continued three days, and computing the third day according to the day of the month, the time would be expired for making a re-

port absolute, yet this not so, it being only a continuance of the first day. *Id. ib.*

UNDER CLERK, *see* PR. OFFICERS OF COURT, 10.

USHER, *see* PR. OFFICERS OF COURT, 11.

### XCII. VACATION.

Subpoena may be sued out without affidavit out of term, to appear and answer returnable immediately, but no attachment until eight days after service. *Gen. Ord. June 30, 1828. 2 Y. & J. 492. PR. SUBPOENA SUABLE IN VACATION; PR. ATTACHMENT.*

Applications to the Ld. Ch. in the vacation, should be by petition and not by motion, and such petition and affidavits sent to the chancellor previously. 2 *Russ. 473.*

Reference directed to ascertain if separate answers all to the same effect, by defendants having same interests was vexatious. *Vansandau v. Moore, 2 S. & S. 509.*

The Ld. Ch. can issue the writ of *habeas corpus* at common law in vacation. *Cronley's Case, 2 Swan. 1. S. C. Buck, 264. JURISDIC.; HABEAS CORPUS.*

Injunction granted in vacation. *Temple v. Bank of England, 6 Ves. 771. PR. INJUNCTION.*

A prohibition may issue in the vacation. *Ileson v. Harris, 7 Ves. 257.*

VARYING MINUTES, *see* PR. DECREE, 13.

VEXATION, *see* VEXATION, *post.*

WAITING CLERK, *see* PR. OFFICERS OF COURT, 12.

WARDEN OF FLEET, *see* PR. OFFICERS OF COURT, 13.

WITNESS, *see* BANKCY. VII. 2. (a).—PR. COSTS, 10. (H).—PR. EXID. 27.

WRIT OF PROCEEDING, *see* BANKCY. VI. 12.

### XCIII. WRIT.

*See also* LUNACY.—OUTLAWRY.—PR. CERTIORARI.—PR. HAB. CORPUS.

1. *De coronatore elegendo.*
2. *Of error.*
3. *De excommunicando capiendo, and de contumace capiendo.*
4. *Ne exeat regno.*
  - (a) When granted.
  - (b) Discharge of.
  - (c) Bond and surety.
5. *Of supplicavit.*
6. *De ventre inspiciendo.*
7. *Generally and of other natures.*

#### 1. *De coronatore elegendo.*

Confinement in prison out of the county, is a sufficient ground for the removal of a coroner from his office, although during his absence, another coroner of the same county has performed his duties. The great seal has power, independently of the statute 25 G. 2. c. 29, to remove coroners from their office for neglect of duty. Notice to a coroner of a petition for his removal, is not necessary. The practice is, to

issue the writs *de coronatore exonerando* and *de coronatore aliando* at the same time; the latter is dated last, but it is not irregular to execute it before a return is made to the former. *Exp. Parnell, 1 Jac. & W. 451.*

The under sheriff under pretence of administering the oath, swears a candidate coroner. The court ordered him to shew cause why he should not be committed, and not to file a return to the writ without leave of the court. But this is not a good cause at law, and therefore not in equity to direct the new writ to the other coroner. *Exp. Jones, Mos. 254.*

#### 2. *Of error.*

Writ of error generally stays execution in civil cases; not in criminal. *Huguenin v. Barclay, 15 Ves. 180.*

The court will not order the filing an original to make good a judgment on error brought without some excuse for not filing one before, though a slender excuse may be sufficient. *Anon. 3 P. W. 314. PR. ORIGINAL WRIT.*

A writ of error can in no case be amended, and why? *Id. 315. note.*

Where reference is to judges on a case stated, no writ of error will lie on their judgment. But if they certify their reasons, the court may reconsider of it. *Gore v. Gore, 9 Mod. 5. CASE FOR OPINION OF COURT OF LAW.*

Suing the bail below pending a writ of error in parliament is a contempt and breach of privilege. *Throgmorton v. Church, 1 P. W. 685. CONTEMPT.*

This court will not order a writ of error in a criminal cause to be sealed till it is first signed and allowed by the attorney general. Writ of error in a criminal matter not due *ex debito iustitie*. *Crawle v. Crawle, 1 Vern. 170.*

The court will not allow writs of error in the King's Bench upon judgments in the petty bag. *Hier v. Carey, 1 Vern. 131. JURISDICTION.*

Error lies in K. B. on judgment in *sci. fa.* in chancery. *Dyer 315. pl. 100.*

#### 3. *Excommunicando capiendo, and de contumace capiendo.*

*See* stat. 53 Geo. 3. c. 127., by which this writ is discontinued, except in certain cases; and the writ *de contumace capiendo* substituted. *Chit. Stat. 248, and notes.*

Must be under seal of ordinary. *Beame's Ord. 27.*

A plea that plaintiff is excommunicated, is good. *Beame's Ord. 26.* But in *Phampton v. Headlam*, and *Brookes v. —*, *Toth. 74.* demurrers because plaintiff excommunicated, overruled; and in *Tomes v. Vaughan*, *id.* where two executors were plaintiffs and one was excommunicated, it was held that defendant must answer the other. That excommunication is a good plea to an executor or administrator, though they sue *in autre droit*. *Vide Co. Lit. 133. b. 4 Bac. Abr. 36. Aliter, as to the prochein ami, or guardian of an infant. Wy. Pr. Reg. 327. Curs. Canc. 185.* For the reason of this difference, *vide Wentw. Pl. 9.*

This plea may be put in without oath. *Beame's Ord. Ch. 26.* But it must be put in under the seal of the ordinary. In *Curs. Canc. 198.*, it is said, that the bishop is to certify the excommunication, and that certificate to be annexed to defendant's plea, and pleaded. *See* further, as to this plea, *Beame's Pleas, 106. Beame's Ord. Ch. 27, n. Mitf. Pl. 185. Wy. Pr. Reg. 327. Coop. Pl. 246.*

Where the spiritual court has excommunicated a party for a cause for which it has no authority to do so, he has a right to some writ to absolve him; but notice must be given to the complainant in the spiritual court of the application for such writ. *Borlase's Case, 16 Ves. 346.*

Executrix in custody under a writ *de excommunicato capiendo*, for not appearing to a citation by a creditor to exhibit an inventory, moved for a supersedeas disputing the debt upon equitable grounds; motion refused. *Rex v. Blatch*, 6 Ves. 113. EXECUTOR.

Motion to supersede a writ *de excom. cap.*; the court refused to interfere; and ordered the party applying to pay the taxed costs of the application. *Exp. Cheveley*, Dick. 473.

The court cannot do any thing after the return of the writ *excommunicato capiendo* is out, the King's Bench having the recognizance; for they can compel the sheriff to return it, and the application to quash it must be there. *Exp. Little*, 3 Atk. 479.

If the writ had issued in the vacation, and not returnable, the court of chancery would have given relief and discharged the person out of custody. *Id. ib.*

On motion to quash the writ of significavit, because the cause of excommunication was not set forth, and for divers other causes, it was held sufficient to warrant the writ of *excommunicato capiendo*. *Trebee v. Keith*, 2 Atk. 498.

Motion to supersede a writ of *excommunicato capiendo*, first, for want of addition, secondly, because not said the defendant was commorant in the diocese. Court allowed both the exceptions, but inclined to think, that after the writ had been issued out of this court, and then brought into B. R. and then delivered to the sheriff, but not yet actually returned into B. R. this court, on a plain error appearing, may supersede or quash it. By stat. 53 G. 3. c. 127. excommunication is now discontinued, except for offences of ecclesiastical cognizance. *Rea v. Burrard*, 1 P. W. 435.

Supersedeas to a writ *de excommunicando capiendo* denied, though the significavit was general and uncertain; and said, that the method was to proceed by habeas corpus; but an appeal being brought, a supersedeas was granted. *Rea v. Sneller*, 1 Vern. 24.

One that had been a prisoner in Newgate for debt, but since removed to the Fleet, is excommunicated; the court of chancery will not direct the cursitor to make out a writ of *excommunicato capiendo* to the warden of the Fleet, but the writ may be directed to the sheriff, who may return a non est inventus; and on the return, the King's Bench may grant a habeas corpus, and thereupon charge him with an *excommunicato capiendo*. *Capt. Studwick's Case*, 3 P. W. 53. S. C. Anon. Mos. 365.

After a plea of excommunication, plaintiff obtained letters of absolution, and produced them; defendant ordered to answer, and on payment of costs, to be discharged of process of contempt which had issued against them. *Amers v. Legg*, Cho. Ca. Ch. 164. In Mitf. Pl. 185, 186, it is laid down, that on obtaining letters of absolution, plaintiff may sue out fresh process, and compel defendants to answer. And see Pra. II. Ch. 164.

The defendant must answer the bill though excommunicated. *Tichborne v. Edwards*, Toth. 11. PR. ANSWER.

#### 4. Ne exeat regno.

See PR. EVID. 11. (k.)

(a) When granted.

(b) Discharge of.

(c) Bond and surety.

(a) When granted.

Only one writ of ne exeat regno in the same cause. Beams's Ord. 37.

Properly issues on attempts prejudicial to king and state. *Id.* 39.

Other cases to which usage allows the writ to be extended. *Id.* 40.

On a motion for a ne exeat, the sum sworn to be due must be mentioned in the order granting the writ, that the sheriff may know how to measure the bail. 1r. Ord. Ch. 1750. O'Keeffe's Ed. 60.

In a suit for specific performance by a vendor, a writ of ne exeat regno ought not to issue against the purchaser, unless the court deems it quite clear, that there must be a decree for the specific performance of the contract. *Morris v. McNeil*, 2 Russ. 604. VENDOR & PURCH.

Ne exeat regno does not lie in respect of costs taxed in a chancery suit. *Goodman v. Sayers*, 5 Mad. 471. PR. COSTS.

A writ of ne exeat regno against a feme covert administratrix cannot be sustained. *Pannell v. Tayler*, 1 Turn. & R. 96. Overruling, Ambl. 62. S. C. 3 Atk. 409. Dick. 107. See, however, 6 Mad. 218. FEME COVERT.

The writ of ne exeat regno does not issue for alimony after a decree in the ecclesiastical court pending an appeal from that decree. *Street v. Street*, 1 Turn. & R. 322. ALIMONY; PR. APPEAL.

The writ of ne exeat regno is not granted for interim alimony before a decree. *Id.* 323. ALIMONY.

What the sheriff does in the case of a writ of ne exeat regno is upon his own responsibility. *Buchan v. Wood*, 1 Turn. & R. 340. SHERIFF.

Upon the defendant's stating, that if the plaintiffs obtained a decree he would leave the kingdom, the writ of ne exeat regno was issued in an early stage of the cause. *Id.* 342.

The master of the rolls has jurisdiction to direct this writ to issue. *Id.* 343. JURISDIC. OF MASTER OF ROLLS.

The debt for which the writ issues, must be equitable, must be due, and must be such debt that the sum to be marked upon the writ can be ascertained. *Id. ib.*

Writ of ne exeat regno granted upon motion made without notice after the appearance of the defendant. *Elliot v. Sinclair*, 1 Jac. 545. PR. NOTICE.

Ne exeat regno will be granted though not prayed by bill. *Moor v. Hudson*, 6 Mad. 216. PR. BILL.

Ne exeat regno granted against husband and wife, executrix, plaintiff undertaking to serve only one writ. *Id. ib.* HUSB. & WIFE.

Writ of ne exeat regno refused, on a bill to enforce an agreement to give a bill of exchange to secure the debt of a third person. *Blaydes v. Calvert*, 2 Jac. & W. 211.

A residuary legatee cannot have a writ of ne exeat regno against a debtor of the testator, on the ground that he colludes with the executor. *Graves v. Griffith*, 1 Jac. & W. 646. RESIDUARY LEGATEE.

Writ of ne exeat regno granted against the obligor in a bond given to trustees, at the suit of a party beneficially interested in the money secured by it. *Leuke v. Leuke*, id. 605. TRUSTEE AND CESTUI QUE TRUST.

Writ of ne exeat regno, granted at the suit of an English subject against a native of Russia, generally resident, and carrying on business in partnership at St. Petersburg, and in this country only for a temporary purpose, upon a balance of account in respect of goods consigned to him and his partner. The writ will issue on a balance of account sworn by the deponent to be due, to the best of his belief; but if the mode of computing the account be mentioned, and it appears to comprise unascertained sums, it will not be granted. The court will always hear a defendant moving to discharge the writ; but it will only enquire whether there is reasonable ground to suppose

that the plaintiff will succeed in the suit. Exemption from arrest for a debt of the same nature by the laws of Russia, is not a sufficient ground for discharging the writ, when one of the parties is an Englishman, and was resident in this country. Whether the writ will be granted where the debt has been contracted while the plaintiff and defendant resided in a foreign country, by the laws of which arrest for debt is not permitted; *Qu. Flaek v. Holm*, id. 405. **FORMIGNER.**

The court acts on evidence of intention to go abroad, without regard to denial. *Whitehouse v. Partridge*, 3 Swan. 375. **EVIDENCE.**

In general, the writ of *ne exeat regno* can be issued only for an equitable debt actually payable. *Id.* 377.

The ground on which the writ of *ne exeat regno* issued, is always stated in the body of it. *Hyde v. Whitfield*, 19 Ves. 345.

Court of exchequer will grant an order in nature of *ne exeat regno*, against an accountant of crown, sworn to be about to leave the kingdom without rendering his accounts, though no precise sum sworn to, by affidavit made, to support the motion, as being the amount in value of the stores unaccounted for: but they will use a discretion as to the amount of sureties, and will require notice of the order to be given before attachment shall issue. *Att. Gen. v. Mucklow*, 1 Price, 289.

A writ of *ne exeat regno* obtained on behalf of a lunatic by his committee, on a note as given for the balance of an account, restraining the captain of an East Indian ship from proceeding on his voyage: that the debt will be endangered is sufficient, without stating that the object is to avoid the jurisdiction. *Stewart v. Graham*, 19 Ves. 313.

Writ of *ne exeat regno* granted against a person, generally resident in Ireland; and in this country only for a temporary purpose: under the circumstances, that a balance was sworn to, for which bail might have been had; that the plaintiffs had filed a bill in Ireland, where the transactions arose, for an account, and a proposal of reference: the writ discharged on giving security. *Horden v. Rogers*, 1 V. & B. 129.

*Ne exeat regno* granted; the defendant's general residence being in the West Indies, Scotland, and Ireland. *Id.* 133.

Prayer for a writ of *ne exeat regno* in the bill not essential, nor affidavit of the debt established by the master's report absolutely confirmed. *Collinson v. —*, 18 Ves. 353. *S. P. Moore v. Hudson*, 6 Mad. 218. **PR. BILL; PRAYER.**

No notice of motion to the writ of *ne exeat regno* *Id.* 355.

A writ of *ne exeat regno* upon the current jurisdiction in account, though bail might be had at law against a positive affidavit, the defendant's affidavit, or evidence of the plaintiff's admission, that no debt is due, will not avail. The affidavit of a threat or intention to go abroad, must be positive, not upon information and belief. *Jones v. Adephsin*, 16 Ves. 470. **NE EXEAT REGNO; JURISDICTION; ACCOUNT.**

Defendant arrested under a writ of *ne exeat regno*, for a debt due to an intestate, was discharged, plaintiff not having obtained administration in Ireland. *Swift v. Swift*, 1 Ball & B. 326. **ADMINISTRATION.**

A writ of *ne exeat regno* granted on the application of a defendant against a plaintiff, whose bill was dismissed with costs, it being, from the declarations of the plaintiff, apprehended he would leave the country before service of the process to pay costs could be made effectual. *Stewart v. Stewart*, 1 Ball & B. 73.

Writ of *ne exeat regno* upon a legal demand against an attorney, on the ground of his privilege, by analogy

to the case of equitable demands, refused. *Gardner v. —*, 15 Ves. 444.

The writ of *ne exeat regno* is in the nature of equitable bail; therefore, in the case of alimony marked only for the arrears, actually due; and not carried farther by analogy to the case of a judge, holding to bail for uncertain damages upon a personal tort. *Haffey v. Haffey*, 14 Ves. 261. **ALIMONY.**

In an account *ne exeat* granted, though bail might be had at law. *Hannay v. M'Entire*, 11 Ves. 55. **ACCOUNT; BAIL.**

*Ne exeat* to restrain M. P. going to Ireland, refused. *Bernal v. Marq. Donegal*, 11 Ves. 43. **MEMBER OF PARLIAMENT.**

As to writ *ne exeat* in general, see *id.* 40.

If a child were grown up, and about to leave the kingdom, the prerogative might, by *ne exeat regno*, prevent him, and if gone, might, by great or privy seal, call on him to return, and if not obeyed, take its property. *De Manneville v. De Manneville*, 10 Ves. 63. **INFANT; JURISDICTION.**

Belief, without circumstances or declarations shewing the ground of it, will not sustain a writ of *ne exeat regno*. *Answick v. Barklay*, 8 Ves. 597.

*Ne exeat* granted in cases of alimony, but only for sums actually due, and costs. *Shafte v. Shafte*, 7 Ves. 171. *S. P. Dawson v. Dawson*, id. 173. *S. P. Oldham v. Oldham*, id. 410. **ALIMONY.**

Writ *ne exeat regno* refused, upon an undertaking for indemnity; to obtain it there must be equitable demand in nature of a debt actually due. *Cock v. Harie*, 6 Ves. 283.

There is no instance where a writ of *ne exeat regno* has been applied for upon admissions in the answer, but the admission would certainly do as well as an affidavit. *Rodlum v. Hetherington*, 5 Ves. 95. **PR. ANSWER, ADMISSION BY.**

Where plaintiff has two demands on defendant, the one liquidated, the other matter of account, a writ of *ne exeat regno* shall be marked for the former demand only. *Parker v. Appleton*, 3 Bro. C. C. 427.

*Ne exeat regno* refused against the agent of a surviving executor, having in his possession a bond which was the security for a residue to which plaintiff was entitled. *Storey v. Higgins*, 3 Bro. C. C. 476.

A writ of *ne exeat regno* was granted in respect of a debt for which the plaintiff had made himself liable on the defendant's account, but which he had not yet paid. *Sealy v. Laird*, 3 Swan. 368. **PRINC. & SURETY.**

Upon a suit in ecclesiastical court by wife for alimony; *quare*, whether before the decree, court will not grant writ of *ne exeat regno* against husband. *Coglar v. Coglar*, 1 Ves. J. 94. **HUSB. & WIFE.**

*Ne exeat regno* refused at suit of assignee of a bond, the original obligee being dead, without representatives. *Ray v. Fenwick*, 3 Bro. C. C. 25.

*Ne exeat regno*, upon affidavit of wife against husband, refused: wife's evidence against husband allowed, only for security of the peace. *Sed vide* 10 Ves. 56. but she cannot sustain indictment against him. *Sedgwick v. Watkins*, 1 Ves. J. 49. *S. C.* 3 Bro. C. C. 11. **HUSB. & WIFE.**

No equity can arise for the writ here, from a transaction legally satisfied in a foreign country where it arose. It is never granted but on a clear demand. *Anon.* 1 Bro. C. C. 376.

Court will not grant *ne exeat regno* where the person lives out of the kingdom, and the transaction was on the faith of having justice where he resided. *Robertson v. Wilkie*, Anbl. 177.

Court of equity will not grant *ne exeat regno* for a mere legal demand, for which the defendant may be held to bail. *Reynolds v. Lisle*, Anbl. 75.

A writ of *ne exeat regno* originally confined to state



affairs, but now very properly used in civil cases. *Anon.* 1 Atk. 521.

Motion to discharge a *ne exeat*, the bill not praying it, and there being no charge in the bill introductory to it. But the chancellor thought it unnecessary to pray it, and that a party might apply for the writ pending a suit, though not thought of at the beginning. *Anon.* Turner's Ch. Pr. 52. In *Collinson v. —*, 18 Ves. 353. *Moore v. Hudson*, 6 Mad. 218, the writ was granted, though not prayed for in the bill.

Creditor having arrested, and got in part of bankrupt's effects in Scotland, writ *ne exeat* against him granted. *Mackintosh v. Ogilvie*, Dick. 119.

Where writ is granted till answer, it extends until further order of court. *Atkinson v. Bedel*, id. 98. S. P. Mad. 218. *Sed quare* 1 Turn. & R. 96.

*Ne exeat* against feme covert executrix. *Jernegan v. Glass*, Dick. 107. *Sed quare* 1 T. & R. 96.

There is no instance of a *ne exeat regno* being granted, where it is not a mere equitable demand, except where a wife sued in the spiritual court for alimony, and the husband threatened to leave the kingdom, and to aid that court, and out of compassion to her, it was granted. *Anon.* 2 Atk. 210.

Granted against administratrix come to England to get in husband's debts. *Moore v. Meyell*, Dick. 30. *Sed quare* 1 T. & R. 96.

Granted only on a mere equitable demand. *King v. Smith*, Dick. 82.

Though England and Scotland be now one kingdom, yet the writ of *ne exeat regno* has not been altered since the union. It was originally a state writ; *quare*, whether, in the common form, and security given thereupon, it can restrain the party from going into Scotland? *Hunter v. Maccray*, Forbes. 196. *Scotl. AND.*

A writ of *ne exeat regno* is not to be granted without a bill first filed. *Exp. Brunker*, 3 P. W. 312. See 6 Ves. 92. *Beame's Ne. Ex.* 26.

Nor where the demand is entirely at law. *Id. ib.*

A precedent of a *ne exeat* being granted, on affidavits, though there was no bill in court whereon to ground the writ. *Id. ib.* See 6 Ves. 92.

*Ne exeat* granted to prevent husband from avoiding payment of alimony. *Exp. Whitmore*, Dick. 143.

*Ne exeat* never granted where demand is at law. *Broker v. Hamilton*, id. 154.

*Ne exeat* against trustee upon an account acknowledged. *Taylor v. Leitch*, id. 380.

Writ never granted on legal demand. *Exp. Duncombe*, id. 503.

*Ne exeat regno* will be granted in case of alimony decreed by spiritual court. *Pearne v. Lisle*, Amb. 76. *ALIMONY.*

A creditor of bankrupt residing in England having, upon sentences obtained since the bankruptcy, proceeded by process from the courts in Scotland, to recover sums due to bankrupt's estate there, to an amount much beyond his own debt, was, upon evidence of his intent to go abroad, restrained by *ne exeat regno*. *Mackintosh v. Ogilvie*, 3 Swan. 365.

*Ne exeat* granted since the union to prevent a party going to Scotland. *Anon.* 2 Salk. 702. S. C. nom. *Done's case*, 1 P. W. 263.

A solicitor's bill being taxed and overpaid 60*l.*, the client, on motion and affidavit of his being about to go beyond sea, had a *ne exeat regno*, though no bill in court whereon to ground this writ. *Lloyd v. Cardy*, Prec. Chan. 171.

*Ne exeat* granted against husband in aid of proceeding instituted against him by wife in ecclesiastical court. *Smithson's case*, 2 Vent. 345. *Huss. & WIFE; ECCLES. COURT.*

## (b) Discharge of.

Motion for leave to amend without prejudice to a *ne exeat*, refused. *Grant v. Grant*, 2 Sim. 14. *PR. AMENDMENT.*

Where a writ of *ne exeat regno* issues for a larger sum than is due, the court will make an order that so much only shall be raised as is due, without quashing the writ. *Pannel v. Taylor*, 1 Turn. & R. 100. overruling *Amb. 62.* and *S. C. 3 Atkins, 409.* *Dick. 107.* See, however, 6 Mod. 218.

Where the writ issues against an executor, at the instance of a legatee, it must be marked for the whole amount of what is due, not only to the plaintiff, but to other persons. *Id. ib.* *EXECUTOR.*

In a suit against a purchaser for specific performance where a receiver had been appointed, and was in possession of the estate, and the master's report in favour of the title, except as to a very small part of the estate for which the purchaser was entitled to an abatement, had been confirmed; and followed by an order, by which, after referring it to the master to ascertain what abatement the purchaser was entitled to, and to compute interest upon the remainder of the purchase-money, and to settle the conveyances, it was ordered, that upon the execution of the conveyances, and delivery thereof, and of the title-deeds to the purchaser, he should pay to the plaintiffs the remainder of the purchase-money, after deducting the abatement, with the interest, to be computed by the master; and that the receiver should thereupon deliver up to him possession of the estate; the court refused to discharge a writ of *ne exeat regno* issued against the purchaser, and marked for the full amount of the purchase money, though the abatement (which it clearly appeared would be less than the interest) had not been ascertained by the master, and no steps had been taken towards the execution of the conveyances. The sheriff having taken the defendant under the writ, refused to release him out of custody, until the whole sum for which the writ was marked was paid into his hands, and the court did not disapprove of his conduct. *Boehm v. Wood*, 1 Turn. & R. 332.

*Ne exeat* obtained on the filing of the bill, discharged, on the ground that the defendant had been previously arrested at the suit of the plaintiff, for the same debt, and discharged. *Raynes v. Wyre*, 2 Mer. 472.

Writ of *ne exeat* discharged with costs, it having issued against a captain of ship on point of sailing, who had been in England a considerable time. *Dick v. Swinton*, 1 V. & B. 371.

Writ of *ne exeat* is a great prerogative writ, and applied to purpose of equitable bail. *Id. ib.*

Writ of *ne exeat regno* for a demand upon which bail might be had, viz. the admitted balance of an account, on the ground that, if bail was given, plaintiff disputing the balance would be entitled to an account, and the defendant could not put him to his election, to sue at law or in equity, except upon terms. *Jones v. Sampson*, 8 Ves. 593.

Plaintiff having twice held the defendant to bail, obtained a writ of *ne exeat regno*, discontinuing the action; the writ was discharged. *Amsinck v. Barklay*, 8 Ves. 594.

Writ of *ne exeat regno*, upon declarations or facts, as evidence of the intention to go abroad, not discharged upon affidavit denying the intention. *Id. ib.*

Upon an application for the writ of *ne exeat regno*, no subpoena is served, but upon personal service of the writ, the party is bound to appear, and to put in his answer, and then he may apply to supersede the writ, but not upon his affidavit. *Russell v. Ashby*, 5 Ves. 96. *PR. SUBPENA; PR. SERVICE OF ORDER.*

Writ of *ne exeat regno* obtained by a resident here against a resident in the W. Indies, upon a demand arising there, when the answer came in, was discharged

under the circumstances, with costs, against the prochein ami of the infant plaintiff; but upon the admissions in the answer, the defendant was ordered to give security to abide the decree. *Roddam v. Hetherington*, 5 Ves. 91. FOREIGNER; COSTS; PROCHAIN AMI.

Writ of *ne exeat regno* obtained by one French emigrant against another, discharged upon the circumstances appearing upon the affidavits in support of the bill, and upon the answer, which may be read, the application not being in the nature of an affidavit to hold to bail, but to the discretion of the court applying a remedy, not in its origin distinctly applicable to private transactions between subject and subject. *De Carriere v. De Calonne*, 4 Ves. 577. FOREIGNERS.

Writ of *ne exeat regno*, obtained by one inhabitant of Antigua against another casually in this country, upon a bond stated in the bill to be lost, discharged on giving security to abide by the decree. *Atkins v. Leonard*, 3 Bro. C. C. 218.

Writ of *ne exeat regno* discharged on paying into court the sum for which it was marked. *Evans v. Evans*, 1 Ves. J. 96.

Order for *ne exeat regno* discharged, the demand being for negroes in Antigua, and the defendant is going there where he will be amenable. *Pearne v. Lisle*, Amb. 76.

*Ne exeat* till answer and further order. Writ discharged after answer on security for want of cause. *Boon v. Collingwood*, Dick. 115.

#### (c) Bond and surety.

Defendant being committed for want of answer, his bail, under a writ *ne exeat regno*, not discharged. *Stapylton v. Peill*, 19 Ves. 615. BAIL; DISCHARGE OF; PR. COMMITMENT FOR WANT OF ANSWER.

Order on sureties to pay money into court, on forfeiture of recognizance entered into on a *ne exeat*. *Musgrave v. Meder*, 1 Mer. 49. S. P. *Utten v. Utten*, id. 51.

Defendant having given bond, with sureties on writ, and being in custody for contempt; sureties and bond discharged. *Debusin v. Debusin*, Dick. 95.

Sheriff having taken bail bond on writ *ne exeat*, defendant, after appearing and putting in two insufficient answers, left the kingdom. Court discharged an order obtained for leave to put the bond in suit, as the court has nothing to do with prosecuting the bond. *Collinridge v. Mount*, id. 688.

A surety in a *ne exeat regno* could not be discharged after answer put in by the defendant, not even after decree against the defendant, and commitment for 19000*l.* decreed against him, for if (as urged), there is no danger of defendant's going beyond sea, (being in prison), then the surety is in no danger. *Le Clea v. Trot*, Prec. Chan. 230. PR. SURETY; DISCHARGE.

#### 5. Writ of Supplicavit.

For good behaviour, when and how to be granted. *Beame's Order*, 39.

The security under a writ of *supplicavit*, on articles by a wife against her husband, is not unreasonable with reference to his circumstances, but leave was given to apply again, in case of a repetition of ill treatment. *Tunncliffe's Case*, 1 Jac. & W. 348. HUSB. & WIFE.

Order for security, under a writ of *supplicavit* on articles by wife against her husband. *Dobbyn's Case*, 3 V. & B. 183. HUSB. & WIFE; SECURITY.

Order for security, under *supplicavit*, on articles exhibited by wife against husband, under 2 Jac. 1.

c. 8. *Ileyn's Case*, 2 V. & B. 182. HUSB. & WIFE; PR. SECURITY.

Court tender of discharging a *supplicavit*. *Clarering's Case*, 2 P. W. 202.

Where a cause which leads to the ill treatment of the wife, upon which a *supplicavit* was granted against the husband continued to exist, the court refused to discharge the *supplicavit*. *Exp. King*, Amb. 333. S. C. 2 Ves. 578.

The court can only bind the husband to his behaviour, not remove the wife from him. *Id.* 334. HUSB. & WIFE; JURISDICTION.

Court will not discharge *supplicavit* on affidavit denying the fact, nor in any case but where combination and contrivance appear. S. C. Amb. 240. S. C. 2 Ves. 578.

It is usual to discharge persons committed for want of surety on articles of peace or *supplicavit*, at the end of a year, if nothing new happens. *Baynum v. Baynum*, Amb. 63.

A quaker cannot be admitted to exhibit articles of peace against her husband upon her affirmation, as it is in nature of a criminal prosecution. And in case of articles of peace, when party complained of is not in court, attachment for breach of peace goes on the oath of the complainant. *Exp. Gumbleton*, 2 Atk. 70. S. C. 9 Mod. 232. QUAKER; ATTACHMENT.

A, in a letter to his wife's father, said, as he did not choose to be a witness to her infirmities, he would allow her 400*l.* per annum while she lived with her father. The wife, on a bill for separate maintenance, moved for the arrears (600*l.*) to be paid for her support till the hearing. The court granted 400*l.* in gross, but not as arrears, and said it would be refused in future. The husband in his answer, swore he was desirous of cohabiting with his wife. Two years after the motion, the wife filed a bill for the arrears and growing payments for the 400*l.* pursuant to agreement, and the husband contended that the agreement was only intended to exist during his occasional absence. It appeared that the wife was disordered in her mind, and that upon the husband's attempt to confine her, she obtained a *supplicavit*. Ld. Ch. gave judgment, 1st. That the 400*l.* was only intended to continue during the husband's occasional absence. 2d. As to the liberty to live separate, prayed by the wife, the court could not decree a separation or separate maintenance, unless upon the parties' own agreement. And 3d. The obtaining a *supplicavit* does not justify the wife's elopement, for it is granted on a supposition that they are to live together. Decreed, that as the court saw grounds for granting a *supplicavit*, and the husband's offer to receive his wife was only judicially made by his answer, the arrears of the annuity should be paid, and that the husband should take his wife home and maintain her; if she refused, the maintenance should cease; but if he refused, then the maintenance to continue. *Head v. Head*, 3 Atk. 295. 447. 1 Ves. 17. HUSB. & WIFE.

One taken on a *supplicavit*, and continued in prison a year, without any fresh threatening, ought to be discharged. *Exp. Grosvenor*, 3 P. W. 103.

After an imprisonment for fifteen months on *supplicavit*, party may be discharged on slender security. *Grosvenor v. Edwards*, Fitzgib. 268.

The master of the rolls would not order a *supplicavit* to be marked with the sum the sheriff should take security in, because there was an affidavit of the husband's circumstances as a measure for him to go by. *Exp. Lewis*, Mos. 191.

The Ld. Ch. ordered a *supplicavit* to be marked without affidavit, only upon enquiry of the husband's circumstances from the solicitor of the wife. *Exp. Gibson*, id. 198.

*Supplicavit* of the peace granted on petition and articles, and not on motion, and issued without indorse-

ment, was yet held regular. *Stoell v. Botelar*, 2 C. R. 68.

A supplicavit against defendant; he complained that the articles were too general to ground it, and produced a certificate of his good behavior. The court referred it to the two next justices of the peace in the neighbourhood, to inquire into it. *Snelling v. Flatman*, 1 Dick. 6.

#### 6. Writ de ventre inspiciendo.

Their apparent cannot have a writ de ventre inspiciendo in life of ancestor. *Id. Dursley v. Berkeley*, 6 Ves. 260.

Writ de ventre inspiciendo ordered to issue against a married woman, whose husband had been ten years abroad, on the application of a devisee, there being a limitation in the will, that if she had a male child within forty weeks after testator's decease, it should take previous to the devisee; but to lie in the office fourteen days, and if she submitted to an examination of midwives in the meantime, not to go; otherwise to issue. *Exp. Wallop*, 4 Bro. C. C. 90. S. C. Dick. 781.

A writ de ventre inspiciendo may be had by devisee, as well as by an heir at law. *Id. ib.* DEVISEE.

A writ de ventre inspiciendo is always applied for by petition. *Exp. Bellett*, 1 Cox, 297. PETITION.

The effect of writ de ventre inspiciendo, decreed upon a bill in equity, where a sum of money was devised to a charity on the death of A, without issue; A dying and leaving a widow of ill fame, who pretended to be with child. *Exp. Aiscough*, 2 P. W. 591. Mos. 391. CLARITY.

Held to be a writ of common right, being to secure the next heir from a fraudulent and supposititious birth; and lies for a tenant in tail, because at the time it was first allowed, an estate tail was a fee-simple conditional. *Id.* 593.

A widow being admitted to be with child, the court will fix a place agreeable to both parties, where she shall be till delivered, and where the heir may, from time to time, at proper seasons, and on notice, send women to see her, and to be present when the child is born, and in such cases, no need to execute the writ in a strict manner. *Id. ib.*

#### 7. Generally, and of other natures.

Writ of *dedimus potestatem*, to whom to be directed. General Ord. July 12, 1798., 4 Ves. 1.

Only one writ of consultation to issue in the same cause. Beame's Ord. 37.

*Scire facias* not to be awarded, unless upon recognition enrolled. *Id.* 36.

Anciently awarded on injunctions. *Id.* 41.

No writ of *scire facias* to issue after day of return. *Id.* 321.

Every such writ to be lodged two days before return. *Id.*

No *testat.* or *alias scire facias* to issue before the first *scire facias* be issued, &c. *Id.*

*Procedendo* to issue, if plaintiff in *certiorari* put not in bond to prove his suggestion. *Id.* 12.

Whether general or special, only one in the same cause. *Id.* 37.

Writs of which only one in same cause. *Id.*

What are only to pass by warrant under counsel's hand. *Id.*

Of privileges, how to issue. *Id.* 38.

*Ret. coram lege* in cause, to be filed in Roll's chapel. *Id.* 40.

Writ of *duces tecum* to examine witnesses in perpetual memory, and to shew cause only, to be made by clerks of the subpoena office. *Id.* 143.

What writs pay no fees. *Id.* 155. 234. 413.

No writ of *scire facias* to issue after return. *Id.* 321.

Every such writ to be lodged two days before return. *Id.*

No *testat.* or *alias scire facias* to issue before first *scire facias* be issued, &c. *Id.*

To whom writs of *dedimus potestatem* are to be directed. *Id.* 463.

Writ of privilege to be granted only to ministers, officers, and known clerks of the court. *Id.* 54.

And that on certificate or affidavit. *Id.*

Other requisites. *Id.* 55.

To be enjoyed by George Mynn. *Id.* 90.

As to fees on privilege writs. *Id.* 413.

Where a distringas was issued, and served upon the secretary of the Bank of England, accompanied by a notice, that it was for the purpose of preventing the transfer and payment of stock and dividends, standing in the name of W W, but no bill has been filed against the bank, or W W, the distringas was, under the circumstances of the case, set aside with costs. *Scott v. Gov. &c. of Bank of Engl.*, 2 Y. & J. 327.

In a writ of intrusion by a remainder-man, or reversioner after a life estate, the demandant must allege and court upon an actual seisin, by the person creating the life estate taking the espices; and the fifty years allowed by stat. 32 Hen. 8. c. 2. s. 2., for bringing the writ, is reckoned from that seisin, and not from the death of the tenant for life, or the commencement of the adverse possession. *Widdowson v. El. Harrington*, 1 Jac. & W. 532.

Order for sequestration, made upon the return to a single distringas, issued under a decree for payment of costs. Such an order is only an order nisi in the first instance. *Lowten v. Mayor, &c. of Colchester*, 3 Mer. 543. PR. SEQUESTRATION.

Form of distringas regular, being to appear and answer contempt merely (not *ad comparendum et solvendum*), but the cause for which it issued being specified by indorsement. *Id. ib.*

Injunction to restrain sheriff from executing *fi. fa.* on goods, &c. of landlords', in possession of plaintiff, his tenant, refused. *Garstin v. Asplin*, 1 Mad. 150. INJUNC.; LANDLORD & TENANT.

Writ of *executio ad curiam*, to remove a real action for copyhold estate from the Lords' court to the C. P., superseded. *Scott v. Kettlewell*, 19 Ves. 335. CONVERSION. COURT.

Court of Exchequer will not in exercise of its equitable jurisdiction over extents, grant a writ of *amoveas manus* to release property seized under extent in aid, against a debtor in a more remote degree, on ground that debt which had been found on original commission to be due to King's debtor, has been subsequently satisfied by payment of bills of Exchequer, deposited by him for securing that debt; if it appear that those bills were not *bona fide* the property of the person depositing them, who thereby committed a breach of trust. *Res v. Blackett*, 1 Price, 96. n. JURISDIC.; EXTENT.

A writ of restitution will not be granted to put into possession a person not a party to the cause, who had been turned out by an injunction, though he had a legal title, he having obtained such possession under a grant from the defendant pending the suit. *Gaskell v. Durdin*, 2 Ball & B. 167. PL. PARTY.

In a writ to absolve a person unlawfully excommunicated, notice is required. *Bornaine's case*, 16 Ves. 346. PR. NOTICE.

Injunction on motion of course, to deliver possession of land decreed, as a ground for the writ of assistance, the only mode of obtaining immediate possession: a court of equity properly acting only in *personam*. *Haguenin v. Baseley*, 15 Ves. 180. SEC. LEVIES v. *Morgan*, 5 Price, 468. INJUNC.

Writ of execution, only in the case of a party to

cause, a stranger, must be served, first, with an order to pay the money by a given day, and in case of default, with an order to pay on another day, or stand committed. *Anon.* 14 Ves. 207.

Order, that a person against whom a commission of lunacy was established, should be delivered up to the committee; *habeas corpus* not necessary. *Exp. Cranmer*, 12 Ves. 445. LUNACY.

Writ of right does not lie for a devise. *Saunders v. Id. Annesley*, 2 Sch. & L. 104. DEVISER.

The custody of an examiner taken under a *dedimus* in the country, belongs to the clerk in court, who is entitled to make copies of it. *Drake v. Woodford*, 1 Smith, 116. PR. EXAMINATION.

Service of a writ of execution upon the clerk in court, not good. *Ellison v. Pickering*, 8 Ves. 319. PR. SERVICE SUBSTITUTED.

Writ improvidently issued, while within the controul of the court, shall be quashed: if beyond its controul, shall be superseded. *Lawlor v. Murray*, 1 Scho. & L. 76.

In a *scire facias* to repeal a patent, the venue cannot be changed from Middlesex to any other county. *Rex v. Haine*, 2 Cox, 235. PR. MOTION IN PETTY BAG.

A *dedimus* issued to take the acknowledgement of a husband and wife, who were resident in Jamaica. Owing to accidental circumstances, the *dedimus* was not returned until a year after the teste; and on this account the cursitor refused to receive it, as being contrary to the practice of their office. But the court directed the cursitor to receive it. *Townsend v. Lowe*, 1 Cox, 410.

Writ of assistance, and the course of proceeding previously to applying for it. *Dore v. Dove*, 1 Bro. C. C. 375.

If after *fi. fa.* executed, other effects are discovered, another *fi. fa.* may issue, or *ca. sa.* *Hopkins v. Adcock*, Dick. 443.

After *ca. sa.* executed, *fi. fa.* cannot issue, but after *fi. fa.*, *ca. sa.* can. *Id. ib.*

To run in liberty of Rolls, writ must be backed by Master of Rolls. *Exp. Carpenter*, Dick. 334.

Writ de *homine replegiando*, against man running away with woman of weak mind and infant; on second day being married, husband and clergyman committed. *Exp. Ashton*, id. 23.

Defendant, against whom *supplicavit* had issued, opposing it, matter referred to two justices of peace. *Snelling v. Flatman*, id. 6.

Writ de *vilaica removenda*, for part of parsonage, and injunction for the house. *Boult v. Blunt*, Cary, 51.

Of privilege granted to a suitor in Chancery. *Dutton v. Alersey*, id. 43.

As to the writ of *ad quod damnum* to change the condition of a way. *Exp. Armitage*, Ambl. 294., and *seq.*

Application to the court to set aside an *ad quod damnum*, on a suggestion of surprise upon the neighbouring inhabitants, when the inquisition was taken, and for want of a new road being set out (in lieu of the road taken away by the person who issued the writ) in his own ground. Lord Hardwicke held there was no surprise, nor was it necessary the new road should be set out on the party's own soil. So where a new road is made, and the parish can be at no farther expence with regard to the old one, the inhabitants ought in future to repair the new; but where the new road lies in another parish, the person who sued out the writ, and his heirs, ought not only to make it, but keep it in repair. In cases of *ad quod damnum*, equity must judge according to the rules of law, and the inconvenience to the public in such cases is not inquirable in equity, for the jurisdiction belongs to the quarter sessions, and it is sufficient if the inquisition

is executed in a fair and open manner, and though the appeal is directed to be at the next quarter sessions, by 8 & 9 W. 3. c. 16., the justices may adjourn it to a subsequent sessions. *Exp. Vennor*, 3 Atk. 766. JURISDIC.

Certiorari may be returnable in court from whence it issues. *Woodroffe v. Kinaston*, Dick. 233.

Return of certiorari too long, ordered, cursitor to prepare writ to shorten same. *Id. ib.*

Defendant committed to Fleet on confession of rescue, allowed to prosecute action of false return. *Bouville v. Bouville*, Cary, 106.

Sheriff amerced 5l. for return of *non est inventus*, he having been in defendant's company. *Stradling v. El. Pembroke*, id. 44.

Cause to quash a writ must be apparent on the face of it. Ld. Ch. cannot quash an original writ after it is returned into another court, but may supersede it. *Ogier v. Heywood*, Ambl. 59. JURISDIC.

After a writ of execution of a decree, and an attachment served on the defendant, the plaintiff may have an injunction to the defendant to deliver possession, and next a writ of assistance to the sheriff, commanding him to be aiding in putting the plaintiff in possession. *Strebly v. Hawkie*, 3 Atk. 275. *Dove v. Dove*, 1 Cox, 101. *Huguenin v. Baseley*, 15 Ves. 180.

K was cited to the Bishop of London's court, for officiating as a clergyman without licence in a chapel of ease; and being for forty days denounced excommunicate for contempt, upon the bishop's certificate, a *significavit* issued in Chancery.—Upon a motion to quash the writ of *signif.*, Lord Hardwicke overruled all the exceptions, and held, that there was sufficient to warrant a writ of *excom. cap.* *Dr. Trebec v. Keith*, 2 Atk. 498. *Vide Exp. Little*, 3 Atk. 479.

A man may be resident in one diocese, and come into another to commit the offence charged upon him in the *significavit*. This, for the purpose of being cited, is a sufficient residence, and he may be prosecuted in the diocese where the offence was committed. S. C.

The court will not, on motion, supersede a writ of *replevin*, unless there is a fraudulent use made of it. *Anon.* 2 Atk. 237.

After a writ of *replevin* has once issued here, it is *de officio*, and the court has nothing further to do with it. *Id.*

Distingas against relators after subpoena, to pay defendant money due. *Att. Gen. at rel. of Tenby v. Waters*, Dick. 73.

The writ de *hom. repleg.* is original, returnable in a court of law, and suable of right on petition or motion, without shewing cause. It is remedial, and therefore the defendant in the writ must assign some reason why he does not comply with it. It is not supersedeable in Chancery, but the party must plead to it below. *Treblecock's Case*, 1 Atk. 633.

The court will not order the filing an original to make good a judgment on error brought, without some excuse, for not filing one before, though a slender excuse may be sufficient. *Anon.* 3 P. W. 314. WRIT OF ERROR.

A *scire facias* is not in nature of a new action, but a continuation of the old one only. *Morris v. Hankey*, 3 P. W. 148. See S. C. 2 Eq. Ab. 628.

Instructions for an original, against an hundred for a robbery, were brought to the cursitor, within the year, but the writ passed the great seal after the year, though tested within the year, (*viz.*) when the instructions were brought to the cursitor: this held good, being warranted by the practice of the cursitor's office. *Price v. Hund. of Chewton*, 1 P. W. 437.

Where equity will give leave to file an original, and when not. *Anon.* 1 P. W. 411.

After a decree against a corporation for a sum of money, and a *distingas* issued out against them,

court refused to give them any time, or to let them be examined on interrogatories; otherwise, if it was a distringas on mesne process. *Harvey v. E. I. Comp.* 2 Vern. 395. *Pr. Ch.* 129. S. G. CORPORATION; *Pr. EXAMON. ON INTERROGS.*

A motion for a mandatory writ to the chief justice of king's bench to sign a bill of exceptions denied, though such writ was issued out of chancery to a judge of an inferior court. *The Rioters' case*, 1 Vern. 175. JURISDICTION; *Pr. BILL OF EXCEPTIONS.*

*Seire facias* to repeal a new charter after the surrender of the old one, returned by the old sheriffs; if it shall be received. *Case of Town of Nottingham*, 1 Vern. 155.

No writ *de cautione admittenda* ought to issue till the affidavits filed that the bishop refused to admit of caution. *Abp. of York v. —*, 1 Vern. 119.

Plaintiff was in execution at suit of the king, and there being no just cause thereof, he was delivered by supersedeas. *Pyke v. Grant*, Cary, 39.

An injunction will never be granted upon a bill and affidavit to stay any proceedings at law, till the defendant prays a *dedimus*, or is in contempt; an injunction upon a *dedimus* must never be granted concerning the possession, but only to stay process at law. *Anon.* 2 Freem. 6. *Pr. INJUNCT. TO STAY PROC. AT LAW.*

Where a tenant, party to the suit, refuses to deliver possession of the estate pursuant to a decree, and the court grants an injunction to deliver possession upon motion supported by affidavit of personal service of the writ of injunction, and of disobedience to it, the court will grant a writ of assistance. *Dove v. Dove*, 1 Bro. C. C. 375. 1 Cox, 101. 2 Dick. 617.

*Seire facias* by the first patentee to repeal subsequent patent of office of parkership. *Hunt v. Coffin*, Dyer, 197. pl. 45.

So of sergeant at arms for not attending office. *Rex v. Estlin*, Dyer, 197. pl. 48.

One was condemned in *seire facias* on recognisance in chancery, the warden informing the court that he was in the Fleet *pro certis causis*; the court cannot order him to be detained in execution thereof. *Paine v. Pattenham*, Dyer, 306. pl. 62.

Judgment on *seire facias* in chancery, reversed on error in K. B. Dyer, 315. pl. 100.

## PRÆMIUM PUDICITIÆ.

See CONSIDERATION, III. 3.

## PRE-EMPTION.

Option to a tenant to purchase; the rents, until the option made, belong to the heir; from that time the connection takes place, and the purchase money belongs to the personal representative. *Tonole v. Redwell*, 14 Ves. 591. LANDL. & TENANT; EXORS. GENERALLY.

A right of pre-emption given by will, whether at a price expressed, or to be fixed by the trustees, will be executed; the construction in the latter case being a reasonable price to be ascertained by reference to the master. But to pass such right to the heir or devisee, the intention to accept the offer, must appear by some act, or at least by will. *El. Radnor v. Shafto*, 11 Ves. 448. WILL, C. OF.

A, seised in fee, devised lands to his daughter and her heirs; and his mind was, that if his son paid to her 50*l.*, then his son should have the land; the money was not paid at the day, and the daughter sold the land, but decreed against the vendee on the son's paying the money; for the court took it to be

but in the nature of a security. *Bland v. Middleton*, 2 Ch. Ca. 1.

A, having five daughters, devises lands in trust to convey to eldest, in case she should pay 6000*l.* among her four sisters, and if not, he gives the like pre-emption to each of his daughters. Equity will not enlarge the time. *Muster v. Willowby*, 2 Bro. P. C. 244. CONDITION.

Equity will not, after a sale, enforce a covenant for pre-emption against mortgagor, in favour of mortgagee. *Orby v. Trigg*, 9 Mod. 2. MORTGAGOR. & MORTGEE; COVT.

A wills that B shall sell his land to C; C shall compel B, by subpoena. Cary, 14.

## PREScription.

See TITHES, IX.

## PRESENTATION.

See ECCLESIASTICAL PERSONS, &c.

## PRESUMPTION.

See also BOND, VI. — COPYHOLD, IX. — DEATH. — MORTGAGE, IX. 1.

### I. OF TITLE.

### II. OF SATISFACTION, RELEASE, AND PAYMENT.

### III. OF DEEDS AND OTHER MATTERS, AND GENERALLY.

#### I. OF TITLE.

The statutes of a college, directing that the president, on his election, should be admitted, and prescribing an oath to be taken by him, and some other ceremonies to be performed, held upon evidence of a particular form of admission, besides the oath, and ceremonies mentioned in the statutes having been used, and upon the ground that in such offices the admission is generally a distinct act, that the admission did not consist in taking the oath and going through the ceremonies mentioned in the statutes, but in the observance of that particular form. In a college of royal foundation, a practice having, for many years, prevailed of electing two fellows of a county, for which the statutes allowed only one, a dispensation from the crown authorising that practice, was presumed. *Case Queen's Coll.* 1 Jac. 1.

A grant from the crown of an advowson, (excepted in a former grant under general words,) will be presumed after a possession evidenced by title deeds for 133 years, and three presentations. *Gibson v. Clark*, 1 Jac. & W. 159. LENGTH OF TIME; GRANT.

Presumption from length of time in favour of long possession of whatever is necessary to constitute a right. *Chalmer v. Bradley*, id. 63. LENGTH OF TIME.

To make good a title to the residue of an old term, mesne assignments, which cannot be produced, will be presumed, even at law. *White v. Foljambe*, 11 Ves. 350. TITLE.

Upon possession for many years, the origin of it not appearing, and no title except as *cestui que trust* under a term to raise a sum of money, the court would not presume any other title; and therefore decreed the plaintiff to be let into possession on payment of the charge, but with reluctance, and upon the laches refused an account of the rents even from the filing of the bill. *Acherley v. Roe*, 6 Ves. 565. LENGTH OF TIME; TITLE; ACCOUNT; LACHES.

## II. OF PAYMENT, RELEASE AND SATISFACTION.

Length of possession, as a ground for presuming a release, depends on the nature of the possession, whether adverse or not. *Fenwick v. Reid*, 1 Mer. 114. **LENGTH OF TIME.**

The presumption of payment of a bond after twenty years, may be repelled by evidence that obligor had no opportunity or means of paying. *Fladong v. Winter*, 19 Ves. 196. **LENGTH OF TIME; PR. EVID.**

Presumption of payment of a bond upon twenty years or less, without payment of interest, unless repelled by circumstances. *Hillary v. Waller*, 12 Ves. 266. **BOND.**

Mortgage presumed satisfied, no interest having been received for twenty-five years. *Id.* **MORTGAGE.**

Distinction between a legacy and a residuary bequest as to a presumed satisfaction by the advancement of a portion. The presumption from the former does not arise from the latter, and parol evidence of an intention to satisfy cannot be admitted originally, as it may, where first introduced, to repel a presumption. *Freemantle v. Pankes*, 5 Ves. 79. **LEGACY, SATISFACTION OF; RESIDUARY BEQUEST, SATISFACTION OF; EVIDENCE.**

After thirty-five years a legacy would be barred on presumption of satisfaction. *Pickering v. Id. Stamford*, 2 Ves. J. 280. 4 Bro. C. C. 214. **LENGTH OF TIME.**

Payment of a legacy presumed after above forty years without demand. *Jones v. Turberville*, 2 Ves. J. 11. S. C. 4 Bro. C. C. 115. *Id.*

Arrears of annuity presumed to have been paid after the lapse of twenty-two years from the death of the annuitant to the bringing of the bill. *Smallman v. Hamilton*, 2 Atk. 71. **ANNUITY, ARREARS OF.**

Owner of charge not to be presumed to have released it by permitting it to run largely into arrear, nor without proof to be suspected of so doing to prejudice those in remainder. *Aston v. Aston*, 1 Ves. 264.

Where no demand of principal or interest for twenty years, satisfaction will be presumed, except in cases of mortgages. Mortgagee is supposed continuing in possession, and mortgagor tenant at will to him. *Lennan v. Neunham*, 1 Ves. 51. **LENGTH OF TIME; MORTGAGE.**

An executor of a house steward to Ld. B. after an acquiescence of seventeen years, set up a demand for a large sum for business done by this testator, which Ld. B's representatives resisted on the statute of limitations. *Per cur.* Satisfaction is to be presumed from the length of time, for it is not to be imagined, if any thing was really due to the plaintiff, he would have been quiet under it. *Lacon v. Briggs*, 3 Atk. 105. *Id.*

Where no demand has been made on a bond for twenty years, the judge will direct a jury to find it satisfied. *Gratwick v. Simpson*, 2 Atk. 144. **BOND, SATISFACTION PRESUMED.**

Bond fraudulently obtained fifty years back, under circumstances deemed satisfied. *Hancock v. Hancock*, 10 Mod. 436. **BOND.**

## III. OF DEEDS AND OTHER MATTERS, AND GENERALLY.

If bill for specific performance of agreement state that agreement was in writing, signature will be presumed. *Rist v. Hobson*, 1 S. & S. 543. **PL. BILL; AGREEMENT; DEEDS, EXECUTION OF.**

A reconveyance of a mortgage made in 1745, but not afterwards mentioned in the title deeds, ought to

be presumed where no demand of either principal or interest has been made for several years, and mortgage deeds have been long in possession of the owner and his ancestor. *Cooke v. Soltau*, 2 S. & S. 154. **LENGTH OF TIME; RECONVEYANCE.**

Where there is an ambiguity in expressions of settlement regarding the issue, the presumption is taken in favour of the children. *Perfect v. Curzon*, 5 Mad. 442. **SETTLEMENT, C. OF; AMBIGUITY; CHILDREN.**

A deed creating composition real will not be presumed from payment of a sum in lieu of tithes for 200 years. *Esourt v. Kingscote*, 4 Mad. 140. **LENGTH OF TIME; TITHES; COMPOSITION REAL.**

A father having purchased, in the names of his sons a copyhold estate, which he afterwards demised by licence obtained subsequently to the purchase; the sons take the estate successively as an advancement. To repel the presumption of advancement, evidence of the father's intention must be contemporaneous with the purchase. *Murless v. Franklin*, 1 Swan. 12. **PAT. & CHILD; ADVANCEMENT.**

The presumption in respect to advancement to a child, arising from the circumstances of the purchase of one estate, cannot be qualified by transactions relative to other estates. *Id.* 19.

A grant of tithes of land will not be presumed from long non-payment, although lands may be shown to have been once in possession of a former lay proprietor, unless some evidence of the existence of a grant be offered, or the enjoyment of tithes be shown by at least something like peramancy or dealing with tithes as owner. Nor will evidence of retainer only be sufficiently strengthened to support such presumption by its being shown that a former proprietor had declared the lands in question to be exempt from tithes, or by instances of exception of tithes in leases by improper rector. *Wood, B. dissentiente. Meade v. Norbury*, 2 Price, 338. **TITHES.**

From the obscurity and inaccuracy of a deed, fraud and inadequacy of consideration will not, after the deaths of the parties, be presumed if not proved. *M'Namara v. Browne*, 2 Ball & B. 1. **FRAUD.**

The existence and execution of a settlement by indentures of lease and release presumed from circumstances, principally the existence of the drafts; the statement is an abstract of the title, and the existence of the lease for a year of other estates appearing to have been included in the same place of settlement. *Ward v. Garmons*, 17 Ves. 134. **SETTLEMENT.**

From tenant for life paying off a charge, it is not to be presumed he meant to exonerate the estate, but that may be rebutted and disproved. *Reddington v. Reddington*, 1 Ball & B. 141. **PAYING OFF INCUMBRANCES; TEN. FOR LIFE.**

Presumption that the cancellation of one duplicate of a will cancels the other, though both are in the testator's possession, and the cancelled instrument had been altered. In the two latter cases the presumption weaker. *Pemberton v. Pemberton*, 13 Ves. 310.

Presumption is not always on a belief that the thing has actually taken place. *Hillary v. Waller*, 12 Ves. 252.

Grants presumed upon the principle of quieting possession. *Id. ib.*

Every fair presumption is to be made against a stale demand. Matters of record are presumed. Deeds are presumed to be lost. *Pickering v. Id. Stamford*, 2 Ves. J. 583. **LENGTH OF TIME.**

Presumptions are to be made in favour of a charity. *Id.* 584. **CHARITY.**

A declaration of uses by the founder of a charity presumed from an entry in an ancient book purporting to be such declaration, but without signature or date, the book being kept by the trustees for entering their proceedings, and containing an order by the trustees dated six years after creation of the trust that

the declaration of the founder be there entered as a direction to the trustees. *Att. Gen. v. Boulbee*, 2 Ves. J. 379. DECLON. to USES.

A settled estate is sold, but no part of the money is laid out in other lands; yet this court will, under certain circumstances, presume an agreement between the parties interested, that it should be so laid out, and upon such presumption will decree the money to that person who would have been entitled to the land if any purchase had been made. *Newton v. Newton*, 6 Bro. P. C. 408. SETTLEMENT.

## PRINCIPAL AND AGENT, AND FACTORS.

- I. THE APPOINTMENT AND AUTHORITY OF AGENT, AND WHAT ENGAGEMENTS BIND PRINCIPAL.
- II. AGENT'S DUTIES, AND LIABILITIES.
- III. AGENT'S POWERS, AND INCAPACITIES.
- IV. ACCOUNTS BETWEEN, AND ALLOWANCES TO AGENT.
- V. EFFECT OF BANKRUPTCY, OR INSOLVENCY OF EITHER PARTY.
- VI. NOTICE TO AGENT, WHEN BINDING ON PRINCIPAL.

### I. THE APPOINTMENT AND AUTHORITY OF AGENT, AND WHAT ENGAGEMENTS BIND PRINCIPAL.

Consent of counsel is to be given upon their own conception of the authenticity of their own instructions, and if given, is binding on the client. *Mole v. Smith*, 1 Jac. & W. 673. BARRISTER; CONSENT.

Two counsel appearing for same party by different attorneys, petition to stand over to verify the retainer of the attorney by affidavit. *Butterworth v. Clapham*, cited 1 J. & W. 673. note. SOL. & CLIENT; COUNSEL'S RETAINER.

An objection to title on purchase having been waived, an offer of compensation made by a clerk of the vendor's solicitor, without express authority, is of no effect. *Burnell v. Brown*, 1 Jac. & W. 168.

Specific performance decreed against the purchaser of an estate by an agent, upon the signature of the agent's name by the auctioneer, who is an agent lawfully authorised for that purpose within the statute of frauds. *Kemeys v. Proctor*, 1 Jac. & W. 350. S. C. 3 V. & B. 57. SPEC. PERF.; STAT. OF FRAUDS.

The question as to the authority of an agent to sign, denied by the answer, and by his deposition, stating his declaration to the contrary at the time of execution, is to be determined by an issue: the evidence of a witness, impeaching the instrument he has attested, as a witness to a will, denying the sanity of the devisor, &c., being admissible, but to be received with the most anxious jealousy. *Howard v. Braithwaite*, 1 V. & B. 202. PR. EVID.; PR. ISSUE AT LAW.

Specific performance of a contract concerning land, not decreed on the signature of an agent, without authority. *Id.* SPEC. PERF.; REAL ESTATE.

Distinction between a general and special agent as to their powers to bind the principal. *Id.* 209.

Auctioneer may limit his general power of agency, but only by declaration, equivalent in legal effect to the general authority: upon that principle, evidence of loose declarations at the sale not admitted. *Id.* 210. AUCTIONEER.

For the purpose of commitment under short order to pay money, the person serving the order must have authority to receive the money. *Wilkins v. Stephens*, 19 Ves. 117. PR. SERVICE OF SHORT ORDER FOR PAYMT.; PR. COMMITMENT.

Parol authority sufficient for a written agreement by an agent. *Deverell v. Id. Bolton*, 18 Ves. 509.

Though an agent may, within the scope of his au-

thority, bind his principal by his agreement, and in many cases by his acts, evidence of his declarations is confined to what is either by the statement itself, or as tending to determine the quality of cotemporary acts, the foundation of, or inducement to, the agreement. *Fairlie v. Hastings*, 10 Ves. 123. EVID.

Authority of agent may be by parol, though the agreement must be by writing. *Mortlock v. Buller*, 10 Ves. 311. FRAUDS, STAT. OF.

Letter by an agent is not evidence against the principal of a pre-existing agreement, though it may be of an agreement contained in that letter. *Fairlie v. Hastings*, 10 Ves. 128. EVID.

Vendor is bound by signature of agent's clerk thus: "witness, E P, for Mr. S., agent for the seller," upon evidence of assent; but clerks in general have no authority to bind the principal. *Coles v. Trecothick*, 9 Ves. 234. S. C. 1 Smith, 233. STAT. OF FRAUDS; VEND. & PURCH.

Agent need not be authorised in writing. S. C. *Id.* 250.

A principal is answerable for the act of his agent in concealing or suppressing deeds, though not done with the knowledge of the principal. *Bowles v. Stewart*, 1 Scho. & L. 209. DEED, SUPPRESSION OF.

An agent to contract for the sale, &c., of land, under the second section of the statute of frauds, need not be authorised by writing. *Clinan v. Cooke*, 1 Scho. & L. 22. FRAUDS, STAT. OF.

Agent, authorised to make agreements for leases for lives or years, makes an agreement in which the term of the proposed lease is not mentioned: this is an agreement not pursuant to his authority, and not binding on his principal. *Id.* 32.

An authority given to A to draw bill in the name of B may be exercised by the clerk of A. *Exp. Sutton*, 2 Cox, 84.

A joint stock company having permitted a transfer of stock under a forged letter of attorney, held that the company, and not the fair purchaser, should bear the loss. *Ashby v. Blackwell*, 2 Eden, 299. S. C. Amb. 503.

Baron and feme having joint power to sell an estate of the wife's, give authority to an agent to sell by auction: he sells by private contract for more than the price they required: the buyer shall not compel specific performance. Husband delivering his wife's compliments in a letter to the agent, is no proof of her joining in giving authority to agent. *Daniel v. Adams*, Amb. 495. SPEC. PERF.

An agreement for a lease made with an agent, who acts under a power of attorney, and a lease executed by such agent in pursuance of the agreement, shall effectually bind the principal. *Hamilton v. El. Clanricarde*, 1 Bro. P. C. 341. LEASE.

M, owner of a ship, lets it to the commissioners of the navy, and appoints T his factor and attorney, with power to receive the freight and profits, and to compare and transact with the commissioners. T settled the account, and took a navy bill for the money to M: he then sells it, and indorses it, as attorney for M. Qu., whether M bound? *Ekins v. Mackintosh*, Amb. 184. ACCOUNT, WHO BOUND BY.

Brokers very often transfer stock without the principal being so much as mentioned, and yet he may maintain an action against the person to whom the stock was transferred. *Lissett v. Reave*, 2 Atk. 394. BROKERS.

A country client employs an attorney or solicitor in the country in a cause in chancery; the solicitor employs a clerk in chancery; the client in the country pays his solicitor, but the clerk in chancery is unpaid. The client is not bound to pay the clerk in chancery, but if the latter has any papers in his hands, he may retain them. *Farwell v. Coker*, 2 P. W. 460. SOL. & CLIENT LIEN; CLERK IN COURT.

See the case of the liability of the great duke of Marlborough to the contract for building Blenheim house, from the circumstance of a person giving directions to workmen, as his agent. *Dk. Marlborough v. Strong*, 1 Bro. P. C. 175. CONTRACT.

A steward has a general authority to contract with tenants, &c. This will not bind the lord, without his consent, nor unless part of the bargain is executed. *Anon.* 5 Vin. 522, pl. 35.

In a voyage, the master of ship is the owner's servant, and his duty requires him to provide necessaries for the ship, and it is the owner's interest that they should be provided; therefore, what the master necessarily takes up, (though not on bottomry) and employs for that purpose, the owners must pay. *Cary v. White*, 5 Bro. P. C. 325. SHIP.

Master of a ship buys provision for the ship, and has money from the owners to pay for the provisions, but fails, without paying the money. The owners are liable to pay in proportion to their respective shares in the ship. Master of the ship is but a servant to the owners. *Speerman v. Degraeve Galloway*, 2 Vern. 643. SHIP.

S, having borrowed 100*l.* of A on a bond, B, the scrivener, when the bond was sealed, delivered it to A. S paid many years' interest, and 50*l.* of the principal, to B, which he paid over to A; but the remaining 50*l.*, which S paid to B, was not paid over to A when B failed. *Per curiam*, though B received the interest so long, and 50*l.* of the principal, it did not imply he had any authority from A, and, as S could not prove he had any such authority, he shall pay the last 50*l.* again. *Wolstenholme v. Davies*, 2 Freem. 289. PAYMT.

Defendant had stock in the E. I. funds, in trust for plaintiff, and a bond in his own name from the company, but in trust for plaintiff; plaintiff being abroad, drew a bill on defendant, and promised to send him effects to pay it; defendant accepted the bill; but, before it was due, plaintiff failed; defendant thereupon sold the stock and bond to pay the bill, at a great discount, though at the current price. Two years afterwards, the stock and bond having risen in value, defendant went to plaintiff, and desired him to sell, and reimburse himself: on a bill by plaintiff for an account, it was held, that the want of effects was sufficient to justify defendant in the sale without orders, for as much as would pay the bill; but it appearing that the produce of the stock alone was sufficient to answer the bill, defendant was decreed to account for the bond according to the value at the time plaintiff gave directions for the sale. *Henriques v. Franchise*, Pre. Ch. 205.

If one trusts his scrivener (who puts out money for him) with the custody of his bonds, and the scrivener receives the money, and delivers up the bond, the obligee is barred as against the obligor for ever. Secus, in case of a mortgage, because a legal estate is vested which cannot be divested without assignment. *Martyn v. Kingly*, Pre. Ch. 209. BOND.

Scrivener puts out money on bond, and receives the interest from time to time, and then receives part of the principal, the bond remaining in the obligee's custody: held no good payment. *Roberts v. Matthew*, 1 Vern. 160. See 1 Salk. 157. BOND; PAYMT.

It is the rule of the court, that if the scrivener have the custody of the security, payment of the interest is good; if he deliver it up, being a bond, payment of the principal is good; but where payment of the principal, in case of a mortgage deed, the giving up the deed is not sufficient to restore the estate, there must be a re-conveyance, so payment of interest good, if the mortgagee consents, or after his death his executor either expressly or by implication, as if he accept the money afterwards of the scrivener, though the scrivener have not possession either of deed or bond.

*Whitlock v. Waltham*, 1 Salk. 157. 1 Vern. 150. in note. PAYMT.

## II, AGENT'S DUTIES AND RESPONSIBILITIES.

The bare relation of principal and agent is not sufficient to entitle the former to relief in equity, if the account can be fairly tried at law. *King v. Rossett*, 2 Y. & J. 33. ACCOUNT.

A mere agent of the trustee may not be accountable to the *cestui que trust*, but otherwise with respect to a substituted trustee, who accounts to nobody else. *Myler v. Fitzpatrick*, 6 Mad. 360. ACCOUNT; TRUSTEE.

Consent of counsel is to be given upon their own conception of the authenticity of their instructions, and if given, is binding on client. *Mole v. Smith*, 1 J. & W. 673. COUNSEL; CONSENT.

Agent to receive particular monies, is bound to pay same over to principal, notwithstanding claims of third persons; therefore, he cannot file bill of interpleader. *Nicholson v. Knowles*, 5 Mad. 47. INTERPLEADER.

Agent acting gratuitously, charged with loss, arising from failure of his bankers, having paid in the monies to his own account. Agent depositing money with a banker to his own account, cannot relieve himself from liability, by informing his principal of the payment, without a correct specification of the particulars. *Massey v. Bunner*, 1 Jac. & W. 241. INVESTMENT.

A town agent of attorney cannot be ordered to be taxed on motion of client. *Wildbore v. Bryan*, 8 Pri. 677. TAXATION OF COSTS.

A gratuitous agent receiving money under a trust deed, and placing it mixedly with his own in banker's hands, is liable for loss by their failure. *Massey v. Bunner*, 4 Mad. 413. INVESTMENT.

Bankers the agents of executors, authorized by them to receive certain assets, but prior to receiving them advancing the amount to executors in the course of their duty as agents, and afterwards applying the assets when received in payment of the amount of such advances, are not responsible, in respect of the misapplication by the executor's agents, not being privy to any intention of such misapplication. *Keane v. Roberts*, id. 332. BREACH OF TRUST; EXORS.

Bill for account will lie against agent. *Mackenzie v. Johnston*, id. 373. See S. P. id. 417. ACCOUNT.

Where agent was obliged as such to indorse bill, and fact was known to indorsees; injunction was granted to restrain proceedings thereon against him. *Kidson v. Dilworth*, 5 Price, 564. INJUNCTION; BILL OF EXCHANGE; INDORSEMENT.

Where town agent of country solicitor (since a bankrupt), had received papers from him belonging to his client, for purpose of his client's business, they have a lien against the client for amount of money due from him to solicitor, and from solicitor to them on account of business done in that cause. And where client had after solicitor's bankruptcy paid the agent his bill to obtain such papers, although an action had been previously commenced against him by assignees for recovery of it, the court granted and continued an injunction against the action, on the ground of agent's lien. *Bray v. Hine*, 6 Price, 203. LIEN; BANKRUPT. ASSIGNMENT; SOL. & CLIENT.

Interpleader allowed by a factor against both defendants residing abroad, and one not appearing. The subject, a policy on a cargo lost, for effecting which, the plaintiffs claimed to be reimbursed their expenses. *Martinus v. Helmuth*, Coop. 245. PL. INTERPLEADER.

Bill of interpleader sustained upon bills of exchange, received by the plaintiff, as agent to procure payment



for his principal in Scotland, to whom they were remitted, against an order for goods, pursued in an action of trover by the party, who so remitted them, and by attachment in Scotland by a creditor of that party. *Stevenson v. Anderson*, 2 V. & B. 407. See *Farebrother v. Prattent*, 5 Pri. 303. BILL OF EXCHANGE; INTERPLEADER.

Bill of interpleader by a factor upon opposite claims, as principals to the benefit of a policy of insurance retained by him, subject to his expenses. *Martinius v. Helmuth*, *id.* note (1.) 2nd Edit. INTERPLEADER.

Agent or bailiff, confounding his principal's property with his own, charged with the whole, except what he can prove to be his own; and in this instance, the case of a breach of the terms, upon which the court dissolved an injunction, the inquiry was directed with costs. The court refused in such a case a prospective direction to admit books, not legal evidence; usual in a fair case; as, where from want of notice of an adverse claim a strict account cannot be given; merely giving liberty to apply upon any question of evidence. *Lupton v. White*, 15 Ves. 432. ACCOUNT; EVIDENCE.

Interest and costs decreed against a steward upon fraud, wilful concealment, &c., and in such cases generally there is no limitation of time. *El. Hardwicke v. Vernon*, 14 Ves. 504. ACCOUNT, IN FACT; COSTS.

Agent not responsible; he names his principal as the person to be responsible. *Exp. Hartop*, 12 Ves. 352.

Account against a confidential agent in possession of estates since 1780, without giving any account to his principal, residing in Ireland, and an inquiry into the circumstances of a lease granted under his direction, and in which he took an interest. *Ly. Ormond v. Hutchinson*, 13 Ves. 47. Affirmed 16 Ves. 94. ACCOUNT.

A confidential agent, in that character bound to keep regular accounts: having neglected to do so, and to preserve vouchers against himself, though he had preserved those in his own favour, on the ground of gross neglect of duty, was not allowed a charge in respect of bills of costs for business done as a solicitor. *White v. Ly. Lincoln*, 8 Ves. 363.

Injunction until answer, restraining a transfer of stock standing in the name of a steward, on strong evidence by affidavit, that it was the produce of his master's property, rents, &c. received for many years without account; refused, as to money at his bankers in his name. *Id. Chelworth v. Edwards*, 8 Ves. 46. PR. INJUNCTION TO RESTRAIN TRANSFER.

The character of the defendant as agent, accompanying him in his situation as tenant, deprives him of the benefit of an objection, that might be competent to another person; as the neglect of the plaintiff in not bringing forward the demand at an earlier period. *Beaumont v. Boulthbee*, 5 Ves. 485. 7 Ves. 599. LANDLORD & TENANT; LACHES.

On suspicious circumstances in the answer, a general account was decreed against a steward, notwithstanding a receipt in full, which was allowed only as proof the particular payment, not of a general release or discharge upon an account stated; though under circumstances it might have that effect, as upon proof that the principal never would give any vouchers, and an account kept by the steward. *Middleditch v. Sharland*, 5 Ves. 87. FRAUD; ACCOUNT SETTLED.

An agent, charged with personal fraud, cannot by disclaiming interest, avoid answering fully. *Bulkeley v. Dunbar*, 1 Anst. 37. FRAUD; DISCLAIMER; ANSWER.

Servant taking by collusion more than belongs to his office, must account: so must a stranger upon a bargain with a servant, which is a fraud on the master. *E. J. Comp. v. Hensham*, 1 Ves. J. 289. ACCOUNT.

A usually employed B as his agent, to buy hops of the several planters in and about Canterbury, but having in a particular season omitted to give him any orders at the usual time, B enters into a partnership with three others, for purchasing hops of that year for their mutual benefit. The hops are accordingly purchased, but A having intelligence of this transaction before they were delivered, prevails upon B to declare to the planters, that he bought them as A's agent, and by that means A got the hops delivered to him. Held that this was a fraud upon the partners of B, and that A should account for the value of the hops, according to the highest price for which he sold them. *Hunter v. Shippard*, 4 Bro. P. C. 210. FRAUD; PARTNERS; ACCOUNT.

Scrivener, &c. receiving money, and giving a note to place it out at interest, is bound to do so, and is not discharged from paying interest for it, unless his employer accepts the security and interest. Balance of an account, stated by such scrivener, &c., will carry interest. *Barwell v. Parker*, 2 Ves. 364. INTEREST, WHEN PAYABLE.

Factor or correspondent pretending to insure as directed, charged as if he had insured. But such equity does not extend to an agent employed by him (ignorant of such deception.) *Tickel v. Short*, 2 Ves. 239.

Plaintiff, a factor abroad, having exceeded the price limited for the purchase of hemp, the defendant, who objected to the contract, but afterwards reshipped and disposed of some of it on a risk, was ordered to account for the cost price. *Cornwall v. Wilson*, 1 Ves. 509. ACQUIESCENCE; ACCOUNT, WHEN DIRECTED.

Factor exceeds orders on one part, saves on another, the principal to take the whole. *Id. ib.*

Broker or factor not naming principal, may be examined on action in name of principal; but simply for benefit of trade: if principal is declared, action must be against him. *Dixon v. Parker*, 2 Ves. 221. WITNESS, COMPETENCY OF.

But such broker or factor must act for another at the very time; no subsequent consent or agreement will do. *Id. ib.*

Attorney as agent, on sale of an estate, not disclosing to the buyer an incumbrance, and leading him to suppose the title would be a good one, held liable to make satisfaction in default of the vendor. *Arnot v. Biscoe*, 1 Ves. 95. VENDOR & PURCH.: FRAUDULENT CONCEALMENT.

J, of K, caused a sum in S. S. stock, belonging to another person of the same name to be transferred into his own name, and then into the name of a broker, for sale, and who accordingly sold it for him. In a bill against the representative of J, of K, and the S. S. Comp. for satisfaction, the broker is not a necessary party. *Harrison v. Pryse*, Barn. 324. PL. PARTY.

An attorney on behalf of his client, the defendant, promises to pay 500*l.* to plaintiff; this being done by the authority of the client, attorney not liable, but only client; otherwise, if the attorney had no authority from client to make the engagement. *Johnson v. Ogilby*, 3 P. W. 277. SOL. & CLIENT.

Brokers and factors who act or agree for their principals, not liable in their own capacities. *S. C. Id.* p. 279.

Where one recovered in trover against a servant of the African Comp., equity would not relieve, because plaintiff in equity might at law have defended himself, but decreed that the company should indemnify the servant, and that the plaintiff at law (one of the defendants in equity), might prosecute the decree in the servant's name. *Langdon v. African Comp. Prec. Chan.* 221.

Infant cannot be made to account as factor. *Smally v. Smally*, 1 Eq. Ab. 6. ACCOUNT; INFANT.

Scrivener or attorney puts out his client's money on

a security, which he might on the least inquiry have found to be defective, or even where he had notice of ejectment delivered on a prior mortgage, yet could not be charged in equity to answer the money. *Luke v. Bridges*, Prec. Chan. 146. INVESTMENT.

A articles on behalf of B to purchase some houses, and covenants to pay 800*l.* for the same, and the houses are afterwards destroyed by an earthquake. Though A had no effects of B's in his hands, yet the court decreed him to pay the 800*l.* *Cass v. Rudell*, 2 Vern. 280.

A trustee empowered S to manage a trust estate; S accounted to him. The trustee died, yet S was decreed to account again to *cestui que trust*. *Pollard v. Downes*, 2 Ch. Ca. 121. ACCOUNT.

### III. AGENT'S POWERS, AND INCAPACITIES.

Assignment of a policy by a master to a confidential clerk, as to two thirds of the premium of which the master had paid, the clerk paying the residue; under circumstances as well as the firing of a jury upon an issue, being satisfied that it was executed under undue influence, declared the assignment as to such two thirds of the amount of the policy fraudulent and void. *Collins v. Hare*, 1 Dow, N. S. 139. S. C. 2 Bli. N. S. 106. FRAUD; UNDOE INFLUENCE.

Service of subpoena on persons who in one instance had acted as agents of the defendant who resided in Ireland, ordered. *English v. Hendrick*, 6 Mad. 205. PR. SERVICE OF SUBPOENA SUBSTITUTED.

Consent of counsel is to be given upon their own conception of the authenticity of their instructions, and if given, is binding on the client. *Mole v. Smith*, 1 J. & W. 673. COUNSEL; CONSENT.

The agent of trustee for sale of estate, employed therein, cannot purchase the same. *Whitcomb v. Minchin*, 5 Mad. 91. TRUSTEE; FRAUD, FID. SIT.

An agent employed to sell an estate, secretly buys it himself in the name of a trustee, whom he represents to his employer to be the real purchaser; he cannot call for an execution of the trust until the transaction is confirmed by the vendor. *Woodham v. Meredith*, 1 Jac. & W. 204. VEND. & PURCH.; FRAUD, FID. SIT.

Demurrer to bill by annuitant against an incorporated company and their clerk, for a discovery of funds not appropriated, overruled, on account of clerk joining in demurrer. *Gibbons v. Comp., &c. of Waterloo Bridge*, 5 Price, 491. PL. PARTY.

It is doubted whether equity ought to allow a dealing between an agent and his principal, under any circumstances, there being such a conflict between interest and duty. *Dunbar v. Tredennick*, 2 Ball & B. 319. FRAUD, FID. SIT.

Agents permitted under circumstances to sign petition, principals being in the country. *In re. Boldevo*, 1 Rose, 231. BANKCY. PETITION, SIGNATURE OF.

Reversionary leases at under value obtained by agent from principal, the relation of creditor and debtor also subsisting after an acquiescence of twenty-seven years, not set aside; the fiduciary character having, during that period, ceased to exist, and the transactions being recognized on oath by the principal as fair. *Medlicott v. O'Donel*, 1 Ball & B. 156. FRAUD; FIDUCIARY SITUATIONS.

Bill to set aside leases obtained by an agent and attorney from his principal, dismissed as to voluntary leases; being pure gift, and no fraud, misrepresentation, &c. with costs as to some, intended as a provision upon, and inducement, to the marriage of the defendant: without costs as to others, the relation of

the parties and the circumstances upon general principles of public policy and utility justifying inquiry. Another lease decreed to be delivered up, the verdict in an issue establishing that a full consideration was not paid. *Harris v. Tremenheers*, 15 Ves. 34. FRAUD FID. SIT.

Demurrer by a married woman to a bill, praying discovery only against her, and relief against her husband as to contracts, &c. by her as agent for her husband; alleging the vouchers, &c. to be in her possession; allowed upon the objection, first, to making a mere agent a party; secondly, to admitting the testimony of a wife in her husband's name. *Le Terrier v. Marg. Aspach*, 15 Ves. 159. HUSBAND & WIFE; DISCOVERY; PL. PARTY.

The only case, in which a person, against whom no relief is prayed, is allowed to be made a party, is that of the agent of a corporation. Where an agent is so involved in a fraud, that the court will charge him with costs, though relief cannot be prayed against him, yet if costs are not prayed against him, a demurrer lies. *Id.* 164. PL. PARTY.

Jurisdiction by bill in equity for the delivery of a specific chattel, a valuable picture deposited by an executor with a dealer in pictures, and claimed to be retained by him as purchased at a very low price; issue directed to ascertain whether there was a sale, who therefore could not purchase without full communication. An objection that the transaction not being in the usual courses of administering assets, could not protect a purchaser from the executor, was therefore not determined. *Louthier v. Louthier*, 13 Ves. 95. CHATTEL SPECIFIC; JURISDICTION.

Valuable leases and agreements for leases, obtained by an agent from his principal, the principal reposing confidence in the agent, and the agent availing himself of the inexperience, negligence and extravagance, of the principal, set aside; or held securities only for money advanced. *Watt v. Croze*, 2 Sch. & L. 492. FRAUD, FID. SIT.

Purchase of a share in a colliery, in trust for the agent and manager, confirmed under particular circumstances, but with reluctance. *Wren v. Kirton*, 8 Ves. 502. *Id.*

The indemnity of the trustees under a deed of trust, does not give the persons employed by them a right as creditors against the trust fund. *Worrall v. Harford*, 8 Ves. 4. TRUSTEES.

Under a general power to sell, assign, and transfer, an agent cannot pledge for his own debt. *De Bouchout v. Goldsmid*, 5 Ves. 211.

Agent employed to sell estates, took them for himself under colour of a fictitious purchase, and sold part; after his death an inquiry was directed to ascertain the real value according to which his estate was to be charged, the principal having an option to take what remained unsold, and the agent having fraudulently prevailed on his principal to execute a lease at a rent under the real value, the agent's estate was charged with the loss arising from that. *Id. Hardwick v. Vernon*, 4 Ves. 411. FRAUD FID. SIT.

A covenanted servant of the E. I. Comp. being a senior merchant, and acting as agent of the company (as resident or chief at one of their factories) is incapable of forming any contract whatsoever, in which the company is interested; so as to derive profit to himself or any otherwise however than for the profit and advantage of the company. And if any such contract be actually made between him as a merchant dealing for himself and the company board of trade in India, in which contract undue advantage is taken by him, by means of his knowledge and influence as resident at the factory, he cannot demur generally on ground of want of equity, to bill for discovery and relief by company. *Henchman v. E. I. Company*,

9 Bro. P. C. 85. PL. DEMURRER; PL. DISCOVERY TENDING TO CRIMINATE.

An agent who was to have no emolument beyond his salary, decreed to account for profit made by a clandestine sale to his principal on his own account. Timber purchased for a colliery: before it was applied to the use of the colliery, some of the owners retired, and it was paid for by those only who remained; the former owners are not necessary parties to a suit by those who remained, against the vendor on account of sale. *Mussey v. Davies*, 2 Ves. J. 317. ACCOUNT; PL. PARTIES.

Among the various acts which in a court of equity constitute fraud, the abuse of confidence is one. A, reposing an unlimited confidence in B, makes him a trustee of his estates, for the purpose of paying his debts; B at the same time negotiates with A, for the absolute sale of those estates to himself, and obtains a conveyance at an under value; B afterwards sells the estates at a very advanced price; this conduct of B was held to be fraudulent, and he was decreed to account to A for the advanced price, with interest and costs; although it appeared, that the purchaser at the advanced price was a considerable loser by his bargain. *Muckreth v. Far*, 4 Bro. P. C. 258. S. C. 2 Bro. C. C. 400. 2 Cox, 320. FRAUD FID. SIT.

An agent employed by a young man to sell a reversionary legacy, shall not be permitted to be purchaser thereof himself at an under value, and nothing shall amount to a confirmation of such a transaction, until the vendor be fully apprized that he might be relieved against the original transaction, if he chose to impeach it. *Cove v. Ballard*, 2 Cox, 253. S. C. 1 Ves. J. 215. 3 Bro. C. C. 117. FRAUD FID. SIT.; CONFIRMATION.

At a public auction, the vendor's known agent bade for the plaintiff the vendee, and under the circumstances the sale was damped thereby, a specific performance refused on that account. *Twining v. Morrice*, 2 Bro. C. C. 326. SALES BY AUCTION; FRAUD.

Agents must sue in name of principal. *Leigh v. Thomas*, 2 Ves. 313.

Voluntary conveyance by one lately come of age, to an agent of a reversion of no great value, for a nominal consideration of 180*l.* and containing covenants, as in the case of a purchase, not absolutely rescinded, as not being a case of fraud, but the transaction modified by decree that the agent should release the covenants at his own expence, and remove the impropriety of them as referable to a gift. *Gray v. Mansfield*, 1 Ves. 379. FRAUD FID. SIT.

Service on agent of principal in Jamaica, good. *Hyde v. Foster*, Dick. 102.

A factor who sells goods for a principal may bring an action in the name of the principal against the vendee, and make himself a witness; or a vendor of goods to a factor for the use of his principal, may maintain an action against the principal, and the factor may be a witness for the vendor. *Snee v. Prescott*, 1 Ark. 248.

A being standing counsel and manager for B, obtained leases for long terms of different parts of his estate, and a release of the equity of redemption of other part; on a bill brought to set aside these transactions for fraud, it was proved that A had as great a power over B as a parent has over a child, and could persuade him to do whatever he pleased; but it being proved on the other side, that the purchase money was nearly equal to the value of the land, and that A had in many respects been exceedingly serviceable to B, the bill was dismissed. Decree of the court of chancery in Ireland, affirmed. *Ld. Kingsland v. Burnewall*, 4 Bro. P. C. 154. FRAUD FID. SIT.

IV. ACCOUNTS BETWEEN; AND HEREIN, OF ALLOWANCES TO AGENT.

An executor in India is entitled to a commission of 5*l.* per cent. on all assets of a testator collected by him there, including the assets which he retains in respect of a legacy to himself, not given to him in the character of executor, and including monies belonging to the testator, which were in the hands of a commercial house in which the executor was, and the testator had been a partner. *Cockerell v. Barber*, 2 Russ. 585. EXOR., WHEN ENTITLED TO COMMISSION.

In an action by the assignees of a bankrupt underwriter against a broker, for premiums due to the bankrupt; semble, that the broker cannot set off a loss on a policy, effected by him as agent, without a commission *del credere*, where there has been no adjustment, though the loss took place before the bankruptcy. *Baker v. Langhorn*, 2 Marsh. 215. BANKCY. SET OFF.

Reasonable commission, 2*s.* 6*d.* per cent. allowed to a country agent on discounts, though for a person resident in London, and paid through a banker there, if not colourable. *Exp. Jones*, 17 Ves. 332. S. C. 1 Wils. 29. BANKER'S COMMISSION.

A reasonable commission beyond legal interest, for extra incidental charges, as upon agency in the remittance of bills, not usurious. *Baynes v. Fry*, 15 Ves. 120. USURY; COMMISSION, CHARGE OF.

Claims by the agent for expences on account of the principal, which from the conduct of the agent undertaking the business without authority or agreement, could not be ascertained, disallowed. *Beaumont v. Boulthée*, 11 Ves. 358. ACCOUNT.

Agent, by the desire of his principal, keeping large sums in his hands, for which he was to be responsible from time to time and duly accounting, not liable to interest, even supposing he employed it. *Ld. Chedworth v. Edwards*, 3 Ves. 48. INTEREST.

Account opened, and general account decreed against an agent who was also tenant, to his principal in respect of fraud; and laches in landlord, under circumstances not an objection. *Beaumont v. Boulthée*, 7 Ves. 599. 5 Ves. 485. ACCOUNT SETTLED.

Agents, being also appointed executors of the principal, are not entitled to commission upon remittances from India by the testator, not received till after his death. *Hovey v. Blakeman*, 4 Ves. 596. EXECUTOR; COMMISSION; FOREIGN LAWS.

Account between principal and agent settled from loose papers, the agent having kept no regular books after his death, liberty was given to surcharge and falsify upon allegation of errors since discovered. *Ld. Hardwicke v. Vernon*, 4 Ves. 411. ACCOUNT.

A, by will, devises all his estates to his eldest son in tail male, with remainders over; part of the property consisted of an estate in Jamaica, and therefore the testator added the following clause: "and I recommend to my executors, that all sugars, rum, and other plantation produce that is sent to the port of London, be consigned to the house of C. E. & Co. until such time as any of my sons shall set up in the business of a sugar factor; then my desire is, that the consignments may pass through his or their hands." C, a natural son of the testator's set up in the business of a sugar factor during the minority of the devisee, and accordingly got the consignments; upon the devisee's coming of age C accounted with him, but insisted on being entitled to his commission, not only upon the produce which he had actually sold, but also upon the produce which had been consigned to him, but was not then arrived in the port of London. Held, that the words of the above clause were not imperative, or amounted to words of bequest in favour of C, but were recommendatory only. Held also, that C was entitled to a commission only upon what he had

actually sold, and not upon what was only consigned, but not delivered to him; decretal order affirmed, *Beckford v. Beckford*, 4 Bro. P. C. 38. **WILL, CONSTRUCTION OF; ACCOUNT.**

#### V. EFFECT OF BANKRUPTCY OR INSOLVENCY OF PRINCIPAL OR AGENT OR FACTOR, AND THEIR RESPECTIVE LIEN ON CONSIGNMENTS.

Factor's lien both for his expenditure on the goods in his possession, and his general balance, lost by a special contract for a particular mode of payment. So in various trades. *Covell v. Simpson*, 16 Ves. 280. **LIEN.**

A agreed to sell goods to B to be accounted for in part of a debt to B; C with notice, agreeing to sell the goods as factor, not allowed to retain for a debt to him from A. *Weymouth v. Boyer*, 1 Ves. J. 416. **NOTICE.**

Bill sent by a correspondent to a merchant to be applied to a particular use; if the merchant becomes bankrupt before the money is received, the correspondent has a special lien and shall be preferred to the general creditors, *aliter* where bills are sent on a general account. *Exp. Orsell*, Amb. 297. **LIEN.**

Where goods consigned to a factor continue in specie, and are found in his hands at the time of the bankruptcy, the principal is entitled to them and not the creditors at large. *Exp. Dumas*, 1 Atk. 234. *Godfrey v. Furzo*, 3 P. W. 186. *Mase v. Cadell*, Comp. 233. Also, if notes and not money be taken for the goods, they shall belong to the principal. *Ibid.* **BANKCY. REPUTED OWNERSHIP.**

Factor gains a lien on goods consigned to him from his correspondent for the balance of his account, as well as for the duties, &c. and may retain for such balance; but if he parts with the possession of the goods to the owner, he loses the lien for the balance of accounts. *Kruger v. Wilcol*, Amb. 252. S. C. 1 Dick. 269. **CONSIGNMENT; LIEN.**

Where agents abroad are in disburse for their principal, and upon being doubtful of his circumstances, make bills of lading to their own order indorsed in blank; notwithstanding these bills of lading come to the principal's hands; yet if the agent's partner in London writes them word that their principal is become bankrupt and desires them to send the bills of lading, and an order to the captain to deliver the goods to him, he may retain them for himself and company against the assignees under the commission till paid and reimbursed so much as the partnership is in advance. *Snee v. Prescott*, 1 Atk. 245.

A factor makes an agreement with the master for the hire of a ship on his own account, for 48l. per month, and not on the part of the merchants his principals; they are not liable, nor are their goods put on board to satisfy the master's demand, but they are liable to pay the factor the freight for their cargo, and as he was bound by the charter-party, which gave the master a specific lien on the goods, the master has a right to be paid in the first place, before the assignees of a factor under a commission of bankruptcy, for the assignees only stand in the bankrupt's place. So, if a factor becomes bankrupt, and the merchant's goods are not mixed with his, the assignees shall not have them. Whoever lets a ship to hire, must take care that the hirer is substantial, for if he be not competent, the master must pay for his neglect; yet a factor may retain goods to pay custom for salvage. *Paul v. Birch*, 2 Atk. 621.

Merchant's goods in hand of factor are not liable to debts of a superior nature: otherwise of money. *Whitcomb v. Jacob*, 1 Sal. 160.

*A. employs B as his factor to sell cloth, B sells*

cloth on credit, and before the money is paid, dies, indebted by specially more than his assets will pay; this money shall be paid to A, and not to the administrator of B, as part of his assets, but thereout must be deducted what was due to B for commission: a factor is in nature of a trustee only, for his principal. *Burdett v. Willett*, 2 Vern. 638. **DEBTOR & CREDITOR; ADMON. OF ASSETS; LIEN.**

Administrator of a clothier brings an action against the factor for cloths sent by the clothier to the factor; the factor cannot in equity deduct out of the value of the cloth, the money owing to him from the clothier. *Chapman v. Derby*, 2 Vern. 117. **SET OFF.**

A surviving factor must account both for himself and his co-factor, though admitted that the executrix of the deceased factor was compellable, and that among merchants, the *jus accrescendi* has no place. *Holtcomb v. Rivers*, 1 Ch. Ca. 127. **ACCOUNT.**

If a factor evades the customs of goods due to a foreign prince, and thereby incurs the punishment of a felon, and the forfeiture of the whole freight: he shall have the benefit, for he ran the risk. *Smith v. Orenden*, 1 Ch. Ca. 25. *Knipe v. Jesson*, 1 Ch. Ca. 76. S. P. Secus, if the factor evades the customs due to the king of England, for that is a fraud. *Por v. Vandoal*, or *Boore v. Vande*, 1 Ch. Ca. 30. Nels. Ch. Rep. 87.

#### VI. NOTICE TO AGENT, ITS EFFECT ON PRINCIPAL.

Whether notice to an attorney in one transaction, shall be notice to him in another transaction, must in all cases depend upon the circumstances. *Mountford v. Scott*, 1 Turn. & R. 280. **SOL. & CLIENT.**

Notice to an agent, in order to fix principal, must be given in the same transaction by which they are so related, even in the case of attorney for vendor and vendee. *Mountford v. Scott*, 3 Mad. 34.

Whether publication of decree of court in the provincial newspaper, is a sufficient notice to agent in that neighbourhood of its contents, so as to commit him for breach of injunction? *Jewes v. Morgan*, 5 Price, 518. **PR. INJUNC., BREACH OF.**

Purchaser having employed the vendor's agent, who had notice of an incumbrance, charged with notice, notwithstanding the purchase was made under the sanction of the court, and an infant was interested in it. *Toulmin v. Steere*, 3 Mer. 210. **VEND. & PURCH.; PR. SALE JUDICIAL.**

An agent receiving notes from an executor, payable to him as executor, as a security for advances by the principal to the executor on his private account, and not as executor, affects his principal, with notice that it is a dealing with an executor for the assets for a purpose foreign to the trusts he was to discharge; the principal is thereby a party to the *devastavit* and liable to the consequences of it; and cannot therefore retain the notes against those claiming under the will. *Downes v. Power*, 2 Ball & B. 491. **EXOR.; DEVASTAVIT.**

Notice actual or constructive, as to an agent, which must be while concerned for the principal and in the course of the transaction which is the subject of the suit. *Heirn v. Mill*, 13 Ves. 120.

An agent must be confidentially employed by his principal, in order to affect the latter with constructive notice. *Chandos v. Brownlow*, 2 Ridgw. P. C. 394.

Notice to agent, held to affect principals, and no difference in this case by his being owner of the estate. *Sheldon v. Cur*, 2 Eden, 224.

Notice to agent placing out money on mortgage, of a prior judgment, shall affect the employer. *Ashley v. Baillie*, 2 Ves. 370.

No constructive notice from title deeds, &c. laid

before counsel or attorney, or anything that could not be supposed to make an impression on the memory. *Id. ib.*

Where by a transaction foreign to the business in hand, a counsel or attorney employed to look over a title has notice, that shall not affect the purchaser. *Louthier v. Carlton*, 2 Atk. 242. S. C. Ca. Temp. Talb. 186. **VEND. & PURCH.**

To affect purchaser by notice to his counsel, it should be in the same transaction. *Fitzgerald v. Fauconberge*, Fitzgib. 207. *Id.*

A agrees to take a lease of certain lands, but previous to signing articles he has notice that B has a previous agreement for lease. B disregards notice and obtains lease in his son's name. Held, that notice to father affected son. *Cooté v. Mammon*, 5 Bro. P. C. 355.

A, having notice of an incumbrance, purchases in the name of B, and then agrees that B shall be the purchaser, and he accordingly pays the purchase-money without notice of the incumbrance. Though B did not employ A, nor knew anything of the purchase till after it was made, yet B approving of it afterwards, made A his agent *ab initio*, and therefore shall be affected with the notice to A. *Jennings v. Moore*, 2 Vern. 609. *Blankarne v. Jennen*, 2 Bro. P. C. 278. **VEND. & PURCH.**

A makes three several mortgages to B, C and D, and in the last mortgage B is a party, and agrees that after he is paid, that he will stand a trustee for D. Decreed, that C shall be paid before D; for all the security being transacted by the same scrivener, it was notice to D. *Brotherton v. Hutt*, 2 Vern. 574. **MORTGAGE, PRIORITY OF SECURITY.**

Where notice to the party's counsel, is notice to the party. *Preston v. Tubbin*, 1 Vern. 287.

## PRINCIPAL AND SURETY.

See also **BANKCY.** XIII. 5.

### I. GENERALLY, AND OF CONTRIBUTION BETWEEN CO-SURETIES.

#### II. SURETY'S LIABILITIES.

#### III. SURETY'S RIGHTS IN BANKRUPTCY, AND GENERALLY AGAINST PRINCIPAL AND HIS ESTATE.

#### IV. SURETY, HOW DISCHARGED.

### I. GENERALLY, AND OF CONTRIBUTION BETWEEN CO-SURETIES.

Where creditor who has proved is fully paid by surety, he cannot sign certificate. *Rutcliffe v. Gunson*, 6 Mad. 193. **BANKCY. CERTIFICATE.**

Right of contribution between co-sureties, whether by separate instrument, or by the same instrument. *Mayhew v. Crickett*, 2 Swan. 185. **CONTRIBUTION.**

In the case of an ordinary money bond, there is no distinction upon the face of it between principal and surety. Secus, in the case of an indemnity bond, where the surety expressly stipulates for the act of his principal. *Antrobus v. Davidson*, 3 Mer. 578.

A surety may in equity compel his principal to relieve him of his liability by payment of the debt. *Id. ib.*

All obligors in joint and several bond, principals and sureties, must be parties generally. Exception, where the surety is insolvent or has paid nothing. *Cockburn v. Thompson*, 16 Ves. 326. **PL. PARTIES.**

No contribution in favour of one surety against another; his engagement, according to the bond, and parol evidence, which was held admissible, being not as co-surety, but without the privity of the other; as a distinct collateral security, limited to the default of

payment by the principal and the other surety. *Craythorne v. Swinburne*, 14 Ves. 180. **CONTRIBUTION.**

Right to contribution as between co-sureties; whether by the same or several instruments, whether prior or not, and whatever their number, depending rather upon a principle of equity than contract, except as upon the implied knowledge of that principle. *Id.* 164. *Id.*

Right of contribution among co-sureties, limited by the extent of their respective contracts; as, where they are for different sums. *Id.* 165.

This doctrine of contribution amongst sureties is not founded in contract, but is the result of general equity on the ground of equality of burthen and benefit. *Dering v. El. Winchelsea*, 1 Cox, 318. **CONTRIBUTION.**

On a bill filed by a surety against his co-surety and the principal, for a contribution from the co-surety, in respect of money actually paid by the plaintiff for the principal, it is not necessary to prove the insolvency of the principal; otherwise, where the principal is not a party to the suit. *Lawson v. Wright*, *id.* 275. **PL. PARTY; PR. EVIDENCE; CONTRIBUTION.**

A bill by the surety of an officer of commissioners of excise, after being sued upon his bond for an account, alleging the officer had over-paid, the commissioners must be parties. *Makepeace v. Needler*, Bun. 291. **PL. PARTY.**

A is bound for B, and has a counter bond. Equity will compel B to pay the defendant, though A is not sued. *Ranelagh v. Hayes*, 1 Vern. 190. **PR. BILL. QUIA TIMET.**

Suit by one surety against another for contribution; the representatives of another surety, who died insolvent, ought to be parties. *Hole v. Harrison*, Rep. T. Finch, 15. **PL. PARTIES; EXORS. & ADMORS.; CONTRIBUTION.**

## II. SURETY'S LIABILITY.

A, on taking B as a clerk, took a bond from him, and a surety to secure his duly accounting for his receipts. No time was fixed for the continuance of the service; that it was to be determinable at the option of either party. The surety died. His executrix gave notice to A, that he should no longer consider himself liable on bond. A read the notice to B, and required him to execute a new bond with another surety, which was done. Then B died, and deficiencies were found in his accounts subsequent to the notice. An injunction obtained as of course by the executrix to restrain an action on the bond, was dissolved. *Gordon v. Culvert*, 2 Sim. 253.

A receiver who had omitted to account regularly became bankrupt, being indebted to the trust estate in a large sum, and for some time no steps were taken to have the accounts duly passed. Held, that under the particular circumstances of the case, his sureties were not liable to pay interest on the balance found due from him, though he himself, if solvent, would have had to pay such interest. Semble, that in general the sureties of a receiver are answerable for such interest, as well as for such principal as the receiver himself is liable to pay. *Dawson v. Raynes*, 2 Russ. 466. **PR. RECEIVER SURETIES OF, LIAB. OF.**

Proof allowed against each person liable upon bill or bond, if nothing is received before bankruptcy, until 20s. in the pound is received, without distinction whether principals or sureties. *Exp. Rushforth*, 18 Ves. 416. **BANKCY., PROOF IN.**

Relief upon a lost bond against sureties, the principal being out of the jurisdiction, upon giving an indemnity against the demand of the plaintiffs, or persons claiming under them by virtue of the bond, and

such costs, damages, and expences, as defendants may be put to by loss of the bond. *E. I. Comp. v. Biddain*, 9 Ves. 462. **BOND, LOST.**

A writ of *ne exeat regno* was granted in respect of a debt for which the plaintiff had made himself liable on the defendant's account, but which he had not yet paid. *Sealy v. Laird*, 3 Swan. 368. **NE EXEAT REGNO.**

Second tenant in tail, joins in a mortgage and bond with the first, who receives the money lent. Held to be only a surety, and the real estate not liable in aid of the personal estate of the first, although he had joined in hopes to prevent a recovery. *Robinson v. Cee*, 1 Ves. 251. **TENANT IN TAIL; CHARGE ON REAL ESTATE; ADMON. OF ASSETS.**

A is principal in a recognizance of 5000*l.*, and B and C sureties. A, afterwards jointures his wife, before marriage in some lands, without notice either to the wife or her friends of this recognizance, and devises his real and personal estate to B, one of his sureties, and dies. First, the personal estate of A, the principal, shall be applied towards the recognizance; then his lands devised, the devisee being a volunteer; next the paraphernalia of the wife of A, the principal; and lastly, the two sureties shall contribute to make up the deficiency. *Tynt v. Tynt*, 2 P. W. 542. **MOS. 192. RECOGNIZANCE; ADMON. OF ASSETS.**

✓ If bond is lost, equity will set it up against surety, as well as principal debtor. *Sheffield v. Ld. Castleton*, 1 Eq. Ab. 93. **LOST DEEDS, &c.**

A surety not chargeable in equity, further than he can be by law. *Ratliffe v. Grays*, 1 Vern. 196.

Sureties relieved from the penalties of the bond in chancery. *Cary*, 12.

### III. SURETY'S RIGHTS IN BANKRUPTCY, AND GENERALLY AGAINST PRINCIPAL AND HIS ESTATE.

The liability of sureties in a replevin bond is limited to the amount of the rent in arrear at the time of the distress and costs, and they are not liable for subsequent rent; and therefore, where on the trial of an action of replevin, a verdict was taken by agreement between the plaintiff in the action, and the avowant for the penalty of the bond subject to reference, not only as to the amount of the rent due at the time of the distress, but of the rent then due, and also of certain penal rents, the sureties being no parties to such agreement, and the arbitrator awarded damages to the full amount of the penalty of the bond: the court held, that the sureties were entitled to be relieved from the bond, it appearing that the rent originally distrained for had been fully paid before the trial of replevin. *Ward v. Henly*, 1 Y. & J. 285.

A surety for part of a debt is not entitled to the benefit of a security given by the debtor to the creditor, at a different time, for another part of the debt. *Wade v. Corpe*, 2 Sim. 155. **DEBTOR & CRED.**

A surety paying after the bankruptcy to a creditor who has proved, can only stand in his place upon the bankrupt's estate, and in case of a surplus, can claim no interest which the creditor could not have claimed. *Exp. Houston*, 2 G. & J. 36. **BANKCY. PROOF.**

Where two persons execute a bond, the one as principal, the other as surety, and no other assurance is executed at the time, the surety paying the bond debt, is a simple contract creditor only of the principal. *Copis v. Middleton*, 1 Turn. & R. 224. **SIMPLE CONTRACT CREDITOR; BOND.**

It is a general rule, that in equity a surety is entitled to the benefit of all the securities which the creditor has against the principal; the rule, however, must be qualified, by considering it to apply to such

securities as continue to exist, and do not get back upon payment to the person of the principal debtor. *Id.* 229.

Where a bond is given by principal and surety, and at the same time a mortgage is made for securing the debt, the surety, if he pays the bond, has a right to stand in place of the mortgagee. *Id.* 231. **ADMON. OF ASSETS.**

Surety paying the debt after proof by the creditor under the commission, is entitled to stand in the place of the creditor for the debt paid, not only in respect of dividends, but of the certificate. *Exp. Gee*, 1 G. & J. 330. **BANKCY. PROOF.**

Surety in a bond for the bankrupts, after the bankrupts obtain their certificate, joins with them in a new bond to the representatives of the creditor, and the old bond is delivered up to the surety; held, that this was not equivalent to payment by the surety so as to enable him to prove under the commission. *Exp. Sergeant*, 1 G. & J. 183. **AFFID. 2 G. & J. 23. Id.**

Surety under an annuity deed, redeeming the annuity subsequent to the bankruptcy of the grantor of the annuity, is entitled to the benefit of the grantee's proof under the grantor's commission, and to proceed by action against the grantor, having obtained his certificate, for the arrears of the annuity subsequent to the commission. *Watkins v. Flanagan*, 1 G. & J. 199. **S. C. 6 Mad. 280. Id.**

Sureties are entitled to the benefit of every security which the creditor has against the principal. *Mayhew v. Crickett*, 2 Swan. 191. **DEBT. & CRED.**

If a surety become bankrupt, the creditor cannot, under the 49 G. 3. c. 121. s. 8. prove the debt if it become due after the bankruptcy. *Exp. M'Millan*, Buck, 287. **BANKCY. PROOF IN.**

Settlement by a husband, of money, in trust to pay the interest to the wife during her life, with a proviso against anticipation. The husband joins with a surety in a covenant to pay an annuity, secured by an assignment by the wife, of the interest to become due, and of the principal sum in the event of there being no children of the marriage: held, the surety not entitled to any remedy in equity under the assignment in respect of his payment of the arrears of the annuity recovered against him by an action upon the covenant, although he had no notice of the proviso against anticipation in the settlement; a charge of fraudulent concealment not being sufficiently established: and even if fraud had been fully made out against the wife, it seems it would not be sufficient to support the assignment, which would be to give her a power of alienation against the intention of the settlor. *Jackson v. Hobhouse*, 2 Mer. 483. **HUSB. & WIFE; SETTLEMENT; FRAUDUL. CONCEALMENT.**

Surety entitled to dividends on the debt proved by their satisfied principal. *Exp. Brook*, 2 Rose, 334. **BANKCY. PROOF.**

Surety paying off specialty debts is to be considered as a specialty creditor. *Robinson v. Wilson*, 2 Mad. 434. **DEBT; SPECIALTY CREDITOR.**

The drawer of a bill of exchange, though not strictly a surety for the acceptor who is generally primarily liable, may be in the nature of a surety; but the drawer, if first liable by the real nature of the transaction, with reference to the distinction, whether the acceptor had effects or not, is to have relief as a "person liable" within the stat. 49 G. 3. c. 121. s. 8. *Exp. Yonge*, 3 V. & B. 40. **BILL OF EXCHANGE.**

Surety for a receiver indemnified out of the balance due to him. *Glossop v. Harrison*, 3 V. & B. 134. **COOP. 61. S. C. INDEMNITY; RECEIVER.**

Surety cannot prove for interest due and paid subsequent to commission under the 6 G. 4. c. 16. s. 52. *Exp. Wilson*, 1 Rose, 137. **INTEREST; BANKCY. PROOF.**

The court will not, sitting in bankruptcy, on behalf

of the sureties of a bankrupt, direct a sale of mortgaged premises for payment of the debt secured by recognizance, or for payment of any other security, except a mortgage. *Exp. Usher, 1 Ball & B. 197. SALE; BANKCY.*

Annuity bond forfeited when the grantor was discharged under an insolvent act, which provided that future estate should not be discharged, the penalty being less than the subsequent arrears, was allowed as the debt, and not only in favour of the purchaser of an annuity, but also of a co-obligor as surety having compounded with the purchaser, and obtained possession of the securities, by repaying the money advanced with the arrears then due, being at that time less than the penalty. *Butcher v. Churchill, 14 Ves. 569. BOND PENALTY.*

Surety for indemnity to a limited amount having paid to the extent of his engagement, entitled to dividends, upon proof by the creditor under the bankruptcy of the principal debtor, subject (see *Exp. Turner, 3 Ves. 243.*), to a deduction of the proportion of dividend upon the residue of the debt proved beyond that for which the surety was engaged, supposing that expunged. The surety not entitled to the benefit of the proof against other estates, upon a distinct security. *Paley v. Field, 12 Ves. 435. BANKCY. PROOF IN.*

Surety by bond for advances generally, but under a limited penalty, is not liable beyond that amount. Therefore, paying that sum, he is entitled to a proportion of the dividends on the proof by creditor to a greater amount under the bankruptcy of the principal debtor. *Exp. Rushforth, 10 Ves. 409. Id.*

Surety in bond may compel creditor to prove under bankruptcy of principal, and creditor will be a trustee of dividends for surety paying the whole: but party liable with others upon bill of exchange, cannot raise that equity by payment subsequent to proof of holder, until he has received 20s. in pound. *Id. 414. DEBT. & CRED.; BANKCY. PROOF IN; BILLS OF EXCHANGE; MARSHALLING SECURITIES.*

It is a rule, that surety charged for the whole debt, and paying only part, has no equity to stand in the place of party paid. *Id. 420. BANKCY.*

Surety depositing money, and indemnifying against expence, &c. may compel creditor to go against principal, and even to prove under commission of bankruptcy for benefit of surety. *Wright v. Simpson, 6 Ves. 734. DEBT. & CRED.; BANKCY. PROOF IN.*

Holder of bill of exchange may be compelled to prove under bankruptcy of acceptor for benefit of drawer. *Id. Id. BILL OF EXCHANGE, DRAWER AND INDORSEE; BANKCY. PROOF IN.*

B was a surety for A, in a joint bond to C and D, for 180,000*l.* conditioned to pay 90,000*l.* with interest, at 5 per cent. By a counter bond of equal date, A was bound to B, in a like penalty; with condition to indemnify B, his heirs, executors, &c. from payment of the said 90,000*l.* and interest, and from all damages he might sustain on account of the non-payment of the said sum, and interest. After the deaths of A and B, the executors of B were called upon, and did pay to C and D 22,000*l.* on account of the principal, and several large sums for interest on A's debt. In a suit for the administration of A's estate, the court allowed the executors of B to come in as creditors for the several sums so paid by them, and for interest on the 22,000*l.* but not for interest on the several sums of money paid for interest on the original debt. *Rigby v. Macnamara, 2 Cox, 115. INTEREST; BOND.*

The E. I. Comp. having compelled payment from a surety in India by their power over him, as one of their servants, without an account or proceeding against the principal, though solvent, and otherwise under harsh circumstances, he was restored to the

same situation by a decree for re-payment, with interest at 5 per cent. upon giving security for re-payment in case in a future suit by the company, he should be held liable; the court would not, upon the circumstances, give Indian interest. *Law v. E. I. Comp. 4 Ves. 825. E. I. COMP.; INTEREST.*

Bond of indemnity to a surety for payment of instalments, the first of which was not due till after the bankruptcy of the principal, cannot be proved, though payable before the bankruptcy. *Exp. Walker, 4 Ves. 385. BANKCY. PROOF IN; BOND.*

A and B join in executing a bond and warrant to C, who entered judgment thereon, and issued execution against A; he being merely a surety, filed bill to have judgment assigned upon payment of the debt, which was decreed. *Hill v. Kelly, 1 Ridg. L. & S. 265.*

A surety admitted under the bankruptcy of his principal as to all recovered against him and his costs, there being a surplus. *Exp. Mills, 2 Ves. J. 302. BANKCY. PROOF IN.*

A surety by bond for advances generally, but under a limited penalty, is not liable beyond the penalty; by paying the penalty he is entitled to a proportion of the dividends from a proof by the creditors to a greater amount under the bankruptcy of the principal debtor; and a surety may compel the creditor to prove under the commission against the principal, and to become a trustee of the dividends for such surety having paid the whole. *Exp. Wood, cor. Id. Thurlow, Bridg. Index. BOND PENALTY; BANKCY. PRINC. & SURETY.*

A being indebted to B, lodges several securities for money with him as collateral securities for the debt; A afterwards borrows a further sum of money of B, for which C becomes his surety; A becomes bankrupt, and B calls upon C to pay the second debt. The securities in the hands of B, being more than sufficient to pay the first debt, C shall have the benefit of the surplus in reduction of the second debt. *Praed v. Gardiner, 2 Cox, 86. BANKCY. SURPLUS.*

Surety paying a debt after the act of bankruptcy, but before the commission taken out against the principal, cannot prove this debt under the commission, nor can he stand in the place of the creditor if the debt be paid by the surety before any proof made by the creditor under the commission. *Exp. Badger, 1 Cox, 28. BANKCY. PROOF IN.*

Executor surety with testator for another, allowed to retain out of estate, whole amount due on bond. *Mathurst v. De la Zouch, Dick. 460.*

In cases of a bond debt, interest is computed only to the commission. In the case of principal and surety, if principal become bankrupt, the surety cannot prove for interest paid by him after date of the commission. *Francis v. Rucker, Ambl. 674. BANKCY. PROOF OF; INTEREST; BOND.*

Bill by principal debtor for injunction being dismissed, the bail cannot bring another taking up the equity, unless for collusion. *Anon. 2 Ves. 630.*

One of two joint debtors becomes a bankrupt, and the creditor proves his whole debt under the commission, but no dividend made; that creditor, though he receive a composition from the other debtor, may still receive a dividend upon his whole debt, as proved, till he obtain 20s. in the pound. It would have been otherwise if he had received a dividend before the bankruptcy. *Exp. Wyldman, 2 Ves. 113. S. C. 1 Atk. 109. BANKCY. PROOF.*

Bill of surety in a bond, to have it assigned after having paid its amount, dismissed with costs, as useless. *Gannon v. Stone, 1 Ves. 338.*

Principal and surety, on a note payable by instalments; after one payment became due, principal discharged under the insolvent debtor's act. Bill by creditor, and decree against surety and him, to have

remedy over against effects of the principal for the first money due on the first payment, and the common decree for the rest. *Daniel v. Carrolls*, Amb. 611. **DEBTOR & CRED.**

Where the surety pays off debt in bankruptcy, he is entitled to have an assignment of the security to enable him to obtain satisfaction for what he has paid above his own share. *Exp. Crisp*, 1 Atk. 133. **BANKCY. ASSIGNMT. OF SECURITY.**

A mortgaged his own estate, and his wife joined him in charging her's; this is a pledge, and the wife shall stand in the mortgagee's place. *Parteriche v. Penlett*, 2 Atk. 384. In *Clinan v. Cooke*, 1 Sch. & Lef. 35. Ld. Redesdale said, this case was imperfectly reported by Atkyns. **ADMON. OF ASSETS; MARSHALLING ASSETS.**

If A borrows money for B, on a mortgage of his estate, the covenant in the mortgage deed to pay the money will bind him for whom it is borrowed. The mortgagor may file a bill against his debtor to have his estate disencumbered, and so may every surety against his principal, for he shall not be put to his *indeb. assump.* *Lee v. Rook*, Mos. 318. **COVT. WHO BOUND BY.**

A, together with B and C, as his sureties, executed a bond to D, for securing 300*l.* and interest; the debt is paid by C, with the proper money of A, but C neglects delivering up the bond to A, to be cancelled; C afterwards procures this bond to be assigned as a collateral security for a debt of his own: held, that this assignment was a gross fraud in C, and a perpetual injunction was granted to restrain all further proceedings upon the bond. *May v. Harman*, 4 Bro. P. C. 156. **FRAUD, ASSIGNMT.**

The principal in a bond being arrested, gave bail, and judgment is had against the bail; on a bill by the sureties, who had been sued on the original bond, and paid the money, decreed the judgment against the bail to be assigned to them in order to reimburse them what they had paid, with interest and costs. *Parsons v. Bridglock*, 2 Vern. 608. **ASSIGNMT. OF SECURITY.**

Bond creditor shall have the benefit of all counter bonds or collateral security given by debtor to surety. *Maure v. Harrison*, 1 Eq. Ab. 93.

A, bound with his father for the debts of the father, who enters into a statute to the son to pay the debts, and indemnify the son; one of the creditors delivers up his bond, and takes a mortgage from the father. The son shall not set up the statute to defeat the mortgage. *Legriel v. Barker*, 2 Vern. 39.

A is indebted by bond, (in which J is bound as security) and also by simple contract to B; A states an account of both debts with B, and makes a bill of sale for securing the balance, which proves deficient. On a bill by the surety, decreed the money arising by the bill of sale should be applied towards discharge of both debts in proportion. *Perris v. Roberts*, 1 Vern. 34.

Surety having paid defendant for fear of arrest, shall recover same in chancery. *Cary*, 19.

#### IV. SURETY, HOW DISCHARGED.

A creditor pending an action on a guarantee against a surety who contests the question of his liability, proves the debt under a commission of bankrupt against the principal debtor, and, by his signature, enables the bankrupt to obtain his certificate, though the surety had given him notice not to sign it: the surety is not thereby discharged from his liability on the guarantee. *Browne v. Carr*, 2 Russ. 600.

A surety is not discharged by the creditor's taking

from the debtor a cognovit in an action he had brought against the debtor, with a stay of execution until a day earlier than that on which judgment could have been obtained in the regular course. *Hulme v. Coles*, 2 Sim. 12.

A court of equity will not relieve a surety by bond upon the ground of the creditor having given time to the principal debtor, unless there has been an express and positive contract between them for that purpose. *Heath v. Key*, 1 Y. & J. 434.

The liability of a surety in a bond is not discharged by the delay of the creditor in suing for the debt, or by the circumstance of the principal debtor afterwards executing to the creditor another bond for a larger sum. *Lyre v. Everett*, 2 Russ. 381.

If by neglect of the creditor the benefit of some of securities for the debt is lost, the surety is *pro tanto* discharged. *Crope v. Butler*, 28. & S. 457.

A and B entered into a joint and several bond for securing a sum of money advanced to A by his bankers. After the execution of the bond, and before it became due, A paid money to the bankers, and he continued to draw upon them until his banking account was overdrawn. Some years afterwards an account was settled between A and the bankers, in which the whole money secured by the bond was treated as remaining due from A. The bankers then took a warrant of attorney from A for securing payment of the balance found due upon the settlement by instalments at distant periods. Several of the instalments were paid, but A became bankrupt before the whole debt was liquidated. It being proved that B was privy to the settlement of accounts between A and the bankers, and to the arrangement respecting the warrant of attorney: held, first, that B was not discharged by the time given to A; and secondly, that the bond was not discharged by the course of payment, the money paid by A to the bankers being applicable to the banking account, and the bankers being entitled to hold the bond and warrant of attorney as distinct securities. Upon the occasion of the bond being executed, the title deeds of an estate purchased by A were deposited with B as an indemnity against his liability upon the bond; the legal interest in the estate was likewise conveyed to B, and it was agreed that he should also hold it as an indemnity. After the death of B, his executor delivered up the title deeds to A, upon a false representation by him that the bond had been paid off. Held, that a conveyance of the legal estate could not be compelled until the indemnity was worked out, and that the lien upon the title deeds remained. *Tyson v. Cor*, 1 Turn. & R. 395. **BOND; INDEMNITY.**

Where sureties are bound after a certain time's demand, creditor may make arrangements with debtor for time, &c. prior to that interval, so that it does not interfere with sureties' recourse back on debtor. *Prendergust v. Devey*, 6 Mad. 124.

It is competent for creditor's executing a deed of composition with the principal debtor, and certain of his sureties, to reserve their remedies against other sureties. *Exp. Carstairs*, Buck. 560. See *Exp. Glendinning*, id. 517. **DEED OF COMPOSITION.**

If a creditor execute a deed of compromise with the principal debtor, he thereby discharges the surety. Not so if it be stipulated in the deed of composition that the remedies against the sureties shall be reserved. Parol evidence of the understanding of the parties to the deed that the remedies against the sureties should be reserved, cannot be admitted. *Exp. Glendinning*, Buck. 537. See *Exp. Carstairs*, id. **DEED OF COMPOSITION; PAR. EVIDENCE, PAROL.**

Where action in replevin is by agreement referred to arbitration, and without consent or privity of surety in bond, time for award is enlarged, surety be-



comes charged. *Burmaker v. Moore*, 7 Price, 228. ENLARGEMENT OF TIME FOR AWARD.

By giving time to the principal, the grantee of an annuity exonerates the surety for past and future arrears. *Eyre v. Bartrop*, 3 Mad. 221.

Creditor giving time to debtor without notice to surety, releases him, and injunction granted to restrain proceedings against him at law. *Gov. & Bank of Ireland v. Beresford*, 6 Dow, 233. INJUNCTION.

A creditor whose debt is secured by a warrant of attorney, having received promissory notes from the debtor and two sureties, and afterwards entered up judgment and taken the goods of the debtor, and without the knowledge of the sureties withdrawn the execution, has discharged sureties; but a subsequent promise to pay the debt by one surety, knowing that the execution has been withdrawn, renews his liability. *Mayhew v. Orickett*, 2 Swan. 185. DEBTOR & CRED.

A guarantees the payment of any goods to be supplied by B to C between the 2nd April, 1814, and the 2nd April, 1815; C having accepted bills for the amount of the goods delivered, which B permits him to renew when payable without any communication to A on the subject of such renewal: Held, that A was discharged from his guarantee by virtue of the rule that a creditor giving further time to the principal debtor, without the consent of the surety, releases the surety; and that although it was proved that the renewal was given only in consequence of C's inability to pay, and that no injury could accrue to A, the surety being himself the fit judge of what is or is not for his own benefit. *Samuel v. Howarth*, 3 Mer. 272.

Court will grant injunction to restrain landlord from proceeding at law on assignment of replevin bond against the sureties, if there has been an agreement to refer, and a reference between landlord and tenant (the debtor) without concurrence of surety, whereby performance of condition of bond (to proceed with effect) has been suspended. *Burmaker v. Moore*, 3 Price, 214. *PR. INJUNCTION TO STAY PROCEEDINGS AT LAW.*

Creditor having, among other securities, a bond with a surety, taking a mortgage from the principal debtor, and agreeing to receive the residue by instalments, secured by warrant, &c. without prejudice to any security he now holds; injunction granted against suing the surety. *Boulthée v. Stubbs*, 18 Ves. 20. INJUNCTION.

Composition, with reserve of the remedy against sureties valid, but must plainly appear. *Id.* 22.

Holder of a bill of exchange discharging the acceptor by receiving a composition, cannot come upon the drawer. *Exp. Wilson*, 11 Ves. 410. BILL OF EXCHANGE.

Holder of a bill giving time to the acceptor discharges the drawer. *Id.* *ib.*

Creditor may sue surety first: if he sues principal first and gives time, surety is discharged. *Wright v. Simpson*, 6 Ves. 734. DEBT. & CRED.

Discharge of surety by creditor has not the effect of a discharge of the principal without reserve, and, therefore, a co-surety is not discharged. When it is ascertained what each of the co-sureties has paid beyond his proportion, the equity as between them is arranged upon the principle of contribution for excess. *Exp. Gifford*, 6 Ves. 805.

Held, in bankruptcy, that after a voluntary discharge by agreement, the creditor cannot make use of a security against third persons, where the effect would be to make the party discharged again liable, though in another form and in the shape of the claim of another person. *Mawson v. Stock*, *id.* 306.

A surety to the E. I. Comp. discharged by pay-

ment of a balance to the principal under an erroneous settlement by the officer of the company without their authority or knowledge. *Law v. E. I. Comp.*, 4 Ves. 824. E. I. COMP.

Creditor sues the principal by direction of the surety, but without his privity agrees to stay execution, the surety is discharged. *Rees v. Berrington*, 2 Ves. J. 543.

Obligee in a bond with a surety, without communication with the surety takes notes from the principal, and gives further time, the surety is discharged. *Fordyce v. Ford*, *id.* 539.

A creditor giving the principal debtor further time for payment, discharges the surety. *Nisbet v. Smith*, 2 Bro. C. C. 579.

Plaintiff, by examining a defendant as a witness, precludes himself from obtaining any relief by decree against him; and if from the nature of the case that defendant would be primarily liable to plaintiff, and another defendant only in a secondary degree, the plaintiff has lost his remedy altogether. *Thompson v. Harrison*, 1 Cox, 344. *PR. EXAMON. OF PARTY DEFENDANT.*

If A take a joint bond from B, C and D, and then accepts the notes of B and C in discharge of the bond, D, as a surety, is no longer liable. *Skip v. Edwards*, 9 Mod. 438. 3 Atk. 91. S. C. nom. *Skip v. Huey*, or *Wilcar v. Edwards*.

Defendant having given bond with sureties on writ of *ne exeat*, and being in custody for contempt, sureties and bond discharged. *Debusin v. Debusin*, Dick. 95.

A surety in a *ne exeat regno* could not be discharged after answer put in by the defendant, not even after decree against the defendant, and commitment for 19000*l.* decreed against him, for if (as urged) there is no danger of defendant's going beyond sea (being in prison), then the surety is in no danger. *Le Clea v. Trot*, Prec. Chan. 230. *NE EXEAT REGNO.*

## PRINTS.

See COPYRIGHT, V.

## PRIORITY OF DEEDS.

See DEEDS, XII.

## PRIORITY OF SECURITIES.

### I. BETWEEN DIFFERENT SECURITIES AND PROCESSES OF COURTS GENERALLY.

#### II. HOW LOST AND ACQUIRED.

1. Generally.
2. By tacking Securities.
3. By equitable Lien.

### 1. BETWEEN DIFFERENT SECURITIES AND PROCESSES OF COURTS GENERALLY.

A judgment in the lord mayor's court obtained against the garnishee does not entitle the plaintiff to rank as a judgment creditor in the administration of the garnishee's assets. *Holt v. Murray*, 1 Sim. 485. ADMON. OF ASSETS; JUDGMENT IN MAYOR'S COURT.

Where there was a debt due for money had and received, and the same was secured by a promissory note on an improper stamp, the debt was held sufficient to support a sequestration in Scotland. Where petition for a sequestrator against a party domiciled in Scotland, was on the 26th January, and the first

deliverance upon that petition, on the 26th January, and the sequestration awarded by interlocutor of the 16th of August, and a commission of bankruptcy issued on the 15th March upon an act of bankruptcy committed on the 4th of January: Held, that the sequestration had the priority. *Exp. Geddes*, 1 G. & J. 414. **BANKCY. COMMISSION OF; SCOTCH SEQUESTRATION; STAMP.**

A person having a beneficial interest in a sum of money invested in the names of trustees, assigns it for valuable consideration to A, but no notice of the assignment is given to the trustees; afterwards the same person proposes to sell his interest to B, and B having made enquiry of the trustees as to the nature of the vendor's title and the amount of his interest, and receiving no intimation of the existence of any prior incumbrance, completes the purchase and gives the trustees notice; B has a better equity than A to the possession of the fund, and the assignment to B, though posterior in date is to be preferred to the assignment to A. It is of no importance in the questions as to the priority of title acquired under the assignments, whether the interest of the vendor be vested or contingent, present or reversionary. *Dearle v. Hall*, 3 Russ. 1. S. P. *Leveridge v. Cooper*, id. 30. and see *Cooper v. Fynmore*, id. 60.

Where English commission precedes Scotch sequestration, all Scotch personal estate would pass under that commission; personal is not, therefore, liable to the subsequent sequestration. *Exp. Criddland*, 3 V. & B. 100. **SCOTCH SEQUESTRATION; BANKCY. COMMISSION.**

In the distribution of separate property of a married woman, as assets after her death, a bond not entitled to priority. *Anon.* 18 Ves. 258. **FEME COVERT; BOND; DISTRIBUTION OF ASSETS.**

Order for payment out of a bankrupt's estate, with interest to the time of payment, in preference to all other creditors, with costs, under stat. 51 G. 3. c. 15. s. 4, for an issue of exchequer bills, they being to relieve commercial credit. *Exp. Holden*, 18 Ves. 436 **STAT. C. OF; EXCHEQUER BILLS; BANKCY.**

The question of priority between incumbrancers, if the legal estate has not been got in, depends upon the better right to call for it, and the prior incumbrancer, if he has the right, is, in equity, in the same state as if he had an assignment. *Exp. Knott*, 12 Ves. 616.

Injunction granted against proceeding under foreign attachment by joint creditor, upon separate commission of bankruptcy, overruling the attachment, by relation to the act of bankruptcy. *Barker v. Goodair*, 11 Ves. 78. **INJUNCTION; FOREIGN ATTACHMENT.**

Execution is overruled by prior act of bankruptcy. *Id.* 84. **BANKCY.; EXECUTION.**

A papist, by articles on his marriage, in 1764, agrees "to convey to trustees in strict settlement, in case he should, at any time thereafter, during his life, be qualified by law so to do." In 1778 he becomes qualified by law to carry these articles into execution. The lands held not to be specifically bound by these articles until 1778, and therefore judgments subsequent to 1764, but before 1778, were prior liens. *Kennedy v. Duly*, 1 Scho. & L. 355.

A mortgagee is prevented by the operation of the registry act, 6 Anne, c. 2, from tacking, so as to gain a priority against mesne registered incumbrances. And for the purpose of adjusting the priorities between deeds under this act, judgments also obtain priorities, although not generally within the contemplation of the act. *Latouche v. La. Dunsany*, 1 Scho. & L. 137. **TACKING SEC.; REGISTRY ACT; C. OF.**

The fifth section of the registry act applies not to judgments generally. Judgment creditors have no priority by the registry act, except where priority between deeds is to be adjusted. *Id.* 160. 161. **BUT**

to this latter position, see *Ant. D'Arcy v. Chambers*, 1 Scho. & L. appendix, 457. *Id.*

A power, when executed, takes place according to the original deed creating it. *Mosley v. Mosley*, 5 Ves. 249. **POWER.**

The general rule of equity is, that all fair creditors stand in a situation equally favoured, and therefore if a subsequent creditor, by using due diligence, has contrived to receive his debt, the court will not interfere to oblige him to account for what he has so received, and refund it to a prior creditor. *Dillon v. Burton*, 3 Ridgw. P. C. 104. **DEBTOR & CREDITOR.**

Owner of eight sixteenths of a ship mortgages them; he afterwards sells the eight sixteenths to different persons, one of whom, the plaintiff, took possession of the ship and got possession of the grand bill of sale, upon which the names of all the purchasers were indorsed, but there was no date to it. Held, the mortgagee should be preferred. *Gillespy v. Coutts*, Ambl. 652.

Rector entitled to an annual stipend in lieu of tithes, assigns it by way of mortgage; afterwards a creditor of the rector obtains judgment, and in the regular course sequestration of the stipend. Held, the mortgagee should be preferred; without prejudice to sums received by judgment creditor, before he had notice of the mortgage. *Errington v. Howard*, Ambl. 485.

Second mortgagee with notice of a former, but without notice of a trust charge, antecedent to both of which first mortgagee had notice, must take subject to that demand. Secus, if first mortgagee had no notice. *El. of Pomfret v. La. Nelson*, 2 Ves. 485. **NOTICE; MORTGAGE.**

If two judgment creditors, and no elegit, prior judgment shall be first satisfied. *Reece v. Bant*, Dick. 152.

Bond creditors are considered in equity, as having a priority to simple contracts, because they have a priority at common law; and this court govern themselves by rules established in that forum, to which the jurisdiction properly belongs. *Reynish v. Martin*, 3 Atk. 333.

The priority of creditors by decree over subsequent judgment creditors established. *Morrice v. Bank of England*, 3 Swan, 573. **DECREE FOR ADMINISTRATION.**

Creditors under successive decrees are entitled to payment, according to their priorities. *Abbis v. Winter*, id. 578. **DECREE FOR ADMINISTRATION.**

A judgment was signed in June, 1726, and a mortgage was made to plaintiff in 1728; in January, 1730, the judgment was docketed. Ifeld, that the docket was not good, being after the time limited by 4 & 5 W. & M. c. 20., and that thereby the mortgage got the preference of the judgment; and notice or no notice, is not material, for the statute is express, that judgments not docketed shall lose their preference: Decreed for the plaintiff. *Farshall v. Coles*, 7 Vin. Ab. 54. pl. 6. But where A purchased an equity of redemption, and it plainly appeared that he had notice of a judgment that was not docketed in due time; it was held a strong presumption of an agreement to pay off the judgment, and it was so decreed, especially as the judgment creditor by the defect in the docket, was deprived of his remedy at law. *Thomas v. Pledwell*, 6 Vin. 53. pl. 5. The former case, however, seems to prevail as being the last adjudged. **BRIDG. IND. JUDGMENT, DOCKETING OF.**

If an extent and a commission issue on the same day, the extent shall have the preference. *Ree v. Earl*, Bunb. 33. **EXTENT; BANKCY. COMMISS. OF.** Act of Parliament for sale of Ld. S's. estate, and that the monies arising by sale should be first applied to pay off the mortgages, and afterwards for payment

of statutes, judgments, and recognizances, with a saving to all but the rights of the heirs of the Ld. S. Decreed, that subsequent mortgages shall be paid before precedent statutes. *Ward v. Cecil*, 2 Vern. 711.

A mortgaged house to B, and C and D were his sureties; money being due for interest, C paid it to prevent suit. D lent A money on equity of redemption, on which C requested him to include debt, in consideration money, which he did. Held, that C shall have his demand first satisfied. *Beckett v. Booth*, 2 Eq. Ab. 695.

Where a person who has a bill of sale of goods for securing a sum of money lent shall be preferred to a judgment creditor. *Bucknal v. Roiston*, Prec. Chan. 285. BILL OF SALE.

An incumbrance by judgment, being a lien on the land, if made prior to the grant of an annuity, shall be preferred before the grant of an annuity, because his charge on the land is posterior. *Davidson v. Goddard*, Gilb. Eq. Rep. 66.

Mortgages are not to be preferred to other real incumbrances; but mortgages, judgments, statutes and recognizances, shall be paid according to the priority. *Bristol v. Hungerford*, 2 Vern. 525. MORTGAGE.

In voluntary deeds and voluntary appointments, the first is to take place. *Chadwick v. Doleman*, id. 530. VOLUNTARY DEEDS.

Mortgages are not to be preferred to other real incumbrances, but they shall all take place according to their priority, and as they severally stand in order of time. *Symmes v. Symonds*, 4 Bro. P. C. 328. MORTGAGE.

A, seised in fee in right of his wife, joins in a fine, and declares the uses to B by way of mortgage for securing 15,000*l.*, and subject thereto to the use of A for life, remainder to the wife in fee, then A acknowledges a statute to C for 500*l.*; then the wife dies, and A sells his estate for life for 3000*l.* to D, the son and heir at law of the wife, who had no notice of the statute, and the mortgage is assigned to a third person, who paid off the 15,000*l.* and advanced the 3000*l.*; then D acknowledges a statute to E, who had no notice of C's statute, makes his will and devises these lands to A, and dies. As to the 3000*l.*, held clearly, that it should be preferred to C's statute; held also, that E's statute should be preferred to C's, because the mortgage was but in nature of trustee for the son. *Blake v. Hungerford*, Prec. Chan. 158.

A decree in chancery against an executor preferred to a judgment at law against him, being prior in time. *Joseph v. Mott*, id. 79. EXOR; DECREE; JUDGMENT.

A purchases lands of B, and mortgages back those lands for part of the purchase money, and gives a note to B for 200*l.*, the other part thereof; A devises those lands to be sold for payment of his debts. This 200*l.* note, though for part of the purchase money, shall not be preferred to other debts, nor be a charge on the land in equity. *Bond v. Kent*, 2 Vern. 281. LIEN; VENDOR & PURCHASER.

The husband, in consideration of his wife's joining with him in a fine, and parting with her jointure of 40*l.* per annum, gives her trustee a bond to settle other lands of 40*l.* per annum on the wife for life; remainder to the heirs of his body by her. The husband being indebted in other bonds, dies intestate, and the wife takes administration and confesses judgment to her trustee: on a bill by another bond creditor, decreed the wife's bond as to herself only, to be performed before the plaintiff is paid; but the children to have no benefit of the bond, preferable to the other bond creditors: the husband being to be made tenant in tail of the lands, by the condition of the bond. *Cottle v. Fripp*, 2 Vern. 220.

A recognizance being enrolled by the special order of the court, after the time for enrolling it was

elapsed, the consor, betwixt the date of the recognizance and the enrolling of it, borrowed money of S upon a judgment, which was now overreached by the recognizance: and the estate of the consor was in mortgage prior to the recognizance, so that neither the recognizance nor the judgment could reach the estate without the aid of equity. The court inclined to give the preference to the judgment creditor. *Fothergill v. Kendrick*, 2 Vern. 234.

A voluntary judgment given by a freeman of London, payable three months after his death, is to be postponed to debts by simple contract, and to the widow's part, but will bind the freeman's legatory part. *Fairebeard v. Bowers*, 2 Vern. 202. Prec. Ch. 17. S. C. CUSTOM OF LONDON.

A man possessed of a term for years, mortgages it, and then becomes indebted by statute, and afterwards by judgment, and dies. The judgment shall be first satisfied out of the equity of the redemption of the term. *Morgan v. Sherrard*, 1 Vern. 293. ADMON. OF ASSETS.

Debt by a decree shall be paid after judgments, and before debts by bond. *Harding v. Edge*, 1 Vern. 143. 2 Ch. Ca. 94. S. C. Sed quare, decree equal to judgment? DECREE, DEBT BY.

Third mortgage buying in first, only protects the land in the first mortgage. *Marsh v. Lee*, 2 Vent. 339. MORTGAGE.

Where there are two voluntary conveyances of the same estate, the first shall prevail. *Goodwin v. Goodwin*, 1 Ch. Rep. 173. VOLUNTARY CONVEYANCE.

## II. HOW LOST AND ACQUIRED.

1. Generally.
2. By tacking Securities.
3. By equitable Lien.

### 1. Generally.

Where, by the custom of a manor, no time is limited for presenting surrender of copyholds, an incumbrancer, whose security has not been enrolled until long after a subsequent incumbrance, will not be postponed, although the subsequent incumbrancer had no notice of the prior charge. *Harlock v. Priestley*, 2 Sim. 73. COPYHOLD.

A mortgagee of a leasehold house gave up the indenture of lease to his mortgagor, in order that it might be shewn to an intending purchaser who wished to see what the covenants in it were; the mortgagor concealed from the purchaser the fact of the existence of an incumbrance on the property, and produced the lease to him, and left it in his possession: within a week afterwards, the purchaser accepted a conveyance, paid his purchase money, and took possession of the house; without any notice of the existence of the mortgage; but the solicitor of the mortgagee deposed, that in an interview which he had before the completion of the purchase with the solicitor of the purchaser, he had informed the latter, that a client of his was to receive a considerable sum out of the purchase money, and had requested to have notice of the time when the money was to be paid, and though the solicitor of the purchaser denied that any such interview had taken place before the completion of the purchase, a jury gave a verdict in favour of the statement made on that point by the solicitor of the mortgagee: Held that the mortgagee was not to be postponed to the purchaser. *Martins v. Cooper*, 2 Russ. 196. FRAUD.

Mortgage by demise for a term of years, the mortgagor does not deliver to the mortgagee the purchase deed conveying the freehold to the mortgagor, but

keeps it back, and subsequently deposits it with another person as a security for a loan; the conveyance to the mortgagor and the mortgage were executed within a day of each other, and were both registered on the same day; the deposit was not made for a considerable time afterwards, but no notice by the subsequent incumbrancer of the mortgage being proved, and being denied by his answer, it was held that he was entitled to the benefit of the deposit, as against the mortgagee, and was not bound to deliver up to him the conveyance. *Wiseman v. Westland*, 1 Y. & J. 117. **MORTGAGOR; & MORTGEE; DEPOSIT OF DEEDS.**

If third incumbrancer, having constructive notice of second mortgage, fails to keep on foot first security for his protection, he is not entitled to stand in place of first mortgagee against second. *Purry v. Wright*, 1 S. & S. 369. **MORTGAGE; NOTICE.**

Where a mortgagee has, without fraud or gross neglect, parted with the possession of title deeds, which are deposited with another person equally innocent, whether the court will take possession from him, *quare?* *Exp. Canthorne*, 1 G. & J. 240. **MORTGAGOR; & MORTGEE.**

A agrees verbally to sell an estate to B; he afterwards agrees in writing to sell it to C, and then conveys it to B, in pursuance of the first contract, B having notice of the second. *Semble*, C cannot call on B for a conveyance. *Dawson v. Ellis*, 1 Jac. & W. 524. **NOTICE; VEND. & PURCH.**

A second incumbrancer having obtained the appointment of a receiver, and a decree for a sale, without making the first incumbrancer a party, a petition by the latter, for a reference to ascertain priorities, and for the receiver to keep down the interest, refused, on the ground that the petitioner had commenced a suit for the same purpose, and had delayed it; but leave was given to bring an ejectment. *Brooks v. Greathed*, 1 Jac. & W. 176. **LACHES.**

Where trustees to raise money grant annuity as a security, and retaining the title deeds, mortgage the premises, without notice, as a further security, the mere retaining the deeds does not postpone the annuitant to the mortgage. It depends on whether or not the first incumbrancer ought to have, and was remiss in not having the deeds in his possession. *Harper v. Fowler*, 4 Mad. 129.

A testator having directed his trustees and executors, after sale of his estates, to stand possessed of the money arising from the sales, upon trust, in the first place, to invest 400*l.* in trust for his wife for life, in bar of dower, and after her death for W C; and upon farther trust, out of the residue of the money, to invest 400*l.* in trust for J R for life, and after his death for his children; and upon further trust, to pay other sums to persons named; and having bequeathed the residue of his estate to W C, and the only acting executor having made no investment on the trusts of the will, but having paid interest on the two sums of 400*l.* to the respective legatees, and applied the assets to his own use, and afterwards become bankrupt; it was held, that by that dealing the two legatees had waived whatever priority the will might have given to them; and the dividends payable on the whole sum proved under the commission against the executor in respect of the testator's estate, was divided among the pecuniary legatees and the residuary legatee, in the proportion of the amount of their legacies, and of the residue, as it was computed at the death of the testator, with interest on each. *Exp. Chadwin*, 3 Swan. 380. **WAIVER; BANKRU; EXECUTOR.**

To affect a registered deed by notice of a prior unregistered deed, the policy of which has been much doubted, actual notice must be clearly proved, amounting to a fraud. *Wyatt v. Barwell*, 19 Ves. 435. **REGISTRY OF DEEDS; NOTICE.**

A plea of purchaser for valuable consideration, with-

out notice, cannot avail against a prior duly registered deed, and whether a legal or equitable title be conveyed, the deed will have priority from its registration. *Eyre v. Dolphin*, 2 Ball & B. 300.

A person having notice of a prior unregistered deed, cannot avail himself of the registry of a subsequent deed to defeat the priority of the other, for it would be a fraud to take a conveyance to defeat a prior deed of which there was notice. *Id.* 302. **DEEDS, REGISTRY OF.**

It is not a general rule in equity that second mortgagee who has title deeds, without notice of prior mortgage, shall be preferred to first: negligence alone will not postpone him; there must be fraud. *Evans v. Bicknell*, 6 Ves. 183. **MORTGAGE.**

A registered conveyance of premises in Middlesex for valuable consideration, established against a prior devise, not registered; the evidence of notice, which ought to amount to actual fraud, not being sufficient. *Jelland v. Stainbridge*, 3 Ves. 478. **REGISTRY OF DEEDS; NOTICE.**

The title deeds of an estate were deposited with the plaintiff as a security for his demand. The defendant, fourteen years afterwards, upon the eve of the bankruptcy of the mortgagor, took a mortgage, antedated; he had notice of the deposit, but avoided enquiring the purpose for which it was made. The court decreed for the plaintiff. *Birch v. Ellames*, 2 Anst. 427. **MORTGAGE; NOTICE.**

Title deeds were deposited as a security for money, the defendant, a creditor of the mortgagor, fearing his immediate insolvency, took a conveyance of the same premises, without notice of the incumbrance; this was held good. *Plumb v. Fluit*, 2 Anst. 432. *Id.*

Judgment creditor, prior to a mortgage, need not make the subsequent mortgagee party, in order to postpone him. *Shepherd v. Guinnet*, 3 Swan. 151. **JUDGMENT CREDITOR; MORTGAGE; PL. PARTY.**

Mortgagee of a reversion not having the title deeds, shall not be postponed to another mortgagee, whose mortgage was made after mortgagor came into possession who has the title deeds, there being neither fraud nor gross negligence. *Tourle v. Rand*, 2 Bro. C. C. 650. **MORTGAGE.**

J being about to mortgage an estate, upon which his younger brothers and sisters had charges, got them to join in the conveyance, and acknowledge the receipt of their portions, giving them an undertaking that he would grant them a subsequent mortgage, and enter into prior security. He afterwards makes a subsequent mortgage to plaintiff, for money lent before on bond, and a fresh sum advanced; the claims of the younger children have priority in equity, and shall be preferred to plaintiff's mortgage. *Beckett v. Cordley*, 1 Bro. C. C. 353.

Registration in Middlesex of an equitable mortgage is not presumptive notice of itself to a subsequent legal mortgagee, so as to take from him his legal advantage. *Morecock v. Dickens*, Amb. 678. **EQUITABLE MORTGAGE; REGISTRATION OF DEEDS.**

Notice of an unregistered mortgage, held to affect subsequent mortgagees, who had registered. *Sheldon v. Cox*, 2 Eden. 224. *Id.*

The custody of the deeds creating a term, accompanied by a declaration of the trust of it in favour of a second incumbrancer, without notice of the prior mortgage, held to give him an advantage over the first incumbrancer, which a court of equity would not deprive him of. *Stanhope v. El. Ventry*, 2 Eden. 81.

The person claiming under such second incumbrancer, upon purchasing the equity of redemption from the mortgagor, was held not to have relinquished such advantage by having covenanted to retain part of the purchase money to redeem the prior mortgage, as it was agreed that he might use the money ad-

versely, in case he could not adjust the matter amicably. *Id. ib.*

Where premises had been sold under a decree, held that the lien of an incumbrancer was not transferred to the purchase money, so as to be out of the registry act, and he was, therefore, postponed to subsequent incumbrancers. *Hennard v. Moore*, 1 Eden, 327. SALES, JUDICIAL; REGISTRATION OF DEEDS; LIEN.

Deed of appointment of lands in a register county, pursuant to a power in a former deed which was not registered, postponed to a mortgage made subsequent to it, and registered before it. *Scruton v. Quincy*, 2 Ves. 413. REGISTRY OF DEEDS.

The first mortgagee permits the mortgagor to keep the title deeds, and the mortgagor shewing a fair title, mortgages the premises to a second mortgagee, to whom he delivers the deeds; the first mortgagee is accessory to the drawing in of the second. *Head v. Eger-ton*, 3 P. W. 281. MORTGAGE; FRAUDULENT CONCEALMENT.

Where a first mortgagee is a witness to the second mortgage, though no actual proof of his knowing the contents thereof, yet since the presumption is, that he might have known the same, this shall postpone him. *Mocatta v. Murgatroyd*, 1 P. W. 394. *sed quære*, see note (1) *id. ib.* MORTGAGE; NOTICE.

Mortgagee of a ship by deed intrust: the mortgagor with the original bill of sale, and the mortgagor indorses thereon subsequent mortgages, or bills of sale, of several parts of the ship, and mortgagee acquiesces; this is evidence of an assent in such mortgagee, and shall therefore postpone him. *Id. ib.*

A, having a mortgage of a leasehold estate, the mortgagor borrows the original lease of A, with an intention to borrow more money on the premises. If A was privy to the mortgagor's intention of taking up more money on the premises, A's mortgage shall be postponed to the subsequent mortgage, as being accessory to the fraud; otherwise, if A was not privy to the subsequent loan, but innocently lent the lease to the mortgagor. *Peter v. Russell*, 2 Vern. 726. Gilb. Eq. Rep. 122. S. C. FRAUDULENT CONCEALMENT OF TITLE.

A made a mortgage for years to B, to secure a sum already lent, and all sums thereafter to be lent by B to A; A made a second mortgage to C, with notice of the first, and then B, with notice of C's mortgage, lent more money. *Per cur.* the second mortgagee having notice, shall not redeem without paying the whole due to B. *Gordon v. Graham*, 7 Vir. 52. pl. 3. MORTGAGE; NOTICE.

The steward of a manor mortgaged his estate four times, but entered the admittance of the third mortgage in a wrong book, contrary to the custom of manor; *per curiam*, where there is a second mortgage of part of the lands, that were before in mortgage, he shall not redeem part of the first mortgage, and so put the first mortgagee to seek what is due to him out of the residue of the lands where he has a precedent title to the whole; but paying all that is due, he shall redeem the whole. Ordered that the second mortgagee shall redeem what was contained in his own mortgage, and the master settle what proportion he shall pay to the first; decreed also, that the fourth mortgagee being without notice of the third, which was entered in a wrong book, the third shall be postponed until after the fourth is satisfied. *Welman v. Warren*, 2 Eq. Ab. 595. MORTGAGE, REDEMPTION.

A registered deed, with notice of an unregistered one, shall not prevail against it. *Blades v. Blades*, 1 Eq. Ab. 358. DEEDS, REGISTRY OF.

A makes three several mortgages to B, C, and D, and in the last mortgage B is a party, and agrees that after he is paid, he will stand a trustee for D. Decreed that C shall be paid before D; for all the securities being transacted by the same scrivener, it was

notice to D. *Brotherton v. Hatt*, 2 Vern. 574. NOTICE; PRINC. & AGENT.

A lends money to B on mortgage, but before he does so, sends C to enquire of D, who had a prior mortgage, whether he had any incumbrance on B's estate, who denied he had any. This was proved by C, D, by answer, confessed C enquired of him what money B owed him; but denied C told him that A was about to lend B any money. Decreed, the estate should stand charged, in the first place, with A's debts; but upon an appeal, issue directed to try whether C told D, that A was about to lend money on B's estate. *Abbottson v. Rhodes*, 2 Vern. 554. FRAUDULENT CONCEALMENT OF TITLE.

A counsel having a statute from A, advises B to lend A 1000*l.* on a mortgage, and draws the mortgage with a covenant against all incumbrances, and conceals his own statute. The statute shall be postponed to the mortgage. *Draper v. Borlase*, 2 Vern. 370. FRAUDULENT CONCEALMENT OF TITLE.

A, bound by statute to B; C lends money to A, and land bought therewith; B extending this land, hath priority. *Cary Rep.* 8.

## 2. By tacking Securities.

Where several mortgagees have all equal equity, and the legal estate is obtained by neither of them, but remains in trustees throughout; the incumbrances are available according to their several dates only, and there can be no preference *inter se*; therefore, first mortgagee being also third, cannot tack the two securities, so as to exclude the mesne one. *Frere v. Moore*, 8 Price, 475. MORTGAGE.

Purchaser of an equity of redemption, cannot set up a prior mortgage of his own, or which he has got in against subsequent incumbrances, of which he had notice. *Toulmin v. Steere*, 3 Mer. 210. NOTICE; VENDOR & PURCH.

First and second mortgagees, the mortgagor a bankrupt; the first mortgagee entitled to take a subsequent judgment, docketed, though no execution had issued at the time of the bankruptcy. *Baker v. Harris*, 16 Ves. 397. MORTGAGE & MORTGEE; JUDGMENT.

The claim to tack by a third mortgagee having taken in the first mortgage of the inheritance, but subject to a term outstanding, given up as against a mesne incumbrancer, as against the assignees under the bankruptcy of the mortgagor; *quære*, the commission being subsequent to the last mortgage, whether the act of bankruptcy was previous? doubtful; no objection that the consideration for the last mortgage was a debt originally by simple contract. *Exp. Knot*, 11 Ves. 609. BANKRUPTCY, ASSIGNMENT.

A subsequent incumbrancer, without notice, protected by getting possession of the deed, creating an outstanding term. *Id.* 613. NOTICE.

Mortgagee may tack a subsequent judgment, but a mere judgment creditor cannot tack, not contracting for an interest in the land, though he has a lien. *Id.* 617. JUDGMENT CREDITOR.

The right to tack in equity not affected by the relation to the act of bankruptcy. *Id.* 619.

Tacking allowed up to a decree to settle priorities, not afterwards. *Id. ib.*

Distinction as to tacking between a commission of bankruptcy, and a decree to settle priorities. *Id. ib.*

Mortgagee not permitted to tack, as against the assignees in bankruptcy, a mortgage subsequent to an act of bankruptcy, though without notice, and previous to the commission, and though he had the legal estate. *Exp. Herbert*, 13 Ves. 183. BANKRUPTCY, ASSIGNMENT; MORTGAGE.

The right of the first mortgagee with the legal estate to take as against mesne mortgagee, does not cover a

mortgage of the equity of redemption coming to him as executor. To postpone the first mortgagee on the ground of having the title deeds in the possession of the mortgagor, the case must amount to fraud. *Barnett v. Weston*, 12 Ves. 130. MORTGAGE.

Rule between incumbrancers, that a subsequent incumbrancer, without notice, and having as good a right, getting in the legal estate by assignment of term or possessing himself of the deed creating it, is protected. *Maundrell v. Maundrell*, on appeal, 10 Ves. 260.

Subsequent incumbrancer cannot protect himself by a satisfied term against a prior incumbrance, unless in some sense got in either by an assignment or making the trustee a party to the instrument, or taking possession of the deed creating the term; nor if he has notice before he pay his money; distinction upon that as to the dower, upon no principle, but established by practice. *Id.* 271. TERM, ATTENDANT.

A mortgagee is prevented by the operation of the registry act, 6 Anne, c. 2. from tacking, so as to gain priority against mesne registered incumbrances; and for the purpose of adjusting the priorities between deeds under this act, judgments also obtain priorities, although not generally within the contemplation of the act. *Latouche v. Ld. Dunsany*, 1 Scho. & L. 137. REGISTRY ACT, C. OF.

The registry act in Ireland does not permit tacking. *Id.* 157.

Tacking securities against creditors or assignees for valuable consideration. *Adams v. Clifton*, 6 Ves. 226.

Mortgagee may protect himself against a claim of dower, by taking an assignment of an old mortgage term, prior to the right to dower. *Wynn v. Williams*, 5 Ves. 130. MORTGAGE; DOWER.

A purchaser of an equity of redemption filed his bill against the mortgagee, to redeem the original mortgage, having made a mortgage of other premises to the same mortgagee for a distinct debt, the purchaser cannot redeem the first without redeeming the second mortgage; and the parties interested in the equity of redemption of the second mortgage, are necessary parties to the suit. *Freson v. Denn*, 2 Cox, 425. MORTGAGE, REDEMPTION OF; PL. PARTIES.

Bond not to be tacked to a mortgage against creditors. *Hamerton v. Rogers*, 1 Ves. J. 513. BOND.

Mortgagee having also bond, cannot tack it against other specialty creditors, though he may against the heir. *Louthain v. Husel*, 3 Bro. C. C. 162. MORTGAGE.

Third mortgagee buying in the first mortgage *pendente lite*, shall exclude the second. *Robinson v. Davison*, 1 Bro. C. C. 63. MORTGAGE; LIS PENDENS.

Executor of a mortgage lends a further sum on bond; he may tack against the heir or devisee of mortgagor, but not against other creditors if the estate be charged with, or devised for payment of debts. *Price v. Fastledge*. Ambl. 685.

Mortgagee may tack a bond debt as against heir or devisee. *Id. ib.*

It is an established rule in equity, that a third mortgagee without notice of second, may, by paying off first incumbrance, and taking an assignment of his interest to himself, hold the estate against the second mortgagee, until he shall be paid what is due to him on both mortgages. *Belchier v. Renfurther*, 5 Bro. P. C. 292. MORTGAGE.

Third mortgagee, having, *pendente lite*, and after the first mortgagee had by his answer submitted (on payment of the money due to him) to assign to the plaintiff, the second mortgagee, obtained an assignment of the first mortgage, decreed to be entitled to hold the estate against the second mortgagee, till he should be paid what was due to him upon both; he having had no notice of the second mortgage when he

advanced his money. *Belchier v. Rutler*, 1 Eden, 522. MORTGAGE; LIS PENDENS.

A prior mortgagee may tack a subsequent judgment, but a prior judgment creditor for obtaining a subsequent mortgage cannot; a prior mortgagee, however, cannot tack a bond debt against the mortgagor, his assignee of the equity of redemption, or creditors; though he may, as against the mortgagor's heir, to prevent a circuitry. *Anon.* 2 Ves. 662.

Where a mortgagee has tacked a judgment to his mortgage, he shall not be confined to the penalty of his judgment, but he is entitled to interest upon his judgment debt, though it should exceed the penalty. *Godfrey v. Watson*, 3 Atk. 518. MORTGAGE; JUDGMENT; INTEREST BEYOND PENALTY.

M gave plaintiff at different times three notes to secure different sums of money, and expressed in each "to be secured on his Stoke Hall estate," which was mortgaged to defendant; plaintiff took in a prior mortgage, to protect the money lent on the notes: Held, that plaintiff, the note holder, on his having notice of the second mortgage to defendant, and paying off the first incumbrance, shall protect himself against defendant's mortgage, and shall be paid, not only the money due on the first mortgage, but the money due on the notes also. *Matthews v. Cartwright*, 2 Atk. 347.

As to tacking securities, see *Morret v. Parke*, 2 Atk. 52.

Where a first incumbrancer, by judgment, has likewise a mortgage; though there is another judgment prior to the mortgage, yet if the mortgagee had no notice of it, the court will not direct a sale in favour of the second judgment creditor, unless he will pay off the first incumbrancer. *Smithson v. Thompson*, 1 Atk. 520.

Mortgagee having notice of a judgment, cannot tack against the judgment creditor sums advanced after such notice on security of the mortgaged premises. *Siah v. Hopkins*, Ambl. 793. MORTGAGE.

Where copyhold is twice mortgaged, by surrender before the same steward, a third mortgage to the steward, who buys in the first, shall not postpone the second. *Brothers v. Bence*, Fitzgibb. 118. NOTICE.

If a puisne mortgagee buys in a judgment or statute, being the first incumbrance, he shall hold till by law he can be evicted. *Brace v. Dr. Marlborough*, 2 P. W. 493. Mos. 50. See also 9 Mod. 38.

So where the first mortgagee lends a further sum to the mortgagor, upon a statute or judgment, he shall retain against mesne mortgages till the statute or judgment is paid. So if a puisne mortgagee buys in a prior judgment, extended on an elegit at an under value, he shall hold the extent till evicted. But in all these cases there must not be notice of the mesne incumbrances when the money is lent. If a puisne incumbrancer buys in a prior mortgage, and the legal title be in a trustee, or in any third person, then the buying in such first mortgage will not avail; but in all cases where the legal estate is standing out, the incumbrances must be paid according to their priority. *Id. ib.*

Third mortgagee buying up first, becomes prior to second. *Husket v. Strong*, 1 Stra. 689. MORTGAGE.

A mortgagee of a copyhold cannot tack a judgment to his mortgage, because no judgment can affect that estate. *Cameon v. Pack*, 6 Vin. 222. pl. 6. MORTGAGE; COPYHOLD.

Where bond is tacked to mortgage, mortgagor cannot redeem without paying the whole, though exceeding the penalty. *Piers v. Baldwin*, 2 Eq. Ab. 611. INTEREST; PENALTY BOND.

Assignee of equity of redemption shall not be affected by judgment after confessed by the mortgagor, though the judgment creditor purchase in the mortgage; but shall redeem upon payment of the first mort-

gage money only. *Breerton v. Jones*, 1 Eq. Ab. 325, 6. MORTGAGE, REDEMPTION; JUDGMENT CREDITORS.

So also if first mortgagee buys up a judgment. S. C. id. 326. *Id. ib.*

A, in 1687, lends £1000 to B on a judgment, at which time there was a term of years attendant on the inheritance, which had been assigned to three trustees. In 1688, B and one of the trustees assign the term to C for securing money then borrowed of him. A, having notice of this assignment, gets an assignment of the term from the two other trustees to D, in trust for the better securing his £1000; A shall have the benefit of this assignment and he paid before C. *Bristol v. Hungerford*, 2 Vern. 524.

Third mortgagee buys in the first, and brings bill to foreclose the second. He need not prove the money actually lent on the third mortgage, the producing an acquittance being sufficient. *Holt v. Mill*, 2 Vern. 297. MORTGAGE.

A makes a mortgage, and afterwards a commission of bankruptcy is taken out against him, and commissioners make an assignment of his estate, and then B lends £200 to the bankrupt on a second mortgage, having notice of the bankruptcy, and afterwards he gets in the first mortgage: this prior mortgage shall not protect the mortgage subsequent to the bankruptcy. *Hitchcock v. Sedgwick*, 2 Vern. 177. MORTGAGE.

When a purchaser buys in an old estate or mortgage, though nothing is due upon it, yet in equity, he shall defend himself by it. So he shall, though he got in this prior incumbrance by undue means. *Id.* 159.

A man makes a first mortgage, and afterwards for a further consideration absolutely releases the equity of redemption, and then makes a second mortgage: the second mortgagee shall protect himself under an old statute. *Id.* 160.

One articles to sell lands to A, and afterwards articles to sell the same lands to B. B pays the money and gets a conveyance, and A assigns his articles to C, who gets in an old statute, he shall defend himself by it. *Id. ib.*

A subsequent purchaser protected by getting in an old satisfied statute. *Stanton v. Sadler*, 2 Vern. 30.

After a bill brought by a second mortgagee against the first and third mortgagee to discover incumbrances, the last mortgagee may get in the first incumbrance, and project himself against the second. *Hawkins v. Taylor*, 2 Vern. 29. MORTGAGE.

Third mortgagee without notice at the time of his mortgage, buys in the first incumbrance; being a satisfied judgment, he shall have the benefit of it. *Edmunds v. Povey*, 1 Vern. 187. MORTGAGE.

Assignee of a statute purchases the estate, having notice of a second statute. How far he shall make use of the first statute to protect his purchase. *Huntington v. Greenville*, 1 Vern. 49.

Conusee of a statute having extended the land, assigns it to J and dies. One that had a second statute, gets administration and acknowledges satisfaction on the first statute. Equity will relieve against this practice, and put the assignee in the same plight as if the statute was still in force. *Id.* 51.

If A mortgages land to B, and then makes another mortgage of it to C without notice, and C purchases a precedent mortgage outstanding at law, though nothing be due upon it, or a statute whereon money is due which he extends; he shall hold the land until he is satisfied, though he had notice of B's mortgage before his second purchase of the prior security; for as he lent his money innocently at first, he may do what he can to secure it, and it is of no consequence that money is not due on the first incumbrance, since the legal title is bought up. *Marsh v. Lee*, 1 Ch. Ca. 162, 163, 166. 2 Vent. 337. *Churchill v. Grove*, Ch. Ca. 36. *Edmunds v. Povey*, 1 Vern. 187. *Hig-*

*don v. Lyddal*, 1 Ch. Ca. 149. *Hitchcock v. Sedgwick*, 2 Vern. 157. *Haskett v. Wakefield*, Hard. 173. *Bovey v. Skipwith*, 1 Ch. Ca. 208. MORTGAGE.

### 3. By equitable Lien.

Equitable agreement by articles for security upon a share of a ship then building; with a covenant for a future bill of sale, and if the ship should be in the interval for payment out of the purchase-money, postponed to a subsequent bill of sale, with possession taken as far as it could be subject to the builder's possession and lien. *Daniel v. Russell*, 14 Ves. 393. EXECUTOR'S AGREEMENT; BILL OF SALE.

Equitable mortgage by deposit of title deeds, preferred to a purchase with notice. *Hiern v. Mill*, 13 Ves. 414. EQUITABLE MORTGAGE.

One agrees for a valuable consideration to convey lands to S, and afterwards confesses judgment to N. If the consideration money paid by S, be anyways adequate to the value of the land, it binds the land in equity, and shall defeat the judgment. Secus, if a mortgage, or if the consideration was inadequate. *Finch, &c. v. El. Winchelsea*, 1 P. W. 277. AGREEMENT FOR SALE; JUDGMENT.

Mortgagee or purchaser, precedent, though by defective conveyance, shall be preferred before assignees of bankrupt. *Taylor v. Wheeler*, 2 Salk. 449. BANKCY. ASSIGNMENT.

If a defective conveyance be made, as a mortgage in fee by way of feoffment without livery, equity will make good this conveyance, and this though after such incomplete feoffment, a judgment is confessed to a third person, whose debt did not originally affect the land. *Burgh v. Francis*, 1 Eq. Ab. 320.

## PRIVATE ACT OF PARLIAMENT.

See STAT. I.

## PRIVATE LETTERS.

See also COPYRIGHT, II.

The principle of the equitable jurisdiction to restrain the publication of letters, doubted: *Coe v. Pritchard*, 2 Swan. 422. JURISDICTION.

The person receiving letters may destroy them. *Id.* 418.

No injunction to restrain the publication of letters, as painful to the feelings of the writer. *Id.* 413.

The publication of letters may be restrained, although not designed for profit. *Id.* 415.

The acts of the parties may supply reasons for not restraining the publication of letters. *Id.* 427.

## PRIVILEGE FROM ARREST.

See BANKCY., VII. 3. (b); VIII. 1. (c).—PR. PRIVILEGE FROM ARREST.

## PRIVITY OF CONTRACT, TITLE AND BLOOD.

See also DEBTOR & CRED. II.

Principle on which debtor to estate cannot be made defendant to bill by creditors, or residuary legatee

against executor, unless collusion, &c., applies equally to the case of a creditor overpaid by the executor. *Alager v. Rowley*, 6 Ves. 748. PL. PARTIES; DEBTOR & CRED.

Creditor under deed of trust cannot have a decree for redemption of mortgage against mortgagee, unless on a special case, as collusion; that the trustee refuses, &c. *Troughton v. Binkes*, 6 Ves. 573. MORTGAGE, REDEMPTION OF; DEBTOR & CRED.

Upon the purchase of an equity of redemption, the agreement of the purchaser with the vendor to pay the mortgage, without any communication with the mortgagee, is not sufficient to make it the personal debt of the purchaser. *Butler v. Butler*, 5 Ves. 534. VEND. & PURCH.; MORTGAGE.

Creditors of A cannot maintain a bill against the representatives of B to part of the residue, to whose estate A is entitled. *Emslie v. M'Aulay*, 3 Bro. C. C. 624. DEBTOR & CRED.

B entered into bonds to H, and took a counter bond; H deposits B's bond with C as a security; bill filed by C against B and H, that B might might pay him out of the debt to H, dismissed. *Cutor v. Burke*, 1 Bro. C. C. 434. BOND.

If first tenant in tail be made party, remainder-men need not be joined, but are bound by decree. *Reynoldson v. Perkins*, Dick. 427.

Defendants, executors to their father, who was guardian in socage to the plaintiff, were ordered to answer for profits taken by him. *Burgh v. Wentworth*, Cary, 54.

Bill by creditors, and one residuary legatee, against a debtor to estate, the executor, and other residuary legatees, to compel debtor to pay debt, is not maintainable. *Bickley v. Dmington*, 2 Eq. Ab. 253. DEBTOR & CRED.; PL. PARTIES.

Depositions taken in a former cause cannot be read in another cause, against one who does not claim under the party against whom those depositions were taken; but if a legatee brings a bill against the executor, and proves assets, another legatee, though no party, may have the benefit of those depositions. *Coke v. Fountain*, 1 Vern. 413. PR. EVIDENCE.

If a decree be signed and enrolled, an assignee may revive by *scire facias*. *Dunn v. Allen*, 1 Vern. 283. Purchaser or assignee who comes not in privity, cannot revive either by *scire facias* or by bill of revivor, but may bring an original bill to carry former decree into execution. S. C. *id.* 426. ABATEMENT & REVIVOR; ASSIGNEE.

A decree for confirming an agreement between lord and his tenants, for settling heriot and stinting common, revived by bill brought by purchaser, who did not come into possession and conform, and though lord and tenants were tenants for life. *Id. ib.* 427.

An infant entitled to the trust of lands in fee, marries without the consent of her father. The father brings a bill against the husband and wife and her trustees, that a provision might be made for her and her children out of these lands. The husband and wife demur, and the demurrer was allowed. *Micoe v. Powell*, 1 Vern. 39. PL. DEMURRER.

Account decreed between two who had dealings only circuitously to avoid multiplicity of suits. *Anon.* Show. P. C. 17. PL. BILL OF PEACE.

paid to the owners. These proceeds are entirely in the discretion of the crown; and upon motion for payment into court of a sum, admitted by the commissioners of transports to be due for freight under the charterparty, which motion was resisted on the ground that the commissioners were entitled to set off the amount of the proceeds received by the owners under the warrant, payment was ordered accordingly, without prejudice to the question of ownership. *Thurgar v. Morley*, 3 Mer. 20. CHARTERPARTY.

A British ship was taken by the Americans, and afterwards taken by one of the British crew, brought into port and condemned. A writ of prohibition to enjoin the judge of the prize court from proceeding after the termination of the war, at the suit of the American owners, to try the question of the recapture, was refused; it being a case clearly within the jurisdiction of a court of prize, and such jurisdiction not being determined by the cessation of the hostilities. *Case of the Ship Harmony*, Coop. 325. *Exp. Lynch*, 1 Mad. 15.

A court of equity has jurisdiction upon a bill by officers of the army and the E. 1. Company, on behalf of themselves and all others, &c. for an account of prize money received beyond the due proportion, and for a distribution according to the king's grant and usage, considering the defendants as trustees. But upon the construction of the grant, as not creating a trust, a demurrer was allowed. *Brown v. Harris*, 12 Ves. 552. JURISDICTION.

Privateer sailing and taking prize without letters of marque, the prize belongs to the king as a droit of the crown. *Nichols v. Gaudall*, 10 Ves. 155. CROWN PREROGATIVE.

No interest completely vested in prizes before condemnation; but upon condemnation it is considered the property of the captor from the time of the capture. The crown, in prize grants, puts what is strictly bounty upon the footing of right, considering the claim as transmissible to the legal representatives of the claimant, deceased before the grant, subject to his will, &c. as his other property. *Stevens v. Bagwell*, 15 Ves. 139. INTEREST VESTED.

Whether the court of chancery has jurisdiction to determine whether a ship of war was or was not at the time of the capture, one of the squadron under the command of a particular officer. *Qu.?* *Parker v. Toulmin*, 1 Cox, 265.

Where satisfaction is made to ship owners under a royal proclamation, for a distribution of prizes, such of the underwriters as have paid are entitled to a restitution of the insurance money; but those who have compounded and renounced salvage are not; and the underwriters who are foreigners are entitled to the benefit of the proclamation equally with British subjects. *Blauwpot v. Da Costa*, 1 Eden, 130.

Assignment of sailor's share of prize money at great under-value, set aside for fraud, but still to stand as security for what really advanced. The same equity as to an under-assignment. *How v. Weldon*, 2 Ves. 516. UNDUÉ ADVANTAGE.

Sale of a seaman's prize money, and subsequent agreement in confirmation, set aside. *Taylor v. Rochfort*, *id.* 281.

### PRIZE MONEY.

Charterparty of affreightment between the owners of the ship M, and the commissioners of transports, for and on behalf of his majesty; during its continuance in the transport service the ship makes a capture, which is condemned, and upon petition to the treasury, two-thirds of a moiety of the proceeds arising from the capture, ordered by warrant from the crown to be

### PROBATE.

See WILL, X.

### PROCHAIN AMI.

See PR. PROCHAIN AMI.



PROFESSIONAL CONFIDENCE.

Protection of confidence between solicitor and client extends to all communications made by client for professional assistance, but not where solicitor employed in matter not professional. *Walker v. Wildman*, 6 Mad. 47. SOL. & CLIENT.

A clerk to a solicitor commencing practice for himself, not to be restrained from acting as solicitor for parties against whom his master was employed, upon general allegations of his having in his former service acquired information likely to be prejudicial to the clients of his master. *Briehono v. Sharp*, 1 Jac. 300. SOL. & CLIENT; INJUNCTION.

Motion to restrain a solicitor from giving evidence of confidential matters, refused; the propriety of his being examined, being left to the consideration of the court before which he might appear as a witness. *Beer v. Ward*, id. 77. PR. INJUNCTION; SOL. & CLIENT.

A solicitor who has been discharged, may upon proof of misconduct be restrained from communicating information that came to him confidentially from his client. *Semble*. Id. *ib.*

Professional adviser not bound to discover knowledge communicated by client, but such as he knows *alunde* he must. *Morgan v. Shaw*, 6 Mad. 57. PL. DISCOVERY; SOL. & CLIENT.

A witness not compelled to discover matters of which he obtained knowledge in professional confidence. The privilege not of the attorney but the client, its principle and limitation. *Packhurst v. Lowten*, 2 Swan. 216. WITNESS.

How far solicitor may after being concerned for one party, be restrained from being concerned for the opposite party. *Robinson v. Mullett*, 4 Price, 353. SOL. & CLIENT.

An attorney or solicitor cannot give up his client and act for the opposite party in any suits between them. *El. Cholmondeley v. Ld. Clinton*, 19 Ves. 261. ATTORNEY & CLIENT.

Attorney prevented from communicating his client's secrets, even by striking off the roll; not permitted to give evidence of them. Id. 268.

Solicitors in partnership cannot dissolve their partnership, as against their client without his consent, so as to enable the retiring partner, as discharged, to act against him. Id. 273. ATTY. & CLIENT; PARTNERSHIP.

Practice of solicitors, partners, dividing their business, considering one only as agent to the other, disallowed; the client being entitled to their united exertions. Id. *ib.*

A solicitor may by answer to a bill against him and his clients refuse to discover any deeds or facts confidentially communicated to him. *Stratford v. Hogan*, 2 Ball & B. 164. SOL. & CLIENT; PL. ANSWER.

Counsel or attorney cannot be called upon to reveal the advice given to the client; demurrer therefore overruled as to the case, and allowed as to the opinion. *Richards v. Jackson*, 18 Ves. 474. DISCOVERY; PL. DEMURRER.

No breach of confidence in a solicitor to prove client's handwriting; he is bound to do so, if called upon. *Bowles v. Stewart*, 1 Scho. & L. 226. SOL. & CLIENT.

Defendant having examined B his clerk in court, plaintiff exhibited interrogatories to cross-examine him, to which he demurred, for that he knew nothing but as defendant's clerk in court or agent. Demurrer overruled, as covering too much for it ought to conclude, that he knew nothing but by the information of his client. *Valliant v. Dodmoult*, 2 Atk. 524. PR. CROSS-EXAMON; PL. DEMURRER.

Where at law the party calls upon his attorney as

a witness, the other side may cross-examine him to the point in the cause. S. C. *ib.*

Counsel, solicitor or attorney may be privileged from being examined in such cases, but not an agent.

Demurrer to examination, as being counsel for the opposite party, was overruled, for that what he knew was as conveyancer only. S. C. *ib.*

Counsel is not bound to disclose professional confidence. *Rothwell v. King*, 2 Swan. 221. S. P. *Spencer v. Luttrell*, id. *ib.* and *Stanhope v. Nott*, id. *ib.* COUNSEL.

A scrivener is entitled to same protection. *Harvey v. Clayton*, id. SCRIVENER.

PROFITS.

See RENTS AND PROFITS.—INTERMEDIATE PROFITS.

PROMISSORY NOTES.

See BILLS OF EXCHANGE.

PROPERTY TAX.

See STAT. C. OF, II. 27.

PUBLIC ACCOUNT.

See ACCOUNT, VII.

PUBLIC CALAMITY.

By terms of French contract, *rentes viagères* for two lives in succession, were, after the death of first life, payable with all arrears to survivor. Representative of first life relieved against loss of arrears occasioned by the French revolution. *Hachett v. Pattie*, 6 Mad. 4. ACCIDENT.

It has been the constant rule of courts of equity in Ireland, that when, by a general and national calamity, nothing is made out of lands which are a fund for the payment of interest, no interest ought to run during the continuance of such public calamity. *Basil v. Atcheson*, 4 Bro. P. C. 502. INTEREST, WHEN PAYABLE.

It seems that arrears of an annuity or jointure, which accrued due during the time of a public rebellion, cannot be recovered under a bill in equity. *Kirkby v. Ormsby*, Colles' P. C. 134. The decree in this cause does not appear.

PUBLIC OFFICERS.

See AMBASSADOR.—OFFICES AND OFFICERS PUBLIC.

PUBLIC POLICY.

See also AGREEMENT, VI.—BOND, III.—PR. INJON. 12. (g).

A revolted colony of Spain not recognized as an independent state by Great Britain, executed bonds at six per cent. interest as securities for a loan. P acting in collusion with B, a holder of the bonds in England, by falsely representing that he had purchased some of them, induced the plaintiff to become a purchaser: Held, on demurrer, that the bonds were not usurious, as it did not appear by the bill that the contract for the loan was made, or the amount of it to be paid in this country, that P and B would have been answerable to the plaintiff for losses sustained

upon his purchase, but that as the original contract was made with a government not acknowledged by Great Britain, the court would not relieve them: *Thompson v. Powles*, 2 Swan. 194. USURY; VEND. & PURCH.

An agreement between two sons to divide equally whatever property they may receive from their father in his lifetime, or become entitled to under his will, or by descent or otherwise from him, is not contrary to public policy, but will be enforced in equity. *Wethered v. Wethered*, 2 Sim. 183. AGREEMENT.

To prevent a demurrer to bill, it was falsely alleged in it that a revolted colony of Spain had been recognized by Great Britain as an independent state: the court is bound to know judicially that the allegation is false, and not to give it the intended effect. *Taylor v. Barclay*, id. 213. P.L. BILL.

Where, on bill for account of profits of voyage against captain of East India ship, the executors of captain alleged the consideration to be that of procuring him the command of the ship; a case was sent to law as to the consideration, and question as to agreement being against public policy, reserved. *Money v. Macleod*, 2 S. & S. 301. AGREEMENT, CONSIDERATION; ISSUE AT LAW.

A sum of money was paid by A to B for the purpose of purchasing C promotion in the army, and it remained unapplied in the hands of B at the death of A. C having been compelled, from the bad state of his health, to quit the army, and having no prospect of being able to enter into the service again, filed a bill for the money, and it was decreed to be paid to him. *Leche v. Id. Kilmorey*, 1 Turn. & R. 207. FRAUD, ILLEGAL, BARGAIN.

Not against public policy that trader sells secret in trade, and restrains himself generally from use of it. *Bryson v. Whitehead*, 1 S. & S. 74. TRADE, RESTRAINTS ON; TRADE, SECRET IN.

Injunction to restrain the infringement of copyright in a work as to which it appears doubtful whether it did not tend to impugn the doctrines of the scriptures, refused. *Lawrence v. Smith*, 1 Jac. 471. INJUNC.; INFRINGEMENT OF COPYRIGHT.

Securities given to persons who would be prejudiced by the passing of a private bill in parliament in consideration of their withdrawing their opposition to it, are not illegal. *Vaughall Bridge Comp. v. El. Spencer*, id. 64. CONTRACT.

An agreement between an insolvent debtor and his assignee, by which an estate of the insolvent is to be held in trust by the assignee to pay out of the rents and profits, annuities to the insolvent and his wife, and the surplus towards the extinction of a debt owing to the assignee, is a transaction which, being brought before a court of equity at the instance of the insolvent himself, must be rescinded on the ground of public policy. *McNeill v. Cahill*, on appeal, 2 Bli. 229. AGREEMENT; INSOLVENCY.

A person executing a deed for the purpose of defrauding the law, cannot come into equity for the purpose of setting it aside, even though the instrument has never been made use of; and, therefore, if A convey an estate to B as a qualification to kill game, equity will not compel a reconveyance. *Roberts v. Roberts*, Dan. 143. FRAUD.

Demurrer to bill of discovery in support of an action to recover the expenses of entertainment given by the plaintiff under an agreement with the defendant to introduce him to a woman of fortune with a view of marriage, allowed. *King v. Burr*, 3 Mer. 693. P.L. DEMURRER.

Securities given in consideration of withholding opposition to bill in parliament are illegal as against public policy, and securities ordered to be delivered up. *Vaughall Bridge Comp. v. E. Spencer*, 2 Mad. 356. But see S.C. 1 Jac. 64. SECURITIES, DELIVERY UP OF.

Injunction granted to restrain the defendant from suing for a rent-charge, granted to qualify him to sit in parliament, the purpose never having been answered. *Platanora v. Staple*, Coop. 250. FRAUD; INJUNCTION.

Equity will not look minutely into the circumstances of a transaction impeached on the grounds of public policy. *Roche v. O'Brien*, 1 Ball & B. 338. CONTRACT.

Agreement between A, B and C that they shall purchase ship, and that it shall be registered in the names of A and B is against public policy, and demurrer allowed to bill for account in such transaction. *Buttersby v. Smith*, 3 Mad. 186. SHIP REGISTRY; AGREEMENT.

An agreement between two persons having expectations from a third to divide equally whatever he might leave them, is valid. *Harwood v. Tooke*, 2 Sim. 192. *Wethered v. Wethered*, id. 183. AGREEMENT.

Contracts contrary to the policy of the law, as a deed of gift by a client to an attorney, by an heir to guardian, the purchase of a reversion from a young heir, the trustee selling to himself, set aside without evidence of fraud. *Morse v. Royal*, 12 Ves. 371. CONTRACT.

Bond to marry or pay money established at law; but injunction granted till hearing on ground of policy, being an engagement upon expectations under will of third person, though not a relation, from whom it was kept secret, to marry at his death, and no mutual obligation. *Cock v. Richard*, 10 Ves. 429. BOND; MARRIAGE; INJUNCTION; MUTUALITY.

A bond, given as a remuneration to obligee for having assisted obligor in affecting an elopement and a marriage without consent of the friends of the wife, declared void, though given voluntarily after the marriage, and without any previous agreement for the same. *Williamson v. Gihon*, 2 Scho. & L. 357. BOND.

Contract for sale of command of E. India ships is illegal, and therefore cannot be enforced by suit upon equity against the fund paid by Comp. as a compensation under the regulations of 1796, to restrain the practice in future. *Thompson v. Thompson*, 7 Ves. 470.

Bond by a father to secure an annuity to his son until he should be in possession of a living of a certain value, and an agreement of the same date reciting the bond, declaring that the son would forthwith enter into holy orders and accept such living. The Ld. Ch. expressed a strong opinion that upon grounds of public policy, by the effect of the agreement, the transaction was illegal; but the decision was, upon the ground that son had not complied with the condition, having received the annuity nine years, and being still only in deacon's orders, that the annuity was determinable by the father or his representatives. *Id. Kircudbright v. Ly. Kircudbright*, 8 Ves. 51. BOND.

Bill for reconveyance of qualification to sit in parliament, given by father to his son, dismissed, with costs. *Curtis v. Perry*, 6 Ves. 747. FRAUDULENT CONVEYANCE.

Bill for specific performance of agreement, originating in communications by commissioners who took the depositions in a cause, and by witnesses, to defendant, as to nature and effect of evidence; though plaintiff was not implicated in the transaction, bill was dismissed on grounds of public policy. *Cloth v. Jackson*, 6 Ves. 12. SPECIFIC PERFORMANCE.

The command of an E. India ship is a public trust; and the sale of it, contrary to a public regulation of the Company, is a breach of public duty.

*E. I. Comp. v. Neave*, 5 Ves. 181. *E. I. Comp.*; OFFICES, SALE OF.

Bill for discovery whether the plaintiffs were not employed by one defendant, a peer, as solicitors, to present and prosecute a petition on behalf of the other defendant, complaining of a return of a member of parliament, that he might be duly elected. Demurrer allowed on grounds of public policy, and because the discovery could have no effect; and principally because such transaction would amount to maintenance at common law. *Wallis v. Dk. Portland*, 3 Ves. 494. PL. DISCOVERY; MAINTENANCE OF SUIT.

Bill of exchange given to secure procuration money, stipulated to be paid to colonel of regiment for commission, is void, and court will interfere even after the money is in hands of sheriff on execution at law. *Whittingham v. Bourgoigne*, 3 Anst. 900. INJUNC.; SALE OF OFFICES.

An assignment of the half-pay of an officer in the army is bad in equity, as well as at law. *Stone v. Lidderdale*, 2 Anst. 533. ASSIGNMENT OF HALF-PAY.

Perpetual injunction granted against a bond for the purchase of an estate upon the public policy of the law, although the office was not within the stat. *Hamington v. Du Chatel*, 2 Bro. C. C. 124. INJUNC. PERPETUAL; BOND.

Money advanced by plaintiff to the defendant to procure him a commission in the marines, decreed to be refunded with interest, plaintiff having, after six months, been discovered to have worn a livery, and being thereupon discharged, first, upon grounds of public policy, and secondly, as plaintiff had been imposed upon, defendant knowing that he was incapable of holding the commission. *Morris v. McCulloch*, 2 Eden, 190. Ambl. 432. FRAUDULENT AGREEMENT.

Exhibits ordered to be delivered before determination of question on ground of public policy. *Elliot v. Williams, Dick*, 325.

A promissory note suspicious in itself, under the circumstances, and the admitted object of it being an improper one, even if the note were actually genuine, decreed, at the instance of the person alleged to have given it, to be deposited with the register of the court, in the first instance, with a declaration that the plaintiff was entitled to be relieved against it, without preventing the defendant from bringing an action on it within a reasonable time; and if delay in doing so, then to be delivered up. *Bp. Winchester v. Fournier*, 2 Ves. 445. DELIVERY UP OF VOIDABLE SECURITIES.

A bill in equity lies not to compel specific performance of an agreement to pay money, in consi-

deration of having stifled prosecution for felony. *Secus*, if to stop a prosecution at law for a fraud. *Johnson v. Ogilby*, 3 P. W. 279. SPECIFIC PERFORMANCE.

The purchase of a share in mines, which proved to be a bubble, or money paid for effecting illegal insurances, are not such considerations as will support a bill of exchange in equity. *Brown v. Marsh*, Gilb. Eq. Rep. 154. *Exp. Mather*, 3 Ves. 373. CONSIDERATION.

It seems that arrears of an annuity or jointure, which accrued due during the time of a public rebellion, cannot be recovered under a bill in equity. *Kirkby v. Ormsby*, Colles' P. C. 134. The decree in this cause does not appear. PUBLIC CALAMITY.

Bond given by A to B for B's quitting his pretence, and procuring A to be admitted purser to one of the king's ships. Court will relieve on payment of principal without interest or costs. *Symonds v. Gibson*, 2 Vern. 308. BOND.

One apprentice gives a bond to another apprentice for 50l. won at play. Bond decreed to be delivered up, gaming among apprentices being of the worst consequences. By the custom of London, a master may justify turning away his apprentice if he frequents gaming. *Woodroffe v. Farnham*, 2 Vern. 291. GAMING; APPRENTICE; CUSTOM OF LONDON.

A policy of insurance being made an ill use of, the court decreed it to be delivered up. *Whittingham v. Thornborough*, Prec. Chan. 20. S. C. 2 Vern. 206.

One differing with his mother, settles his mansion-house on his brother, but first takes a bond from him in his sister's name, that the brother should not permit his mother to come into the house. Bond set aside in equity as unnatural bond. *Traiton v. Traiton*, 1 Vern. 413. BOND.

A agrees to surrender his office to B for 100l., for which B gives a bond to A. A surrenders; but B is refused to be admitted. No relief against this bond. *Berisford v. Done*, 1 Vern. 98.

Legacy left to procure a dukedom, void. *El. Kingston v. Piecpoint*, 1 Vern. 5. LEGACY.

## PUFFERS.

See AUCTION.

## PURCHASE.

See ESTATE, XI.—FRAUD, VII.—PL. PLA, 15.

## QUAKERS.

As to Quakers answering and deposing. *Deame's Order*, 248, 249.

If one puts in his answer as being a Quaker, the court will not enquire whether he is such. *Marsh v. Robinson*, 2 Anst. 479. PR. ANSWER.

A Quaker cannot be admitted to exhibit articles of the peace against her husband upon her affirmation, as it is in nature of a criminal prosecution. *Exp. Gumbleton*, 2 Atk. 70. S. C. 9 Mod. 232. PR. SUBJICAVIT.

The court allowed a Quaker to put in his answer without oath or affirmation, where the bill appeared

frivolous. *Wood v. Story*, 1 P. W. 781. PR. ANSWER, JURAT OF.

By the Irish stat. 6 Geo. 1. c. 6. s. 5. Quakers are obliged to give in their answers to bills against them in Chancery or the Exchequer, with their names or marks subscribed, making the affirmation prescribed by the act; by which the affirmant is required to declare that he is persuaded in his conscience, that the taking of an oath in any case is contrary to the law of God, and that the answer he gives is true; such affirmation to be written at the foot of the ingrossed copy of the answer, and to be signed or have the mark put, witnessed by the affirmant's six clerk or attorney or solicitor;

any Quaker convicted of so declaring contrary to the truth, to be liable to the penalties of perjury: provided (s. 6.) that no person shall be deemed a Quaker within the act, unless he produce a certificate to the court, under the hands of six creditable persons of his own congregation, of his being of that profession for at least three years past.

A bill being preferred against a Quaker for tithes, who refused to answer upon oath, the defendant was brought to the bar, and having been brought three times before, the bill was taken *pro confesso*, and it was referred to a master to examine what was due, and not to be armed with a commission for that purpose. *Anon.* 2 C.C. 237. 2 Free. 27. *PR. ANSWER, JURAT; PR. BILL, PRO CONFESSO.*

### QUIT RENTS.

Quit rents, being incidents of tenure, are proper subjects of compensation. *Estelle v. Stephenson*, 1 S. & S. 122. COMPENSATION; VEND. & PURCH.

Quit rent shall not be apportioned as between the tenant for life and remainder-man, the stat. 11 Geo. 2. c. 19. s. 4. having no application in this case. *Sutton v. Chaplin*, 10 Ves. 66.

Bill does not lie against several tenants of a manor for quit rents, the plaintiff's remedy being at law, and the suit also multifarious as to the different tenants. *Bouverie v. Prentice*, 1 Bro. C. C. 200. PL. MULTIFARIOUSNESS; LANDL. & TEN.

Though a bill in equity lies to recover a small quit rent, yet it ought to appear that plaintiff has no remedy for the same at law. *Holder v. Chambery*, 3 P. W. 256.

Bill by the landlord against his tenant for a quit rent: the bill alleged, that the land out of which it issued, by reason of the unity of possession of the lands out of which the rent was supposed to issue, with other lands, was not known. Defendant answered as to discovery, but demurred as to relief. *Sed quare*, whether a demurrer to all relief be good. *North v. El. Stafford*, 3 P. W. 149.

An owner of a quit rent shall pay taxes only in proportion to what the land pays; but if the matter has been examined by the commissioners of the land tax, the court will not re-examine it. *Brockman v. Honeywood*, 1 P. W. 328.

The court of judicature for rebuilding houses burnt down by the great fire in London, having settled the rent which the tenant was to pay for a house at 5l. per annum, and there being an ancient rent of 25s. per annum issuing out of the same house to a charitable use, now twenty years in arrear, a question arose, whether the landlord or tenant should pay this rent? Upon reading the act of parliament, Ld. Keeper was satisfied the tenant was in no case to be charged with more than the rent of 5l. per annum in the whole, and directed plaintiff to bring Lady D., who had the reversion expectant on the lease, before the court, and ordered the tenant not to pay any more of his rent in the mean time, and declared that the growing payments, and the arrears of the 25s. per annum, should be deducted out of the rent. *Grice v. Banks*, 1 Vern. 309.

Bill in equity lies for recovering ancient quit rents, though very small as 2s. or 3s. per annum; and if proved to be constantly paid, the court will decree payment, or will direct an issue to try whether any and what rent is issuing out of all or any of the lands in the bill. *Cocks v. Foley*, 2 Vern. 359.

### REAL ASSETS.

See EXECUTORS, X. 1; XI. 3.

### REAL ESTATE.

See ESTATE, VIII.

### REBELLION.

See PR. COMMISSION OF REBELLION.

### RECEIPT.

See also EXECUTORS, VI.; TRUSTEES, V.

Where conveyance is executed to purchaser which expresses purchase money to have been paid, estate does not pass by the conveyance in equity till money actually paid, although receipt for same is indorsed on conveyance. *Winter v. M. Anson*, 1 S. & S. 444. CONVEYANCE; VEND. & PURCH.

A right is not barred, by merely signing a receipt as a witness, upon payment by the executor to the adverse party, not amounting to a release or fraud. *Holmes v. Custance*, 12 Ves. 279.

Joining in a receipt, though perhaps not absolutely necessary, not conclusive against an executor, any than against a trustee, to charge him with the

receipts of his co-executor. *Hovey v. Blakeman*, 4 Ves. 608. EXOR. PERSONAL LIAB.

Executor joining in receipt for conformity sake, and not receiving money, is not liable. *Westly v. Clarke*, Dick. 329.

Otherwise, in case of trustee. *Id. ib.* 330.

Defendant bound, in chancery, to answer as to receipt of rent. *Dire v. Lintoft*, Cary, 71.

Payment of debt, without taking receipt, relievable in equity, on oath of party. Cary, 2.

Receipt indorsed, signed by the seller for the purchase money, if the money be not really paid, is of no avail. *Coppin v. Coppin*, 2 P. W. 295.

### RECOGNIZANCE.

Recognizances must be enrolled to warrant *scire facias*. Beame's Ord. 36.

Not to be enrolled after year, unless ordered. *Id.* 37.

For good behaviour, when to be filed in the year. *Id.* 39.

To the king's use, to be enrolled and calendared. *Id.* 41.

The vacating of, to be attended by clerk of enrolments. *Id.* 98.

To be enrolled within a few days, and taken to Rolls chapel. *Id.* 98.

Unless enrolled within six months, not to be enrolled. *Id.* 244.

Exceptions thereto. *Id.* 244.

Recognizance by a guardian, in the matter of a

minor, is not a debt due to the crown: Where a debt to the crown is not of a public nature, crown process should not issue. *Exp. Usher*, 1 Ball & B. 199. GUARDIAN & WARD; CROWN DEBT.

Recognizance of defendants, and two sureties for 2000*l.*, discharged on payment of that sum, although, in the mean time, a larger sum appeared to be due. *Baker v. Jefferies*, 2 Cox. 226.

Surety in recognizance of receiver discharged; fresh recognizance entered into; time for enrolment elapsed, entered *nunc pro tunc*. *Vaughan v. Vaughan*, Dick. 90. S. P. Blois v. Betts, id. 336.

Habeas corpus to warden of Fleet to have defendant in court, to be charged with debt on recognizance. *Ward v. Crouch*, Cary, 71.

Plaintiff, being in execution on statute, released on recognizance, no cause being shown. *Rosse v. Laszels*, Cary, 60.

A is principal in a recognizance of 5000*l.*, and B and C sureties. A afterwards jointures his wife before marriage in some lands, without notice either to the wife or her friends of this recognizance, and devises his real and personal estate to B, one of his sureties, and dies first. The personal estate of A, the principal, shall be applied towards this recognizance; then his land devised, the devise being a volunteer; next the paraphernalia of the wife of A, the principal; and lastly, the two sureties shall contribute to make up the deficiency. *Tynt v. Tynt*, 2 P.W. 542. Mos. 192. ADMON. OF ASSETS; PAIN. & SURETY.

A recognizance not enrolled, shall be looked upon as a bond, and paid as a debt by specialty. *Bothomly v. Fairfax*, 1 P.W. 334. 2 Vern. 750. ADMON. OF ASSETS.

So a recognizance, not regularly taken, may be sued as an obligation. *Id. ib.*

An action at law will lie upon a recognizance; but if it is entered into in pursuance of an order of this court, the court will not allow it to be sued otherwise than by a *scire facias* in this court. *Grant v. Stone*, 1 Vern. 313. INJUNC. AGAINST PROCS. AT LAW.

## RECONVEYANCE; REIMBURSEMENT; AND RETRANSFER OF STOCK AND UNCLAIMED DIVIDENDS.

See also MORTGAGE, V. 5.

A second claimant proving his right, and unable to obtain transfer from first claimant, court of chancery, &c., to order commissioners for reduction of national debt, to transfer such stock, in their name, as shall be sufficient. 56 Geo. 3. c. 60.

As to security for reimbursement of tenant for life, for loss sustained by being wrongfully restrained from cutting timber, &c. *Wombwell v. Belaysse*, cited 6 Ves. 110. n. (a).

The court, upon petition, under the stat. 56 Geo. 3. c. 60., will direct stock, which has been transferred to the sinking fund, to be re-transferred to the petitioners, where their title is clear, without any reference to the master to ascertain who is beneficially entitled to the stock. *Exp. Nicholl*, 1 Turn. & R. 119. STAT. C. OF.

On petition, under the stat. 56 Geo. 3. c. 60., for a re-transfer of unclaimed stock that has been transferred to the sinking fund, the costs are in general to be paid out of the stock in question. *Exp. Martin*, 1 Jac. 55. PR. COSTS.

Court will not, under 56 Geo. 3. c. 60., order, on petition, a re-transfer of unclaimed stock that has been transferred to sinking fund, when title is disputed. *Exp. Lovell*, 2 J. & W. 397. TITLE.

Unclaimed dividends, which had been transferred

to commissioners for sinking national debt, standing in the name of A, who had become bankrupt, and died, were claimed by A's assignees and B, who alleged A to have held the stock as trustee for B: stock ordered to be re-transferred to the accountant-general, and a reference directed to master to inquire who entitled. *Exp. Gillet*, 3 Mad. 28. NATIONAL DEBT.

Creditor, who had advanced money to corporation established for maintenance of poor of certain district, held entitled to compel assessment of rates sufficient after maintenance of poor, to pay principal and interest of the debt. *Jones v. Parishes of Montgomery*, &c. 3 Swan. 202. ASSESSMENT OF RATES.

Sum of money, paid by mistake by assignees of one bankruptcy to assignees of another bankruptcy, and divided amongst creditors, directed to be reimbursed out of future effects. *Exp. Bignold*, 2 Mad. 470. BANKCY.; PAYMT. BY MISTAKE.

Advances to a married woman, deserted by her husband, on the credit of a fund in court, her property for her maintenance exceeding the income of that, reimbursed out of the capital. *Guy v. Pearkes*, 18 Ves. 196. A FUND IN COURT; FEME COVERT, SEPARATE ESTATE.

The relief in respect of expenditure, under an erroneous opinion of title, or an expectation of a larger interest, or that the enjoyment would not be disturbed, with the knowledge and permission of the other party, requires a case of bad faith clearly made out. In this instance, it failed for want of evidence. *Dann v. Spurrier*, 7 Ves. 231.

Bill by a former churchwarden against the parish officers, trustees of an estate for the poor of the parish and forty inhabitants, to be reimbursed money laid out on account of the trust under an order of vestry; his accounts being passed, and an order made for payment: upon demurrer, the Ld. Ch. expressed a strong opinion against such a bill, and, as it appeared not to be signed by counsel, ordered it to be taken off the file, and the plaintiff to pay the costs. *French v. Dear*, 5 Ves. 547. PL. SIG. OF COUNSEL; CHURCHWARDENS.

Where deeds are set aside for fraud, but the estate has been conveyed to a third person, as an instrument not privy to the fraud, or where they are set aside on paying so much money, a re-conveyance ought to be decreed. *Bates v. Graves*, 2 Ves. J. 295. FRAUD.

Demurrer overruled, and costs paid; on re-argument, demurrer allowed, costs to be refunded. *Outs v. Chapman*, Dick. 148. PR. COSTS.

Articles, on marriage, to settle lands on husband and wife for lives, remainder to heirs male of body of wife by husband, remainder to his heirs male by second wife, remainder to heirs female by marriage. Settlement is made before marriage, and said to be in pursuance of articles, whereby lands are limited to husband for life, without waste, and with power of making leases, remainder to first, &c., sons of marriage in tail male, remainder to first, &c., sons in tail by second marriage, remainder to heirs of body of husband. There are two daughters: husband suffers recovery, and devises to sister. Daughters may compel re-conveyance. *West v. Erisy*, 1 Com. 412. S.C. 2 P.W. 349. S.C. on appeal, 1 Brown, P.C. 225. SETTLEMENT, C. OF; FINE & RECOVERY, WHO BOUND.

Where tenant in tail, supposing himself tenant in fee, lays out money on estate, court will not decree satisfaction against devisee of ancestor, who becomes entitled on failure of issue in tail. *Ellinor v. Garton*, 9 Mod. 48. TEN. IN TAIL.

Money paid for reversion, which could not be enjoyed, ordered to be refunded. *Pickston v. Littlecote*, &c. Cary, 93.

## RECORDS.

See also DEEDS.

When records to be exemplified and when not. Beame's Ord. 45, 46.

Their vacating, &c. to be attended by clerks of inrolments. *Id.* 98.

To be carried to chapel of rolls and there filed and calendared. *Id.* 99.

On being filed with attorney, to be personally transferred to the attorney of other side. *Id.* 100.

Not to be taken out of the office. *Id.* 111, 123, 141.

To be transferred to chapel of rolls. *Id.* 118, 124, 136, 252, 268, 331.

To be filed with six clerk. *Id.* 140.

To remain in custody of six clerk. *Id.* 141.

To be returned to six clerk. *Id.* 231.

Records lost, new engrossment ordered from office copies. *Williams v. Floyer*, Dick. 324.

## RECOVERIES.

See FINE AND RECOVERIES.

## REDEMPTION.

See SECURITY, V.—MORTGAGE, V.—ANNUITY, VII.

## REGISTRY.

See SHIP REGISTRY.—DEEDS, XII.—PRIORITY OF SECURITY.

## REIMBURSEMENT.

See RECONVEYANCE, &c.

## RELATIONS.

See also CONSIDERATIONS, III. 2.

First cousins twice removed come under denomination of first and second cousins, as second cousins, they being related to propositors in same, viz. sixth degree. *Silcox v. Bell*, 1 S. & S. 301. DISTRIBUTION.

Word "relations," in a will, means "next of kin;" bequest of residue to testator's wife for life with a direction to dispose of the residue amongst his relations in such manner as she should think fit. Appointment to relations not being next of kin, void, and the residue decreed to be distributed amongst those who were next of kin to the testator at the time of his death. *Pope v. Whitcombe*, 3 Mer. 689. WILL, C. OF, WHO TAKE.

Bequest to relations confined to next of kin according to statute of distributions. *Cruwy v. Colman*, 9 Ves. 323. WILL, C. OF.

Though upon bequests to relations with a power of selection, the party may go beyond those included in statute of distributions; the contrary is adhered to whenever the execution devolves on the court. *Id.* 324. *Id.*

Legacy to executor to be distributed amongst the poor relations of testator; a relation who was poor at the time of testator's death, but became rich before distribution, not entitled; poor relation dying before distribution, his claim not transmissible to his personal representative: where a person has a power of

distribution amongst poor relations, he may distribute amongst all poor relations, however remote; but where the court is called on to distribute, in failure of the person so empowered, it will confine itself to relations within the statute of distributions. *Mahon v. Savage*, 1 Scho. & L. 111. *Id.*

Bequest to relations means those entitled under statute of distributions. *Thomas v. Hole*, Dick. 50.

## RELATOR.

See CHANCERY, IV. 2.

## RELEASE.

See also DEEDS, IV.—DEEDS, VI.—DOWER, IV.—PL. PLEA, 16.—PRESUMPTION, II.—PRINCIPAL & SURETY, IV.

A plea of release, if the consideration be impeached, must contain averments supported fully by an answer covering the grounds upon which the consideration is impugned, and cannot extend to a discovery of the consideration. *Parker v. Alcock*, 1 Y. & J. 432. PL. PLEA OF RELEASE.

The assignee of a lease executes a bond to indemnify the original lessees against the covenants contained in the original lease; he afterwards quits the country; the house is left untenanted, and the original lessees are obliged to pay the rent reserved; the assignee having subsequently returned to England, makes a compromise with them for the sum then due, in respect of his non-performance of the covenants, and shortly afterward goes abroad; they demise the house to a person who continues in the possession till the end of the term: held, that this mode of dealing with the premises does not give the assignee any title in equity to relief against the legal effect of his bond. *Anderson v. Bailey*, 1 Russ. 313. BOND; OBLIGOR AND OBLIGEE.

A charge on lands created by deed cannot be discharged but by deed, or at least by some formal act of release. *Cupit v. Jackson*, 13 Price, 721. S. C. 1 M'Clel. 495. CHARGE ON LANDS.

If the wife insist upon her equity against the assignee in bankruptcy of her husband, it attaches for the benefit of her children, and she cannot afterwards release it in favour of her husband. *Barker v. Lee*, 6 Mad. 330. BANKCY. PROVISION FOR WIFE; HUSB. & WIFE.

Demurrer to a bill by a surety, stating that two partners, having agreed to execute a release to the principal, in consideration of an assignment of his effects, one alone executed the release, overruled; whether a release so executed binds all the partners; *Quere?* *Hackshaw v. Parkins*, 2 Swan. 539. PARTNERSHIP.

R G having died intestate, possessed of considerable personal property, and entitled, after the death of his wife, to the principal of certain bank stock, standing in the name of a trustee, his brother, by letter, expressed his intention of relinquishing his share of the intestate's estate to the said widow, executed to the trustee (transferring to the widow) a release of the bank stock, and directed the preparation of a release of the general personal estate, the execution of which was prevented by his death, but his wish to execute it continued to his last hour; the release of the stock is effectual in favour of the intestate's widow; but the intention to relinquish the share of the general personal estate not being perfected, amounts not to a gift, and she, as administratrix, must account to the representatives of the bro-

ther, but without interest. *Hoopes v. Goodwyn*, 1 Swan. 485. EXEMPTION OF DEBTS; GIFT.

A solicitor has a lien upon costs, ordered to be paid to his client upon a petition in bankruptcy, although there be no fund in court; nor can the client release the benefit of the order to the prejudice of the solicitor. *Exp. Bryant*, 2 Rose. 237. SOL. & CLIENT; LIEN; BANKCY. ORDER FOR PAYMENT; DEBTOR AND CRED.

A bond from the owner of an estate charged to the person entitled to the charge, who signed a receipt for the amount, is not a substitution for the charge, but merely an additional security, and the estate not thereby released. It is not incumbent on the creditor to prove that it was not the intention of the parties to this transaction that the bond should be a substitution of the charge, but it lies on the owner of the estate to make out that the estate is discharged. *Saunders v. Leslie*, 2 Ball & B. 509. CHARGE ON ESTATE; PR. EVID. ONUS PROBANDI.

Defence of release is not proper for answer, but for plea only. *Leonard v. Leonard*, 1 Ball & B. 323. PL. ANSWER.

Quasi intail of an estate for lives barred by release. *Moody v. Walters*, 16 Ves. 313. TENANT IN TAIL, AND REMAINDER.

Proof under bankruptcy of one joint debt after receiving composition from the other, expunged; release to one being a release to both. *Exp. Slater*, 6 Ves. 146. BANKCY. PROOF IN; BANKCY. PARTNERSHIP.

Notwithstanding declaration of the testator to his executor, that he never meant to call for payment of a promissory note, it was held part of the assets which were insufficient for the legacies, a charge on the real estate failing for want of a proper attestation of the will. *Byrn v. Godfrey*, 4 Ves. 6. ASSETS; DEBTOR & CRED.

"I return A his bond," in a will, is not a release, but a legacy, and having lapsed, the bond remains in force against a surviving co-obligor. *Maitland v. Adair*, 3 Ves. 431. BOND; WILL, C. OF; LAPSED LEGACY.

Bill, charging fraud in obtaining a release; plea, the release, supported by an answer denying the fraud; the benefit of the plea was saved to the hearing. *Lloyd v. Smith*, 1 Anst. 258. PL. PLEA.

Testator gave his brother and nephew legacies, and appointed them executors, but did not dispose of the residue; they were indebted to him in several sums; this is no release of the debts, and they are trustees for the next of kin as to the residue. *Carey v. Goodwyn*, 1 Bro. C. C. 110. WILL, C. OF; DEBTOR AND CRED.; EXORS. BENEFICIALLY INTERESTED.

Plaintiff, having released the principal in a fraud, cannot go on against the other parties, though they would have been secondarily liable. *Thompson v. Harrison*, 2 Bro. C. C. 164. FRAUD; PRINC. AND ACCESSORY.

General release from a sister to a brother, not binding as to particular rights under the marriage settlement, or articles of the parent, the sister being ignorant of them, and the brother having covenanted, that he was seized in fee contrary to the fact; the sister held entitled to her claims under the settlement or articles, and also to the consideration recited and expressed in the deed of release, the brother being a debtor to her in such amount on the face of it. *Ramsden v. Hyton*, 2 Ves. 305.

A general release, with a particular consideration recited, will be construed according to the particular recital. *Id. ib.*

General release restrained to what was under consideration. *Cole v. Gibson*, 1 Ves. 507.

Voluntary release by a party to his adversary not to defeat the clerk in court of his lien for costs; if the suit had ended on a *bond fide* compromise for a reasonable consideration paid, it would have been otherwise. *Anon.* 2 Ves. 26. PR. LIEN FOR COSTS OF CLERK IN COURT; SOL. & CLIENT.

A penalty was never held to release parties from their contracts, which must be performed in equity, though the penalty be incurred. *Howard v. Hopkins*, 2 Atk. 371.

If a mortgage is found cancelled in the possession of the mortgagee, it is as much a release as cancelling a bond; but there must be some deed to re-vest the estate in the mortgagor. *Harrison v. Owen*, 1 Atk. 520. MORTGAGE CANCELLED.

Plea of general release containing the words "decree and orders of the court of chancery," is good bar to any demand set up under a decree of that court made prior to the date of the release; and if the defendant, by his answer, denies all charges of fraud, &c. in obtaining the release, such answer is sufficient to corroborate the plea. *Walter v. Glanville*, 5 Bro. P. C. 555. PL. PLEA.

No reason to set aside a release because the party releasing had a right; secus, if ignorant of his right, or if the same was concealed from him. *Cann v. Cann*, 1 P. W. 727.

If two joint tenants are plaintiffs, and one releases, the cause is not thereby abated. 2 Free. 6. JOINT TENANCY; ABATEMENT.

A devises 100l. to B; and by will released to B all debts and demands, and afterwards A lends B 100l. whether this 100l. is released by the will. *Benham v. Alston*, 2 Vern. 136. WILL, C. OF, WHAT PASSES.

Whether a release by will of all debts, accounts, and demands will transfer the property of goods which defendant then had in his hands belonging to plaintiff's testator. *Fisk v. Jenson*, 2 Vern. 114. WILL, C. OF, WHAT PASSES.

Although an executor does actually release, yet he must be a party to the suit. *Smithby v. Hinton*, 1 Vern. 31. PL. PARTY; EXECUTOR.

## RELIGION.

See also DISSENTERS.—PAPISTS.

A bequest for the maintenance of an assembly for reading the Jewish law and advancing the Jewish religion, is illegal. *Da Costa v. De Pa*, 2 Swan. 487, S. C. Dick. 258. S. C. Amb. 228. JUDAISM; CHARITY.

Christianity is a part of the law of England. *Id.* 490. *Id. ib.*

Petition of an attorney, a Roman Catholic, to have the oath under the statute 31 Geo. 3. substituted for the oath of supremacy in a commission for swearing him a master extraordinary, refused. *Exp. Agar*, 3 V. & B. 169.

Residuary bequest for purpose of bringing up children in Roman Catholic faith, void. The fund does not go to next of kin, but is in the disposition of crown to some other charitable use by sign manual. *Cary v. Abbott*, 7 Ves. 490. CHARITY.

By the statute of Eliz. and 13 & 14 Ch. 2, the laity are bound by the rubric against marrying without publication of banns, and by the first act, are expressly punished by the censures of the church; and by the second act, the power of the ordinary is directed to be continued and applied for punishing the like offence against the rubric of the present book of Common Prayer. *Middleton v. Crofts*, 2 Atk. 674. MARRIAGE.

## REMAINDERS AND REVERSIONS.

See also ASSIGNMENT.—BARRING REMAINDERS.—  
HUSBAND & WIFE.—INTEREST IN PROPERTY, I. II  
—TRUSTEES, IX.

A private sale of a reversionary interest will not be set aside for mere inadequacy of price, as compared with arithmetical value determined by calculation of an actuary, exclusive of every other circumstance, the latter value not being possible to be obtained in fact. *Hadden v. Roshier*, 1 M'Clel. & Y. 89. INADEQUACY OF CONSIDERATION.

A reversion expectant upon an estate for life, and upon estates tail limited to unborn children, held to be assets for the payment of specialty debts, and decreed to be sold for that purpose. A reversion expectant upon an estate tail may be sold for payment of specialty debts. *Semble*. *Tyndall v. Wane*, 2 Jac. 212. ADMON. OF ASSETS; POSSIBILITIES, &c.

Where there is mortgage term of 1000 years, and mortgagees takes assignment of another term of 500 years of the same premises: Held, the term of 1000 years is merged in the reversionary term of 500 years. *Stephens v. Bridges*, 6 Mad. 66. MILEGE OF TERM OF YEARS.

Wife cannot by consent dispose in favour of her husband of her reversionary interest in personality. *Pickard v. Roberts*, 3 Mad. 384. HUSB. & WIFE.

Sale of reversion by public auction held good, and not within the general rule of sales of reversions, that purchaser must prove he gave full value. *Shelly v. Nash*, 3 Mad. 232.

Tenant for life and remainder-man in tail, both in distress, join in selling estate for inadequate consideration. Held, that it could not be considered as the sale of reversionary interest, subject to rules relating to such sales, but that sale was invalid on account of inadequacy of price, coupled with distress of vendors and their want of advice. *Wood v. Abrey*, 3 Mad. 417. TENANT FOR LIFE AND REMAINDER-MAN; FRAUD, OPPRESSIVE BARGAIN.

Husband cannot reduce wife's reversionary interest into possession. If they join in assigning it as security for debt of husband and she survives, she takes it disencumbered. *Hornshy v. Lee*, 2 Mad. 16. HUSB. & WIFE; CROSS IN ACTION.

Wife's reversion, which cannot fall into possession during the husband's life as if it is upon his death, not assignable by him. *Dalbui v. Dalbui*, 16 Ves. 122. HUSB. & WIFE, SEPARATE ESTATE, ASSIGNMENT.

Bill to set aside the sale of a reversion, dismissed with costs, the only ground on the evidence being inadequacy of price, and no fraud; &c., and the bill filed twelve years after the sale. *Moth v. Atwood*, 5 Ves. 845. LACHES.

The court leans against the construction for raising portions or maintenance out of reversionary term, and upon that principal when the term fell unto possession, and the portion was raised, refused to charge the difference between the sum annually allowed by the infant's grandfather for her maintenance, and the sum charged. *Clinton v. Seymour*, 4 Ves. 440. PORTIONS, RAISING OF; MAINTENANCE.

Upon sale of a reversion, part of the terms was, that purchase-money be paid by a certain time; not being so by default of the vendee, vendor discharged from his contract. *Newman v. Rogers*, 4 Bro. C. C. 391. VENDORS & PURCH.; SPEC. PER.

Testator devised all his manors, messuages, lands, &c. to trustees, in trust for A for his life, with remainders to his first and other sons in tail male, and for want of such issue, he devised all the same manors, &c. to his daughters and grand-daughters respectively, during their lives, and after their deaths, to the heirs

male of their bodies, to take as tenants in common; and on failure of such issue, he devised the remainder of his whole estate to his own right heirs. The devise will create cross-remainders amongst the daughters and grand daughters. *Stanton v. Peck*, 2 Cox, 8. WILL; C. OF.

A, seized in fee and in possession of several estates, and of the reversion in fee of the manor of S, subject to the estate tail of three persons who were living, devises all his estates, generally, to trustees in trust to be sold, and to invest the money for benefit of their children. This reversion passed by will, and was well vested in trustees for benefit of testator's children. *Atkyns v. Atkyns*, 3 Bro. P. C. 408. WILL, C. OF, WHAT PASSES.

Articles on marriage, for settling land to be bought with money, on all the children of the marriage and their respective issues, and for default of such children and their issue, over. Held, there should be cross-remainders by implication. *Treiden v. Lock*, Ambli. 663. ARTICLES ON MARRIAGE; MARRIAGE SETTLEMENT.

Question as to cross-remainders in will. *Eastland v. Reynolds*, Dick. 317.

A, devised to the use of trustees and their heirs in trust for B for life; remainder to his first and other sons in tail; remainder to the future sons of C, successively for life; remainder over. B died without issue in testator's lifetime; the contingent limitations were taken as executory devises, because no child was then born to C; afterwards a child was born to C and died; and a subsequent remainder-man claimed the estate, upon a supposition, that all the preceding intermediate limitations which could not vest at the death of such child, were destroyed, as it had been decreed, that upon the vesting of the executory devise in that child, the subsequent limitations became contingent remainders upon that executory devise; but it was held, that the inheritance in the trustees was sufficient to support the intermediate contingent remainders till they should come in case, although no particular estate to support, &c. was inserted, and that the estate should not vest in possession whilst any of the preceding limitations might come in case. *Hopkins v. Hopkins*, 1 Atk. 580. 1 Ves. 268. Ca. temp. Talb. 44. Vide *Hubergham v. Vincent*, 4 Bro. C. C. 390., where Lord Loughborough has stated this case from a corrected copy. Vide etiam *Bunfield v. Popham*, 1 P. W. 46. 1 Ves. 26., where Ld. Trevor said it had been resolved that a *cestui que trust* for life could not destroy the contingent remainders to his first and other sons. TRUST TO PRESERVE CONTINGENT REMAINDERS.

The legal estate in trustees will support contingent remainders of a trust declared by a will, where no conveyance is directed. S. C. 1 Atk. 594. CONTINGENT REMAINDERS IN EQUITABLE ESTATES.

Though contingent remainders by law must vest, during or at the instant the particular estate determines, yet it does not hold in the case of trusts; the ground the law goes upon is, that a freehold cannot be in abeyance, because there must be a tenant of the freehold to perform services and answer all writs concerning the realty; but this objection is obviated in the case of an equitable estate, because the trustee is the tenant of the freehold to perform those services, and if there are ever so many contingent limitations of a trust, it is sufficient to bring the trustees before the court, together with him in whom the first remainder of the inheritance is vested. *Id.* 589, 590.

The legal estate in trustees will preserve contingent remainders of a trust declared by will, where no conveyance is directed. *Id.* 594. CONTINGENT REMAINDERS, WHEN PRESERVED.

The resulting trust of a freehold to support contingent remainders of a trust, may connect with the



limitation in tail, though not created together with it. *Hopkins v. Hopkins*, 1 Atk. 386.

In a limitation to preserve contingent remainders, it is not material to restrain it to the life of the tenant for life, provided it be restrained to the life of a person in being. *Id.* 596.

A devised lands to his wife for life, and then to his son and daughter, to be equally divided between them and the respective issues of their bodies, and for want of such issue, to his wife in fee. This will not create a cross-remainder, which can only be raised by an implication absolutely necessary, which is not here the case, for the words "several and respective," effectually disjoin the title. *Davenport v. Oldis*, 1 Atk. 579.

Cross-remainders have never been adjudged to arise merely upon these words, "in default of such issue." *S. C.* 1 Atk. 580.

The mortgagee for a term of years being in possession, devises the premises as an estate of inheritance, to three several persons for life successively, with remainder to their first and other sons, remainders over. The remainders over are void, as tending to a perpetuity. *Brett v. Sawbridge*, 3 Bro. P. C. 141. PERPETUITY; WILL, C. OF.

Tenant in tail, with remainders in tail, and reversion in fee to tenant in tail, the lands having been mortgaged for a term by donor, previous to those estates, and so every of them having the equity of redemption incident to it; tenant in tail, by will, appoints the mortgage to be paid off, and then the mortgaged term to be assigned to his mother; and by the same will (being seised of other lands in fee) devised all his lands to W, and his heirs, by which the reversion of the mortgaged premises passes, estate tail, and remainders being spent. Held, that equity of redemption, which was incident to the reversion in fee of tenant in tail, did not pass to mother by the will, and was therefore not severed from the reversion. *Amhurst v. Litton*, Fig. 99; affirmed 5 Bro. P. C. 254. WILL, C. OF.

Reversion in fee after estate tail spent, held assets to pay debts. *Cs. Warwick v. Edwards*, Dick. 51.

Settlement, wherein manor of Dale is settled to the use of grandfather for life, remainder to his son; the husband for life, remainder to trustees for 1000 years, for raising 20,000*l.* for a daughter, if but one, payable at twenty-one, or marriage, &c. in the mean time 300*l.* per ann. for maintenance, and to be raised by trustees, either by rents and profits, or by sale, or mortgage, and to be paid quarterly; the first payment to be made at such of the feasts as shall next happen after the father's death. Father dies, leaving one daughter, and the grandfather living. Bill prayed a mortgage of the reversion for the infant's maintenance, but the court strongly inclined against it. *Pierpoint v. Cheney*, 1 P. W. 498. Pre. Cha. 503. SETTLEMENT; C. OF; INFANT MAINTENANCE.

Reversion never mortgaged to raise maintenance, where the mother was able to keep the child. *Id.* *ib.*

One seised in fee, devised land to his granddaughter for life, remainder to his right heirs male for ever, and died, leaving his granddaughter his heir at law, and his deceased brother's son his next heir male; the devise of the remainder is void. *Dawes v. Ferrers*, 2 P. W. 1. Pre. Cha. 589. DEVISE TO HEIR AT LAW.

Where court has at instance of eldest son ordered trustees to join in destroying contingent remainders, it has sometimes imposed conditions on the son as a provision for a sister. *Frewin v. Charlton*, 1 Eq. Ab. 386.

A devised a farm to B for life, and after some legacies, devised all other his personal estate, lands, tenements, and hereditaments, not before devised to C. The reversion of the farm passed by the general devise. *Id.*

*Willes v. C. Kingman v. Kingman*, 2 Vern. 560. WILL, C. OF, WHAT FATHER.

A directs 1000*l.* to be laid out in the purchase of lands, that the rents and profits thereof might come to his nephew W, for his life; but the testator made no disposition of these lands, after the death of W. Held, that the lands belonged to the testator's heir at law. *Fletcher v. Chapman*, 3 Bro. P. C. 1. WILL, C. OF; HEIR AT LAW.

A remainder of a term is an assignable interest; as if J G, being possessed of a term of 2000 years, devised the estate to his wife for 50 years, if she should so long live; and, after her decease, to his son for 50 years, if, &c.; and, after his decease, to his two grandchildren, for the remainder of the term. One of the grandchildren assigns his interest in the life of the father or grandmother. *Per cur.* This is an assignable interest, and a moiety passed by the assignment. So decreed. *Kingslader v. Courtney*, 2 Freem. 236. *Kimpland v. Courtney*, 2 Freem. 250, semb. *S. C.* POSSIBILITIES, ASSIGNMENT OF.

A, seised in fee by deed and fine, conveys the lands to the use of trustees for 70 years, if A so long live, remainder to trustees for 3000 years, and, after the death of A, then to his son B. Whether the remainder to B is good? *Penhay v. Hurrell*, 2 Vern. 376. 2 Freem. 258. *S. C.*

A, having an estate for three lives, settles it to the use of himself in tail, remainder to B: the remainder is void, or if good, it might be barred by deed, surrender, or other conveyance. *Baker v. Bayley*, 2 Vern. 225. ESTATE, PUR AUTRE VIE; LIMITATION.

In case of judgment recovered against an heir, who has a reversion in fee which is only assets *cum acciderit*, court will not decree a sale of the reversion, but the creditor must wait till it falls. *Fortrey v. Fortrey*, 2 Vern. 134. SALE.

A remainder-man in tail in a voluntary settlement, brings a bill for the discovery of the deed, and it appearing the entail was discontinued, the court would not relieve him. *Kelley v. Berry*, 2 Vern. 35. DISCOVERY.

A term being limited in trust for H in tail, remainder, if T die without issue male in the life of H, to C in tail: the remainder is good. *Howard v. Dk.* *Norfolk*, 2 Swan. 454. LIMITATION.

## REMAINDER-MAN AND REVERSIONER.

See also ESTATE, II. 2. (6); III. 3.—PL. PARTIES, 20.

In a suit concerning the inheritance of a trust estate, settled on B or on C for life, and after remainders to his unborn children, upon the person who should then be entitled to claim as Baron C. in tail, with an ultimate remainder to the present Baron C. in fee; the person presumptively entitled to the barony, although no person entitled to a prior estate of inheritance is before the court, is not a necessary party. *Chalmondely v. Clinton*, 2 Jac. & W. 2. PL. PARTY.

Where a reversioner conveys his legal title, he cannot maintain an ejectment for non-payment of rent for arrears due in his own time, but there being some doubts when the deed conveying the reversion was delivered, an inquiry to ascertain the fact was directed. *Blennerhasset v. Day*, 4 Ball & B. 104.

Remainder-man is an incompetent witness to prove payment of a legacy charged on the estate. *Aldridge v. Ld. Walscourt*, 1 Ball & B. 312. WITNESS, COMPETENCY OF.

Remainder-man lying by, and suffering the tenant to lay out money without giving him notice of his in-

tention to impeach his title, a ground of relief against the remainder-man. *Shannon v. Bradstreet*, 1 Scho. & L. 73. FRAUD; CONCEALMENT.

After lying by for a length of time, remainder-man shall not turn round the tenant to seek compensation against the assets of tenant for life. *Id. ib.*

When stock is left to pay the interest to plaintiff for life, and then after payment of gross sums, the residue to him, the court will not permit the security to be lessened by laying out a certain sum to secure the legacies, and paying the residue immediately to the plaintiff. *Soundy v. Burgen*, 3 Bro. C. C. 258. LEGACY; SECURITY.

If tenant for life be made party, remainder-man need not be joined, but are bound by decree. *Reynoldson v. Perkins*, Dick. 427.

The court will not direct money to be paid to a party entitled in remainder, upon the improbability of an intermediate event, if such event be possible. *Kirby v. Clayton*, 2 Ves. 241. And see *Anon.* id. 113. But contra, *Leng v. Hodges*, 1 Jac. 585.

Bill to impeach settlement is not demurrable because remainder-man expectant on estate still is not made party. *Anon.* 2 Eq. Ab. 166. PL. PARTY.

Depositions taken in a cause, wherein tenant in tail only is party, or where the father only, who is tenant for life, remainder to the son, cannot be read against the remainder-man. *Peterborough v. Norfolk*, Prec. Chan. 212. PR. EVID.

Cestuique trust in tail, with remainder over, levies a fine, and dies without issue, and there are five years and non-claim. By opinion of lord keeper, remainder-man barred. *Basket v. Pierce*, 1 Vern. 226. FINE AND NON-CLAIM.

Entry of remainder-man within five years after a fine levied by tenant in tail, will not save his right. *Stapleton v. Sherrard*, 1 Vern. 213. 2 Ch. Rep. 255. S. C. Id.

Purchasers *pendente lite*, are bound by the decree. *Yevelly v. Yevelly*, 3 C. R. 48. *Gaskell v. Durdin*, 2 B. & B. 169. PR. DECREE, WHO BOUND BY.

All original parties to the suit, or those that are made parties thereto, or to the decree, of full age, and such as claim under them *pendente lite*, are regularly bound by the decree. *Style v. Martin*, 1 C. C. 152. Id.

A decree against the lessee, and all claiming under him, he surrenders to him in reversion who was held to be bound by the decree for so long a time as the lease would have continued. *Chapman v. Bisson*, Toth. 61. Id.

A decree for the execution of an agreement to inclose a common, parties having an interest in the common, but not parties to the agreement, shall not be bound. *Tharston v. Collier*, 1 C. C. 48. S. C. *Anon.* 3 C. R. Nel. 79. Id.

A decree by consent of a personal estate, binds a purchaser for valuable consideration. *Wyndham v. Wyndham*, 3 C. R. 22. 2 Free. 127. Id.

## RENEWAL.

See COVENANT, IX. 1.—LEASES, VIII.

## RENOUNCEMENT OF TRUST.

See EXORS. III.—TRUSTEES, II.

## RENTS.

See AFFORTIONMENT, I.—LANDLD. & TEN. VII.

## RENT CHARGE.

Widow held barred of dower in equity by rent charge granted in trust for her by way of jointure by marriage settlement, to which her father was party, although she was infant at time of marriage, and rent charge failed by defect of husband's title, and was afterwards confirmed by deed and recovery during coverture, which, though the recovered a valid confirmation, might have been defeated if there had been a son of the marriage. *Corbet v. Corbet*, 1 S. & S. 602. DOWER; JOINTURE; INFANT.

Grant of rent charge out of particular lands to an infant, in consideration of marriage for her jointure, though the grantor be afterwards evicted, being in equity a general agreement to grant rent charge of that amount out of some lands, will bind infant if her guardian or parents assent to it. *Id.* 621.

The statute of limitations does not bar a demand for a rent charge. *Cupit v. Jackson*, 1 M'Clel. 495. S. C. 13 Price, 721. STAT. OF LIMITATIONS.

Quere as to rent charge being subject of compensation; though when small, court has allowed them to be such. *Eddale v. Stephenson*, 1 S. & S. 122. COMPENSATION; VEND. & PURCH.

Rent charge not incident of tenure. *Id. ib.*

If a purchaser of the legal estate in lands, subject to an equitable rent charge, refuse to pay the rent charge, a receiver will be appointed. *Pritchard v. Fleetwood*, 1 Mer. 54. PR. RECEIVER; VEND. & PURCH.

It is a general rule, that where a party is prevented by court from proceeding to establish his right at law, it is the duty of the court to see no injury arise to him in consequence of its interference; therefore, where an annuitant was restrained by injunction from proceeding at law to recover the arrears of rent charge; interest was allowed. *O'Donoghue v. Browne*, 1 Ball & B. 262. S. P. 6 Ves. 93. See also 2 Y. & J. 73. 1 Vern. 74. INTEREST; INJUNCT.

Upon a bill for equitable relief as to a rent charge, all the persons whose estates are liable, must be parties. The rule dispensed with under circumstances, making it impracticable, or highly inconvenient. *Att. Gen. v. Jackson*, 11 Ves. 369. PL. PARTIES.

Whether an annuity or rent charge out of the profits of the New River company, is to bear the full assessment to the land-tax, or is to have the benefit according to the proposition of a reduction, in consequence of an assessment upon the profits of the company at an under value, quere? The bill by the annuitant was dismissed, the court refusing to raise an equity as to the profit arising from disobedience to the act. *Adair v. New River Comp.* 11 Ves. 429. ANNUITY; LAND TAX.

No limitation to a rent charge at law or equity; but demand may be excluded by presumption from length of time, and acquiescence. *Stackhouse v. Barnston*, 6 Ves. 467. LENGTH OF TIME.

A woman entitled to a rent charge marries, and at the husband's death there are arrears due; they shall go to the wife surviving, notwithstanding she had no settlement, there being no express or implied intention that the husband should be a purchaser of all her fortune. *Salwey v. Salwey*, Amb. 692. HUSB. & WIFE; CHOSE IN ACTION; ACCOUNT.

As to a fine of land, not barring a rent charge issuing out of the lands. *Whitfield v. Faussett*, 1 Ves. 387. FINE AND RECOVERY.

Bill in equity lies for payment of an entire rent out of a manor where there are no demesne lands on which to distrain; but it seems that the lands must be indisputably of greater value than the rent. *Leeds v. Powell*, id. 171. JURISDICTION.

The augmentation of vicarage by yearly payments of corn and money out of rectory, is a charge on rec-

tory inappropriate, into whose hands soever it shall come. Where vicar brings bill for arrears of annual payments issuing out of inappropriate rectory, he shall recover against the improprator, though a considerable time has elapsed between the commencement of arrears and improprator's possession: but purchaser, with notice of such claim, pending such suit, shall only account for arrears after his possession. *Cooke v. Smees*, 2 Bro. P. C. 184. ACCOUNT; VEND. & PURCH; NOTICE.

S had a rent-charge granted to him and his assigns for three lives. S, and his wife mortgaged it to A, his executors, administrators, and assigns. *Habendum* to him, his heirs and assigns, during the three lives, upon trust that A, his executors, administrators, and assigns, should enjoy 100l. per annum out of it, till the mortgage was satisfied. A, made an unattested will, and appointed plaintiff his executor, who brought his bill against the heir of A for this 100l. per ann. Decreed, that the heir of S should take this rent charge, but for the benefit of the executor, agreeable to the trust in the mortgage deed. *Kendal v. Micfield*, Barn. Ch. Rep. 46. TRUST; DEEDS, C. OF.

A, is tenant in tail, subject to a rent charge to B, for life; A dies, the rent charge being in arrear; the issue in tail not liable by the statute of 32 H. 8. c. 38. to the arrears incurred in the life of his ancestor. 5 Co. 118. a. *Ld. Fairfax v. Ld. Derby*, 2 Vern. 612. TENANT, AND ISSUE IN TAIL.

Devisee of a rent charge out of lands, with power of distress, dies; his executrix brings a bill for the arrears: decreed, that she may enter, and hold and enjoy till paid the arrears. *Foster v. Foster*, 2 Vern. 386. PR. CH. 122. S. C.

Rent charge in fee, granted out of gavelkind land, shall descend in gavelkind. *Edwin v. Thomas*, 1 Vern. 489. GAVELKIND.

A, on his marriage, settled a rent charge on his wife for her jointure, and afterwards devises to the wife part of the land charged with the rent charge: bill is, that the rent charge might be apportioned. Bill dismissed. *Knight v. Calthorpe*, 1 Vern. 347. WILL, C. OF; APPORTIONMENT; SETTLEMENT.

A rent charge of 20l. granted in consideration of 240l. redeemable on repayment of the consideration to the grantee's heirs, within a year after notice of the death of his wife, ceases on repayment of the sum stipulated to his executors, the conveyance being considered as a security for money. *Stokes v. Verrier*, 3 Swan. 634. SECURITY.

Under a suspension of a rent charge by act of the parties, the rent ceases *pro tempore*. *Cook v. Fountain*, 3 Swan. 596.

Purchaser of one of several parcels, into which land had been divided, shall not be subject to the rent charge on the whole; grantor restrained by order. *Cary*, 2. S. P. *Dolman v. Varasor*, id. 92.

Where the deeds by which a rent-charge was granted were lost, and the rent had been paid twelve years, equity decreed the arrears and future payment to be secured. *Collet v. Jacques*, 1 Ch. Ca. 120. LOSS OF DEEDS; SECURITY.

## RENTS AND PROFITS.

See also ACCOUNT—PR. RECEIVER.

Where, in consideration of sale, there is no stipulation as to interest, and purchaser completes his part, he pays 4 per cent. interest, and takes rents and profits; but if rents and profits value under that rate, he pays no interest, and vendor takes them. *Esdaile v. Stephenson*, 1 S. & S. 122. VEND. & PURCH; INTEREST.

Where by will, estate is directed to be sold, (but

no time therein is stated,) and interest of produce is bequeathed to plaintiff, and estates continue unsold, plaintiff on construction of will is entitled to rents and profits of first year after testator's death. *Pittsgerald v. Jervoise*, 6 Mad. 25. ADEEMOR OF ASSETS; WILL, C. OF.

Words in will, "rents and profits," extended beyond their natural meaning, viz. "annual profits" to mortgage or sale, when necessary to effect the object, such as raising a gross sum for fines on renewal, as well as portions; and are not controuled by apparent intention to preserve estate entire. *Allan v. Backhouse*, 2 V. & B. 65. AFFID. 1 Jac. 631. WILL, C. OF.

Devise of "profits" will pass land. *Id.* 74. WILL, C. OF, WHAT PASSES.

Account of rents and profits confined to six years, by analogy to the action for meane profits. *Reade v. Reade*, 5 Ves. 744. ACCOUNT.

In a doubtful case, an account of rents and profits directed only from the time of the filing of the bill. *Forder v. Wade*, 4 Bro. C. C. 521. *Id.*

Rents and profits of real estate descended, are to be accounted for, and applied before inheritance sold and applied. *Rouse v. Hewis*, Dick. 178.

Rents and profits undisposed of, belong to the owner of the inheritance, or persons entitled to the enjoyment. *Hopkins v. Hopkins*, 1 Ves. 268. CA. TEMP. TALB. 44. TRUST, RESULTING.

Lands are limited by marriage settlement, upon failure of issue male, to the daughters of the marriage and their heirs, until the next remainder-man should pay them 3000l. there being four daughters only; they entered: decreed at the Rolls, they should account for the profits, and that the rents should be applied first to pay the interest, and then sink the principal, as in case of a common mortgage. Decree affirmed by the Ld. Chancellor, with this variation, that the principal should not sink till a third part was raised above the interest, and so again when another third part was raised. *Blagrove v. Clunn*, 2 Vern. 523. SETTLEMENT, C. OF.

## REPAIRS.

Tenant for life choosing to reside in mansion-house, must submit to repairs done by himself. *Hibbert v. Cooke*, 1 S. & S. 552. TEN. FOR LIFE & REM.-MAN; MANSION.

The registered owners of ship are *prima facie* alone liable, though so registered without their knowledge. *Exp. Mackell*, 2 V. & B. 216. S. C. *Rose*, 447. SHIP REGISTRY.

Receivers and committees not to apply the trust fund in repairs to any considerable extent without a previous application. Upon a receiver's application to be allowed for repairs done, an inquiry was directed whether the repairs were reasonable. *Att. Gen. v. Vigor*, 12 Ves. 563. RECEIVERS.

An order specifically to repair the banks of a canal and stop gates, &c. refused. But, by injunction restraining defendant from impeding plaintiff from navigating, &c. by continuing to keep banks, &c. out of repair, &c. the effect of such former order was given. *Lane v. Newdigate*, 10 Ves. 192. INJON.; CANALS, &c.

Repairs made without previous order, though reported necessary, are not allowed to committee of lunatic's estate. *Anon.* id. 104. ALLOWANCE TO COMMITTEE OF LUNATIC.

Receiver is not to lay out money in repairs at his own discretion, but under circumstances an inquiry was directed, and the report stating that expenditure was for lasting benefit of estate, and by the direction of trustees, order for that allowance was made. *Blunt v. Chithrow*, 6 Ves. 799. PR. RECEIVER, DUTIES OF.

A mortgagee is not bound to keep up buildings in as good repair as he found them, if the length of time will account for their being worse. *Russell v. Smith*, 1 Anst. 96. MORTGAGEE.

### REPRISES.

The word "reprises" being of uncertain signification, ought to be construed *secundum subjectum materiam*. Spelman has not the word in all his glossary, though it is explained in Blount's Law Dictionary, and in Cowell's Interpreter. *Blundford v. Marlborough*, 2 Atk. 545.

### RESIDUE.

See also EXORS. VII.

- I. ITS INCIDENTS.
- II. WHAT CONSTITUTES AND PASSES AS.
- III. WHO TAKE.
- IV. RESIDUARY LEGATTEE AND DEVISEE.

#### I. ITS INCIDENTS.

Survivorship may take place among executors. *White v. Williams*, 3 V. & B. 72. S.C. Coop. 58. EXOR.; SURVIVORSHIP.

Executors take the residue precisely in the same plight as residuary legatees would take it. *Darson v. Clark*, 15 Ves. 417. Affd. 18 Ves. 247. EXORS.

Probate conclusive as to the character of executor. The appointment of executor gives a joint interest in the residue, which not being severed, survives. *Griffiths v. Hamilton*, 12 Ves. 298. EXORS.; JOINT TENANCY; SURVIVORSHIP.

Residuary bequest construed to vest only as the property was received. *Gaskell v. Harman*, 6 Ves. 159. But see further as to the decree in this cause, 11 Ves. 489. Held, therefore, that the representatives of a deceased residuary legatee are entitled only to that part which was got in before his death. *Id.* 10. *Innes v. Mitchell*, id. 461. From this decree plaintiff appealed, when the Ld. Chancellor reversed that part of it which declares that the residuary property vested only as it was converted into money; his lordship holding that such an intention, (though if clearly expressed, must, notwithstanding its inconvenience, be executed,) was not the true construction of the whole will, and it is not to be collected unless clearly expressed. S.C. 11 Ves.; 489. INTEREST, WHEN IT VESTS; WILL, C. OF.

Distinction between a legacy and a residuary bequest as to a presumed satisfaction by the advancement of a portion. The presumption from the former does not arise from the latter, and parol evidence of an intention to satisfy cannot be admitted originally, as it may where first introduced to repel a presumption. *Frémantle v. Bankes*, 5 Ves. 79. LEGACY, SATISFACTION OF; PRESUMPTION; EVID.

Persons taking a residue as executors, take as joint tenants; therefore, if one die before severance, his share survives. *Frazer v. Belfe*, 2 Bro. C. C. 220. EXORS. JOINT TENANCY; SURVIVORSHIP.

On marriage, the husband covenanted that if the wife should survive him and there should be no issue, his executors should, within nine months after his death, pay to the wife 800*l.* for her own use, but if there should be issue, then the 800*l.* should be laid out by the trustees, and the interest paid to the wife for life, and after her death the principal divided amongst the children. There was no issue of the marriage. The husband, by will, bequeathed one

moiety of certain articles of his personal estate to his wife, which moiety greatly exceeded in value the sum of 800*l.*: Held not a performance or satisfaction of the covenant in settlement. Gift of residue is never considered a satisfaction of a certain provision made for wife on marriage, although much more beneficial. *Deves v. Pontet*, 1 Cox, 188. MARRIAGE SETTLM., SATISFACTION OF.

#### II. WHAT CONSTITUTES AND PASSES AS.

A B bequeathed dividends of property in funds to C D for life, and directed that after his decease principal should be divided amongst his children in manner after mentioned. He then gave children certain sums of money which would have exhausted whole funded property at date of will. Between that time and A B's death, that property greatly increased: Held, executors entitled to surplus as undisposed of. *Haynes v. Littlefear*, 1 S. & S. 496. WILL, C. OF.

A bequest "to my two executors whom I appoint to this purpose (i. e. the performance of trusts of the will, in trust to see the above fulfilled), I bequeath ten guineas, together with all the rest and residue of my estate whether real or personal, wherever deposited after my funeral expences, &c. are paid by them, my executors." Held, that legacies lapsed fall into the general residue, and that one executor having died in the lifetime of the testator, the other executor, though he died shortly after the testator, and had done no act manifesting an intention to take upon himself the execution of the will, was entitled to the whole of such general residue. *Parsons v. Saffery*, 9 Price, 678. LAPSED LEGACIES; WILL, C. OF; EXORS. BENEFICIALLY INTERESTED.

Where a residue is given to a valid purpose, it will fail with a prior or void purpose if not capable of being ascertained except by the execution of that void purpose. *Limbrej v. Gurr*, 6 Mad. 151. MORTMAIN; CHARITABLE USES.

Gift of the residue of a fund after the application of an undefined amount to a void charity, is void for uncertainty. *Att. Gen. v. Hinnamam*, 2 Jac. & W. 277. WILL, UNCERTAINTY; CHARITY.

Bequest of personal property held a general residuary disposition, although accompanied with expressions favouring a more limited construction, and pointing only to a surplus beyond property specifically mentioned. *Blund v. Lamb*, id. 399. WILL, C. OF.

Reasons for the rules on which a residuary bequest of personal estate is extended to that which testator subsequently acquires. *Id.* 405. *Id.*

Very special words required to confine a residuary bequest to property belonging to testator at date of his will. *Id. ib.*

The excess of accumulation prohibited by the stat. will form part of the residue of estate. *Haley v. Bannister*, 4 Mad. 277. ACCUMULATION.

A testator having bequeathed annuities issuing out of a leasehold estate to some annuitants for life, to some during the continuance of the fund, and to others indefinitely, with a general provision for an increase or diminution of the annuities, in proportion to the increased or diminished income of the estate; and a particular provision that, on the death of some of the annuitants for life, their portion should be paid to the survivors: the annuities given indefinitely are payable during the continuance of the fund, and the amount of annuities ceasing by the death of annuitants for life, not named in the particular provision, belongs not to the survivors, but forms part of the residue. *Huck v. Tuck*, 3 Swan. 270. WILL, C. OF.

A testator having, by his will, directed his execu-

tion to transfer 500*l.*, part of his residuary estate, to H N, and made a specific disposition of the other parts, and having afterwards drawn a pen through the name of H N, and by a codicil declared that he razed her name out of his will with his own hand; the 500*l.* belongs as undisposed of to his next of kin. The costs of ascertaining the right to that sum paid thereout in exemption of the general residue. *Skrumsher v. Northcote*, 1 Swan. 566. WILL, C. OF; LEGACY, ADEMPMENT OF.

Construction of a residuary devise, as including under the general words "estate and effects," a copyhold not surrendered in favour of a younger son subject to debts, the will reciting that the eldest son was provided for, and no freehold estate. *Pennington v. Pennington*, 1 V. & B. 406. COPYHOLD; WILL, C. OF.

General residuary disposition of real and personal estate not hereinbefore specifically disposed of, held to comprehend specific legacies lapsed; the words "specifically disposed of" held to comprehend specific legacies lapsed, the word specifically being construed particularly. *Roberts v. Cook*, 16 Ves. 450. WILL, C. OF; LEGACIES LAPSED.

Construction of a residuary claim as comprehending a legacy given upon a contingency which did not happen. *Bird v. Le Fevre*, 15 Ves. 589. WILL, C. OF.

Testator gave all his estate and effects to two persons, their heirs, executors, &c., upon trust in the first place to pay, and charged and chargeable with all his debts and funeral expences, and the legacies after given. Those persons, whether they could claim in their individual characters or not, being afterwards appointed executors, held entitled to the residue, undisposed of (including a legacy to a charity void by the stat. 9 Geo. 2. c. 36.) for their own benefit, against the claim of the next of kin, the whole property being personal. *Dawson v. Clark*, 15 Ves. 409. Affd. 18 Ves. 247. WILL, C. OF; EXORS. BENEFICIALLY INTERESTED.

The general residue of personal property comprehends every thing, not otherwise effectually disposed of; and no difference whether a legacy falls into it by lapse, or as void at law: the next of kin, therefore, excluded by an express bequest of the residue. *Dawson v. Clark*, 15 Ves. 416. Affd. 18 Ves: 247.

Trust of an annuity for a charity charged upon a devised estate being void under the act 9 G. 2. c. 36. does not pass by a residuary disposition, but sinks for the benefit of the specific devisees. *Baker v. Hall*, 12 Ves. 497. MORTMAIN; TRUST, VOID; DEVISEE; TRUST, RESULTING.

The words "what remains" at the close of a bequest of a specific fund, held a general residuary disposition: the full sense not being necessarily confined; comprising, therefore, personal estate bequeathed upon a contingency too remote, not being to take place until thirty years after the testator's death. *Crook v. De Vandes*, 11 Ves. 330. WILL, C. OF.

Residuary clause passes all personal property that is not disposed of, as by lapse, construed upon the particular expressions to have been separated, and now intended to pass with the residue. *Cambridge v. Rous*, 8 Ves. 13. Id.

A leasehold house, the bequest of which being to a charity, fails, passes under a general disposition of the residue, and does not belong to the next of kin as undisposed of. *Shanley v. Baker*, 4 Ves. 732.

A legacy out of the produce of a copyhold estate directed to be sold, failing, was held to pass by the residuary clause against the heir, the object being a general conversion out and out. *Kennell v. Abbott*, 4 Ves. 892. LEGACY LAPSED; HEIR AT LAW.

Resulting trust for the heir at law as to the pro-

duce of the sale of real estate not exhausted by a trust in which it was combined with the personal. *Robinson v. Taylor*, 1 Ves. J. 44. RESULTING TRUST; HEIR AT LAW.

Bequest of all other unbequeathed goods and chattels, notwithstanding a subsequent bequest to the same person of debts due to the testator. *Bennett v. Hatchellor*, 1 Ves. J. 63. S. C. 3 Bro. C. C. 28. WILL, C. OF.

No difference between a lapse and what is not disposed of, except for construing intention. *Id.* 1 Ves. J. 67. 3 Bro. C. C. 28. Id.

Real and personal by will to be sold, legacies, &c. therewith to be paid, residue by fifths to five persons. One dies before testator, held to be real estate to heir of testator. *Digby v. Lingard*, Dick. 500.

Residue under particular circumstances will not take in lapsed legacies, the residue being given as a small remainder of about 100*l.*, and the lapsed legacies amounting to 20,000*l.* In general, the residue takes in lapsed legacies: as to real estates it is otherwise. But the legatee must be a general legatee. *Att. Gen. v. Johnstone*, Ambl. 577. 580. LAPSED LEGACY; WILL, C. OF.

A being possessed of a bond for 1400*l.*, deposits it in the hands of B, who signs a proper acknowledgment for the same. A afterwards assigns this bond to B, and takes his promissory note for the value, but the note was never paid. A, by his will, gives several legacies, and appoints B and another executor; but makes no disposition of the residue of his estate: Held, that the money due on this bond is part of the residue, and shall go to the executors equally, and that B's note is not such a debt as can be extinguished by his being made an executor. Decree affirmed, except as to costs. *Matthew v. Fitz Simon*, 4 Bro. P. C. 11. EXOR.; BOND; EXTINGUISHMENT OF DEBT.

If devise of land is revoked or does not take place, the land does not pass by the residuary clause. *Watson v. Lincoln*, Ambl. 328.

Residuary bequest of personalty includes every thing; as a void or lapsed legacy. *Durour v. Motteux*, 1 Ves. 320.

Though not at law, yet in equity a man may die partly testate and partly intestate; but when a whole residue is given, it is a contradiction to say any part of that estate is undisposed of; and if a personal estate is increased by any event after the testator's death, it is a part of the residue, and will pass as such, and so will the interest of that residue, for that interest is assets and part of the estate. *Green v. Ekins*, 2 Atk. 475. 3 P. W. 306. Vide *Héath v. Perry*, 3 Atk. 102. (n. 1.)

Devise of lands to his executors to be sold, and thereout to pay 500*l.* to A if he return from beyond sea, and the residue to B. A died before testator. This 500*l.* legacy being given on a contingency that never happened, is as no legacy, and falls into the residue; otherwise if it had been an absolute legacy of 500*l.* *Sprigg v. Sprigg*, 2 Vern. 394. AFFECT OF ASSETS.

### III. WHO TAKE.

Executors having equal legacies for care, are trustees of residue for next of kin. *Gibbs v. Ramsey*, 2 V. & B. 294. S. P. *Southouse v. Bate*, 2 V. & B. 396. EXORS. BENEFICIALLY INTERESTED.

No instance of an issue upon the question between executor and next of kin as to the residue. *Walton v. Walton*, 14 Ves. 323. ISSUE AT LAW; EXECUTOR; NEXT OF KIN.

Under a residuary disposition to the testator's right heirs on the part of his mother, his sister, and a nephew

by a deceased sister, were held entitled against remoter relations claiming on the ground of an express provision, by an annuity for the separate use of the sister. *Forster v. Sierra*, 4 Ves. 766. WILL. C. OF WHO ENTITLED.

Testator gave certain leasehold houses in trust for A, absolutely for her separate use; and other leasehold houses in trust for B for her separate use for her life; and after her decease for her children; if none, to fall into the residue: and he gave the residue in trust for A and B to be divided between them, share and share alike; and to be paid and applied in like manner for their use and benefit, as the rents and profits of the leasehold premises herein before settled upon them; and their receipts to be a sufficient discharge. The reference in the residuary clause is not to the interest of A and B in the houses, but to the provision that they shall take for their separate use: therefore they take the residue absolutely. *Thauley v. Baker*, 4 Ves. 732. WILL. C. OF.

Residue unbequeathed, codicil disposing of it, but with blanks for names, &c. not filled up and unexecuted, found with the will and contradictory evidence of intent; executor having a specific legacy, trustee for the next of kin. *Nourse v. Finch*, 1 Ves. J. 344. EXORS. BENEFICIALLY INTERESTED.

Legacies in grandchildren then in existence by name, to sons at twenty-three, daughters at twenty-one, mesne interest for education, surplus to accumulate with survivorship; residue for all the grand children generally for their benefit "as aforesaid." by codicil a fund set apart to pay life annuities. Grandchildren born after testator's death, not entitled to a share of the residue into which the fund under the codicil falls, after the purpose answered. *Hill v. Chapman*, 1 Ves. J. 405. WILL. C. OF.

Where a man gives his wife a legacy of £300, which he declares to be his own money, and makes her executor, but makes no disposition of the residue of his estate, this legacy shall not exclude her from being entitled to such residue. Both the decrees of the Lord Chancellor reversed. *Lawson v. Lawson*, 4 Bro. P. C. 21. EXECUTOR, BENEFICIALLY INTERESTED.

Residue, if nothing given to them, and no intention evident to the contrary, belongs to executors. *Wilson v. Wombell*. DICK, 477.

A legacy to the next of kin does not exclude him from taking the residue. *Att. Gen. v. Parkin*, Amb. 568. NEXT OF KIN.

A gives all his personal estate to trustees in trust, to pay interest to wife during widowhood, but on her second marriage, to pay her an annuity of £110 for life; and in that case he gave residue to P, but made no disposition of it in case wife remained a widow. Wife remained widow; representatives of son who died after twenty-one in mother's life time, held entitled to residue. *Jeffreys v. Reynors*, 6 Bro. P. C. 398. affd. 2 Eden, 365. WILL. C. OF, WHO TAKE.

A by his will gives the residue of his estate to three of his children, share and share alike, as tenants in common, and not as joint tenants. But by a codicil he revoked his daughter M from being one of his residuary legatees, and in lieu thereof, gave her a pecuniary legacy. This third shall go to the testator's next of kin, and does not belong to the two other residuary legatees as such. *Chestyn v. Crosswell*, 3 Bro. P. C. 246. EXORS. OF ASSETS; WILL. C. OF.

Where testatrix by will directed a sum of money to be laid out in land, and settled after some previous limitations, on her own right heirs, and afterwards made a general residuary devise of all her real and personal estate: held, that upon the evident intent of the testatrix to exclude the residuary devise, the heir at law was entitled to a remainder in fee in the lands to be purchased. *Robinson v. Knight*, 2 Eden. 155. WILL. C. OF.

Executor at law takes the whole personal estate subject to debts and legacies, but in this court he is trustee of the residue for the next of kin. *Humphrey v. Tayleur*, Amb. 137. S. C. 1 Dick. 161. EXECUTOR.

A by his will gives several legacies to his children, and appoints his two eldest sons joint executors; but makes no express disposition of the residue of his personal estate. Held, that this residue belongs to the executors as joint tenants; and that one of them having died without making any severance, the whole survives to the other. *Hall v. Digby*, 4 Bro. P. C. 577. JOINT TENANCY.

When a legacy is left to one of two executors, neither of them is thereby excluded from the surplus of the personal estate undisposed of. And though there have been a variety of opinions and some different determinations, touching the residue of personal estates not expressly bequeathed by will, yet it has never been carried so far as to exclude two executors, by reason of a legacy given only to one of them. Decree affirmed. *Mason v. Hankins*, 4 Bro. P. C. 7. EXECUTOR BENEFICIALLY INTERESTED.

B made his wife executrix, and devised to her the use of his table-plate for life, and after, to C his grandson; but made no disposition of the surplus of his personal estate. Parol evidence was admitted, that the testator intended his wife should have the surplus to her own use; it being only to rebut the construction of a court of equity, which would create a resulting trust, and make the executrix a mere trustee for the next of kin. *Ds. Beaufort v. Ly. Granville*, 3 Bro. P. C. 37. WILL. C. OF.

J devised to A & B (his wife's children as he called them, not owning them to be his) 10s. a piece and "no more," and gave the children he owned considerable legacies. He then devised to executors, but did not mention the devise to be for their care, &c. Held that executors did not take the surplus beneficially, but that A and B should have a share with the other children in the distribution. *Vachell v. Brettton*, 5 Bro. P. C. 51. WILL. C. OF; EXORS. BENEFICIALLY INTERESTED.

#### IV. RESIDUARY LEGATEES AND DEVISEES.

A residuary legatee cannot have writ of *ne exeat regno* against a debtor of the testator, on the ground that he colludes with the executor. *Graves v. Griffith*, 1 Jac. & W. 646. PR. WRIT. NE EXEAT. REGNO.

Residuary legatees not necessary parties to suit against executors. *Brown v. Douthwaite*, 1 Mad. 446. PARTIES.

A residuary legatee has not such an interest as to prevent his becoming himself a purchaser of premises sold under a decree in the cause. *Hooper v. Goodwin*, Coop. 95. FRAUD FID. SIT.

Generally a residuary legatee must bring before the court all persons interested in the residue; exception, where not necessary or convenient. *Cockburn v. Thompson*, 16 Ves. 328. PL. PARTIES.

Where court can be satisfied that the fund is clear allowance for maintenance, will be allowed, pending the account, to the residuary legatee; not if an accounting party. *Wharter v. —*, 13 Ves. 92. INFANT, MAINTENANCE PENDENTE LITE.

Residuary legatee need not be a party to a bill for specific legacy. *Wainwright v. Waterman*, 1 Ves. J. 311. PL. PARTY.

All residuary devisees must be parties. *Parsons v. Neville*, 3 Bro. C. C. 365. PL. PARTY.

In a bill against the executor either by creditors or legatees, it is not necessary to make the residuary legatee a party. *Lawson v. Barker*, 1 Bro. C. C. 303. PL. PARTY.

A residuary legatee, on a deficiency of assets, allowed to come in *pari passu* with the other legatees, by

reason of the special circumstances of the case. *Dyose v. Dyose*, 1 P. W. 305. ADMON. OF ASSET.

## RESIGNATION BONDS.

See ECCLESIASTICAL PERSONS, &c. IV.

## RESTRAINT ON MARRIAGE.

See MARRIAGE IV.

## RESULTING TRUSTS.

See HEIR AT LAW, I. 4.

## RETENTION.

See also EXORS. IV. 3.

Devisee has a right to retain debt due to himself or to his trustee, out of the produce of the estate devised to him. *Loomes v. Stothard*, 1 S. & S. 151. DEVISEE.

At common law, an heir can retain for his own specialty debt. *Id. ib.* HEIR.

So also an executor, and if devisee be also executor for a deceased creditor, he may first retain for his own debt, and next for the debt of his testator the creditor. *Id. ib.*

But not in priority to costs. *Id. ib.* COSTS; DEVISEE.

## RETRANSFER.

See RECOGNIZANCE—SECURITY, V.

## REVENUE.

See JURISDICTION, V.

## REVERSION AND REVERSIONER.

See REMAINDER, &c.—REMAINDERMAN, &c.

## REVIVOR.

See PL. BILL, 4; 6.—PR. ABATEMENT & REVIVOR.—

• PR. BILL OF REVIVOR.

## REVOCATION.

See ARBITRATION, II.—POWERS, VIII.—WILL, VIII.

## SALE.

See POWERS, VII.—PR. INJUNCTION, 21.—PR. SALES, JUDICIAL.

## SALE, BILL OF.

See BILL OF SALE.

## SATISFACTION GENERALLY.

See also AGREEMENT, X.—ANNUITY, IX.—BOND, VI.—COVENANT, III.—CUSTOM, II. 5. (b).—DEBTS, II.—DISTRIBUTION, III.—DOWER, IV.—LEGACIES, II.—MORTGAGE, IX. 1.—PORTION, IX.; XI.—PRESUMPTION, II.—SETTLEMENT, VII.—TRUST, XII.

Satisfaction of a mortgage to be presumed after twenty years possession by the mortgagor, without payment of interest, demand, or acknowledgment. *Semble. Christophers v. Sparke*, 2 Jac. & W. 223. MORTGAGE; LENGTH OF TIME.

Land not a satisfaction for money, nor money for land, not being *ejusdem generis*. *Bengough v. Walker*, 15 Ves. 512.

On presumption of satisfaction by will, evidence admissible, first to constitute fact that testator was debtor, and secondly to meet or fortify the presumption. *Pole v. Ld. Somers*, 6 Ves. 321. WILL, C. OF; EVIDENCE.

There is no general rule in this court for presuming a mortgage satisfied after twenty years, or any other period of time elapsing without payment or demand of principal or interest; and if a jury should on that ground presume the bond satisfied, which is given as a collateral security to the mortgage, the mortgagee

is not thereby prevented from shewing the truth of the case in this court, if in fact the money has not been paid. *Toptis v. Baker*, 2 Cox, 119. LENGTH OF TIME; MORTGAGE.

Where a husband, by settlement before marriage, was obliged to do a particular act for his wife's benefit, and he does a thing equally satisfactory, the court will presume a satisfaction by implication. *Weyland v. Weyland*, 2 Atk. 632. HUSBAND & WIFE.

The presumption of satisfaction is stronger in the case of a deed than of a will, where a bounty is supposed to be intended. S. C. 2 Atk. 634.

Court will not, from length of time, presume judgment to be satisfied. *Kemys v. Ruscomb*, 2 Atk. 46. LENGTH OF TIME; JUDGMENT.

So of a rent-charge. *Stackhouse v. Barnston*, 6 Ves. 467.

Money and lands being things of a different kind, the one though of greater value shall never be taken in satisfaction of the other, unless so expressed; whatever is given by a will is *prima facie* to be intended a benevolence. *Eastwood v. Vinke*, 2 P. W. 616.

## SCANDAL.

See PL. ANSWER, 9.—PL. BILL, 2. (2).—PR. MASTER, 1. (d).

## SCHEDULE.

See PL. ANSWER, 14.

## SCOTLAND.

Injunction to restrain proceedings in the court of session in Scotland, dissolved under the circumstances. *Kennedy v. El. Cassilis*, 2 Swan. 313. PR. INJUNCTION TO STAY PROCEEDINGS; JURISDICTION.

Whether property is to be administered according to the English or Scottish notions of equity, is dependant on the national character of the parties, and the property to be affected by the decree. *Id.* 321. JURISDICTION.

The court of session is a court of law and of equity. *Id.* *ib.* COURT OF SESSION.

Residuary estate bequeathed to the minister and church officers of a parish in Scotland, for charitable purposes, was directed to be invested in stock, in the name of the accountant general, and the dividends to be paid from time to time to the minister and church officers of the parish; but the courts of Scotland having jurisdiction to administer the charity, an order confirming the master's report, in approbation of a scheme, was reversed. *Att. Gen. v. Lepine*, 2 Swan, 181. JURISDICTION; CHARITY.

Decree establishing a charity in Scotland. *S. C.* 17 Ves. 309. *Id.*

The assignment under an English commission of bankrupt vests in the assignees and without the necessity of intimation, the whole of the bankrupt's personal property in Scotland, and all subsequent diligence, by any Scotch or other creditor, is thereby precluded. *Selkrig v. Davies*, 2 Rose, 97. 291. BANKCY. ASSIGNMENT, WHAT PASSES.

The Scotch acts of sequestration, many of which passed since the Union, support the general principle, passing all the property of a bankrupt to his assignees. *Exp. Cridland*, 3 V. & B. 100. PR. SEQUESTRATION.

Scotland out of jurisdiction of court. *Stevenson v. Anderson*, 2 V. & B. 407.

A certificate obtained under an English commission, operates as a discharge of the debts of Scotch creditors proveable under commission. *Bk. of Scotland v. Cuthbert*, 1 Rose, 462. BANKCY. CERTIFICATE.

A commission of bankrupt, vests in the assignees under it, all the property of the bankrupt, wherever situate; precluding creditors in Scotland from attaching by sequestration, their debtor's property remaining or situate in that country, and from administering it in a course of distribution, under such process of sequestration. *Id.* *ib.* BANKCY. ASSIGNMENT, WHAT PASSES.

Legacy to be laid out in land in Scotland, in a charity, established, being within the exception of the stat. 9 Geo. 2. c. 36. *Mackintosh v. Townsend*, 16 Ves. 330. MORTMAIN.

Scotland is out of jurisdiction of court, and therefore witness going there may be examined *de bene esse*. *Botts v. Verelst*, Dick. 454.

Though England and Scotland be now one kingdom, yet the writ of *ne exeat regno* has not been altered since the Union. It was originally a state writ. *Qu.* Whether, in the common form, and security given thereupon, it can restrain the party from going into Scotland. *Hunter v. Macraury*, Forbes. 196. See also *Anon.* 2 Salk. 702. *S. C.* 1 P. W. 263. NE EXEAT REGNO.

## SECURITY.

See also ANNUITY, IV.—BANKCY. XII. XIII. 4.—LEGACY, IX.—PR. COSTS, 6.—PR. RECEIVER, 4.—PR. SECURITY.—PRIORITY OF SECURITY.

I. WHERE ORDERED GENERALLY, AND WHAT SUFFICIENT. See also LEGACY, IX.—PORTIONS.—PR. COSTS, 6.

II. EXTENT & EXTENSION OF.

III. WAIVER & LOSS OF. See PRIN. & SURETY, IV.

IV. SALE & ASSIGNMENT.

V. REDEMPTION & RETRANSFER.

VI. COLLATERAL. See also PRIN. & SURETY, IV.

## 1. WHERE ORDERED GENERALLY, & WHAT SUFFICIENT.

See also LEGACY, X.—PR. COSTS, 6.

In equity the court will not make an order to stay proceedings, until security be given for the costs, upon the ground of the plaintiff being about to leave the country. *Willis v. Garbutt*, 1 V. & J. 511.

It is not the habit of the court to direct security to be given for the result of an account. *Nerut v. Bernard*, 2 Russ. 56. ACCOUNT.

Husband and wife defendants, husband without order for title to answer separate, puts in answer separate, stating wife not to live with him, and he had no controul, &c. He being taken on an attachment for want of wife's answer, ordered to be discharged, and wife to answer separate and indemnify husband as to costs. *Garey v. Whittingham*, 1 S. & S. 163. HUSB. & WIFE; PR. ANSWER; PR. COSTS.

Testator having directed annuity to be paid out of his personal estate, a sum of five per cent. stock, was, in the course of the cause, ordered to be set apart as security. Fund becoming insufficient by reduction of five per cent. to four per cent. deficiency, was directed to be supplied out of another fund, to which other persons interested in residue had been declared entitled. *Davies v. Wattier*, 1 S. & S. 463. INVESTMENT; ANNUITY.

Legacy to father, on condition he would not interfere with daughter's education. On bill for legacy, court ordered security and directed costs out of legacy. *Colston v. Morris*, 6 Mad. 89. CONDITION, SUBSEQUENT; LEGACY, CONDITIONAL.

An order directing security to be given, omitted to direct all proceedings meanwhile to be stayed; a motion of course obtained in the mean time, was held to be regular; but in future, all such orders are to direct proceedings in meanwhile to be stayed. *Fox v. Blew*, 5 Mad. 147. PR. ORDER TO STAY PROCEEDINGS.

Vendor having lost title deeds, agrees to give real security for title: held, that personal security is not sufficient, and that he must purchase real estate for that purpose. *Walker v. Barnes*, 3 Mad. 247. TITLE; VEND. & PURCH.; SPECIFIC PERFORMANCE.

The investment of trust money on personal security is a breach of trust. *Walker v. Symonds*, 3 Swan. 63. INVESTMENT; BREACH OF TRUST.

Order for security under a writ of supplicavit, on articles by a wife against her husband. *Dobbyn's Case*, 3 V. & B. 183. HUSB. & WIFE; SUPPLICAVIT.

Interpleader; all the defendant's but one residing out of the jurisdiction in Scotland. The plaintiff, after a reasonable time having used due diligence to bring them in, being decreed to give up the subject to the only defendant appearing, protected afterwards against the others by injunction and order, that service on the attorney should be good. *Stevenson v. Anderson*, 2 V. & B. 407. JURISDICTION; PL. INTERPLEADER.

Order for security under supplicavit, on articles exhibited by wife against husband, under 2 Jac. 1. c. 8. *Heyn's Case*, 2 V. & B. 182. PR. SUPPLICAVIT; ARTICLES OF PEACE; HUSB. & WIFE.

After the order permitting the defendant to rehear the decree made on his default, setting aside the charity case, and directing an account of the rents, he was ordered to give security for the sum reported due. *Att. Gen. v. Bracke*, 18 Ves. 496. PR. REHEARING.

Settlement of stock to the separate use of a married woman for life, and after her death for her husband absolutely: decree upon the bill of the husband and wife for a transfer to him upon his personal security. *Cheslyn v. Smith*, 8 Ves. 183. HUSB. & WIFE; TENANT FOR LIFE.



On sale of estate, part of the consideration was to be an annuity, but it was not settled how it should be secured; the court ordered it to be secured on the estate as well as by bond and judgment, which latter was the mode proposed by purchaser. *Remington v. Deverall*, 2 Anst. 550. PURCHASE.

Tenant for life let into possession on consent, and giving security to pay charges payable out of rents and profits, and to keep down interest of the fund to answer contingent charges. *Blake v. Bunbury*, 1 Ves. J. 514. 4 Bro. C. C. 21. TENANT FOR LIFE; DELIVERY OF POSSESSION; INCUMBRANCES.

Tenant for life subject to a trust term, not let into possession before account till the trust is executed, unless on paying into court a sum sufficient to answer it, or where the best way of performing the trust appears to be by letting him into possession. S. C. 194. TENANT FOR LIFE; CHARGE ON ESTATE.

Manager of estate in West Indies is not to give security faithfully to manage; only to account. Ordered to account for produce, and to consign so far as the management requires it; but must have a discretion as to what to be applied there. *Morris v. Elme*, 1 Ves. J. 139. MANAGER OF WEST INDIA ESTATE.

Legacy to infant at twenty-one; court will not order it to be secured. *Starkie v. Smith*, Dick. 520.

Consul abroad, plaintiff in suit need not give security for costs. *Colebrook v. Jones*, id. 154.

Where one plaintiff resident in England, no security required for costs. *Winthorp v. Royal Exchange Assurance Comp.*, id. 282.

But where plaintiff under protection of foreign ambassador, he must give security for costs. *Adderly v. Smith*, id. 355.

Master to settle what security to be given for costs by plaintiff, a foreign merchant. *Odwyer v. Salvador*, id. 372.

Bill may be taxed after bond and mortgage given as security for same. *Aubrey v. Pupkin*, id. 403.

Securities set aside as unconscionable and oppressive, and taken during parties' poverty and distress. *Lampugh v. Cox*, id. 411.

A, on his marriage covenanted, that if his wife should die before him, leaving issue of their bodies, he would pay, &c. to and for such issue, one-third part of all his chattels, real and personal, which at death of his wife he should be possessed of, to be divided between them, if more than one, as he should direct. The wife died, leaving two daughters, and husband, during coverture, acquired freehold leases for lives: held, that leases were included in the covenant, but that daughters were not entitled to a division till after father's death; he being ordered to give security. *Hawkes v. Jones*, 5 Bro. P. C. 136. MARRIAGE ARTICLES; CONSTRUCTION OF.

A covenants that a specific sum should be paid to B, if B survived; A, having aliened part of it, on a bill by B, A decreed to give security that it should be forthcoming. *Flight v. Cook*, 2 Ves. 619. P. L. BILL. QUIA TIMET.

Will delivered from prerogative court to devisee, on approved security. *Morse v. Roach*, Dick. 65.

Persons named by parties appointed receivers on their own recognizance only. *Ridout v. El. Plymouth*, id. 68.

Defendant applying within seven years to put in answer, &c. according to 5 G. 2. c. 25, he must give approved security for costs. *Bp. of Rochester v. Knapp*, id. 70.

Legacy at twenty-one. If infant dies before twenty-one, then to executor, residuary legatee: court will not order legacy to be raised and secured. *Palmer v. Mayant*, id.

No exec. till answer and further order; writ discharged after answer on security for event of cause. *Roon v. Collingwood*, id. 115.

If bill shows plaintiff to reside abroad, and defendant obtains time to answer, he need not give security for costs. *Migliorucci v. Migliorucci*, id. 147.

Trustee charged with breach of trust, for not putting out money at interest, nor on the best security, according to the trust in a deed. Money lent on a promissory note, is not put out on a security. *Ryder v. Bickerton*, 3 Swan. 80. BREACH OF TRUST; MORTGAGE.

On motion to prevent defendant going out of kingdom till he has put in his answer, the court ordered he should give security to abide by the decree that shall be made at the hearing. *Baker v. Dumaresque*, 2 Atk. 66.

Tenant for life in goods is not obliged to give security for them, but to sign an inventory only to the remainder-man. *Leeke v. Bennett*, 1 Atk. 471. TENANT FOR LIFE OF PERSONAL CHATTELS.

Where annuity given by will payable out of residue, part thereof was ordered to be appropriated for the purpose; but executors not directed to give security. *Stanway v. Styles*, 2 Eq. Ab. 246. APPROPRIATION OF FUND; ANNUITY.

An executor is under no obligation to give security, nor is it usual for a court of equity to compel him to give any security, unless upon affidavit of insolvency or misconduct. But where an executrix appointed guardian of three children by her first husband, marries a second husband, in necessitous circumstances the court will appoint a receiver. *Dillon v. L. Mount-Cashell*, 4 Bro. P. C. 312. EXECUTOR; PR. RECEIVER.

A man makes a deed-poll for payment of an annuity, and after by will subjects his estate to the payment of it; he shall have further security, and not rest on the deed-poll. *Grenon v. Rawson*, Sel. Ch. Ca. 57.

One by will gives an annuity out of his personal estate; if the executor has misbehaved himself, the court will order part of the personal estate to be set aside to secure this annuity. *Batten v. Earnley*, 2 P. W. 163. ANNUITY BY WILL.

A, by will, gives portions to his daughters, but mentions no time when to be paid, but adds a proviso, that his daughters should marry with consent of his wife, and if any married without such consent, her portions to go over; on a bill brought by the daughters for their portions, the court decreed the portions to be paid, but on security to refund if the consideration should be broken. *Aston v. Aston*, 2 Vern. 452. 1 Ch. Rep. 164. PR. Ch. 226. S. C. WILL, C. OF; PORTIONS, PAYMENT OF; CONSIDERATION SUBSEQUENT.

One covenants on marriage articles to pay 1000*l.* within six months after his death, and after growing old and infirm, covenantee would have obliged him to have given security; but the court held, that they could not alter this agreement of the parties, or make it better than they themselves had; and though executors might be obliged to give better security for legacies payable in future, that is because they are in nature of trustees, and there is no agreement one way or another. *Warrington v. Langham*, Prec. Chan. 89. COVENANT.

Bill to bring one who lived out of the jurisdiction of London to come in and give security for orphan's portions; Ld. Keeper decreed plaintiffs to try the custom. *London Corp. v. Slaughter*, 1 Ch. Ca. 203. CUSTOM OF LONDON; JURISDICTION.

Where the deeds by which a rent-charge was granted were lost, and the rent had been paid twelve years, equity decreed the arrears and future payment to be secured. *Collet v. Jacques*, 1 Ch. Ca. 120. LOSS OF DEEDS. RENT CHARGE.

## II. EXTENT AND EXTENSION OF.

A security for a separate demand does not extend to a joint demand. *Exp. Freen*, 2 G. & J. 246.

The interest of partners as tenants in common, where the estate was purchased out of the joint property, and mortgaged by the firm for a joint debt, is a joint security. *Id.* 250. **PARTNERSHIP.**

An agreement by way of deposit of title deeds, with a firm of five, one of whom was a nominal partner only, extended by subsequent agreement to the actual partnership of four. *Exp. Alexander*, 1 G. & J. 409. See S. C. further, 2 G. & J. 275.

Where title deeds are deposited by way of security with a firm, upon a verbal agreement, the deposit may be extended by a subsequent verbal agreement for the security of a new sum, upon a change of partners. *Exp. Lloyd*, 1 G. & J. 389.

Merchants in London agreeing to become sureties for a West India planter, on being secured by a conveyance of his plantation, in trust, with a covenant that they should be continued as consignees till the expiration of five years after the reimbursement of what they might advance; held entitled to the benefit of this covenant. Whether a covenant to continue a mortgagee as consignee after payment of the debt, is valid; *Qu.?* *Bunbury v. Winter*, 1 Jac. & W. 255. **COVENANT; CONSIGNEE; W. INDIA ESTATES.**

A mortgagee having advanced to the mortgagor a further sum upon his bond: Held, that the bond though obscurely worded, was evidence of an agreement for a further charge upon the mortgaged premises. *Exp. Hearn*, Buck. 165. **BOND; EVIDENCE; MORTGAGE.**

A security to a firm continued after an alteration in the members of it, upon the construction of a letter, raising an agreement to that effect. *Exp. Marsh*, 2 Rose, 239. **AGREEMENT.**

Equitable mortgage by deposit of deeds extended beyond original purpose, to advances subsequent by implication or parol. *Exp. Kensington*, 2 V. & B. 79. S. C. *Coop.* 66. **EQUITABLE MORTGAGE.**

A borrows 4000*l.* from B, and deposits title deeds as a security for that sum. He afterwards obtains further advances, and after an act of bankruptcy, signs an agreement subjecting the deposit to such further advances. B declared to be entitled to a lien of the whole amount. *Exp. Langston*, 1 Rose, 26. **BANKCY. LIEN.**

A security bond for a deputy post-master, for three years, shall extend further; but sensible, if the arrears had been paid up at the end of three years, the surety might have been relieved. *Williams v. Jones*, Bunb. 275.

A bond given as a security for a collector of customs, does not extend to a subsequent duty on coals, where the collector had a new deputation, and gave security for the duty on coals. *Bartlett v. Att. Gen. Parker*, 277. So held, where no security was given on the second deputation. *Bowlage v. Att. Gen.* *id.* 278.

## III. WAIVER AND LOSS OF.

See **PRIN. & SURETY.**

Where creditor takes from debtor assignment of debt due from third person, as a security for his own demand, and by his wilful default the debt becomes irrecoverable, he must bear the loss. *Williams v. Price*, 1 S. & S. 581. **DEBTOR & CRED.; LACHES.**

Solicitor's lien is superseded by taking a security. *Baldwin Symes*, 1 Turn. & R. 92. See *Tyler v. Drayton*, 2 S. & S. 309. **SOL. & CLIENT; LIEN.**

In accommodation of C, J accepted bill drawn by

R, which was given by C to B, as security for loan. Before it became due, J became bankrupt; R never paid the amount, but by substituting another bill obtained the former from B. Held, R should not prove amount of bill under J's commission. *Exp. Hunter*, 5 Mad. 165. Affirmed, 2 G. & J. 7. See this case, 3 Mad. 117. 1 G. & J. 9. **BANKCY. PROOF IN; ACCOMMODATION BILLS.**

Estates being conveyed, among other purposes, to secure a debt of comparatively small amount, the court will not direct a release upon payment into court of the largest sum to which the debt can in probability amount; the incumbrancer being entitled to retain the security till the debt is discharged. *Postlethwaite v. Blythe*, 2 Swan, 256. **PR. PAYMENT INTO COURT.**

Specialty security not waived by a promissory note, taken for the balance of the account of interest. *Curtis v. Rush*, 2 V. & B. 416.

Solicitor's lien on papers superseded by taking security. *Cowell v. Simpson*, 16 Ves. 275. **SOL. & CLIENT; LIEN.**

## IV. SALE AND ASSIGNMENT OF.

Joint creditor having separate security from one of his co-debtors, admitted to prove his debt, against the joint estate, without surrender or sale of his security. *Exp. Peacock*, 2 G. & J. 27. **BANKCY. JOINT & SEP. CRED.**

A trader having given to a creditor an order on the executor of her debtor to pay the debt to the creditor, and the executor having received the order, and retained it until the assets of the testator should enable him to pay simple contract debts, and the trader having become bankrupt before payment, the creditor was entitled to receive the amount of the order from the executor, notwithstanding a subsequent assent of the trader. *Exp. South*, 3 Swan, 392. **BANKCY. REPUTED OWNERSHIP.**

Injunction to restrain the negotiation of bills of exchange, void in their creation. *Lloyd v. Gordon and Chaintee*, 2 Swan, 180. **INJUNCTION; BILL OF EXCHANGE.**

Where the grantee of lands, subject to a limited power of redemption, has not all the remainder of a mortgage, the conveyance is not a mortgage, but a conditional sale. *Goodman v. Grierson*, 2 Ball & B. 274. **DEEDS, C. OF.**

Not necessary for tenant for life to take assignment from creditors of a charge on the estate which he paid off, in order to keep it alive. *Reddington v. Reddington*, 1 Ball & B. 142. **PAYING OFF INCUMBRANCES; TEN. FOR LIFE.**

Stock transferred as a security for a floating balance, and under an agreement to continue it transferred and re-transferred by and to the creditor by way of loan, held a sale. *Exp. Dennison*, 3 Ves. 552.

Sale of a share of a ship is good without actual delivery. Whether an executory agreement for the sale of a ship, must recite the registry, under the 26 G. 3. c. 60. s. 170. *Qu.?* *Addis v. Baker*, 1 Anst. 222. **SHIP.**

A, having borrowed 30,000*l.* of B, transferred to him 14,000*l.* E. I. stock, by way of pledge for the repayment of the money so borrowed; and B agreed that he would not sell any part of the stock, until after the expiration of one year from that time. Notwithstanding this agreement, B sold the stock on the very same day. Held, that he was answerable for the money received by such sale, with interest. *André v. Crawford*, 1 Bro. P. C. 366. **ACCOUNT.**

Where one executor is indebted to testator by mortgage, if the co-executors are apprehensive he is insolvent, they should bring bill against him for sale of

estate; to pray foreclosure would be improper. *Lucas v. Scate*, 2 Atk. 56. MORTGAGE; EXORS.

Account charged for all monies received on sale of pledge of stock, notwithstanding day of redemption had passed; it not appearing defendant had stock sufficient at the day. *Harrison v. Hart*, 1 Com. 393. ACCOUNT.

A, having borrowed of B 1100*l.*, gave bond for it, and as collateral security deposited with him a subscription receipt of the S. S. Company, No. 195, for 600*l.*, with liberty to sell in case default should be made in payment of debt. Before bond became payable, B sold receipt for 2700*l.*, but pretended it was another receipt. On bill to discover which receipt it was B sold, it being by issue found to be that deposited by A, account was decreed for difference, with interest and costs. *Tutt v. Mercer*, 2 Bro. P. C. 563. ACCOUNT.

Exchequer annuities were assigned by way of mortgage, for securing 5000*l.* and interest. The money not being paid, the mortgagee (after repeated notice to the executor of the mortgagor, and demand of his money), sold the annuities on exchange at the market-place. Held, that this was a good sale, and that there was no necessity of previously foreclosing the equity of redemption. *Wilson v. Tucker*, 5 Bro. P. C. 193. MORTGAGE.

The principal in a bond being arrested, gave bail and judgment is had against the bail. On a bill by the sureties who had been sued on the original bond, and paid the money decreed, the judgment against the bail to be assigned to them, in order to reimburse them what they had paid, with interest and costs. *Parsons v. Bridgock*, 2 Vern. 608. PRIN. & SURETY.

#### V. REDEMPTION AND RE-TRANSFER OF.

A invests in name of trustees stock as security for B against certain payments. Stock remains uncalled upon for length of time. A cannot have it invested in himself, but dividends ordered in future to be paid to A. *Linton v. Hyde*, 2 Mad. 94. TRUST.

Bank notes, though always regarded by common usage, as cash, cannot be considered as a security for money. *Southcot v. Watson*, 3 Atk. 233.

One for £300 grants a rent of £60 per annum for seven years; whether redeemable. *Furcet v. Bowers*, 2 Vern. 287.

Plaintiff for £80 conveys an estate absolutely to the defendant and brings a bill to redeem; defendant insists the conveyance was absolute, but confesses that after the £80 paid with interest it was to be in trust for the plaintiff's wife and children. Plaintiff replies to the answer, and no proof of the trust, yet decreed the trust for the benefit of the wife and children. *Hampton v. Spencer*, 2 Vern. 287.

A, for £500, makes an absolute assignment of a lease for three lives to B, and B by a writing under his hand agrees that if A pays B £600 at the end of the year, B will reconvey. B dies, leaving C his son and heir. Money was not paid, and two of the lives die, and the lease is twice renewed, yet redemption decreed on payment of the £500, and the two fines with interest, and during the life of B. the profits to be set against the interest of the £500. *Munroe v. Bale*, 2 Vern. 84. CONDON. BREACH, WHEN RELIEVED.

Conusee of a judgment extends the lands of the conusor upon an elegit; conusor grants over the reversion without notice of the judgment and extent; the grantee may bring a bill to redeem the conusee, though at a great distance of time, and though a former bill for the same purpose was dismissed. *Clobery v. Symonds*, 1 Vern. 397. 2 Ch. Rep. 392. JUDGMENT.

What circumstances may induce the court to make an absolute conveyance redeemable or not. Where there is a clause or provision in the conveyance, for the vendor to repurchase, the time limited for that purpose ought to be precisely observed. *Barrell v. Sabine*, 1 Vern. 268, 269. See 3 Salk. 241. CONDON.

A rent-charge of £20 granted in consideration of £240, redeemable on repayment of the consideration to the grantee's heirs, within a year after notice of the death of his wife, ceases on repayment of the sum stipulated to his executors, the conveyance being considered as a security for money. *Stokes v. Verrier*, 3 Swan. 634. RENT-CHARGE.

#### VI. COLLATERAL.

See also PRINCIPAL and SURETY, IV.

To a bill of foreclosure against the principal mortgagor, the mortgagor of another estate, as a collateral security, is a necessary party. *Stokes v. Clendon*, 3 Swan. 150. PL. PARTY.

T was devisee of an estate which had been mortgaged to A by the testator, which mortgage carried interest at five per cent. S joined in an assignment of the mortgage from A to B, discharged from the former promise of redemption, and subject to redemption on payment of principal and interest at the rate of four per cent. only, and S covenanted for payment of such principal and interest. Afterwards S agreed to raise the interest to five per cent., and covenanted to pay interest at that rate; then S died, leaving an arrear of interest due on the mortgage. This not being originally the debt of S, his covenants are only collateral, and his personal estate is not primarily liable to discharge any part, either of principal or interest due on the mortgage. *Shafte v. Shafte*, 1 Cox. 207. ADMON. OF ASSETS.

Interest may be carried beyond the penalty, where the bond is only taken as a collateral security. By marriage articles the lady's father was to pay her portion at different times and in different sums, towards disincumbering the husband's estate; the father advanced money to the husband, and also maintained the wife and child for some years. The money so advanced, together with an allowance for the maintenance, shall be added to the foot of the account; but shall not carry interest. *Kirrane v. Blake*, 4 Bro. P. C. 532. INTEREST; BOND.

#### SEISIN.

See LIVERY OF SEISIN.

#### SEPARATE MAINTENANCE.

See HUSB. & WIFE, V. 4. (e).

#### SEPARATE ESTATE.

See HUSB. & WIFE, III. 3.

#### SEPARATION.

See HUSB. & WIFE, I. 5.

#### SERVANT.

See SERVANT & MASTER.

## SET-OFF.

See also BANKR. XIV.—PR. COSTS, 7.

A being indebted to B in a sum of £1000, executed a bond to him for securing that amount and interest. B subsequently died, having made his will, and appointed C and D his executors and residuary legatees; an apportionment of B's residuary estate being made, the bond is allotted to C as part of his share; C being the steward of A, and having a running account with him enters the bond in that account; C dies intestate; leaving a widow who takes out administration to his estate, and also administration *de bonis non* to B, and as such last mentioned administratrix, she files a bill as a specialty creditor against the representatives of A. Held, that in this suit the representatives of A could not make a set-off against the demand in respect of sums which they alleged to have been omitted or improperly charged in the account of C; but must file a cross bill. There can be no set-off either at law or equity where either of the debts is a debt *in autre droit*. *Gale v. Luttrell*, 1 Y. & J. 180.

In a suit for the administration of assets, a debtor to the estate who is entitled to have his costs of suit out of the fund, will not be allowed to receive payment of them while his debt continues unsatisfied, but the costs due to him will be set off *pro tanto* against the debt due from him. *Harmer v. Harris*, 1 Russ. 165. ADMON. OF ASSETS; PR. COSTS; DEBTOR & CRED.

Joint simple contract creditor, may proceed against a clear residue of assets of deceased partner, the survivor being insolvent, and may set off against a debt to the deceased from the survivor and himself as his surety, a debt to the survivor from deceased, which was agreed to be applied in liquidation of debt secured. *Cheetham v. Crook*, 1 M. Cl. & Y. 307. DEBTOR & CRED.

Cross demand acquired after verdict is not ground for injunction here, to stay proceedings under verdict. *Whyte v. O'Brien*, 1 S. & S. 551. INJUNCTION.

Court will not direct costs of suit and of action between same parties to be set off against each other. *Wright v. Mudie*, 1 S. & S. 266. PR. COSTS.

Demurrer to a bill for a general account to be taken of all dealings and transactions between the parties, and for an injunction to restrain the defendant from taking out execution on a judgment recovered by him in an action at law, allowed on the grounds, that the statement in the bill did not furnish such a case of matter of account between the parties, as to entitle the plaintiff to interference of the court on the principles of equity, in that it was nothing more than matter of set-off, or other defence at law, and if it had been a stronger case, the plaintiff, after having suffered the action at law to be tried and determined *à nisi prius*, had come too late to ask the interference of the court. *Cooper v. Hatton*, 12 Price, 502. PL. DEMURRER; ACCOUNT.

The court refused (but without costs) a motion for special directions to master, requiring him to deduct in his taxation of costs of the parties, the costs which he should allow defendant from those he should allow plaintiff (who had become insolvent) after decree had been passed and acted upon. *Rumney v. Beale*, 10 Price, 113. INSOLVENCY; PR. TAX. OF COSTS.

Allegation by client that costs have been occasioned by solicitor's negligence, is a clear case of equitable set-off. *Piggot v. Williams*, 6 Mad. 95. SOL. & CLIENT.

Where both debts are legal, there can be no set-off allowed in equity, without special circumstances. *Harvey v. Wood*, 5 Mad. 459.

Injunction to stay proceedings at law for rent by landlord, prayed on ground of agreement, constituting

a legal set off refused. *Townson v. Benson*, 3 Mad. 203. INJUNC. TO STAY PROCS.

Charter-party of affreightment between the owners of the ship M, and the commission of transports, for and on behalf of his majesty: during its continuance in the transport service, the ship makes a capture, which is condemned; and, upon petition to the treasury, two-thirds of a moiety of the proceeds arising from the capture ordered, by warrant from the crown, to be paid to the owners. These proceeds are entirely in the discretion of the crown; and, upon motion for payment into court of a sum admitted by the commissioners of transports to be due for freight under the charter-party, which motion was resisted on the ground that the commissioners were entitled to set off the amount of the proceeds received by the owners under the warrant, payment was ordered accordingly, without prejudice to the question of ownership. *Thurgar v. Morley*, 3 Mer. 20. PRIZE MONEY.

If a party neglect to plead a legal set-off to an action, he is not entitled to the assistance of a court of equity to give him the benefit of the set-off. *Exp. Ross*, 1 Buck, 125. LACHES.

Where set-off may be made at law, no bill for injunction will lie to stay proceedings at law. *Hirst v. Peirse*, 4 Price, 339. INJUNCTION TO STAY PROCS. AT LAW.

Costs at law and in equity between the same parties, set off after decree omitting such a provision. *Shine v. Gough*, 2 Ball & B. 33. PR. COSTS; PR. DECREE.

Set-off, where a creditor had borrowed from the debtor, under an express promise to repay. *Taylor v. Okey*, 13 Ves. 180.

Devisee of an equity of redemption is not entitled to have an arrear of interest upon legacy from mortgagee to mortgagor, set off against the interest due upon mortgage. *Peltat v. Ellis*, 9 Ves. 563. MORTGAGOR & MORTGAGEE.

Bill by insurance broker for discovery and account of money paid and received by him in that capacity on account of defendant, and money due to him for commission, &c., and for promissory notes indorsed to him, and to restrain action as brought contrary to universal custom of business. Demurrer allowed, the subject being matter of set-off. *Dunwiddie v. Bailey*, 6 Ves. 136. PR. INJUNC. TO STAY PROCS. AT LAW.

A legatee, son-in-law to the testator, was held entitled to his legacy, discharged from debts due by him to the testator, and a debt for which the testator was his surety, upon evidence from the testator's accounts, letters, and memorandums, in his handwriting. Parol evidence of declarations in conversation was produced for the same purpose; but the court appeared to rely on the evidence in writing. *Eden v. Smyth*, 5 Ves. 341. WILL, C. OF; DEBTOR & CREDITOR; EVID.

Equitable set-off, upon mutual credit; though no mutual debts upon which a set-off could be sustained at law. *James v. Kynnier*, 5 Ves. 108.

Where a balance of account is taken, and a note given as the balance, that must be paid, although there are subsequent accounts upon which the payee may actually be found in arrear. *Preston v. Stratton*, 1 Anst. 50. ACCOUNT.

Where there are costs in equity and at law due from the opposite parties, the court will not set off the costs at law against those in equity, if the solicitor in equity claims his lien on the latter. *Smith v. Brocklesby*, 1 Anst. 61. PR. COSTS; SOLICITOR & CLIENT; LIEN.

A debt cannot be set off against another, if they are in different rights. *Whitaker v. Bush*, Amb. 407.

No set-off allowed where the demand is in *autre droit*. *Meldreth v. Brown*, 1 Ves. 207.

Bill praying relief as well as discovery whilst plain-

tiff was proceeding at law on same account, and amended by striking out the part which prayed relief, and that was thereupon dismissed, and costs of the dismission were taxed to the defendant at 38*l*. Plaintiff recovered judgment against defendant in damages and costs to the amount of 440*l*., and petitioned to set off costs at law against costs in equity. *Ld. Hardwicke* thought it reasonable, and if the precedents would justify him, said he would grant the petition. *Gurish v. Donovan*, 2 Atk. 156. PR. COSTS, SET-OFF.

Where there is a general trust of money for a society, a particular member cannot set off a private debt against a share he may be entitled to on a contingency. *Lee v. Carter*, 2 Atk. 84.

In taking account, charge for board not allowed as set-off from sum due, unless agreed upon. *Hangate v. Fothergil*, 2 Com. 613. ACCOUNT.

A, being bound in a bond to B, the bond is assigned by B to C, in satisfaction of a debt due from B to C: B becomes a bankrupt, and C not being able to sue at law in B's name, brings a bill against A to be paid the money due on the bond. Whether A, out of the money due on the bond, shall retain a debt due to himself from B. *Peters v. Soame*, 2 Vern. 428. DEBTOR & CRED.

Administrator of a clothier brings an action against the factor, for clothes sent by the clothier to the factor. The factor cannot in equity deduct, out of the value of the clothes, the money owing to him from the clothier. *Chapman v. Derby*, 2 Vern. 117. PRINCIPAL & FACTOR.

## SETTLEMENT OF POOR.

See STAT. C. OF, II. 38.

## SETTLEMENT ON MARRIAGE.

See also BANKCY. XIII. 7.—AGREEMENT, VII.—DEEDS, VI.—MARRIAGE, V.

### I. CONSTRUCTION.

1. What Estate.
2. What Interest.
3. Who take under.
4. What passes.
5. Generally.

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2. Settlement after Marriage, in respect of Wife's equitable Property claimed by her Husband.
3. Settlement after Marriage, when voluntary, and when for good or valuable Consideration.
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### IX. REFORMING AND RECTIFYING MISTAKES IN.

### X. WHEN SETTLEMENT PRESUMED TO HAVE BEEN MADE.

### XI. AS TO CHILDREN'S PORTIONS OR MAINTENANCE. (See SATISFACTION OF SETTLEMENT.)

### XII. WIFE'S RIGHTS AND POWERS UNDER SETTLEMENT, AND HOW THEY MAY BE LOST OR WAIVED.

### XIII. IN BAR OF DOWER, THIRDS, &c.

#### I. CONSTRUCTION.

1. What Estate.
2. What Interest.
3. Who take under.
4. What passes under, or is comprised in.
5. Generally.

#### 1. What Estate.

Settlement of sum of money, in trust to be transferred to surviving parent for the benefit of him or her, and any of child or children of the marriage. Held, upon construction of whole instrument, that surviving parent took for life, with remainder to children. *Chambers v. Atkins*, 1 S. & S. 382. ESTATE FOR LIFE.

By a marriage settlement, containing the usual limitations, the husband, having a life estate in reversion, expectant upon the death of his father, was empowered, when in possession under the limitations of the settlement, to revoke, &c., as to so much and to such part of the premises conveyed, "as shall be then in possession of any one or more tenants, by virtue of any one or more lease or leases, whereon a rent of rents, not exceeding 300*l*. by the year in the whole, shall be reserved, &c. so as there shall not, at the time of such revocation, be less than twenty years, or three lives, unexpired of such lease or leases." The clause of the settlement conferring the power, concluded with a declaration, that it was the true intent and meaning of the parties, that the husband should, at any time during his life, after he should come into, and be in the actual possession of, the premises, (settled), have absolute power and dominion over so much thereof as should be of the clear yearly value of 300*l*. sterling, and be at full liberty to dispose of the same in such manner, and to such uses and purposes, as he should think proper. The husband, (donee of the power), after the death of his father, when he was in possession under the trusts of the settlement, by a deed of revocation, purporting to be an execution of the power, and reciting that certain lands therein specified then produced a clear yearly rent of 300*l*. or thereabouts, revoked the uses of the settlement as to those lands, and appointed the same in trust for him, (the donee) his heirs, and assigns. Afterwards the donee died, indebted to an amount exceeding the value of the lands so appointed, and having no other estate or effects. By his will, duly attested, and reciting his title and power to dispose of the lands specified in the deed of revocation and appointment, he devised to trustees his right and interest therein, upon trust, to sell the same, and out of the purchase money to pay his debts, &c. The lands revoked, appointed, and devised, except a very small part to the value of 8*l*. a year, were not (as recited in the deed of revocation) under lease at the time of the appointment by that deed, nor at the date of the will: but, in a suit instituted in behalf of creditors and legatees to carry the trusts of the will into execution, it was found, and reported by the officer of the court, that the lands so appointed and devised were of the value of 300*l*. a year. By the decree in that suit, the will was established, and the revocation and appointment held valid; and, upon appeal to the house of lords against the decree, it was held that the power was rightly applied to the subject, and that the ap-

pointment was well executed. *Lidwell v. Holland*, 2 Bli. 99. POWER, EXECUTION OF.

Settlement by a feme sole, in contemplation of marriage, of part of her fortune, in trust to pay the dividends to herself for her separate use for life, and after her death, for her intended husband; and after the death of the survivor, to transfer the capital according to her appointment by will: and in case she should die without appointment, and he should be then dead, in trust for her next of kin, their executors, &c., according to the statute of distributions. An interest for life only in the widow, with a power of disposition by will. *Anderson v. Dawson*, 15 Ves. 532. ESTATE FOR LIFE.

Settlement, on marriage, of lands of husband to the use of husband for life, without impeachment of waste; remainder to trustees, to preserve contingent remainders; remainder to wife for life for her jointure, and in bar of dower; remainder to first and other sons of the marriage in tail male; remainder to daughters in the same manner; remainder to the heirs of the body of husband and wife. The husband being dead without issue, as to the right of the widow to cut timber, and which would be a consequence to the property in it when severed, as tenant in tail after possibility of issue extinct, either in possession by the effect of merger, if the estates can unite, or, if not, in remainder; *querre?* *Williams v. Williams*, 15 Ves. 419. WASTE; TIMBER.

A remainder in fee by settlement to trustees, limited to the life of tenant for life, though not so expressed, the object of the trust terminating with that life, and a remainder following to the same trustees upon the death of tenant for life for a term of years. A subsequent remainder therefore to the heirs of the body of tenant for life, held a legal estate, uniting with the legal estate for life, and vesting an estate tail, according to the rule in Shelley's case, not an equitable estate capable of taking effect only as a contingent remainder. *Curtis v. Price*, 12 Ves. 89. REM. CONTINGENT.

On articles previous to the marriage of W with R, the father of W, "bound the whole of the farm, &c. as a marriage portion to his son W, along with R; the one half of said farm to be the right, title, and interest of the issue, whether son or daughter, if begotten on the body of R by W." The issue take as tenants in common. *Taggart v. Taggart*, 1 Scho. & L. 84. ESTATE, TENANCY IN COMMON.

By articles relating to leases *pur autre vie*, and for years, and to money, it was agreed, that said leases for lives, and for years should be conveyed to trustees, in trust, (after successive life estates to D and J.) "After the decease of J, to the issue of J and A, in such shares and proportions as the said J should appoint, and for want of such appointment to go to such children equally, share and share alike; and for default of such issue, to the heirs, executors, and administrators of said J, during said leases: the money or the lands agreed to be purchased therewith, to go to the issue of said J and A, in such shares and proportions, &c.; and for want of such appointment, to be equally divided among such children, share and share alike; and if no children of said marriage, or all should die before twenty-one," then a power to dispose of said money: held, that issue is to be construed children, and that the issue of J and A, took the absolute interest in the chattel property, and a quasi fee in the freehold property; that a quasi estate tail cannot be barred by will, *semble*. *Campbell v. Sands*, 1 Scho. & L. 281. S. P. *Williams v. Jekyl*, 2 Ves. 681. ESTATE, FEE SIMPLE.

Remainder in a settlement, after successive estates tail in the sons to the daughters as tenants in common, and not as joint tenants, and in default of such issue to the right heirs of the father, admitted without

argument, an estate for life only in the daughters. *Shall v. Silcock*, 5 Ves. 469. ESTATE FOR LIFE.

A term settled to the husband for life, remainder to the wife, her executors, administrators, &c. for the residue of the term for her jointure; and for the better settling the term on her for life for her jointure, a covenant to renew and insert her name. The addition of those words will not reduce it to an estate for life. *Clarke v. Huckwell*, 2 Bro. C. C. 304. Id.

Settlement to permit "all and every the children to take rents, &c. to them and their heirs for ever"; they are joint tenants, not tenants in common. *Stratton v. Best*, id. 233. JOINT TENANCY; TENANCY IN COMMON.

On marriage the husband executes a deed poll, whereby he purports to settle all his real and personal estate on the wife, and the heirs of her body by him begotten, obliging her to give each of her children by him begotten, 1000*l.* a-piece, at twenty-one, and to divide the residue equally amongst them at her death. This gives an estate for life only to the wife, with remainder in fee to the children as tenants in common. These marriage articles so far tied up the property of the settlor, that a real estate purchased by him in his lifetime, with a part of his personal estate, shall be considered as personal estate, and be disposed of accordingly. *Lauther v. Westmoreland*, 1 Cox, 64. ESTATE FOR LIFE; ADMIN. OF ASSETS.

Lands are settled to the use of the husband and wife, for their lives, remainder to the heirs of both their bodies. The children of this marriage are joint tenants, and if any one dies before severance, his share shall survive to the others. There is nothing hard, severe, or unreasonable in the law of joint-tenancy, there being always an equal chance of survivorship in all the joint-tenants. If any of them have a bad opinion of their own lives they may sever; but if the joint-tenancy be not severed, it is an evidence of intention in the party to submit to the chance of survivorship, or of that supineness and neglect to which the law affords no assistance. *Sir Robert Staples v. Maurice*, 4 Bro. P. C. 580. JOINT-TENANCY.

A woman being entitled to some estates in possession, and to others in reversion, on the decease of her mother, settled them previous to her marriage, to trustees for ninety-nine years, to secure pin-money, remainder to herself and her intended husband for their joint lives, and in case she should survive, remainder to her for life; with remainder as to the estates in reversion, to the first and other sons of the marriage in tail male; remainder to such uses as she, notwithstanding coverture, should appoint, and in default of appointment, remainder to her in fee; with remainder as to the estates in possession, after her death, to such persons as she should appoint, with like remainder in default of appointment; and by the marriage articles it was agreed, that if the husband would have been entitled to be tenant by the courtesy, in case of no settlement, he should enjoy the lands, as if no settlement had been made. The husband became entitled to be tenant by the courtesy; after the marriage a sum of 2500*l.* for paying debts of the wife due prior to the marriage, was raised by mortgage of the estates, the husband joining and covenanting for payment of the mortgage money; and a further sum of 4500*l.* was raised on a like security; and afterwards a sum of 1000*l.* for paying interest on the former sums. The wife died without issue surviving her, having by her will devised the estates to her husband for life, with a limitation of them after his decease, "subject to such incumbrances as they were then subject to." On a bill by the husband, an inquiry was directed into the application of the money raised, and the husband was held discharged from so much as was applied to the wife's

use, except that as tenant for life, he ought to keep down the interest; but the will of the wife was construed not to charge the estates with the whole sum, in exoneration of the husband. *El. Kinnoul v. Money*, 3 Swan. 203. KEEPING DOWN INCUMBRANCES; CHARGE ON LAND; HUSB. & WIFE.

Covenant in marriage settlement, that the settlor would surrender certain copyholds which were intermixed with his freeholds, to be settled upon the first issue of the marriage, with limitations to collateral branches of the family; his eldest son, upon his marriage, covenants to suffer a recovery of the freehold, (which was done,) and to settle the copyhold, (to which he was admitted in fee). Upon a bill brought by a nephew of the first settlor, on failure of issue of that marriage, for a specific performance of the covenant to surrender in favour of collaterals: held, that though the consideration of marriage extended to collaterals, yet that the son, by the covenants on his marriage, and by his admission in fee, had taken the copyholds discharged of the specific limitations. *Hale v. Lamb*, 2 Eden, 292. SPEC. PERF.; COLLATERALS.

A, upon his marriage with B, settles his estates to the use of himself for life, remainder to first and other sons in tail male, remainder to trustees for one thousand years, remainder to his brother C, for life, remainder to the heirs male of his body hereafter to be begotten; and then declares the trust of the term, that if there should be no issue male of the bodies of A and B begotten, that should live to the age of twenty-one years, or be married and have issue, and that there should be a daughter or daughters of the bodies of A and B, such daughter should have 4000*l.* for her portion; and if two or more, they to have 5000*l.* equally to be divided at their ages of twenty-one, or days of marriage, which should first happen; and if only one daughter, she to have the yearly sum of 100*l.* to be paid her half-yearly for her maintenance; if two or more, the like sum to be paid them half-yearly in equal shares, until their respective portions paid; if the portions not paid, the trustees to raise them out of the rents, or by sale or mortgage of the premises, or of part. Provided that if the father should in his lifetime prefer them in marriage with portions equivalent, or the remainder-man should, after the father's death, or that there should be no daughter who should attain the age of twenty-one, or be married, then the term to cease. B died in the life of A, leaving no son, but three daughters, who are all unmarried; C, took an estate tail under this settlement, and the portions may be raised for the daughters in the lifetime of A, their father. *Hebblethwaite v. Cartwright*, Forres. 30. ESTATE TAIL; PORTIONS, WHEN RAISEABLE.

Father and son, on the son's marriage, by lease and release, convey lands to trustees and their heirs, to the use of the father for life, remainder to his wife for life, remainder to the son for ninety-nine years; if he should so long live, remainder to trustees during his life, to support contingent remainders to the son's intended wife for life, for her jointure, remainder to the first and every other son of that marriage in tail male, remainder to the daughter or daughters of that marriage, and the heirs of their bodies, till they shall out of the rents, issues, and profits, have received 3000*l.*; remainder to the heirs of the body of the son, remainder to the second son of the father and to his first and other sons, remainder to the right heirs of the son for ever. There were issue of the marriage only two daughters, who being in possession after all the particular precedent estates determined, suffer a common recovery; and it was held that this was no bar of the subsequent remainders, the limitation to them being only a security till the 3000*l.*

was raised. *Stankope v. Thacker*, Preg. Chan. 435. FINE AND RECOVERY.

A, on the marriage of his son B, settles lands to the use of B for life, remainder to the wife for life, remainder to the heirs of their two brothers, remainder to B in fee; B and his wife, by deed and fine, mortgage in fee, and subject to the mortgage the lands are settled to the use of B for life, and after his and his wife's death, to the heirs of his body by him begotten, remainder to his right heirs. The wife, after her husband's death, suffers a common recovery. Whether the estate of the wife for life, by the first settlement, and the limitation to the heirs of her body by the second did consolidate, and if it did, whether the estate of the wife was aliened, within the statute of 11 Hen. 7. *Clifton v. Jackson*, 2 Vern. 455. ALIENATION.

## 2. What Interest.

Under a settlement and recovery, lands were limited to the use of A for life, and after his decease to the use of B and his heirs, during the life of A, to support contingent remainders; remainder to the use of C for life, remainder to the same B and his heirs during the life of C, to support contingent remainders, remainder to the first and other sons of C in tail male, remainder to the use of D for life, and if she should marry, and her husband should survive her, to her husband for his life, and after the determination of those estates to the said B and his heirs, (without saying during the life of D,) to support and preserve contingent remainders; remainder to the first and other sons of D, in tail male, remainder to the use of E for her life, and if she should marry, and her husband should survive her, to her husband for his life; and after the determination of those estates to the said E and his heirs (without saying during the life of E) to support contingent remainders; remainder to the first and other sons of E, in tail male: held, that under the limitations to B and his heirs, after the limitations of estates for life to D and E, the trustee took the fee, and that E took only an equitable estate. *Colmore v. Tyndall*, 2 Y. & J. 605. LIMIT. C. OF.

It is not a sufficient ground for restraining an estate limited a deed to a trustee and his heirs, to an estate for life, that the estate given to the trustee seems to be a larger than was essential to its purpose, or that the limitation has been unnecessarily repeated. *Id.*

A father covenanted, upon the marriage of a younger son, to grant a perpetual annuity or rent charge of 600*l.* to be issuing out of an estate, which consisted principally of collieries; and the deed granting the annuity was to contain a covenant, that the grantor, his heirs, executors, &c. would make good the deficiency, if the produce of the estate should not be sufficient to answer the annual payments. By his will the grantor gave to his executors a sum of 15,000*l.* upon trust, out of the interest thereof, to make good at the end of every year, any deficiency of the collieries to answer the annuity; and at the end of each year to pay the surplus of the yearly interest to certain persons therein described. The profits of the estate charged with the annuity were in some years not sufficient, and in others much more than sufficient to pay the 600*l.* a year: held, that the person interested in the surplus of the 15,000*l.*, could not claim compensation out of the surplus profits of the collieries in prosperous years, for that portion of the interest of the 15,000*l.* which had been applied in discharge of the annuity in those years, when the profits of the collieries were not sufficient to satisfy the annuity completely. *Murray v. Butts v. Cunningham*, 2 Russ. 276. COMPENSATION.

In marriage settlement, the father of the wife, after

making a provision for her during life, movements, that in case there shall be a child or children of the marriage living at her decease, he will pay 30,000 to such child or children, on their attaining twenty-one, or if they shall have attained that age in their mother's lifetime, at her death. In the directions that are afterwards given for the distributions of the sums in different events, among the children of the marriage and their issue, no reference is made to the contingency of their surviving the mother, and though there is an express enumeration of the cases in which the money is not to be payable, the death of a child in the mother's lifetime after having attained twenty-one is not specified as one of those cases: Held, that the interest which a child who has attained twenty-one takes in these sums, remains contingent during the life of the mother, there not being enough in the subsequent clauses to controul the plain words of the covenant. *Fitzgerald v. Field*, 1 Russ. 430.

In the same settlement the father covenants to pay upon the death of the husband 2000l. to the eldest or only son of the marriage: Held, that this covenant is controlled by subsequent clauses, so as not to give a vested interest upon the death of the father to an only son who was then under age. *Id. ib.*

It is declared by a marriage settlement, that a trustee is to lay out a sum of money, which the husband had agreed to settle in the purchase of any public stocks or funds, or annuities for the life of the intended wife, in his own name, in trust for her, and that he is during her life to pay her the dividends and other produce of the stock or annuity so to be purchased, to her separate use during her life: Held, that the wife is entitled absolutely to a sum of three per cent. stock purchased with the money, and not merely to a life interest in it. *Smith v. King*, 1 Russ. 363.

Construction on settlement; ultimate limitation "to the executors or administrators for their lives, and assigns for ever," as to what benefit they take. *Wellman v. Bowring*, 1 S. & S. 24. S. C. Affirmed, 1 Russ. 374. EXECUTOR.

The plaintiff's father, upon the marriage of his daughters, demises an estate to trustees, upon trusts for raising certain sums, which are settled upon the daughters and their children; and by his will, after charging the estate with other sums, to be settled upon the same trusts, with portions for sons, and with a further sum in discharge of a mortgage of another estate, directs it to other trustees, upon trust, from time to time to receive the rents, &c., and to invest the same in the purchase of stock, so as to accumulate and form a fund for the payment of the aforesaid charges; "and after the same should have been raised and paid, upon trust to pay the net rents, &c. unto, or for the benefit of such persons of his own name, blood, and family, as for the time being should succeed to and be invested with his title and dignity of baronet, to the end that his said estate might be continued in his name, blood, and family, and be enjoyed and go along with his title, so long as the rules of law and equity would permit; but if upon failure of issue male of his body, there should not be any person who should be entitled to enjoy his title, upon trust to stand seised of the estate, for the benefit of the person or persons who should be his right heir or heirs at law, and to convey and assure the same accordingly." Held, that the trust for accumulation was good, and that the plaintiff, the succeeding baronet, took a vested estate for life. *Bacon v. Proctor*, 1 Turn. & R. 31. ACCUMULATION; ESTATE FOR LIFE; INTEREST VESTED.

Settlement in trust for the separate use of a married woman for life, but so as not to anticipate, with remainder to be should succeed by will, and in default of appointment to &c. On the death of her husband, the restraint on anticipation ceased, and therefore she

is entitled, with the concurrence of A, to a transfer of a fund. *Barton v. Briscoe*, 1 Jac. 603.

Though in settlement there was a direction to pay the rents and profits of wife's equitable estate of inheritance, to her separate use for life, yet husband might be tenant by the curtesy. *Morgan v. Morgan*, 5 Mad. 408. TENANCY BY CURTESY.

A bond is given by a trader previous to his marriage, to a trustee, and by marriage settlement of same date, it is covenanted that the sum mentioned in the bond is to be payable only in the event of the wife surviving the husband; and it is also covenanted, that in case of the husband failing in his circumstances, but not otherwise, the trustee shall sue on the bond. The husband fails, living the wife. The trustee ought not to be admitted a creditor. *In mrs. of Murphy*, 1 Scho. & L. 44. BANKRUPT PROOF IN.

Covenant in marriage settlement to settle leasehold estates in trust for such persons, and such or the like estates, ends, intents, and purposes, as far as the law would allow, as declared concerning real estates, limited to the first and other sons in fail male, with several remainders; the court, in executing the covenant, declared that no person should be entitled to the absolute property unless he should attain twenty-one; or die under that age, leaving issue male. *Dk. Newcastle v. Cs. Lincoln*, 3 Ves. 387. But see the variations in this decree, *id.* 398, note, and 12 Ves. 218. on appeal. COVENANT.

By settlement on marriage, reciting an intention to provide for the wife and children, certain tolls were granted for the remainder of grantor's term in trust to raise an annuity for the lives of the wife and her mother and the survivor; then reciting, that the remainder of the term might expire in the life of the wife or her children; therefore, to make a provision for her and her children by her then or any future husband, the trustees should be possessed of the said tolls for the remainder of the term upon trust to raise, after the deaths of the grantor and the mother of the wife, 100l. annually, to be placed out in the purchase of freehold lands or hereditaments or leasehold estates for two or three lives, as often as a competent sum should be raised for that purpose; and until convenient purchases should offer, to be invested in government securities upon trust, in case the wife should survive the term, to pay the rents and profits of such estate or estates so to be purchased, or the interest, produce, and profits to arise from the money so intended to be placed out, until such purchase should be made, to the wife for life; and after her decease, to apply the said rents and profits or interest money towards the support and maintenance of such child and children of her as should be living at her death, till the youngest should be twenty-one, and then to be possessed of such estates so to be purchased, or of the money arising from the annuity not placed out in one or more purchase or purchases, to the use of such child and children, in such share and proportions payable at twenty-one, as the survivor of the husband and wife should by will or deed direct, limit, and appoint; in default thereof, to the use of all such children equally to be divided at their respective ages of twenty-one; but if she should die without leaving any child or children, or all should die under twenty-one, then to the use of the grantor, his heirs, executors, administrators, and assigns, and after paying the said annuities, to be paid out of all the surplus money arising from the said tolls during the remainder of the term, for the use of the grantor, his executors, &c. From the death of the grantor, who survived the wife's mother, the trustees received 100l. a year, and laid out in stock the sums received and the produce. One son was the only issue: he attained twenty-one in the life of his mother, and sur-



vived her. The court would not invest the fund in land; and held it with the accumulations from the death of the grantor and the future payments, a vested interest in the son at twenty-one, and a personal estate belonging to his administrator. *Swain v. Fennereau*, 3 Ves. 41. INT. VESTED.

By marriage settlement, the husband's family estate was settled in the usual way, and it was covenanted with the husband that the wife's portion (1500*l.*) should be paid to trustees to provide for the daughters and younger sons after his death, in equal shares, in default of an appointment by him. It was provided also, that in case of there being but one child, it should have 1000*l.*, and the eldest son the other 500*l.*, and that a daughter, being an only child, should have the whole. The husband was to have the interest for his life, and a power of laying out the principal in the purchase of lands, in trustees' names, as a fund for the purposes aforesaid. Of this marriage there was issue two sons, the elder of whom only survived his father, and claimed the 1500*l.*; but the court decreed him only 500*l.*, to which it was admitted he was entitled. Where money was to be laid out in land as a more secure fund, for certain purposes it (as well as the land when purchased) shall be considered as money, and the heir can claim no benefit of it. *Watkins v. Watkins*, Vern. & Scriv. 61.

On marriage, a sum of 9000*l.* was vested in trustees upon trust to pay the interest to the husband for life, and after his death to the wife for life, and after the death of the survivor, to pay the principal to such persons as the survivor should direct. The husband having occasion for money, the wife joined him in executing a deed-poll, whereby they appointed the money immediately to the husband; but the trustees declining to act without the directions of the court, this bill was filed; and upon personal examination of the wife, the court directed the trustees to pay the money to the husband, and to deliver up the settlement to be cancelled. *Macarnick v. Butler*, 1 Cox, 357. HUSB. & WIFE.

By settlement made previous to marriage of A and B, certain exchequer annuities were vested in trustees in trust for the husband for life, then to the wife for life, and after both their deaths, for the children of the marriage equally, if more than one, and if but one, for such only child, to be assigned over to such child or children respectively at their ages of twenty-one, happening after the death of survivor of husband and wife; but if either children should attain twenty-one during joint life of father and mother, or life of survivor, then his or her share was to be paid within 3 months after death of such survivor. But if there should be no children of the marriage, or being such, all of them should die before their share should become transferable as aforesaid, then the annuities were to go to the survivor of husband and wife. There was issue only a son, who attained twenty-one, but died in lifetime of mother, who survived husband: Held, that the annuities became vested in her on his attaining twenty-one years, and were transmissible by him, notwithstanding he died in his mother's life-time. *Jeffreys v. Reynolds*, 6 Bro. P. C. 228. INT. VESTED.

Settlement of money on husband and wife, &c., and in case the husband shall die and the wife survive, he leaving no issue of her body, or such issue shall die in the lifetime of the wife, then the money to be paid and assigned to the wife. There was issue a daughter, who married, attained twenty-one, and died in the lifetime of the mother, leaving two children, who survived their grandmother: Held, the daughter acquired a vested interest, transmissible to her representatives. *Hawtley v. Mason*, Amb. 621. INT. VESTED.

Limitation of a leasehold estate in a marriage settlement after the decease of husband and wife, in trust for such child and children as they should appoint, and in default of appointment, to all and every the said and children equally: Held to be a vested remainder, which should take in the issue, as they came in issue. *Lawrence v. Maggs*, 1 Eden, 462. INT. VESTED.

Settlement of 10,000*l.*, the interest to be paid to husband and wife for themselves, and after their death the principal to all or such of their children as husband should appoint, and in default, as wife should appoint, and for want of such appointment, to all the children equally at twenty-one, or marriage. There were two children, one died in lifetime of the father, then the father died: Held, the other was entitled to the money after the death of the mother, and to have it secured in her lifetime: Held a contingent vested interest in the children, subject to be divested on appointment. *Gordon v. Levi*, Amb. 364. INT. VESTED.

A agreed on marriage to lay out 4000*l.* in land in strict settlement, with remainder to himself. Wife and issue died, living A. A may bequeath the 4000*l.* as money. *Fulham v. Jones*, 2 Ed. Ab. 296. MONEY AGREED TO BE LAID OUT IN LAND.

By a marriage settlement, a term was limited to trustees for raising, on failure of issue male, 3000*l.* for daughters' portions, payable at eighteen, or marriage. The father and mother die, leaving issue two daughters only, who at the death of the father (who survived the mother) were fifteen or sixteen years of age, and who had by the father's will 500*l.* a-piece devised to them, payable at the same time with their original portions; but the estate was devised to S, one of the daughters, being married, and being of the age of twenty: Held, on her bill, that she must have maintenance from the time of her father's death till the portion became due, and from thence interest at 5 per cent. till paid. *Greenhill v. Walder*, Prec. Chan. 367. S. C. Gilb. Eq. Rep. 31. MAINTENANCE; WILL, C. OF.

A, on his marriage, assigns a term for 1000 years, in trust for himself for life, remainder to his wife for life, remainder to the heirs of his body of the male, and wife, remainder to the husband's right heirs. The wife dies, leaving issue; the whole term was in the husband, and he may assign it. *Webb v. Webb*, 1 P. W. 132. 2 Vern. 668. WIFE.

2500*l.* is provided by settlement for the issue of the marriage, in such proportion as the husband should appoint. He dies, leaving a daughter only, and makes no appointment: she shall have the 2500*l.* *Davy v. Hooper*, 2 Vern. 665; affd. 6 Bro. P. C. 615. POWER OF APPOINTMENT.

By marriage settlement a term is created for raising 400*l.* a piece for younger children, to be paid them within a year after the father's death, and with interest from his death; one of the children dies, after the father, but within a year after his death the portion not being raised: held, that it should sink in the inheritance and not be raised for the benefit of its representative. *Tournay v. Tournay*, Prec. Chan. 290. PORTIONS, RAISED OR.

Husband conveys lands to a trustee in fee, in trust out of the rents to pay 6*l.* per annum for the separate use of the wife, and to be at her disposal for the use of the husband for life. After the decease to the use of the heirs of the wife until the next assignment of the husband should pay to the next assigns, administrators or assigns of the wife, with interest from the death of the husband, to be paid for her life for her jointure, and after her death to be paid for her first husband's life. *Held* 100*l.* *Held*

the wife had no power to dispose of this money. *Sawyer v. Blewett*, 2 Vern. 328. HUSB. & WIFE.

By marriage articles, the household goods and plate of the wife were assigned to trustees, the husband to have the use of them for his life only, afterwards to the wife, her executors and administrators. But if the husband survived, then the absolute property to be to him. A, having got judgment against the husband, takes the goods in execution. The wife's friends give security to the sheriff who returns *nulla bona*, whereupon A brings an action against the sheriff, and recovers, afterwards the same goods are taken in execution by B, another creditor of the husband, and the sheriff on the like security given him by the wife's friends, returns *nulla bona*, whereupon B also brings an action and recovers. The wife's trustees bring bill, but could not have relief, it being all at law, in whom the property of the goods are. *Underwood v. Mordaunt*, 2 Vern. 238. JURISDIC.; HUSB. & WIFE; BANKCY. ASSIGNMT.

A man has issue a son and four daughters, he settles lands on himself for life, remainder for twenty-one years for raising 5000*l.* daughters' portions, 2000*l.* whereof to be paid to the eldest, remainder to the son in tail, remainder to himself in fee. The son dies without issue, and after, the father devises the lands to his four daughters equally; yet held that the eldest should have 1000*l.* more than any of the rest. *Terriot v. Spencer*, Prec. Chan. 5.

A long term of years is assigned upon trust for A for ninety-nine years, if he lived so long, and then to his wife for her life, remainder to the heirs of A begotten on his wife. The whole term does not vest in A, but after the death of him and his wife, shall go to all their children equally. *Ward v. Bradley*, 2 Vern. 23.

### 3. Who take under.

P, on his marriage with T, executed a bond in the penalty of 2000*l.* with condition to be void, if, in the event of T surviving P, his executors, &c. should, within three months after his decease, pay to trustees 1000*l.* in trust for T, and if in the event of P surviving T, and there being any child or children of the marriage living at the decease of P, his executors, &c. should, within three months after his decease, pay to trustees 1000*l.* in trust for such child or children; "and further, if P should, at any time during his natural life, become seised of any messuages, &c. in possession, and should settle the same upon T, and the issue of the said intended marriage, by such good conveyances in the law as counsel should advise, in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for T, in case she should happen to survive P." After the death of T, P having married again, and then, and not before, become seised of real estates, and having, at his death, left issue by both marriages, all the real estates of which he became seised during his life, were subject to the obligation, and settled on the issue of the first marriage, as tenants in common in fee. *Prebble v. Boghurst*, 1 Swan. 309. CHARGE ON REAL ESTATE; BOND, PERF. OF.

An obligation to make a settlement on the wife and the issue, includes an obligation to make a settlement on the issue, after the death of the wife. *Id.* 319. ISSUE; CHILDREN.

Under a limitation, in a marriage settlement, of the wife's property, in default of her appointment, for her next of kin, or personal representative, the husband, taking a prior partial interest, is not entitled. *Bailey v. Wright*, 1 Swan. 39. HUSB. & WIFE.

On limitation by settlement to next of kin of said

A P, of her own blood and family, as if she had died sole, and unmarried, the next of kin take as under the statute of distributions. *Cotton v. Scarsnapke*, 1 Mad. 45.

Limitation by settlement, of personal property, to next of kin, in equal degree, passes the property to a surviving sister, in exclusion of children of deceased brother. *Anon.* 1 Mad. 36.

A sum of money settled on marriage to the use of the husband for life, after his death to the wife for life, and if they should both die, leaving children, to such children, vests in all the children of the marriage, and not exclusively in the children surviving both parents, such being the clear intent of the parties, though contrary to the literal expressions in the settlement. *Bradish v. Bradish*, 2 Ball & B. 479.

Under a limitation in a marriage settlement, of the wife's property, in default of her appointment for her next of kin, a personal representative, the husband not entitled. *Bailey v. Wright*, 18 Ves. 49. HUSB. & WIFE.

A trust created to raise 36,000*l.* for the portions of three children, A, L, & C, to be paid to and amongst them at such time and times, and in such share and proportions as M should appoint by deed or will, and in default of appointment, to be paid, &c. and amongst said A, L, and C, in equal shares, on their respectively attaining twenty-one, or marriage, provided that if any of said daughters should die under twenty-one, or unmarried, 24,000*l.* only to be raised for the surviving daughters, to be paid to and amongst them, at such time or times, and in such shares as M should appoint; and if no appointment, then to be paid equally between them at twenty-one or marriage; and if two die before twenty-one, and unmarried, then a like proviso for raising only 12,000*l.* L attains twenty-one, and dies. The whole 36,000*l.* to be raised; but M has no power to appoint the share of L. It goes equally between the survivors and the personal representatives of L. An appointment as to the remaining 24,000*l.* between A and C unequally, is good. *Fane v. Id. Dugannon*, 2 Scho. & L. 118. POWER, EXEC. OR.

Trust, in case husband and wife should, at death of survivor, leave any child, &c. and such child, &c. attain, twenty-one, to convey to such child, if but one, and if more than one who should attain twenty-one, to convey to such children who should attain twenty-one, according to appointment of father and mother surviving; in default of appointment, equally at twenty-one, with survivorship; and if both parents die without leaving any child, &c. remainder to the father: Held, vested in children having attained twenty-one, who died in life of one parent, with those who survived both. *King v. Hake*, 9 Ves. 438. INTEREST VESTED.

Settlement of wife's estate to such uses as husband and wife, or survivor, should appoint by deed or will, with three witnesses, in default thereof to the heirs of husband; the wife surviving made a disposition by her will, to a charity, and therefore void; decreed to the heir of the husband. *Att. Gen. v. Ward*, 3 Ves. 327. POWER, EXEC. OR.

Settlement upon marriage, of wife's property, only upon certain trusts for husband, wife, and children, in one event for husband absolutely, but making no provision for the event that happened, a resulting trust for the wife. *Langham v. Nenny*, 3 Ves. 467. RESULTING TRUST.

Trust under marriage settlement for the next of kin of the wife, subject to her appointment in favour of the husband, by an unattested will being void, the children are entitled, not the husband, who is not of kin to his wife, and whose claim to her personal property is not in that character under the statute, but *jura mariti*, and in this case, according to the plan of

the settlement, he was not intended. *Watt v. Watt*, 3 Ves. 244. **HUSB. & WIFE; NEXT OF KIN.**

Where property is settled on husband and wife for life, remainder to the issue, subject to a power of appointment, an interest vests in an only child, though no appointment was made. *Mudoc v. Jackson*, 2 Bro. C. C. 588. **INTEREST VESTED.**

By settlement 500*l.* was assigned to trustees, in trust to lay the same cut in land, with consent of wife, and to pay rents to wife for life, for her separate use, remainder to husband for life, and after the death of survivor, in trust, to convey same to such persons, and for such estates as wife should, by deed or will, appoint; and in default of appointment, in trust for the right heirs of wife for ever, proviso, that until such purchase should be made, trustees should invest the money in the public funds, with the consent of wife, and pay the dividends to wife for life, for her separate use, and after her death, to such persons as the rents of the lands to be purchased would go to, according to the limitations aforesaid, and to pay or transfer the principal sum of 500*l.* or the stock in which the same should be invested, to such person as, according to the limitations aforesaid, would be entitled to the inheritance of such lands. This 500*l.* was never paid to trustees, but remained in the hands of husband at the death of wife. She having made no appointment, this 500*l.* vested in her heir at law (subject to the life interest of the husband), but the heir took it as money, and therefore at her death this interest passed to his personal representatives. *Russell v. Smythies*, 1 Cox, 215. **INTEREST VESTED; MONEY TO BE LAID OUT; ADMIN. OF ASSETS.**

A and B are co-heiresses of estate; A being married, her moiety is settled on husband C for life, remainder to A for life, remainder to B for life, remainder to trustees for 1000 years, remainder to right heirs of survivor of B and C. The trusts of term were to raise 1000*l.* to be paid to such relations of A as the survivor of B and C should appoint, and in default of appointment, to next heir or co-heirs of B. A and her husband died in life of B, and B, by will, devised the whole estate to trustees, for certain purposes, but made no appointment of the 1000*l.* It was decreed that heirs at law of B were entitled to have the 1000*l.* raised, and that the term of 1000 years, created by the settlement, was merged in the inheritance of the moiety to which B became entitled. *Morris v. Cantle*, 6 Bro. P. C. 418. **MERGER OF TERM.**

Settlement after marriage of stock, which had been the wife's property, in trust for the husband for life, then to the wife for life, and then to the heir male of the body of husband and wife, in default of such heir male, to the heirs female, &c., with a clause, that if the husband should settle lands of equal value to the like uses, the stock should be re-assigned to him; a son being afterwards born, who died in the lifetime of the father, without issue, and under age, held, that the property vested in the father, and passed by his will. *Le Rousseau v. Rede*, 2 Eden, 1. **INTEREST VESTED.**

In what case money, covenanted by marriage articles to be laid out in lands, shall still be considered as money, and as such go to the personal representative of the party entitled to the money, in prejudice of the heir. *Bowes v. Shrewsbury*, 5 Bro. P. C. 144. **MONEY COVENANTED TO BE LAID OUT IN LANDS.**

A papist, by marriage articles, previous to the disabling statute, 11 and 12 W. 3. covenanted to lay out 12,000*l.* in the purchase of land. The money is never laid out, and therefore shall still be considered as money, and go to the personal representative, instead of the heir, though that heir be a protestant. *Id.* 148. **MONEY COVENANTED TO BE LAID OUT IN LAND; PAPIST.**

Trust of the residue of a term, with a double aspect,

*viz.* settlement on marriage, by deed, of a leasehold estate, in trust for the husband and wife for life, and after the decease of the survivor, to be assigned by the trustees, with the rents and profits to the eldest son, "and for want of such issue of such son," to daughters. A son having been born, who died without issue in the life of the mother, held, that it did not vest in him, but was a good remainder to an only daughter, at the death of the surviving parent. *Esel v. Wallace*, 2 Ves. 118. *Affid.* *id.* 318. **INTEREST VESTED.**

Upon settlement of lands to be sold in trust for several purposes, the residue is given to B and his heirs, reserving only 200*l.* to be paid to such person as settlor should appoint. Settlor died without appointment; the 200*l.* shall go to his heir, and not to B, or his assigns. *Anon.* 1 Com. 345. **POWER TO APPOINT; HEIR; TRUST, RESULTING.**

Money by marriage articles to be laid out in land, to uses of husband and wife for life, then to the children as they should appoint, in default of appointment equally; but if one, to that one in tail, reversion to husband in fee. There was one daughter: the trustee pays it to her and her husband; she not being *sui juris*, not separately examined, the payment not sufficient to make it considered as money, and sister of the half blood may claim the reversion in fee from the father, but the husband of the other sister, who was tenant in tail, will be tenant by curtesy. *Cunningham v. Moody*, 1 Ves. 174. **MONEY TO BE LAID OUT IN LAND; TENANT IN TAIL; TENANT BY CURTESY.**

A posthumous child, within a provision in marriage articles, for such children of the marriage as should be living at the death of the father or mother. *Millar v. Turner*, 1 Ves. 85. **POSTHUMOUS CHILD.**

A settlement was made on the marriage of I S, of two shares in the New River water, to I S for life; to his wife for life, and after their decease one share was limited to such of the younger children as should not be heir at law, or for want of such issue, to the sisters of I S, and their children, as I S should appoint; but in case of no issue of I S, or if he should make no appointment, the same was limited to the sisters, and the children of one of the sisters, under whom plaintiffs claimed, in such manner as they were entitled to one whole share. If there had been only one child, it would have been excluded by the words, "Other than such as shall be heir at law;" or if there had been several daughters, as they would have made but one united heir, they would have been excluded; or if both sons and daughters, and reduced only to one child, that child could not have taken. *Townsend v. Ashe*, 3 Atk. 338, 338.

R, on his marriage, settled exchequer annuities for ninety-nine years, amounting to 300*l.* per ann. in trust to himself for life, remainder to his wife for life, remainder to his children in such manner as he should appoint. By the marriage there was an only child, a daughter. Held, that she was entitled to the exchequer annuities under the settlement, and that the father had no power of disposing of them otherwise. *Bellasis v. Uthwatt*, 1 Atk. 427.

Limitations to collateral relations in marriage settlement are voluntary. *Reeves v. Reeves*, 9 Mod. 132. **CONSIDERATION; COLLATERAL RELATIONS.**

A, by deed, settles his estate to himself for life, and then to trustees, to raise portions for his younger children, provided that if his eldest son (who was otherwise provided for) should pay the portions, then the trustees were to stand seised to the use of the right heirs of A for ever; and after raising and paying said portions, the trustees and their heirs to stand seised of such part of the premises as should remain unsold to the use of the right heirs male of A for ever. The son did not pay the portions. But died in-

testate, leaving D, his daughter and only child. Held, that D being heir general, was entitled to the estate, subject to the charge thereon by the grandfather: *Beckford v. Pendurris*, 5 Bro. P. C. 93.

Lands were settled at marriage on trustees, that if wife survived, she should receive the then profits. Husband made leases and advanced the rent. Held, heir at law entitled to advanced rent. *Lawley v. Lawley*, 9 Mod. 32. *HEIR AT LAW.*

Provisions for daughters to be born, shall extend to daughters then begotten. *Hewet v. Ireland*, 1 P. W. 426. *Gillb. Eq. Rep. 145.*

A settlement of money to be paid to such children "as shall be begotten, &c.," but "that if the husband shall die without any children, then the said money shall be paid to A," extends to a child in esse at the time the settlement was made. *Stingsby v. —*, 10 Mod. 398.

I S surrendered his copyhold to the use of himself and wife, in special tail, remainder to the wife in fee, with a condition to be void if he pay 50*l.* to A, her daughter, on a certain day; the day elapsed, the money not paid, and I S died without issue. Bill, by the heir of I S, against a purchaser from the wife to redeem. Held, this never was a mortgage; and plea that he was a purchaser without notice, was allowed. *King v. Bromley*, 2 Eq. Ab. 595. *MORTGAGE, WHAT CONSTITUTES.*

Lands by marriage settlement are limited to the son in tail male, remainder to A the husband in fee, provided if A and his wife, or either of them, die without issue male living at the time of his or her death, leaving only one daughter unmarried; the trustees to stand seised till they have raised 1500*l.* for such daughter, and if more daughters unmarried at the death of A and his wife, or either of them, and no issue male leaving, begotten between them, then 3000*l.* for such daughters. A dies, leaving daughters, and his wife enurente of a son, which is afterwards born. Whether the daughters are entitled to the 3000*l.*? *Palmer v. Cracroft*, 2 Vern. 578. *POSTHUMOUS CHILD.*

One possessed of a term for years on his marriage, assigns it to trustees in trust for himself for life; remainder to his wife for life, remainders to the heirs of the body of the wife by the husband. They have a son. This is a good limitation to the heirs of the body of the wife, and they are words of purchase and not of limitation. *Dufforne v. Goodman*, 2 Vern. 362. *Pre. Ch. 96. 2 Freem. 23. S. C. LIMITATION.*

One possessed of a term for years, in consideration of marriage assigns it to trustees in trust for himself for life; remainder in trust for the children of the body of the wife. This shall be intended for the children of the wife by this marriage, and not to let in her children by another husband. *Id.* 363. *Pre. Ch. 96. 2 Freem. 23. S. C.*

A, on his marriage, conveys his land to a trustee to the use of himself for life; remainder to his wife for life; remainder to the heirs of their two bodies; remainder to A in fee: proviso, that in default of issue of the marriage, the trustee shall convey to such uses as the survivor should appoint. Although the husband devises the land and dies first without issue, yet the wife has a good power of disposing of the estate by her appointment. *Bp. of Oron v. Leighton*, 2 Vern. 376. *HUSB. & WIFE; POWER.*

W made a deed of settlement, in which an intended marriage between the Dk. of S. and his daughter was recited, and then a clause, that in case the daughter should live to attain sixteen and should refuse to marry the duke, the duke should have 20,000*l.* out of his personal estate; but if the marriage should take effect after the daughter attained sixteen, and he should have issue male, then in trust for the duke and his wife during their joint lives, with benefit of survivorship, remainder over. W, by will, confirmed the

settlement, and directed that in case the marriage should not take effect according to the limitations of the settlement, or in default of issue of the marriage (if had), then remainder to testator's daughter for life, if she should survive the duke; remainder to her eldest son; remainder over. Testator died, and the marriage took effect with the duke before the daughter was sixteen, but she lived to attain sixteen and died before seventeen, without issue. On the hearing, it was insisted, that by the deed and will, the personal estate was not vested as to entitle the administration of the wife, by reason of her marriage before sixteen, and that it was testator's intent to restrain his daughter from marrying before that age. *Ld. Ch. thought* the thing aimed at by the testator was a marriage with the duke, and for that intent the penalty of 20,000*l.* was inserted upon refusal; the latter clause was only to bring the 20,000*l.* again into the personal estate, and to be settled to the same with the rest, in case of a marriage before sixteen, and which did not imply that the marriage might not be before sixteen. *Ld. Ch. therefore decreed* an assignment, &c.; but the lords reversed the decree. *Wood alias Cramer v. Dk. of Southampton*, Show. P. C. 83. 1 Ves. 338. 2 Freem. 186. *CONSIDERATION OF MARRIAGE.*

Term assigned in trust for baron and feme for their lives, remainder in trust for the heirs of the body of the feme by the baron. Baron and feme die. The term shall go to the heir of the body of the feme by baron, and not to her executor or administrator. The words, heirs of the body, being a good description *personae*. *Peacock v. Spooner*, 2 Vern. 195. S. C. 2 Freem. 114. *See* *quare*, see note there. *Id. ib.* *ADMON. OF ASSETS; HUSB. & WIFE.*

A, on the marriage of his son, articles to settle a jointure on the wife and her issue; but no provision is made for the son during his life. The father has the portion, and the wife dies without issue. Whether the son is entitled to an estate in the lands? *West v. Delaware*, 1 Vern. 198.

A, a widower, settles lands to raise 100*l.* a year for his eldest son, and 100*l.* a piece for his younger children, and afterwards marries again and has children by his second wife. Decreed, the children by his second wife were equally entitled with the other younger children, though portions of the younger children were by the settlement to be paid according to their seniority, yet in case of a deficiency they shall be paid in average. The portions of the younger children, who died in the life of their father, not to be raised in favour of the administrators; otherwise, if any of the daughters had married in the lifetime of their father, and afterwards died. *Brathwaite v. Brathwaite*, 1 Vern. 334. *YOUNGER CHILDREN.*

#### 4. *What passes under, or is comprised in.*

Settlement of "all the two-thirds parts of all my property, &c., belonging, &c., lately devised unto me by M." Held to pass only two-thirds of such property as then remained, and did not extend to such parts of property as had been spent previous to settlement. *Cullen v. Missing*, 1 Mad. 175.

Effect of a contract on marriage by bond, *convey* convey or assure, all such goods, personal estate and effects, that the husband should at any time during the joint lives of him and his wife be possessed of, to the use of them and the survivor; attaching on capital, not income, unless laid up as capital; admitting therefore expenditure, and debts, in a fair application of income, not liable to a minute account. On that principle an estate, purchased by the husband with money partly his own, partly borrowed on his personal security, and some paid off by him, was after his death held to belong, not to the trust, but to the

heir, charged for the benefit of the trust with the money that was his own, the debts paid on account of that purchase, and expenditure in repairs, improvements, &c. *Lewis v. Muddocks*, 17 Ves. 48. **APPOINTMENT OF ASSETS.**

Tenant for life, under a settlement of a crown lease, gets a renewal in reversion; it shall go to the uses of the settlement. *Taster v. Marriott*, AmbL. 668. **RENEWAL; TENANT FOR LIFE; TRUST.**

On agreement before marriage, that everything which should come to the wife by her father's death, should go to them for their respective lives, and after the death of the survivor, to the heirs of the body of the wife by him begotten. Held, that 6000*l.*, to which the wife was entitled under the settlement of her father and mother vested in her only, and the husband consenting, the 6000*l.* was decreed to be settled on the younger children. *Green v. Fkins*, 2 Atk. 474.

By marriage articles, A makes a provision for his wife by way of jointure, and in bar of dower, &c.: proviso, that nothing therein contained should bar or hinder her from enjoying any legacy or bequest which the husband might give to her, nor should extend to all or any the household goods, or utensils, or household stuff, rings, plate, jewels, or linen of the husband at the time of his death. A lived in London, but had a large house furnished at Gosport, which he let out to government as an hospital. On his death intestate, the widow claimed to be entitled, under the articles, to the furniture in both houses; but held, that she was only entitled to the furniture of the house in London. *Pratt v. Jackson*, 1 Bro. P. C. 222. S. C. 2 P. W. 302.

Covenant in marriage articles, "to leave wife a moiety of personal estate at his death," held to apply to his property at the time of the articles. *Webster v. Milford*, 2 Eq. Ab. 362.

On marriage, lands are settled on A for life; remainder to the first &c. son of the marriage in tail male; remainder to trustees for 500 years, to raise 5000*l.* portions for daughters, payable at eighteen or marriage; remainder to A in fee. After the marriage, A settles other lands, and a term is created for raising the like sum of 5000*l.* for daughters, on failure of issue male, payable at sixteen or marriage. A dies, leaving a daughter his heir at law, who attains eighteen and dies unmarried. The trust of the term is not merged in the fee, but the portion shall go to the daughter's executors, and is indisposible by her will; but there shall be but one 5000*l.* raised. *Thomas v. Kemys*, 2 Vern. 348. 2 Freem. 207. S. C. **MERGER OF TERM.**

A, on the marriage of B his son, settles a lease on B for life, to the wife for life, and then to the issue of the marriage; and B covenants from time to time to renew the lease and assign it on the same trusts. B renews the lease, but does not assign it, and dies indebted. This lease is bound by the marriage articles, and is not assets for the payment of debts. *Ploeman v. Ploeman*, 2 Vern. 289. **ASSETS.**

##### 5. Generally.

A being indebted, as his father's executor, to the trustees of his sister's marriage settlement, settled on her and her children a sum to a large amount, in consideration of the natural love and affection he bore them: held, that this was not a satisfaction of the debt. *Drewe v. Bedgood*, 2 S. & S. 424. **DEBT, SATISFACTION OF.**

Covenant on marriage to make provision for daughter, by will or otherwise, as great as testator should, by will or otherwise, provide for his other children: held, that proportion did not extend to any advance-

ment made for other children during testator's life time. *Willis v. Black*, 1 S. & S. 526. **ADVANCEMENT.**

Settlement of two estates in remainder on T for life, with remainders to his sons in strict settlement, and remainder over to M, with power to tenants for life in possession to charge the estates with a jointure of 400*l.* and power to revoke the uses of the settlement as to one of the estates, and to appoint new uses: by a subsequent deed the settlor exercises the power of revocation as to the remainder to M, in lieu thereof, appoints real estate to S, and repeats several of the powers contained in the first settlement, and gave power to T & S to charge the estate with a jointure of 400*l.* T by separate deeds executes both powers of jointuring: held, on bill by his widow for both jointures, that T had no new power to jointure under the second settlement. *Wiggell v. Smith*, 1 S. & S. 321. **POWER OF REVOCATION.**

Articles for a settlement with a power of leasing for twenty-one years, and other usual powers, &c., do not authorize the introduction of a power of granting building leases for long terms. *Preece v. Bruch*, 1 Jac. 158. **USUAL POWERS, WILLS.**

Where there is an ambiguity in expressions of settlement regarding the issue, the presumptions are taken in favour of the children. *Perfect v. Curzon*, 5 Mad. 442. **PRESUMPTION: CHILDREN.**

Power in a marriage settlement to grant to a wife any annual sum of money, or yearly rent-charge to be tax free, and without any deduction, and to be issuing out of, and chargeable upon, lands in Ireland, so that such rent-charge do not exceed, in the whole, the yearly sum of 3000*l.* of lawful money of Great Britain: held, that a rent-charge appointed under this power is payable in Ireland in the currency of England; but that the appointee is not entitled to have the sum transmitted to England free of the charge of conveyance and exchange properly so called. The *lex loci contractus*, and the law applicable to cases of money charged as a rent payable out of land, where no provision as to the place of payment is made by the instrument, are inapplicable to a case where the instrument itself furnishes the means of interpretation. In ambiguous contracts the domicile of the parties, the place of execution, the purpose, and the various provisions of the instrument, are material to be considered in the construction. *Lansdowne v. Lansdowne*, 2 Bligh. 60. **DOMICIL.**

Where lands are in settlement, and husband and wife join in mortgage of them, if deed creating the security is no more in effect than a simple charge on lands, and does not alter limitations further than is necessary to create the charge, the right of redemption, although reserved by deed to husband and wife or either of them, their or either of their heirs, &c. belongs only to those who are entitled under settlement, and not to heirs of husband if he survive wife. But where lands of wife on marriage are settled to use of husband and wife successively, for life, remainder in strict settlement, remainder to wife and her heirs, with power of revocation and appointment of new uses and she joined with him, in mortgage and by deed, to lead uses of fine afterwards levied by them according to covenant; the lands, after determination of term created to secure re-payment of money borrowed, were limited to husband and wife and survivor, for life, remainder in tail special, remainder for default of such issue to right heirs of survivor of husband and wife: wife having died without issue, leaving husband surviving: held, husband and his heirs, and not heirs of wife, were entitled to equity of redemption. *Jackson v. Innes*, 1 Bl. 104. See 16 Ves. 366. **HUSBAND AND WIFE; REDEMPTION OF MORTGAGE.**

Bond executed on marriage of child.

to settle lands, "if he should become seised in possession," affects copyhold as well as freehold. *Prebble v. Boghurst*, 1 Swan. 580. **BOND**; **CORNWOLD**, **CHARGE ON**.

A bond conditioned to settle lands, "if the obligor shall become seised," will not affect lands of which he is seised at the date of the bond. *Id.* 321. **CHARGE ON LAND**; **BOND**.

Construction of ambiguous and incorrect settlement as vesting portions at twenty one, against words importing condition of surviving the parents; an intention, which, if clearly expressed, must prevail; but is not to be inferred as not a rational construction of an ambiguous family settlement. *Hougrate v. Carter*, 3 V. & B. 79. **COOP.** 66. **S. C.**

Construction of a clause, giving trustees liberty to forbear enforcing payment; that it was for their indemnity, as if with a view to insolvency, it might amount to fraud. *Exp. Alcock*, 1 V. & B. 179.

Money charged on land, by articles on marriage, to be laid out on government security or freehold estate, in a particular situation, with consent of the wife, to be settled upon trust for her separate use for life; and after her death, to be conveyed or assigned to her husband, his heirs or executors; if she survive; for the issue, if more than one, subject to her appointment by deed or will, equally, at twenty-one, their heirs, if land; their executors, if money; if no issue, subject to her appointment, and in default to his or her next of kin, their heirs or executors: after the husband's death, having disposed of his personal estate by will, this property held personal; to the interest of which his widow was entitled for life, with power of appointment by implication in the event of an only child dead under age, and intestate, and liberty to apply. *Tan v. Barnett*, 19 Ves. 102. **ADMON. OF ASSETS**.

In the constructions of articles the intention of the parties must be the guide. *Lechy v. Knox*, 1 Ball & B. 216.

Distinction between marriage articles and wills; all the parties to the former considered purchasers to effectuate their intention; none of the parties mentioned in the latter are so, as the testator's intention is alone to be considered. *Stratford v. Powell*, 1 Ball & B. 25. **WILL, C. OF**.

Settlement of personal estate upon a second marriage, upon trust to pay to such persons, &c. as the settlor shall by deed or will appoint, and in default thereof to his issue. Construction upon the whole, that it was to operate unless a subsequent instrument should be executed; a prior will, therefore, revoked. *Leigh v. Norbury*, 13 Ves. 340. **WILL, REVOCATION OF**.

Settlement of estates on trustees and their heirs, during the joint lives of W H and his wife, without impeachment of waste, upon trust, out of rents and profits, to pay all expences and out-goings, and to raise and pay a sum, by way of pin money, to the wife, and subject thereto to pay the clear residue of rents, &c. to W H during the lives of himself and his wife, remainder to W H for life, without impeachment of waste, remainder over, with power for the trustees to sell and buy out the produce in the purchase of other lands to the same uses; the land being sold under the power, W P was held entitled to the produce of timber cut down by him previous to the sale, not to the value of timber then standing. *Wolf v. Hill*, 2 Swan. 149. **TIMBER**.

Money settled to separate use of wife, and in event of no children, to her absolutely surviving husband, with power to trustees, with her consent, to invest it in land: held, that no lien existed on estates purchased, by husband having obtained the money from trustee, the circumstances not raising the presumption, as if he had been under an engagement to purchase,

that his purchases were in pursuance of engagement, and upon evidence, the fact of the application of trust fund, or the inability of husband by other means not being made out. *Lench v. Lench*, 10 Ves. 511. **LIEN**; **HUSB. & WIFE**.

As between representatives, money was considered as land under a direction in a settlement, with all convenient speed, after request to lay out; though no request was made; upon the construction, all the limitations being adapted to real uses and other circumstances. *Thornton v. Hawley*, *id.* 129. **MONEY DIRECTED TO BE LAID OUT IN LAND**; **ADMON. OF ASSETS**.

Limitation in an article on marriage to A for life, subject to annuities for the lives of B & C, and a charge for a jointure for D, if she should survive A, and after the death of said B & C, A & D, then to the use of the issue, &c. The limitation to the issue is not to await the deaths of A, B, C, and D, but they are to take upon the death of A, subject to the charges for B, C, and D. *Bushell v. Bushell*, 1 Scho. & L. 95.

Settlement to such uses as husband and wife should jointly appoint, and in default of such appointment, to them for life, and after decease of survivor, to the use of all or any of the child or children of them in such shares and proportions, and for such estate and estates, term or terms, and payable at such time or times, and in such manner and form as the husband should by deed or will appoint, and in default thereof to him and his heirs. The event upon which the last limitation depends, is in default of appointment, not of children. *Jenkins v. Quinchant*, cited, 5 Ves. 596.

Under marriage articles, 15000*l.* was vested in trustees on trust, together with 5000*l.* covenanted by the husband to be paid, to be laid out in land to be settled upon the husband for life, remainder to the wife for life, remainder to the use of such child and children, in such shares, for such estates, and subject to such powers, limitations, and provisions as the husband and wife, or the survivor, should appoint; in default of appointment, to the children in tail; in default of issue to the husband in fee. The husband and wife joined in a direction to the trustees, reciting their resolution to invest the trust fund in an estate lately purchased by the husband for 16,300*l.* and directing them to deliver the said stock, &c. to him, at the price they were at on the day of the purchase, which was done. The wife died; there were two daughters; the father, by will, reciting the purchase, and that he had not conveyed it to the uses of the settlement, and that it was not his intention, that the said purchase should be an investment of the trust fund, but that the said fund, with its increase, should be taken out of his personal estate, gave 10,000*l.* part of the trust fund, in trust, to be laid out in land, to be conveyed to one daughter for life for her separate use, remainder to her children in tail, remainder to the other daughter in fee, for whom he also appointed the residue of the fund, but revoked that by codicil, reciting a portion given on her marriage: held, first, that grandchildren are not objects of the power, but the excess only would be void: secondly, the fund, with its increase, was invested in the purchase: thirdly, there was no appointment of the estate of money due on the covenant: fourthly, the remainders in default of appointment are vested subject to be divested by appointment, and will take effect as to what is ill appointed or unappointed: fifthly, the share of the daughter, to whom the portion was advanced on marriage, was thereby satisfied. *Smith v. Ld. Camelford*, 2 Ves. J. 698. See further this case, *nom.* *Pitt v. Jackson*, 2 Bro. C. C. 51. **POWER**.

Estates are settled on A & B on their marriage, in strict settlement; provided, that if the wife should,

when requested by her husband, refuse to settle her estates in a particular manner, the settlement of the other estate should be void: the husband and wife join in a different settlement of her estate, proceeding, however, on the foot of the former covenant, as if it had been performed; this is no avoidance of the settlement. *Matthews v. Jones*, 2 Anst. 506.

Tenant in tail restrained as to alienation, but with powers of leasing and jointuring, as in case of tenant for life, considered as tenant for life, and, therefore, his personal representative is a creditor for a charge on the estate paid by him (intent to the contrary not appearing), though the subsequent remainders were exactly of the same nature; and the term having been very short, little more than forty years remained. *Cs. Shrewsbury v. El. Shrewsbury*, 1 Ves. J. 227. S. C. 3 Bro. C. C. 120. TENANCY FOR LIFE; CHARGE ON ESTATE.

Under a power to appoint a sum of money among children; but that the eldest son, or the son possessing the estate shall have no part of the money, a younger son becoming an eldest is excluded, though mentioned by name in the execution of the power whilst he was a younger son. *Broadmead v. Wood*, 1 Bro. C. C. 77. YOUNGER CHILDREN.

L having joined her father in raising 24,000*l.* to pay his debts, afterwards, upon her marriage, a settlement being made by which 30,000*l.* was to be raised for the payment of E's debts, it was determined by the court, and affirmed in parliament, that the 24,000*l.* should be taken as part of the 30,000*l.* and not raised beyond it. *Shelburne v. Inchiquin*, 1 Bro. C. C. 339.

Covenant in an infant's marriage settlement, that whatever should come to the wife from the mother, or otherwise, shall be bound by the settlement, restrained to what shall come from the mother, not to property coming unexpectedly from other quarters. *Williams v. Williams*, 1 Bro. C. C. 152.

Articles on marriage for settling land to be bought with money, on all the children of the marriage, and their respective issues, and for default of such children, and their issue, over. Held, there should be cross remainders by implication. *Twicken v. Lock*, Amb. 663. ARTICLES ON MARRIAGE; IMPLICATION.

Tenant in tail conveys his estate to the use of himself and his intended wife, for their lives, with remainder to the heirs of their bodies, and after marriage suffers a recovery; the recovery bars but a moiety, and is a severance of the joint estate. *Moody v. Aldrich*, Amb. 649. FINE AND RECOVERY.

The court will, from the general frame of a settlement, collect the intent, contrary to the express words of a particular clause. *El. Northumberland v. El. Egremont*, 1 Eden. 435.

It is a certain rule of law, that if such a construction can be put upon a limitation as that it may take effect by way of remainder, it shall never take place as a springing use, or executory devise. *Curwaine v. Curwaine*, 1 Eden. 28.

A limitation in a settlement "to trustees, to the use of the settlor for life, remainder to B, his intended wife, for life (except as thereafter excepted), remainder to the heirs of the body of A, begotten on B, remainder to A and his heirs, with a proviso, that if A should die, and leave such issue as aforesaid, without making any provision for such child or children in his lifetime, the same trustees should stand seised of one moiety, from and after the decease of A, to the use of such child: held, a contingent remainder, and not a springing use, and therefore barred by a fine levied by A and B. *Id. ib.*

A, on his marriage, covenanted that if his wife should die before him, leaving issue of their bodies, he would pay, &c. to and for such issue, one third part of all his chattels, real and personal, which at the

death of his wife he should be possessed of, to be divided between them; if more than one, as he should direct. The wife died, leaving two daughters, and the husband, during the coverture, acquired some freehold leases for lives. Held, that these leases were included in the covenant, but that daughters were not entitled to a division till after father's death, he being ordered to give security. *Hunkes v. Jones*, 6 Bro. P. C. 136. SECURITY.

Articles previous to settlement cannot, in general, be read to construe the settlement, unless the bill is brought to rectify the settlement, or the settlement refers to them. *Fritchard v. Quinchant*, Amb. 147. EVIDENCE.

The words in marriage settlement, "such child as married without father's consent, should forfeit the said intended portion," extended to the whole interest each child might expect under the settlement, whether certain or contingent. *Wrottesley v. Wrottesley*, 2 Atk. 584.

A widow of a freeman of London who left children and died intestate, was entitled to four-ninths of his personal estate, and having, by deed, assigned over her four-ninths for her separate use, in case of marriage, and to such persons as she should appoint, and for want of such appointment, then to her children; the widow intending to marry a second husband, by another deed, to which the husband was a party, in consideration of the intended marriage, and of a settlement made on her by him, recites that if she did not dispose of her four-ninths, the husband would be entitled thereto, and then assigns it over to trustees, in trust for the intended husband, during their joint lives, subject to her control and disposal by writing; after which she dies, without disposing of it. Decreed, the second husband is as a purchaser, and the recital, that he would be entitled to it, if the wife should not dispose of it, was a gift. *Poulson v. Wellington*, 2 P. W. 533.

Portions at twenty-one or marriage. "when C and his wife should die without issue male;" Held a condition precedent, and not to be raised till both are dead, though one die and other remain tenant in tail after possibility of issue extinct. *Champney v. Champney*, 10 Mod. 312. CONDITION, PRECEDENT; PORTION; TEN. IN TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED.

Articles on marriage to settle lands on the husband and wife for their lives, remainders to the first, &c. son of the marriage, remainder to the heirs male of the body of the husband, by any wife, remainder to the heirs of the body of the husband by the first wife, remainder to the husband in fee, with provisions for the daughters of that marriage, if no son. Husband has one daughter by the first wife, suffers a recovery, and marries a second wife, taking notice of his first marriage articles, in his second settlement. He being tenant in tail by the articles, was allowed, by his articles, to have barred his daughter of the first marriage. *Powell v. Price*, 2 P. W. 535. FINE & RECOVERY; TEN. IN TAIL.

In marriage articles there is a diversity between a limitation to the heirs of the body of a man, and to the heirs female of the body of a man, and the sons more favoured than daughters. *Id.* 539.

One agrees, before marriage, to settle certain lands on his wife for life, and afterwards devises these lands for payment of his debts; the covenant is a specific lien on the lands; secus, had it been only an agreement to settle so much per annum without mentioning any lands in certain. *Freemount v. Dedire*, 1 P. W. 429. LIEN.

A proviso in a settlement; if the wife survive her husband, they not having issue between them, then she may revoke the settlement. Husband dies, leav-

ing a son, who dies in the life of his mother; she may revoke the settlement. *Holt v. Burley*, 2 Vern. 651. Pre. Ch. 293. S. C. POWER OF REVOCATION.

One makes a settlement, with power by deed to revoke it, and by the same deed, or any other, from time to time, to limit new uses; he revokes the settlement, and limits new uses; but reserves no further power to himself; he cannot, by virtue of the first power, limit any other uses. *Hele v. Bond*, Prec. Chan. 474. POWER, C. OF.

A, on marriage of his son, settles a messuage on himself for life, sans waste, remainder to his son; the father, though his estate for life be sans waste, cannot pull down the house, nor commit any voluntary waste thereon. If he does, the court will grant an injunction to stay waste, and compel the father to put the messuage in as good repair as before the waste committed. *Fane v. Id. Barnard*, 2 Vern. 738. S. C. Pre. Ch. 454. Gilb. Eq. Rep. 127. 1 Salk. 161. TEN. FOR LIFE; WASTE.

A, seised of a leasehold estate to him and his heirs for their lives, settles it on his daughter and her husband for their lives, remainder to the use of his own executors and administrators. The daughter and her husband die; A dies indebted by simple contract, and devises his estate to his wife. Decreed, that the use of this estate being limited to the executors and administrators of A, this makes it personal estate in A, and being personal estate, A cannot devise it exempt from his debts, though due by simple contract. *Deion v. Kinton*, 2 Vern. 719. ASSETS.

Articles construed against the words for the sake of the intent, as where the wife's portion was to be laid out in land, to be settled on husband and wife, and the heirs of their bodies, and if not laid out in land during their joint lives, and the wife should die first, that the money should go to the wife's brother and sister; wife dies first, leaving issue, and the money is not laid out in a purchase; yet the issue, and not the wife's brother and sister, shall have it, equity supplying the words, "if the wife die without issue." *Kentish v. Newman*, 1 P. W. 234.

When a man makes a settlement equivalent to his wife's portion, it shall be intended, that he was to have the portion, though there is no particular agreement for that purpose. *Holt v. Es. Hereford*, 2 Vern. 502. HUSB. & WIFE.

The words begotten, and to be begotten, are the same as well on construction of wills as settlements. *Cook v. Cook*, 2 Vern. 545.

An agreement to settle lands of such a value on wife, must be made up so much, and value proper to be settled, by master. *Hedges v. Eversall*, 1 Eq. Ab. 18. SPEC. PERM.

By a settlement, two estates one in N and the other in S, are subjected to the raising of a portion of 2,000*l.* to a daughter, by a term of 500 years, commencing after the respective decease of two several lives; one upon the S estate, and the other upon the N estate; the life on the S estate fell, and the daughter bringing her bill for the 2,000*l.*, J S, to whom that estate was come, paid the 2,000*l.* Afterwards the life on the N estate fell, and the fee simple thereof descended to the daughter. J S that paid the 2,000*l.* shall have the contribution out of the N estate, in proportion to its value only; the estate shall be valued as an estate in possession, and the N estate as an estate in reversion. *Herevingham v. Herevingham*, 2 Vern. 355. CONTRIBUTION.

A settles land to the use of himself for life, remainder to such of his four children, and in such shares and proportions, as A, by any writing, shall appoint. A may not only limit the land to any of his children, but may charge the land with any rent charge, or sums of money, for any of his children. *Thwaites v. De*, 2 Vern. 80. POWER, C. OF.

A, jointly seised with others, conveys his third part to the use of himself for life, remainder to his wife for life, remainder to his son in fee; and at the same time makes his will, and gives the same lands to his son in tail, charged with his debts. The son is not a trustee for the father in the settlement: otherwise it would have been, if the entire fee had been conveyed to the son. *Baylis v. Newton*, 2 Vern. 28. TRUST.

4,000*l.* portion is secured by articles, wherein is a proviso, that if the husband did not, within two years, settle a jointure, he should only have the interest for his life; the wife dies within the two years, and before any settlement made; the husband is not entitled to the portion. *Yemuden v. Read*, 1 Vern. 68. HUSB. & WIFE; CONSON.

## II. VALIDITY.

1. *Whether Fraudulent, Voluntary, or otherwise.*
2. *Settlement after Marriage in respect of Wife's equitable property claimed by Husband.*
3. *After Marriage when voluntary, and when for good or valuable security.*
4. *Constituted by letter.*
5. *In pursuance of articles, and variance between.*

### 1. *Whether fraudulent, voluntary, or otherwise.*

Settlement on husband and wife for lives, remainder to sons in tail male, remainder to daughters in tail, remainder to survivor of husband and wife in fee, with power to wife if husband survived, and all the children of marriage died without issue, to charge estate with 5000*l.* Held that power is too remote and void. *Bristow v. Boothby*, 2 S. & S. 465. POWER TOO REMOTE.

Ward married day after she came of age. After the marriage, a settlement was made on her and husband, &c. but wife never confirmed the same in court. Settlement was, after husband's death, set aside as not approved of by the court, and as precipitation of marriage was a surprise on wife. *Long v. Long*, 2 S. & S. 119. WARD OF COURT.

Limitations to collaterals in a marriage settlement made by tenant in tail are voluntary against subsequent purchaser for a valuable consideration, in the same manner as if the settler had had the fee. *Cornick v. Trapaud*, 6 Dow. 86. COLLATERAL RELATIONS.

Covenant in marriage articles in favour of a stranger, held merely voluntary, and not to be supported by the marriage consideration. *Sutton v. Chetwynd*, 3 Mer. 249. CONSIDERATION.

Settlement on marriage of freehold estates of inheritance, of freeholds for lives and years, by a man not indebted in trade or intending it, to the use of himself for life, unless he shall embark in trade, and in the life of his wife become bankrupt, and from his decease or bankruptcy to secure an annuity for his wife, and subject thereto for his heirs, executors, &c., on his afterwards engaging in trade and becoming bankrupt, is void as against his creditors. *Higginbotham v. Holme*, 19 Ves. 88. FRAUD ON CREDITORS.

Limitation of wife's property until the bankruptcy of her husband, or a lease determinable on the bankruptcy of the lessee good. *Id. ib.*

Settlement on marriage of wife's fortune in case of bankruptcy of the husband, though in form of bond by him; but as his bond, affecting his property, it is void as against the creditors. *Exp. Hodgson*, 19 Ves. 206. FRAUD ON CREDITORS.

Settlement sustained by the consideration of marriage against creditors, notwithstanding false recitals



that the property was the wife's, protecting also voluntary expenditure by the husband after the marriage, in improvement by building and infranchising copyholds, but not jewels and furniture purchased by him after the marriage and given to her. *Campton v. Cotton*, 17 Ves. 264. FRAUD ON CREDITORS.

The consideration of marriage will support a settlement even of moveable effects, and neither the joint possession of furniture nor the want of an inventory, nor the fact that the settlor was indebted at the time, and that his wife knew it, will affect the settlement. *Id.* 271. CONSIDERATION; MARRIAGE.

Trader by settlement on marriage in consideration of 1000*l.* the wife's fortune, conveyed his house to trustees to his own use till death or bankruptcy, then in either event if wife alive, to raise 1000*l.* for her separate use. This a fair and valid settlement in nature of a mortgage to secure the wife's fortune. *Higginson v. Kelly*, 1 Ball & B. 252. BANKRUPTCY.

A trader cannot on marriage secure a provision out of his property for his wife in the event of bankruptcy in prejudice to his creditors. But marriage settlement of a trader securing a provision in case of bankruptcy for the wife, good to the extent of her property. *Id.* 255, 256. BANKRUPTCY AND SETTLEMENT.

Default of payment of the consideration on one part does not vitiate a marriage contract. But the defaulting party cannot enforce the contract against the party injured by his default. *Compton v. Ormsby*, 2 Scho. & L. 602.

Papist tenant in tail in the year 1766, confessed judgments to a trustee in trust for the use of a settlement made on the marriage of his nephew, and afterwards in 1770, suffered a recovery: Held that the judgments were not a fraud on the then existing disabling statutes, that the recovery, not having any operation to defeat the provisions of those statutes, was valid, and that the issue of the marriage claiming under the settlement had a right to raise the amount of the judgments out of the lands in the hands of a purchaser with notice. *O'Fallon v. Dillon*, 2 Scho. & L. 13. PAPIST.

T, a papist, seised in fee of lands purchased before the stat. 2 Ann. c. 6. by articles on the marriage of his son in 1708, covenanted to settle not only those lands, but others acquired since the statute in strict settlement: Held that these articles had no operation not on the lands purchased before the statute, because such a disposition was made void by that statute, nor on the lands purchased afterwards, because by the statute T was disqualified from holding an estate sufficient to support the covenant. *Moore v. Butler*, 2 Scho. & L. 249. PAPIST.

Articles executed in 1714, and a settlement in pursuance thereof in 1720, made between T and J his eldest son, (both being papists) settling lands acquired since 1708, and re-settling the former lands on J for life, remainder to his then first and other sons for life, remainder to their issue in strict settlement, held also inoperative except as to making a provision for younger children, and not sufficient to put the son of J to an election: Held, therefore, that under a protestant discovery decree, obtained in 1751 in trust for T and assigned to J the younger, (the son of J the settler), J the younger, was not a trustee for the persons claiming under that settlement, but that the effect of that decree was to subject the premises comprised therein to the mortgage of J the younger. *Id. ib.*

Consideration of marriage runs through the whole settlement, and especially supports every provision with regard to the husband and wife; she is interested in the provision for husband, enabling him to provide for her and children, and it is not affected by

subsequent events as death of wife without children. *Nairn v. Prowse*, 6 Ves. 752. CONSIDERATION.

Personal estate settled on marriage for the husband for life, then for the wife for life, then to and among all and every the children and grandchildren, or issue in such shares, under such restrictions, at such times, and in such manner as they or the survivor should appoint by deed or deeds, or by will, for want of appointment, to all and every the children and grandchildren, or issue being at the decease of the survivor equally, payable at twenty-one or marriage; if but one, to that one, provided that in case of no appointment, the issue of any children dead should not have a greater share than their parents would have had: Issue only are within the power, but in any degree: but an appointment to any issue not living must be restrained to twenty-one years after lives in being at the creation of the power, otherwise it is void even as to such as come in esse within those limits; but on marriage of a daughter interests may be given to her children generally, and to the husband. What is ill-appointed goes as in default of appointment: but children of a living parent cannot take under the proviso. *Roake v. Darril*, 2 Ves. J. 356. POWER, EXECUTION OF.

On the treaty of marriage between A and B, the father and mother of B, in consideration of the settlement to be made by A, join in conveying a small estate (out of which the mother was dowerable) to A in fee; (but no fine was levied,) and they also joined in settling another estate of which the father was seized in fee on the father for life, remainder to the mother for life, remainder to the uses of the marriage. At the time of the settlement the father was indebted by specialty. This being a fair and reasonable family settlement, and not made with any view to defeat creditors, the limitation to the mother for life is not fraudulent as against creditors, within the statute 13 Eliz. more especially as she had joined in conveying the small estate in fee to the husband. *Jones v. Boulter*, 1 Cox, 288. FRAUDULENT CONVEYANCE.

A, on marriage settled lands to himself for life, remainder to wife for jointure, remainder to first, &c. sons in tail male, reserving power of charging with 3000*l.* for younger children on payment of debts, and covenanted to lay out 6000*l.* part of wife's portion, in funds to same uses; the 6000*l.* is not laid out. After eldest son came of age, it was agreed in consideration of his advancing 3000*l.* for purchase of commission in army to make a new settlement more beneficial for younger children, by which lands were limited to former uses, but A was empowered to charge 3000*l.* for each of younger children and covenant to lay out 6000*l.* was released; court refused to set aside last settlement. *El. Kerry v. Ld. Fitzmaurice*, 2 Bro. P. C. 384.

Daughter entitled to a portion secured on land, marries clandestinely in the lifetime of her father; afterwards the father secures the portion to the husband on his making a settlement: Held the settlement was not fraudulent against the creditors of the husband. *Wheeler v. Caryll*, Amb. 121. FRAUDULENT CONVEYANCE.

A settlement made in consideration of marriage is good against every body if made before marriage; if made after, is voluntary against creditors. *Id. ib.*

In marriage settlements, &c. on good or valuable consideration as between the immediate parties, such consideration will run through all the limitations for the benefit of the remotest persons, even of those in respect of whom the deeds would otherwise have been voluntary. *Itell v. Beane*, 1 Ves. 215. S. C. Dick. 132. CONSIDERATION.

Where parents did not make so beneficial a bar-

gain for a daughter as they might have done, that is no reason to set aside the marriage agreement; for the law has entrusted them with the marriage of their children, and there are many proper considerations that may induce a parent to agree to a match, besides a strict equality of fortune. There never yet has been an objection to a father's disposing of his daughter in marriage, on what terms he pleases; and though most portions arise under settlements, the daughter is as much a purchaser, as if her portion came from a collateral relation. *Harvey v. Ashley*, 3 Atk. 610, 613.

Parties entitled to an estate confirming a jointress's settlement are purchasers of her interest in incumbrances paid off by her fortune which had been assigned for the better securing her rights under the settlement. *Ex. Portsmouth v. Ly. Suffolk*, 1 Ves. 31. **HUSB. & WIFE; SEPARATE ESTATE; ESTATE BY PURCHASE; PAYING OFF INCUMBRANCES.**

A widow before her marriage with A, her second husband, conveys her estate to trustees in order to make settlements upon the issue of her first marriage. Afterwards A and his wife mortgage the settled estates to persons who had notice of the settlement. Here it was declared that the settlement is no voluntary agreement, but a binding one, and no instance where such a limitation has been held fraudulent and void against subsequent purchasers or creditors: for if it should, no widow on her subsequent marriage could make any certain provision for the issue of a former. *Newstead v. Searies*, 1 Atk. 265. *Cotton v. King*, 2 P. W. 358. 674. **FRAUD AGAINST CREDITORS.**

If a person on marriage make an extravagant or unreasonable settlement, yet if no fraud or incapacity appear, it shall not be avoided by persons claiming under a subsequent marriage settlement. *Hobson v. Stane*, 9 Mod. 80. **FRAUD; UNREASONABLE BARGAIN.**

A seised in fee on his marriage, covenants to settle the premises on himself and his wife, and on the issue of the marriage, remainder to his nephew in fee, the remainder in fee is voluntary and not supported by the consideration of that marriage or of the marriage portion. *Osgood v. Stode*, 2 P. W. 245. S. C. 10 Mod. 533. **SPEC. PERF.; COLLATERAL RELATIONS.**

A, the father, and B the son, on the marriage of B articulated to settle lands on B and his wife for their lives, remainder to their issue, remainder to the nephew in fee, if A had the sole interest, the limitation to the nephew is voluntary. Secus, if the father and son had each same interest. *Id. ib.*

Purchaser for valuable consideration without notice shall not be impeached especially when a settlement has been since made in his favour. *Rochfort v. Nugent*, 5 Bro. P. C. 351. **VEND. & PURCH. NOTICE.**

A limitation to a second son in remainder in tail, on a settlement made on the marriage of the first son, and in consideration of the wife's portion, makes not the second son a purchaser. *Webster v. Bishop*, Prec. Chan. 224. **ESTATE BY PURCHASE.**

A settlement made by a lunatic though reasonable and for the convenience of the family, ought to be set aside in equity. *Clerk v. Clerk*, 2 Vern. 414. **LUNACY.**

## 2. Settlement after marriage, in respect of wife's equitable property claimed by husband.

Divorce obtained by wife after husband's bankruptcy, does not entitle wife to whole of fund bequeathed to her, which came into possession after bankruptcy, though no settlement was made on her at marriage,

and husband at that time received 1500*l.* with her. *Green v. Otte*, 1 S. & S. 250. **HUSB. & WIFE; DIVORCE; ASSIGT.**

Bill for husband for stock held in trust for his wife; a claim was set up under a bond by the wife, and her former husband securing an annuity out of the dividends as an assignment for valuable consideration, but as it came before the court collaterally, and several objections were taken upon the annuity act, the infancy of the wife, and the nature of her interest at the time, the master of the rolls, though upon the general question inclining in favour of the wife's equity against an assignment for valuable consideration, would not determine it, but referred it to the master to approve a settlement upon the wife and her issue, with liberty to the representative of the obligee to apply. *Franco v. Franco*, 4 Ves. 515. **HUSB. & WIFE; ASSIGNMENT FOR VAL. CON.**

Legacy due to wife, she being dead, master to see if husband had made any provision for her. *Cockel v. Phipps*, Dick, 391.

Husband by making settlement on wife after marriage, is purchaser of mortgage of wife, though he did not reduce it into possession. *Sykes v. Meynall*, 1d. 368.

Injunction at suit of wife, granted against husband to stay proceedings in spiritual court by husband for legacy due to wife, he having made no settlement. *Meals v. Meals*, 1d. 373.

Covenant in marriage articles, that lands settled were of a certain value, which they were not, husband by will "confirms the articles and also gives his wife all his lands in A B for life." Held not to be a question of satisfaction or part performance, but of construction, and that the wife was entitled to both interests under the intent thus collected. Further covenant from the husband, "in as much as he was to be absolutely entitled to all the wife's personal estate," to settle "in respect of any sum that might come to her afterwards after the rate of 100*l.* per annum on her for life for every 1000*l.*, and upon certain contingences that she should be paid back a moiety of all that he should receive as her portion." The husband obtained a decree for 400*l.* of the wife's money, but did not receive it. Held she was entitled to a settlement according to that proportion, and the contingencies having happened, to the moiety likewise of all sums received, including the 400*l.*; since the husband might have received it. *Prime v. Stebbing*, 2 Ves. 409. **SETTLE. SATISFYN. OF.**

## 3. Settlement after marriage, when voluntary, and when for a good or valuable Consideration.

A settlement after a marriage in Scotland, not supported against creditors in bankruptcy as upon valuable consideration, by a re-celebration of the marriage in England, but it was sustained as the consideration of an agreement to settle by the parent of the other party. *Exp. Hall*, 1 V. & B. 112. S. C. 1 Rose, 30. **BANKCY.; ASSIGT.; CONSON.**

Voluntary settlement void under the statute 27 Eliz. c. 4, against a subsequent purchaser for a valuable consideration, with notice though a fair provision for a wife and children. An injunction restraining the husband from selling was refused, but a demurrer by the husband overruled as covering too much the plaintiff being entitled until a sale to an execution of the trust. *Pulvertoft v. Pulvertoft*, 18 Ves. 84. **VOLUNT. SETTLE.; NOTICE; INJUNCTION TO RESTRAIN SALE.**

Settlement after marriage, fraudulent only as against creditors at that time. *Kidney v. Coussmaker*, 12 Ves. 136. **FRAUD ON CREDITORS.**

Purchase by wife from husband through the medium

of trustees for her separate use and appointment, may be sustained against creditors, if *bona fide*, though the husband is indebted at the time, and even though the object is to preserve from his creditors, for the family, the subject of the purchase. *J. Arundell v. Phipps*, 10 Ves. 139. FRAUDULET CONVEYANCE.

A settlement after marriage by a person not indebted, is not within the statute of fraudulent conveyances. *Stephens v. Olive*, 2 Bro. C. C. 90. FRAUDULET CONVEYANCE.

Settlement after marriage of a portion paid is on good consideration, and equal to one made before marriage. *Ramsden v. Hyllon*, 2 Ves. 305.

Stock was bequeathed to A after his marriage, which he vested in trustees for the benefit of himself and wife for life, and then to their children. This settlement is void as against the husband's creditors, both before and after the marriage. *Taylor v. Jones*, 2 Atk. 600.

Such a settlement good as against a father after marriage, and against a voluntary conveyance. *S. C. Ib.*

A entitled to 500*l.* marries whilst an infant. After marriage husband agrees that the 500*l.* shall be to wife's separate use for life, and after her death to issue of marriage. The deed contained power to trustee to lend a part or the whole to the husband. He lent her the 500*l.* and in fourteen months the husband became bankrupt. Decreed that trustee would come in as a creditor under the commission for the money lent. *Middlecombe v. Marlow*, 2 Atk. 519. CREDITORS.

A settlement after marriage is good when husband was not indebted at the time, and the wife, when married, an infant. *S. C. Ib.*

If a settlement be just in general, a particular advantage on one side or the other will not affect it. *S. C. Ib.*

A settlement after marriage, in consideration of a portion paid at the time, is good against subsequent creditors. *Stileman v. Ashdown*, 2 Atk. 477. CREDITORS.

Settlement after marriage, in consideration of portion given to wife, is good against husband's creditors. *Russell v. Hammond*, 1 Atk. 13. *S. P. Stileman v. Ashdown*, 2 Atk. 477. *Anon. Prec. Ch.* 101. *Jones v. Marsh*, Ca. temp. Talb. 64. *Brown v. Jones*, 1 Atk. 190. *Lanoy v. Athol*, 2 Atk. 444. *Ward v. Shallet*, 2 Ves. 16. *Hilton v. Biscoe*, 2 Ves. 308. *Wherler v. Caryl*, Amb. 121. CONSIDERATION.

Where settlement was made on wife after marriage, in bar of dower, &c., and by wife's waving it, she would go to heir to prejudice of creditors, she was decreed to have the estate for life according to settlement, but that she should assign it over in trust for creditors who should convey to her a third for dower. *Miller v. Eden*, 10 Mod. 487. ADJON. OF ASSETS; ELECTION.

#### 4. Constituted by letter.

Settlement decreed according to a letter previous to the marriage, though no express assignment, the marriage having taken place immediately: a distinct positive dissent would be necessary to prevent the effect of the letter, and that could be evidenced only to an actual settlement before marriage. *Luders v. Anstey*, 4 Ves. 501.

#### 5. In pursuance of Articles, and variance between.

Articles before marriage for settling real estates of the husband, and also all and singular his personal estate of what nature or kind soever, a proper execution would be by a covenant, that real estate that should be purchased with the personal, should, with respect to the objects of the settlement, be considered

personal: the settlement, therefore, made after marriage containing no such covenant, and being in other respects a defective execution, real estates purchased by the husband according to the evidence, in order to defeat the right of his wife, were decreed to be conveyed by his devise according to the articles. A gift by him in his life in consideration of service, was not disputed but under the particular circumstances attending the marriage, and in the case of an infant the court appeared to question its validity. *Randall v. Willis*, 5 Ves. 262.

By articles, the wife's fortune, and an equal sum advanced by the husband were agreed to be settled for the husband for their joint lives, and if he should die first leaving issue by her, for her life; after her decease as to the capital in such manner as he should appoint; in default of appointment to be divided equally among the issue at twenty-one, with maintenance and survivorship after marriage. In pursuance of the articles, an estate purchased with the fund was settled upon the husband for the joint lives of him and his wife; remainder to trustees to preserve, &c.; remainder in case of his death first, without issue, to certain uses; remainder, in case of his death first, leaving any child or children, to the wife for life; remainder to the child or children in such shares as the husband should appoint; for want of appointment, equally in tail, with cross-remainders; remainder to the heirs of the husband, children only are the objects; and an appointment to a child for life; remainder to his children as he shall appoint is an excess of power; and the doctrine of *cy pres*, by giving the child an estate tail, is not applicable: but the appointment is void for the excess only; and what is ill appointed, goes as in default of appointment. *Bristow v. Warde*, 2 Ves. J. 336. POWEN, EXECUTION OF.

Settlement set right according to articles. *Langley v. Furlong*, Dick. 315. *Neal v. Cust*, Dick. 513.

Settlement under articles from which it deviated set right, and what estate was damaged by tenant for life not upholding it, declared specialty debt, and to be answered out of his assets. *Id. ib.*

The purchase of houses in London, and of lands of the tenure of borough English, held not to be a due execution of a covenant in marriage articles to purchase or settle "lands of inheritance." As to the mode of computing the value of premises in the master's office. *Jinnet v. Hullet*, 2 Ves. 276. *S. C. Amb.* 106.

Articles are considered in a court of equity as minutes only, which the settlement may explain more at large. *Blandford v. Marlborough*, 2 Atk. 545.

No difference between articles unexecuted in toto or in part, for the ground the court goes upon is, what is covenanted to be done is considered as done. *S. C. id.*

Where the articles and the indenture of settlement bear date on the same day, as in this case, they must be considered as one and the same act, and a different construction ought not to be put upon them. *Heneage v. Hunloke*, 2 Atk. 457.

Settlement, after marriage, purporting to be pursuant to articles before, but differing, not supported. But, secus, if both before marriage, except where the settlement purports to be pursuant to such articles. *Legg v. Goldwire*, Forreg. 20. DEEDS, VOLUNTARY SETTLEMENT AFTER MARRIAGE.

Articles, on marriage, to settle land on husband and wife for life; remainder to heirs male of body of wife by husband; remainder to heirs male by husband by other wife; remainder to heirs female by wife. A settlement is made before marriage, and said to be in pursuance of articles whereby lands are limited to husband for life, without waste, and with power of making leases; remainder to first, &c. son of marriage in tail male: remainder to first &c. sons

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in tail by other marriage; remainders to heirs of body of husband. There are issue two daughters. Husband suffers recovery and devises premises to his sister: daughters may compel a reconveyance to them. *West v. Erisey*, 1 Com. 412. S. C. 2 P. W. 349. and on appeal, 1 Bro. P. C. 225. RECONVEYANCE; FINE & RECOVERY, WHO BOUND.

Articles, and a settlement mentioned to be made in pursuance thereof, were both made before the marriage, but the settlement varied from the uses in the articles. Decreed to go according with the articles. *Honour v. Honour*, 2 Vern. 658. S. C. 1 P. W. 123.

### III. OF FUTURE PROPERTY.

Settlement by husband in consideration of portion of fortune which he would have or receive on his marriage, limited to the portion received upon the marriage, not extending to make him a purchaser of future accession, unless clearly the intention. *Carr v. Taylor*, 10 Ves. 574. HUSB. & WIFE.

Effect of an agreement to settle present and future property. *Coke v. Bishop*, 3 Swan. 401. AGREEMENT.

### IV. EFFECT OF HUSBAND'S BANKRUPTCY, OR INSOLVENCY ON.

See also SETTLEMENT, II. ante.

A sum covenanted by the husband to be paid when demanded by the trustees, on the request of the wife, is, if demanded before the bankruptcy, provable. *Exp. Breuchley*, 2 G. & J. 174. BANKCY. PROOF.

Bankruptcy cannot have the effect of voluntary transfer of stock under a covenant. *Exp. Alevick*, 1 V. & B. 179. DELIS. VOLUNTARY TRANSFER; BANKCY. EFFECT OF.

Covenant in marriage settlement by the husband, that he would, upon a month's notice, or in the event of his default during his life, that his representatives would, within a month after his death, transfer stock, in trust, &c. in bar of dower, &c.; with a proviso, that notwithstanding the covenant to transfer upon their request in writing, it should be lawful for the trustees, if they thought fit to forbear requiring from him, during his life, the transfer: Held to be a contingent debt, not capable of proof under a commission of bankruptcy against the husband, no transfer having been made or notice given. *Hill v. Cock*, 1 V. & B. 176. S. C. 1 Rose, 323. BANKCY. PROOF UNDER.

Bond from father of wife to trustees on marriage for separate use of wife in case of bankruptcy of husband, declared valid. *Exp. Orley*, 1 Ball & B. 257. PAR. & CHILD; BANKCY.

Marriage settlement by trader, giving his bond and the rents of his house to trustees for wife and children, in the event of his bankruptcy or death, void for the former. The proof of bond to stand, the dividends invested in securities, the interest to go to assignees, during the life of bankrupt, then to wife and children. *Id.* BANKCY.

Bond upon marriage to pay a sum of money to the husband; which, upon certain contingencies to be determined upon his death, was declared to be subject to the trusts of the settlement for his wife and children. Upon his bankruptcy payment was decreed to the assignees. *Studdy v. Tingcombe*, 5 L. C. 695. BANKCY. ASSIGNMENT.

Money of the wife's by settlement to be lent to the husband on bond at 5l. per cent. and no interest paid till he should decline trade, then the interest to be paid him for life; remainder to the wife, re-

mainder to the children: husband becomes bankrupt, the assignees are entitled to the interest of the dividends during the life of the husband. *Stratton v. Hale*, 2 Bro. C. C. 490. BANKCY. ASSIGNMENT, WHAT PASSES.

### V. WHERE INFANT IS A PARTY.

Female infant not bound by agreement to settle her freehold estate on marriage, without an option when twenty-one to refuse; but her heir bound under the circumstances, claiming as special occupant the subject being leaseholds for lives frequently, during and since the coverture, renewed by the husband, who had settled his own estate: the settlement confirmed by her repeated acts and fines, though not of the life estate, and by orders of court; children having existed, though deceased under age; no claim for many years, and during eighteen, an adverse possession against a former heir by the husband; the bill claiming, not against his assets, but merely an account since his death against his devisee for life; whose possession commenced long since the fall of the surviving life in the original leases. *Altner v. Lt. Harewood*, 18 Ves. 259. CONTRACT, WHO MAY; HEIR AT LAW.

Though a female infant is not bound by an agreement on marriage to settle her real estate; if she does not when of age choose to accede to it, her husband would not be permitted to aid her in defeating it: nor is her act during coverture effectual. *Id.* 275. CONTRACT; WHO MAY; HUSB. & WIFE; REAL ESTATE.

A male infant marries an adult female, who by settlements, covenants that her estate shall be settled to certain uses; he is bound by her covenant. *Stoccombe v. Glubb*, 2 Bro. C. C. 545.

Infant to express his consent, joins in a settlement by a woman in contemplation of marriage with him; he is bound thereby, if on fair consideration, and no fraud; as where the transaction is public and with consent of the family; though his being privy would not have excluded him from any rights as being an infant. *Cs. Strathmore v. Bowes*, 1 Ves. J. 28.

To bind an infant, the marriage settlement must be fair and reasonable, and not tend to deprive her of every thing. *Williams v. Williams*, 1 Bro. C. C. 152. CONTRACT.

Mortgages by husband and wife of the wife's estate to persons who had notice of a settlement made before the marriage, during the wife's infancy; ordered to be assigned to the trustee in the settlement, but the interest during the life of husband and wife to be applied to the payment of the mortgages, without prejudice to her remedy against the husband. As to what settlement made during the wife's infancy will bind her? *Darnford v. Lane*, *id.* 106. MORTGAGE; NOTICE.

### VI. AGREEMENTS, &c. AT VARIANCE WITH, OR FRAUDULENT AS AGAINST SETTLEMENT.

A woman, ten months before her marriage, but after the commencement of that intimate acquaintance with her future husband, which ended in marriage, made a settlement of a sum of money, which he did not know her to be possessed of; this marriage took place, she concealing from him both her right to the money, and the existence of the settlement; ten years afterwards she died, and after her death he filed a bill to have the money paid to him: Held, that the settlement was void, as being a fraud on his marital right. *Goddard v. Snow*, 1 Russ. 485. FRAUD ON MARITAL RIGHTS.

Trustee of a settlement not entitled by an agreement with the husband before the marriage, to a lien on the fund, settled to the separate use of the wife during the joint lives of the husband and wife, with remainder to the survivor, in opposition to a joint appointment made by them, under a power reserved to them in the settlement. *Morris v. Clarkson*, 1 Jac. & W. 107. LIEN; TRUSTEE.

Equity will not decree specific execution of an article which is contrary to the powers in a settlement. *Stratford v. Aldborough*, 1 Ridgw. P. C. 281.

Equity will not decree specific execution of a covenant in a lease violating the restrictions of a prior settlement, of which the lessee had notice. *Cryford v. Oliver*, id. 315. SPEC. PERF.

A settlement will control a writing executed after, but the parties refusing to execute the settlement without it, they must be construed as one entire agreement, and both consistent. *Tyrell v. Hope*, 2 Atk. 500.

## VII. SATISFACTION AND PERFORMANCE OF.

A legacy given by a father's will is such an advancement of younger children in lifetime of father as will be accounted in equity a satisfaction, *pro tanto*, of portions to be raised for them under the testator's marriage settlement; if it contains a clause, providing that advancement shall be a satisfaction so far. The will being silent in that respect, is not *per se* equivalent to a declaration, that legacy shall not be towards such satisfaction. *Golding v. Harefield*, 13 Pri. 593. S. C. 1 McCl. 345. ADVANCEMENT; PARENT & CHILD.

Gift of an equal sum, by will, is a clear performance of a covenant in the settlement. The provision in the settlement is not a debt, in the ordinary sense of the word, so as to come under direction in will to pay debts. *Wathen v. Smith*, 4 Mad. 236. S. C. Id. 325. WILL, C. OF; TRUST TO PAY DEBTS.

G, having by marriage articles covenanted that if he died in the lifetime of his wife, his executors should within three months after his decease, pay to her 3000*l.*, and having, by his will given all his property to his executors, in trust, after payment of his debts, at the expiration of three years from his decease, to divide it "in such ways, shares, and proportions as to them shall appear right," on his death, during the life of his wife, the executors having died or renounced, his property is divisible according to the statute of distribution, and the widow's distributive share exceeding 3000*l.*, is a performance of the covenant in the marriage articles. *Goldsmid v. Goldsmid*, 1 Swan. 211.

Portion by settlement vested at twenty-one, or marriage of daughters, to be paid at the death of the surviving partner, if the parents, or either should in their or either of their lifetime, settle, give, or advance money, land, &c. in marriage or otherwise; such advancement to be taken as part, or the whole of the portion, unless the contrary declared in writing. A legacy payable at twenty-one, a satisfaction *pro tanto*. *Onslow v. Mitchell*, 18 Ves. 490. PORTION, SATISFACTION OF.

Rule as to satisfaction of a portion by a legacy, that there must be some express evidence, or at least a strong presumption that it was intended as such; slight variation in the time of payment between twenty-one, and twenty-one or marriage, immaterial. *Id. ib.*

Marriage articles carried into execution, by limiting estates in strict settlement to A and B respectively, with cross-remainders between B and the issue of A, with power to A to appoint both estates among his children. The will of A referring to the estate, but not to the power, declared a good execution of the

power, to the extent of limiting estates tail to the children; the excess reformed to effectuate the general intention of the articles. *Dillon v. Dillon*, 1 Ball & B. 77. POWER, EXECUTION OF.

Portion by will, *prima facie* a satisfaction of a portion by settlement. *Tolson v. Collins*, 4 Ves. 491. PORTION; WILL, C. OF.

Settlement previous to marriage of the wife's fortune on herself, with a covenant by the husband in consideration of the marriage, &c., and for making some provision for the wife and her issue, to pay within three months after his death 6000*l.* to the trustees, in trust, if the wife should survive him, and there being no issue, which was the event, to pay 1500*l.* to the wife, her executors, &c., and to pay the interest of the remaining 4500*l.* to her for life, she is entitled to dower, and her share, under the statute of distributions, is not a satisfaction or performance of the covenant. *Cough v. Stratton*, 4 Ves. 391. HUSB. & WIFE; DOWER.

Portions for the children by the will of the parent, presumed a satisfaction of a prior provision by settlement, unless clearly not so intended, the presumption is not rebutted by slight circumstances; accounts in the testator's handwriting, where admitted as evidence of the circumstances under which he made his will, but not to explain the will. *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516. PARENT & CHILD; EVIDENCE.

Portions for the children by the will of the parent, held a satisfaction of a provision by settlement upon the intention: slight circumstances of difference that would repel the presumption of satisfaction between strangers, are not sufficient in the case of parent and child. *Sparks v. Cator*, 3 Ves. 530. PARENT & CHILD; PR. EVIDENCE.

Covenant in marriage articles by the husband, to pay his wife if she should survive, 200*l.* as jointure, and 50*l.* to provide herself with a house, yearly for life; afterwards by will he gave her an estate and house, above the value of 100*l.* a year, with the household goods, &c., and an annuity of 100*l.* commencing and payable at different times from those in the articles: held, not a performance, nor intended as a satisfaction; no such intent being expressed. *Richardson v. Elphinstone*, 2 Ves. J. 463. WILL, C. OF.

Wife entitled, under bond by the husband upon the marriage, to the sum payable three months after death; for her for life, then for the children, if none, for her absolutely. By will he gave all real and personal estate he then had, or might be possessed of, upon trust, to pay her the rents and interest for life, then the whole equally to the children; if none, over; and revoked all former settlements and wills. There were no children: held, the widow entitled to both. *Forsight v. Grant*, 1 Ves. J. 298. S. C. 3 Bro. C. C. 242. Id.

On deficiency of assets, marriage portions no satisfaction of a legacy to the wife from her father; the portion being less than the legacy, having been paid absolutely to the husband upon giving up a certain interest of his wife; the legacy being to the wife for life, remainder to her children and grand-children, remainder over, and being expressly in satisfaction of another distinct interest of the wife, and held, no ademption, the intent not being sufficiently plain. *Baugh v. Read*, 1 Ves. J. 257.

Members of a society covenanted mutually, that their widows should receive annuities from the society. Payment from the society is not a satisfaction for a covenant in the settlement by the husband, to pay her an annuity in lieu of all claim on his personal estate. *Rhodes v. Rhodes*, 1 Ves. J. 96. BENEFIT SOCIETIES.

Gift of a residue by will, is a satisfaction for money secured to be paid by marriage articles. *Pearson v. Morgan*, 2 Bro. C. C. 333.

Proviso in a settlement, that the wife should not be barred of any thing the husband should give or leave by deed or will; he dies intestate, and a freeman of London: her shares by the statute and custom are not a satisfaction of the covenant. *Kirkman v. Kirkman*, 2 Bro. C. C. 95. SETTLM. C. OF; CUSTOM OF LONDON.

On marriage, the husband covenanted, that if the wife should survive him, and there should be no issue, his executors should, within nine months after his death, pay to the wife, 800*l.* for her own use; but if there should be issue, then the 800*l.* should be laid out by the trustees, and the interest paid to the wife for life, and after her death the principal divided amongst the children. There was no issue of the marriage. The husband by his will bequeathed one moiety of certain articles of his personal estate to his wife, which moiety greatly exceeded in value the sum of 800*l.* This bequest will not amount to a performance or a satisfaction of the covenant contained in the marriage settlement; the gift of a residue is never considered as a satisfaction of a certain provision made for a wife on marriage, although it may in the event turn out more beneficial. *Devese v. Pontet*, 1 Cox, 188. RESIDUE.

On marriage the husband covenants to pay to trustees the sum of 2000*l.* at least, to be by them laid out in land in the county of D, and settled to the uses of the marriage; the husband never pays the money to the trustees, but soon after the marriage purchases land in the county of D, and takes the conveyance to himself in fee, and then dies intestate, without making any settlement. These lands will be considered as purchased by the husband in pursuance of his covenant, and be liable to the trust of the settlement. *Sowden v. Sowden*, 1 Cox, 165, S. C. 1 Bro. C. C. 582.

In marriage settlement by which a life estate was given to the wife, there was a power to raise 10,000*l.* for younger children: the settlor forgetting that he had made such a settlement, and by will reciting that he had made no settlement on the wife, provided portions of 5000*l.* if but one younger child, and 2000*l.* each, if more; there being two younger children, decreed that this provision by the will, is in part satisfaction of the portion by settlement, and that only 10,000*l.* should be raised. *Warren v. Warren*, 1 Bro. C. C. 305.

By marriage settlement, part of wife's fortune was advanced to husband for the purpose of his trade, for which he secured her an annuity, the rest being settled upon the children after the decease of husband and wife, in such proportions as the wife should direct by will; he directed the wife should relinquish her claim under the settlement, and left a larger sum to trustees, the interest to be paid to her while sole, with a power to her to dispose of the whole among the children; that is, a satisfaction for their portions under the settlement. *Moulson v. Moulson*, 1 Bro. C. C. 82. PORTIONS, SATISFACTION OF.

A provision by marriage settlement, with a proviso that sums advanced should go in satisfaction, unless otherwise declared, 4000*l.* left by will, subject to the life of the mother, and the residue of the personal estate, being given by the will to a child entitled to the provision under the settlement, must go in satisfaction of that provision. *Richman v. Morgan*, id. 63.

One, on marriage, gives bond to settle an estate of inheritance of clear 100*l.* a-year to the use of himself for life, remainder to his wife for life, remainder to the heirs of their bodies, remainder to his own right heirs; he afterwards settled a rent charge, which he was entitled to, payable out of the customs at Hull: held, a performance of the agreement. *Middleton v. Pryor*, Amb. 391.

Land purchased, and suffered to descend, decreed to be taken as a part performance, and satisfaction of the marriage articles. *Hucks v. Hucks*, 2 Ves. 568.

Covenant in marriage articles, that lands settled were of a certain value, which they were not; husband by will, "confirms the articles, and also gives his wife all his lands in A B, for life:" held, not to be a question of satisfaction or part performance, but of construction, and that the wife was intitled to both interests under the intent thus collected. Further covenant from the husband, "inasmuch as he was to be absolutely entitled to all the wife's personal estate," to settle, "in respect of any sum that might come to her afterwards, after the rate of 100*l.* per annum on her for life, for every 1000*l.*, and upon certain contingencies, that she should be paid back a moiety of all that he should receive as her portion." The husband obtained a decree for 400*l.* of the wife's money, but did not receive it: held, she was entitled to a settlement according to that proportion, and the contingencies having happened, to the moiety likewise of all sums received, including the 400*l.*; since the husband might have received it. *Prime v. Stebbing*, 2 Ves. 409. SETTLM. C. OF.

Devise of residue of real and personal for life, not a satisfaction for a sum to be laid out in lands in fee by articles. *Alley v. Alley*, id. 37.

Covenant in marriage articles, to purchase and settle lands, lands purchased and suffered to descend, taken in satisfaction of it. *Lewis v. Hill*, 1 Ves. 274.

But the purchase of houses in London will not answer a covenant to purchase lands of inheritance. *Id. ib.*

A, agrees to settle 100*l.* per annum on intended wife; falling sick, devises 100*l.* per annum to her; recovering, marries her, and the settlement is carried into execution; she can take but 100*l.*, and parol evidence admitted to prove the intent. *Mascal v. Mascal*, id. 323. WILL, C. OF; PR. EVIDENCE PAROL.

An annuity of 40*l.* per annum devised to wife, is no satisfaction of bond for 1000*l.* settled on her at marriage: but held she was entitled to both. *Jobson v. Pelly*, 9 Mod. 437.

Agreement to settle is satisfied by suffering estate to descend, or by devising it to party entitled. *Seys v. Price*, 9 Mod. 220.

In a settlement, a term was raised for daughters' portions (viz.) 10,000*l.*, with a proviso, that if the father by deed or will should give, or leave the sum of 10,000*l.* to his said daughter, it should be a satisfaction; the father leaves land to the daughters of the value of 10,000*l.*: this no satisfaction. *Chaplin v. Chaplin*, 3 P. W. 245. PORTION, SATISFACTION OF.

One gives a bond on his marriage, either within four months, to settle lands of 100*l.* per annum on his wife, or that his heirs, &c. shall pay her 2000*l.* within four months after his death; husband, after this, devises to his wife lands of 80*l.* per annum; this shall not be taken in part of the 100*l.* per annum, but only as a benevolence. *Eastwood v. Vinke*, 2 P. W. 614.

By marriage articles, the eldest son was made tenant in tail; proviso, that the father might sell the lands by the consent of the trustees, and purchase other lands, and settle them to the like uses; he purchased other lands, but did not settle them to the like uses, yet held good. *Reeves v. Reeves*, 9 Mod. 128.

Lands settled in jointure are covenanted to be of the yearly value of 1000*l.*; the husband by his will gives his wife 1000*l.* and other legacies: The jointure lands prove deficient 300*l.* per annum: held, that the legacies which were admitted to be of greater value than the defect of jointure, ought to be taken in satisfaction of such deficiency. *Mountague v. Maxwell*, 4 Bro. P. C. 598.

Covenant in marriage settlement, that sum of money should be laid out in land, and settled so as to descend on children, is not satisfied by the covenantor bequeathing certain sums to the heir. *Slaney v. Slaney*, 5 Bro. P. C. 113.

By marriage articles, the husband was to purchase and settle lands of 800*l.* value, on himself and wife for life, remainder to the heirs male of the marriage, remainders over. The eldest son brought a bill against his father's executors, for the benefit of his agreement; defendants insisted that the father purchased a copyhold estate, which descended to plaintiff, and likewise bequeathed to him 100*l.* to be raised out of land, and that these ought to be in satisfaction of the marriage agreement, especially as the husband and wife were tenants in tail, and might bar the issue: decreed, plaintiff a satisfaction of the agreement, with interest at 4*l.* per cent. from the father's death; the copyhold descending to be taken in satisfaction *pro tanto*, but not the 100*l.* legacy. *Wilkes v. Wilkes*, 5 Vin. 293. pl. 39.

In marriage articles to settle lands on the husband for life, remainder to the heirs or heirs male of his body, a court of equity will decree a conveyance to be made in strict settlement according to the intent of the parties, viz. to the husband for life, remainder to the first and every other son in tail, &c. and not direct an estate tail to the husband according to the legal operation of the words. *Collins v. Plummer*, 1 P. W. 106. *Bale v. Coleman*, id. 143. *Seale v. Seale*, id. 291. *Trevar v. Trevor*, id. 622.

S had an estate in B by his first wife, by whom also he had a daughter, M. By the marriage articles it was agreed, that S should leave his daughter, M, 2500*l.*, if the trustees demanded it, within one year after his death. A, the father of S, was then living. S married again, and had several daughters; by deed in his life-time, he gave the estate in B, to M and her heirs; and by deed also, he charged his reversionary lands in D, with 5000*l.* to each of his daughters, and died. M demanded the 2500*l.* and interest. *Harcourt*, Id. K. decreed, that M should have the 2500*l.* with interest, from the death of S, that the estate in B could not be an equivalent, because it moved from the mother of M, and was the condition of the marriage agreement, that the reversion of the lands in D could not be so, because they were not then in being, and the father of S was then living, and to make it an equivalent, it ought to be in being, and in view at the time of giving the equivalent. *Anon.* 5 Vin. 292. pl. 38.

A agreed with B to give him 2000*l.* portion, to be laid out by A. A purchased lands with 1000*l.*, and mortgaged them, and then settled pursuant to the articles, excepting only in one limitation. A devised these lands to his wife for life, and gave legacies to B and his children, and died without issue, leaving B's children his heirs at law, who, together with B, brought their bill against the widow and executor of A, to have an account of the profits, and for performance of the articles. *Per cur.*, the land settled according to the articles is a good performance, so far as the value is over and above the mortgage. It was urged that the legacy to the children was a bounty, and not a satisfaction of the demand of the heir, because, at the time of the legacy, it was not known, whether he would be heir, or take any thing by the settlement; also, it was a legacy given to him in company with others, and the dispute is not between the executor and a creditor, but between the executor and B, and his son and daughter; and there are assets enough to answer any thing. Yet his lordship directed that the master should enquire what assets by descent in fee, and other personal estate, came into his hands, and that to be as part of the satisfac-

tion of his demand. *Lechmere v. Blagrove*, Glib. Eq. Rep. 64.

A, by marriage articles, agrees to leave his wife 800*l.* and her jewels, &c.; it is declared, that notwithstanding the articles, she should not be debarred of any thing he should give her by will. A, by will, makes a disposition of his whole estate, and gives his wife 1000*l.*: the wife must either waive the articles or the will, she cannot claim the benefit of both. *Herne v. Herne*, 2 Vern. 555. WILL, C. OF; ELECTION.

A child entitled by his father's marriage articles to a share of his father's personal estate, has a legacy given him by the will of his father; if he will have the legacy, he must waive the benefit of the articles. *Id. ib.*

A covenants on his marriage to purchase lands of 200*l.* a year, and settle them for the jointure of his wife, and to the first, &c. sons of the marriage: he purchases lands of that value, but takes no settlement, and on his death the lands descend to the eldest son; on a bill by the son for a specific performance, decreed the lands descended to be a satisfaction of the covenant. *Wilcocks v. Wilcocks*, 2 Vern. 558.

A, on his marriage, covenants to purchase and settle 200*l.* a year on his wife for her life, and if he died before it was done, to leave her 300*l.* out of his personal estate, for her better livelihood and maintenance: he died without making any settlement, and by will gives his wife the interest of 330*l.* for her life, with a power to dispose of 30*l.* at her death: decreed, first, that she was intitled to the 300*l.* by the articles, and that the executors were not at liberty to settle 20*l.* a year on her for life: secondly, that the legacy was not a satisfaction of the articles, but she should have the 300*l.* by the articles, and the legacy, too. *Perry v. Perry*, 2 Vern. 505.

Covenant, that husband, if wife survive him, should secure to her one half value of her fortune, is satisfied by husband's leaving her legacy to larger amount. *Cornus v. Farmer*, 2 Eq. Ab. 34.

A man, by marriage settlement, provides 4000*l.* for daughters, and having two daughters by will, gives them 2000*l.* a piece for their portions, without taking notice of the settlement; the 2000*l.* a piece by the will, shall be in satisfaction of the portion by the settlement. *IWebb v. Webb*, 2 Vern. 111.

The husband, by articles before marriage, covenants to add 500*l.* to his wife's portion of 500*l.*, and that it should be laid out in land, and settled on the wife and the issue of the marriage; the husband, without the trustees' consent, lays out the money in a fine house and gardens: allowed a sufficient performance of the covenant. *Tunbridge v. Tether*, 1 Vern. 345.

#### VIII. CARRYING INTO EXECUTION BY COURT.

Defendant who has covenanted to pay a sum of money to trustees of his marriage settlement, but had omitted to do so: ordered, on motion in suit for performance of trusts, to pay money into court. *Rothwell v. Rothwell*, 2 S. & S. 217. PAYMENT INTO COURT.

The sole proprietor of a recipe for a medicine, assigned it, on marriage of his daughter, to trustees for her and her husband for their lives, and then to their children. The mother destroyed the recipe, but verbally communicated contents to A, the eldest, for the benefit of B & C, the younger children. Upon bill filed against A by B & C, A was declared to hold secret in trust of the settlement, and was decreed to account for profits: since the mother's death, and as a sale was immediately made, the profits were

ascertain value of secret. *Green v. Folgham*, 1 S. & S. 398. ACCOUNT; TRUST; TRADE SECRETS IN.

Court retains jurisdiction over property of ward, after ward becomes of age, so long as property remains in court; and if ward marries, will order proper settlement to be made, or reform an improper one, unless ward consents to settlement either under commission or in court. *Austen v. Halsey*, 2 S. & S. 133. note. WARD OF COURT; JURISDICTION.

A will directing a settlement of estates; and that there should be inserted all proper power for making leases and otherwise according to circumstances, to and for the tenants for life, to be exercised by them when qualified, and when not, by the trustees, does not authorize the insertion of a power of sale and exchange. *Home v. Barton*, 1 Jac. 437. WILL, C. OF; POWER TESTAT.

Portion, by will, on marriage, with consent of the executors, or the major part of them, their heirs or executors, &c. One of two survivors consenting, and the other declining to interfere, inquiry directed, whether the intended marriage was suitable, and if so, a proposal for a settlement to be received. *Goldsmit v. Goldsmit*, 19 Ves. 368. S. C. Coop. 225. WILL, C. OF; CONDITION OF CONSENT.

Material representations of the circumstances of a person contracting marriage, directed to be made good even at the instance of persons concerned in fraudulently defeating such representations. *De Mannerille v. Crompton*, 1 V. & B. 355. FRAUDULENT MISREPRESENTATION.

Covenant by husband in consideration of 1. (the purchase money of an estate of his wife), within two years, to convey lands in the county of N, of the value of such purchase money, by way of settlement; the husband having died without performing the covenant, performance of the same decreed against his representatives, by laying out in the purchase of lands so to be settled, a sum equal to the present value of the estates in N, which (at the time when the covenant ought to have been performed) should have been worth the amount of the purchase money, with interest at 4 per cent., from the death of the covenantor. *Dowager Ly. Sheffield v. Tal. Sheffield*, 3 Mer. 699.

Articles upon marriage of feme infant tenant in quasi tail, covenanting to settle her estate when of age, not binding upon the remainder man, she dying before twenty-one. Bill by husband for a specific execution of the articles, giving him an estate for life, dismissed. *Lecky v. Knorr*, 1 Ball & B. 210. INFANT; COVENANT, WHO BOUND BY.

Execution decreed of a contract on marriage by bond, with condition to settle all the personal estate that the husband should at any time, during the coverture, be possessed of. *Lewis v. Mullocks*, 8 Ves. 150. See this case further, 17 Ves. 48. SPEC. PERI.

Settlement on consideration of wife's fortune confined to her fortune at the time, unless expressed to comprehend future accessions. No claims can be maintained by husband, or in his right while the terms are not fulfilled on his part. *Miford v. Miford*, 9 Ves. 87.

The rule, that a limitation to the heirs of the body in articles shall be carried into execution by a strict settlement, does not prevail, where the concurrence of both parties would be necessary to bar the entail. *Brudenel v. Elwes*, 7 Ves. 390. LIMITATION.

Tenant devised his estates to trustees upon trust, as counsel should advise, to convey, settle, and answer the said premises, to or for the use of, or in trust for his daughter 1 for her life, with remainder to her first and other sons in tail general, with remainder to her daughters in tail general, &c.: the limitation being to both sons and daughters in tail general, there is no necessity for a subsequent limitation to 1 and

the heirs of her body. *Bastard v. Proby*, 2 Cox 6. WILL, C. OF.

Marriage articles to settle estates to the use of husband for life, remainder to the wife for her life, remainder to the use of the heirs of the body of the wife by the husband. The court refused to decree a strict settlement upon them since the power of barring the entail was not in the husband alone; as to the distinctions where a court of equity will or will not rectify settlements made in pursuance of articles, &c. by decreeing a strict settlement; election as to copyholds. *Highway v. Banner*, 1 Bro. C. C. 584.

Where there is order for husband to propose settlement on wife and issue of marriage, and wife dies leaving issue, husband will be kept to order. *Rowe v. Jackson*, Dick. 604.

Articles on marriage for settling lands to be bought with money on all the children of the marriage and their respective issues, and for default of such children and their issue, over: Held, there should be cross remainders by implication. *Twisdon v. Lock*, Ambl. 663. CROSS REMAINDERS; IMPLICATION; MARRIAGE SETTLEMENT.

Where marriage articles limited a joint estate to the intended husband and wife, and after the death of the survivor to the use of the heirs of the body of the husband begotten on the wife, and the settlement after marriage pursued the words of the articles. Husband and wife levy a fine, and first mortgage, and then agree to sell; the articles not being produced, the court would not decree them to be carried into execution by a strict settlement against the purchaser who had notice of them. *Cordwell v. Mackill*, Ambl. 515. S. C. 2 Eden. 344. VENDOR & PURCH.

Specific performance of marriage articles refused, on the ground of their being inconsistent, uncertain, and unintelligible. *Franks v. Martin*, 1 Eden, 309. SPEC. PERI.

By marriage articles it was agreed that 3000*l.* should be laid out in land and settled on husband and wife for their lives, remainder to such issue, &c. as they should appoint, and in default of appointment, to the issue of their bodies: on the death of the husband without appointment, held, the land should be settled in strict settlement, viz. on wife for life, remainder to the first and other sons in tail, remainder to daughter in tail, remainder to right heirs of husband. *Dod v. Dod*, Ambl. 274.

Bond by husband on marriage, reciting agreement to settle wife's estate on the issue, &c., the wife not an executing party. After the marriage, a real estate of the wife came into possession. The husband dies; the wife marries B and dies; held by a younger child against B, and the heir his mother: it seems that the stat. of frauds could not have been taken advantage of on account of the wife not having been an executory party; since the marriage took place in consequence of the instrument executed by the husband. Here, however, the wife had proved and acted under the first husband's will, which recited the bond, from whence it was held she had bound herself at all events. *Archer v. Pope*, 2 Ves. 523. CONSON. OF MARRIAGE.

Marriage articles not decreed in strict settlement, where, by a difference in the penning, the parties intended to leave part in the father's power. *Howel v. Howel*, 2 Ves. 358.

Bill for a strict settlement, after long acquiescence by plaintiff's ancestor, and when impossible to bar the remainder, dismissed. *Parker v. Philips*, 1 Ves. 530. LENGTH OF TIME.

In agreements, no relief in equity where an action at law would not lie by reason of a substantial defect, such as a contingency, not happening. Husband covenants in marriage articles in six



months after death of his mother, and that he should come to and be in possession of the estate in jointure, to settle, &c. He dies in mother's life, having no issue. The estate comes to his heir, who shall not be compelled by the wife to a specific performance. *Whitnal v. Farrel*, 1 Ves. 256. SPEC. PERF.

Upon the words "issue of the marriage," the court, on a bill for carrying articles into execution, have frequently directed the settlement to all the issue, to the first, and other sons, and for default of such issue, to the daughters with proper remainders. In this case the court determined in favour of the daughter. *Hart v. Middlehurst*, 3 Atk. 371.

Woman's portion falling short of husband's expectations, is not a reason for setting aside marriage agreement. *Exp. Marsh*, 1 Atk. 159.

By articles between A and B, his son, on the son's marriage, an estate was limited to the son for life; and, after divers limitations, to plaintiff, a daughter of A, and her heirs male, unless A should appoint other uses: then to his other daughters in tail, then to B his son, and then to the right heirs of B. A died; B, who survived, directed a draft to be prepared according to the articles, and then he died, some of the lands descending to his four sisters in fee: Decreed, the articles to be executed, and plaintiff's entail of the estate settled for *Exp. Marsh*, 1 Atk. 159. *CONSIDERATION. COLLATERALS.*

Where, by articles before marriage, it was agreed, that principal sum should be paid to trustee for benefit of younger children, and that certain freehold houses should be conveyed after previous particular estates, to the younger child or children, in tail general; and by indenture of same date, the houses were settled to uses of the articles. The husband and wife left a daughter, their eldest child, and a son. Held, that the daughter was entitled to the principal sum, and the freehold houses; for an elder daughter, where there is a son, is accounted a younger child. In an ejectment the daughter could not have recovered, for being the eldest, she would not at law be construed a younger child: but in a court of equity, as the articles are executory, they must be carried into execution agreeably to the intention of the parties. *Hesketh v. Huntke*, 2 Atk. 456.

A limitation in marriage articles to the husband for life, to the wife for life, remainder to the issue of their two bodies, will be carried into strict settlement. *Villiers v. Villiers*, 2 Atk. 73.

Where marriage settlement is executed, after marriage, in pursuance of articles previous to marriage, and limitations are to husband for life, to wife for life, and heirs of husband by wife, it is executory, and will be carried into strict settlement by court. Secus, if executed after marriage without previous articles. *Glanville v. Payne*, 2 Atk. 39. S. C. *Barnard*. 18. SETTLEMENT BY COURT.

Where the wife sues the husband for a specific performance of his marriage articles, and that he may settle such and such lands upon her in jointure, it is no bar to her demand, that she has eloped with an adulterer, much less if this be not by the husband put in issue in the cause. *Sidney v. Sidney*, 3 P. W. 269. ADULTERY; SPEC. PERF.

Articles on marriage whereby money is agreed to be laid out in land, and settled; in default of the issue male of the marriage, on the husband's brother, shall, if the husband dies without issue male, and leaving only daughters, be performed in favour of the brother, though they were voluntary. *Lechmere v. Carlisle*, 3 P. W. 223. COLLATERAL RELATIONS.

Father and son, on the marriage of the son, article to settle lands on the intended husband for life, remainder to the issue male of the nephew, remainder to the nephew in fee, on the death of the husband and

wife, without issue; *quære*, whether the nephew shall compel a specific performance of the covenant. *Osgood v. Strode*, 2 P. W. 245. 10 Mod. 533. S. C. SPEC. PERF.; COLLATERAL RELATIONS.

A covenant, by marriage articles, that estate agreed to be settled is worth 500*l.* per annum, and to settle them to the same uses. The new purchase was never made, and estate settled was encumbered beyond its value; held, that out of the purchase money of A's estate not settled, so much shall be paid to eldest son as is equivalent in value to 800*l.* per annum, computed at twenty-two years' purchase. *Barker v. Ivers*, 5 Bro. P. C. 127. SPEC. PERF.

Tenant for life, with power to settle 500*l.* per annum out of such and such lands, on a wife, enters into marriage articles, by which he covenants for himself and his heirs, &c. that he or his heirs would, in pursuance of this power, or otherwise, settle 500*l.* per annum. The marriage takes effect, and a settlement is drawn accordingly, by his direction, of such lands as were comprised within the power; but never executed. The question was, whether this should bind the remainder? or whether the wife should have satisfaction made her out of the personal estate? and decreed upon a second hearing, that the lands should be settled. *Lyt. Coe v. El. Coe v. El. Coe v. El. Coe*, 10 Mod. 464. S. C. 2 P. W. 222. 1 Str. 596. *Gilb. Eq. Rep.* 160. *Comyn*, 312. SPEC. PERF.

One articles on marriage to settle lands on himself for life, remainder to the heirs of his body by his intended wife, with a covenant to make the settlement within two years, or in default thereof, to stand soised to the same uses; though this be an estate tail at law yet equity will turn it into a strict settlement. *Trevar v. Trevar*, 1 P. W. 622. 10 Mod. 436. S. C. *affd.* 5 Bro. P. C. 122. SETTLED BY COURT.

Where, on a marriage agreement, the husband entered into a bond to surrender his copyhold to the use of himself for life; remainder to his wife for life; remainder to the heirs of their two bodies; remainder to the heirs of the husband. Decreed, a surrender to the use of the husband for life; remainder to the first and other sons of the marriage in tail general; remainder to the daughters in tail general, in order, by making the issue purchasers, to secure them from being defeated. *Nandike v. Wilkes*, *Gilb. Eq. Rep.* 114.

A devises lands to the draper's company in trust, to convey to B for life, remainder to his first, &c. sons for their lives successively, and so to their issues male for their lives, remainder over. Though this be a vain attempt of a perpetuity, yet the trustees shall make a strict settlement as may be; making all the persons in being, but tenants for life; but the limitation to the son unborn must be in tail. *Humberston v. Humberston*, 2 Vern. 738. S. C. *Proc. Ch.* 455. *Gilb. Eq. Rep.* 128. 1 P. W. 332. *Witt, C. of*; PERPETUITY.

One, upon his marriage, covenants to levy a fine of his freehold lands, and to surrender his copyhold to the use of himself and wife for their lives, remainder to the heirs male of his body, and dies, leaving issue, a son and a daughter, before any fine levied, or surrender made. The son, for securing money, covenants to levy a fine of freehold, and to surrender copyhold; and, by will, devises his lands for payment of his debts, and dies without issue, having surrendered copyhold, but levied no fine of freehold. On a bill by daughter, to have lands settled according to marriage agreement, decreed both freehold and copyhold to the daughter. *White v. Thornburgh*, 2 Vern. 702. Upon a rehearing before J. Ch. Cowper, he confirmed the decree as to the freehold, but for different reasons; and as to the copyhold, "there appearing no particular custom within the manor for suffering a recovery, was of opinion the surrender would bar the entail, in case the copyhold had been well settled, and

dismissed the bill as to the copyhold. *S. C. Id.* 704.

A covenanted on marriage, that within a month he would surrender his copyhold to his wife for life, remainder over, and if he neglected, then that he would leave his wife 500*l.* at his death. The husband made no surrender, but died after the month without assets. Decreed, the heir to surrender. *Wood v. Pessey*, 5 Vin. 547. pl. 36. **HEIR AT LAW; COPYHOLD, SURRENDER OF.**

In articles there was a covenant to covenant in the conveyance that the lands were free from incumbrance. This is not a covenant that the lands are free, and if any incumbrance is discovered between the execution of the articles and of the conveyance, whereof the party had no notice, that shall be discharged before the sealing of the conveyance, as the concealment of it would be a fraud, though against all incumbrances discovered afterwards, there is only the party's own covenant to protect a purchaser. *Vane v. I. d. Bernard*, Gilb. Eq. Rep. 6. **COVENANT AGST. INCUMBRANCES.**

A man on his marriage covenants to purchase, and settle lands of 400*l.* a year, to the use of himself for life; then to his wife for life, remainder to the heirs of their two bodies; and if he died before a settlement, the wife might elect either to have the 400*l.* a year, or 3000*l.* in money in lieu of dower and thirds. The husband dies before a settlement made. On a bill by the creditors, the wife, by answer, elects the 3000*l.* and the children insist on having a settlement made according to the articles expectant on their mother's death, by which means all the assets would be exhausted. Decreed, a settlement to be made on the wife and children, notwithstanding the election. *Hancock v. Hancock*, 2 Vern. 605. **HUSB. & WIFE; ELECTION.**

A, on the marriage of his son, covenants for himself and his executors, without naming his heirs, to settle lands of 150*l.* a year on his son, and the issue of the marriage, but dies before any settlement made. The son enters on the real estate as heir to his father, and settles it for the jointure of a second wife, who has notice of the articles. Decreed, the articles to be a lien upon the lands, whereof the father was then seized, though no particular lands are mentioned in the articles. *Roundell v. Breury*, 2 Vern. 402. **LIX.**

A father, in consideration of 2600*l.* to be paid him on his son's marriage, as the wife's portion, articles to settle 2600*l.* a year on the marriage, and it being after discovered that she had only 1600*l.*, the father was decreed to make a settlement for the 1600*l.* only, in proportion to what he was to have made for the 2600*l.* and not to deduct out of the 600*l.* per annum, 1000*l.* worth of land, viz. 50*l.* per annum, as was urged he should. *Baskerville v. Gore*, *Proc. Chan.* 186. *S. C.* 2 Vern. 448.

A, before marriage, covenants to settle lands, in consideration of 2000*l.* portion, on himself for life, remainder to their first and other sons in tail, remainder to the daughters in tail, remainder to himself in fee, with a power of revocation reserved to the wife's father, then beyond sea. The marriage is had, and a daughter born, and the husband being taken sick, devises 1500*l.* to his daughter, and if his wife (being *eniente*) should have a posthumous daughter, she to 500*l.* of the 1500*l.*; and if either died before twenty-one or marriage, the survivor to have the whole, and gave all his lands to his wife and her heirs, and the surplus of his personal estate, after debts paid, to his wife, her executors, &c. and makes his wife executrix; then another daughter is born, and the husband dies without any alteration of his will, or any settlement made. Decreed, that a settlement be made, with a power of revocation to the father, and the legacies be likewise

paid the children, the youngest daughter being a posthumous child, within the intent of the will. *Jaggard v. Jaggard*, *Proc. Chan.* 175.

A marriage is treated between the plaintiff and defendant's daughter, and the articles are signed by the plaintiff, but not by the defendant, who tears the articles on pretence of being dissatisfied, though not on material objections. Defendant permitting the plaintiff to court his daughter, and not declaring his dislike to the marriage, and permitting the young couple to live with him; decreed, the plaintiff to pay the portion, according to the articles. *Halfpenny v. Ballet*, 2 Vern. 373. **SPEC. PERFE.**

Marriage agreement reduced into writing, but not signed by either party, yet decreed to be performed. *Cokes v. Muscall*, 2 Vern. 200. **Id.**

Money agreed on marriage to be laid out in land, and settled to the use of husband and wife, and their issue, with remainder to the husband in fee. The husband dies, leaving a son, who died without issue; the heir of the husband brings a bill against the wife, who is administratrix of her husband and son, to have the money laid out and settled according to the articles. Bill dismissed. This cause was reheard in 1687, and decreed for the heir. *Kettleby v. Attwood*, 1 Vern. 298. **MONEY AGREED TO BE LAID OUT IN LAND.**

A, on the marriage of his son, covenants to purchase lands, and settle them to the use of his son for life, remainder to the heirs male of the body. The son dies, leaving issue a son, who brings a bill against the executor of A for the performance of the covenant; bill dismissed in regard the plaintiff's father would have been tenant in tail, if the estate had been settled, and might have barred it. *Canne v. Canne*, 1 Vern. 480. **TENANT IN TAIL; SPEC. PERFE.**

The specific execution of articles being the most adequate justice in general, the court will not leave it to an action at law. Vide *Jenkins v. Keymis*, 1 Lev. 150. 237. 238. and 1 Ch. Ca. 103. **SPEC. PERFE.**

A, being indebted 700*l.*, agrees on his marriage to settle lands of 100*l.* a year on himself for life, remainder to his wife for her jointure, remainder in tail upon their issue; decreed, the land to be sold to pay the 700*l.* and the surplus of the money to be laid out in the purchase of lands, to be settled on the wife and her children; but this decree was reversed on a bill for review, there being no provision made for the husband in the lands to be purchased. *Carpenter v. Bennet*, 1 Vern. 203. **APPOINTMENT OF ASSETS.**

Specific performance of marriage articles decreed after marriage. *Haymen v. Haymen*, 2 Vent. 343. **SPEC. PERFE.**

Spoliation of marriage articles made good by decree. *Bates v. Heard*, Dick. 4.

Bond having been cancelled by obligor, lands settled according to bond by decree. *Arnold v. Barrington*, Dick. 5.

## IX. REFORMING & RECTIFYING MISTAKES IN.

Marriage settlement of trader not securing the wife's fortune in the event of bankruptcy, the intention appearing to be so, amended accordingly. *Higginson v. Kelley*, 1 Ball & B. 252.

Marriage settlement not providing for a bond by husband to trustee for wife's fortune being proveable in the event of his bankruptcy amended accordingly, such being the intention of the parties. *Exp. Varner*, 1 Ball & B. 260.

Bill by husband to have wife's property, part of which was invested in stock, made up money on ground either of express contract or a representation, upon which the marriage took place, dismissed; the de-

scription by articles, though generally "the sum of 4000*l.*" referring to that sum in settlement, and the representation under circumstances not amounting to warranty and proceeding on a common mistake. *Ainslie v. Medlycott*, 9 Ves. 13. SPECIFIC PERFORMANCE.

Settlement reformed in favour of the younger children against the heir, of the mother claiming the reversion by a letter from her on the marriage of her daughter, stating the intention. *Barstow v. Kilbington*, 5 Ves. 593.

Settlement after marriage reformed in favour of the issue against the devise of the husband, claiming under the reversion by his letter of instructions for drawing the settlement, but this equity did not prevail against creditors. *Jenkins v. Quinchant*, cited *id.* 596.

Articles before marriage to settle were so expressed, that the husband would have had an estate tail; a settlement copying the very words of the articles was reformed, estate for life only being intended. *Randall v. Willis*, 5 Ves. 275.

Settlement reformed, according to the intention declared in recital. *Payne v. Collier*, 1 Ves. J. 171.

Marriage settlement not altered in favour of the intention, the recital being too general, and nothing debors the words to do it by. If any thing in the recital by which to correct it, it may be done. *Jordan v. Ross*, 1 Ves. J. 57. 59.

Husband having a power to make a jointure of any part of the estate not exceeding 400*l.* per annum, covenants on his marriage to settle lands of the yearly value of 400*l.* clear of taxes and reprises; he afterwards makes a settlement of lands, with a covenant, that if they should fall short of 400*l.* per annum, he would make up deficiency: held, that the settlement was intended as an execution of the power, and the making the jointure clear of taxes and reprises in the articles was a mistake. *Cs. Londonderry v. Wayne*, 2 Eden. 170. S. C. Ambl. 424.

The court will not rectify a settlement which varies the interest of an adult from what it appears to be under the articles, to his disadvantage, unless where it was clearly intended that the settlement should pursue the articles. *Partyn v. Roberts*, Ambl. 315.

Where a mistake in placing a trust term is rectified. *Worsley v. El. Granville*, 2 Ves. 333.

Trust money in marriage articles in power of the court, and construed against the words for sake of the intent, by supplying the words, "if wife should die without issue." *Targus v. Puget*, 2 Ves. 194.

Marriage settlement rectified by a strict settlement agreeably to the ordinary course, notwithstanding it agreed with the articles verbatim, and both made before marriage, the plaintiff having however taken a benefit under the will which he disputed: held to have made his election, and decreed to give up part of the settlement estate in satisfaction. *Roberts v. Kingsby*, 1 Ves. 238.

An elder daughter where there is a son, is considered a younger child by a court of equity, and the court would rectify the mistake in the settlement; as it has done, where term for raising portions is placed after estate tail, which should have been before. *Heneage v. Hunloke*, 2 Atk. 457. YOUNGER CHILD.

Where children under marriage settlement have obtained a contingent advantage, the court will not, after the marriage vary it to the prejudice of the issue. *O'Keefe v. Culthorpe*, 1 Atk. 17.

In a marriage settlement, a term for years for securing younger children's portions, is by mistake made subsequent to the estate tail limited to the sons; this helped in equity. *Uvedale v. Halfpenny*, 2 P. W. 151. S. C. 9 Mod. 56.

Where a settlement shall be good and take effect, though not according to the intent of the parties.

*Marshall v. Frank*, Pres. Chan. 480. S. C. Gilb. Eq. Rep. 143.

Marriage articles for settling lands varied by decreeing the estate to one for life, with remainder in tail to his issue instead of an estate tail to him. *Griffith v. Buckle*, 2 Vern. 13.

A man articles on the marriage of his eldest son, to settle lands on the son for life; remainder to the wife for jointure, remainder to the first and other sons in tail, remainder to the right heirs of the son. The father brings a bill to be relieved against the articles, alleging that he was surprized and intended that upon failure of issue male of his eldest son, the remainder should have been limited to his younger son, charged with portions for the daughters of the marriage, bill dismissed. *Seymour v. Fotherby*, 1 Vern. 320. FRAUD; SURPRISE.

#### X. WHEN SETTLEMENT PRESUMED TO HAVE BEEN MADE.

The existence and execution of a settlement by indentures of lease and release, presumed from circumstances, principally the existence of the drafts: the statement in an abstract of the title, and the existence of the lease for a year of other estates, appearing to have been included in the same plan of settlement. *Ward v. Carnous*, 17 Ves. 134.

A settled estate is sold, but no part of the money is laid out in the purchase of other lands; yet this court will, under certain circumstances, presume an agreement between the parties interested, that it should be so laid out; and, upon such presumption, will decree the money to that person who would have been entitled to the land if any purchase had been made. *Newton v. Newton*, 6 Bro. P. C. 408.

#### XI. AS TO CHILDREN'S PORTIONS AND MAINTENANCE.

##### See SETTLEMENT, VII.

A son who, when he attained twenty-one, was a younger child, but by the subsequent death of his elder brother, in the lifetime of his parents, becomes an eldest son before the time fixed for the payment of the younger children's portions, is entitled to his share of portions which are directed to vest in the younger sons at twenty-one, though not payable till after the death of the parents; there being enough in the settlements by which the portions were provided, to show that the character of younger child was to be ascertained by reference to the time when the portions vested, and not to the time when they became payable. *Windham v. Graham*, 1 Russ. 331. YOUNGER CHILDREN.

Held, on construction of settlement, that will, not being duly attested, and under other circumstances, trustees had no power to allow maintenance to infants during certain period; but that the eldest son should be put to his election to allow it, as he had other benefits under the will, and was the only party that could be benefited by withholding the maintenance. *Hume v. Rundell*, 2 S. & S. 174. HEIR AT LAW; ELECTION; MAINTENANCE.

Term of years to trustees to raise money for maintenance, &c., of younger children of A, in such shares, &c., as A should direct, and in default of direction, to be applied for benefit of children equally, same to be paid them respectively till their respective portions provided out of other property should be paid. A, by will, appointed a certain portion for plaintiff, to

be vested in her at the age of twenty-one or marriage, and directed that a certain part of the interest and dividends thereof should be applied towards her maintenance, &c., but did not make any appointment, or give any directions, relative to the sum of money raiseable for that purpose under the said term. Held, on construction of settlement, that plaintiff was entitled to have her share of the money provided by the term raised for her benefit, until her portions should become payable. *Poulett v. Poulett*, 6 Mad. 167.

By settlement before marriage, whereby lands given to trustees for five hundred years, in trust, that if husband and wife should leave one or more daughter or daughters, younger son or sons, that should be living at time of decease of survivors of them, the trustees should raise, &c., 20,000*l.* for portion or portions of such daughter or daughters, younger son or sons, the same to be paid to such daughter, if but one, and no younger son, at eighteen or marriage, and to such younger son, if but one, and no daughter at twenty-one, with allowance for maintenance in the meantime, &c.; and if there shall be more than one daughter or younger son, then to be paid to such daughter or daughters at eighteen or marriage, and to such younger son or sons at twenty-one years, &c. Held, that the settlement did not vest any interest in the children. *Hotchkin v. Humphrey*, 2 Mad. 65. INTEREST VESTED.

Trust term, by marriage settlement, without impeachment of waste, immediately exonerate upon the father's death, subject to jointure to the mother, by sale or mortgage, rents and profits, or by any other ways and means, to raise portions for younger children at twenty-one: if after the death of both parents, and by such ways and means as trustees think fit, to raise interests for maintenance, until portions shall respectively become payable; if the remainderman should pay the portions and the interest, or if there should be no younger child, the term, or so much as should remain unsold, to attend the inheritance, which was limited in the usual way. Interest due from the death of the father in the minority of all the children, and the wife surviving. *Ludlow v. Lyddon*, 14 Ves. 550. INTEREST, WHEN PAYABLE.

Term in trust, after decease of father, in case he should leave a younger child, &c., to raise portions, to be paid according to appointment, and in default, &c., at twenty-one or marriage, with provision for advancement in the life of the father, by his direction; and survivorship, upon death of any child before the portion shall be payable; and if there should be no such child, or all die before the portions become payable, not to be raised. Held vested in an only younger child, who, having attained twenty-one, died in life of father, and no appointment having been made. *Powls v. Hurdett*, 9 Ves. 428. INTEREST VESTED.

Portions to be paid or transferred at twenty-one or marriage, if in the life of parents entitled for their life; such portions were not to be paid, &c., till the decease of such parents, with survivorship in case of death of any before his, her, or their shares should be payable, &c. *Schenck v. Leigh*, 9 Ves. 309. INTEREST VESTED.

Articles, on marriage, to settle estates of husband and wife, of equal value, in strict settlement, and providing portions; wife's estate being withdrawn by decree on the ground of her infancy, the younger children were confined, as against the eldest, to half the portion, the articles providing, in the event of no issue male, in which case the estates were to separate, that each should bear a moiety, though they also contemplated the case of wife's refusal to be bound, providing against it by the forfeiture of her interest. *Clough v. Clough*, 5 Ves. 710.

Portions held vested in case of parent and child, by implication from the whole settlement against express words, and a clause of survivorship upon death of child before the portion "should become payable" was upon the authorities construed "before it should be vested." *Hope v. Ld. Clifden*, 6 Ves. 499. PORTIONS WHEN VESTED.

10,000*l.* provided by settlement for one daughter or younger son, 5000*l.* if more: there being but one daughter, the father by will under a power reserved to him, appoints the time of payment and the application of the interest of the 15,000*l.* provided for her by settlement, and gave her the farther sum of 5000*l.*: she was held entitled to 20,000*l.* *Phipps v. Ld. Mulgrave*, 3 Ves. 613. WILL, C. OF.

Settlement on marriage to the use of the husband for life, remainder to trustees for 500 years in trust, after the death of the husband, and not before, unless with his consent as therein mentioned, to raise portions for younger children to be paid in such shares and at such times as husband and wife should appoint, in default of appointment to be paid, if but one besides an eldest or only son, 5000*l.* if two 6000*l.* if three 8000*l.* and if four or more, 10,000*l.* equally, to be paid respectively at twenty-one or marriage of daughters, if after the age of sixteen, if such times of payment happen after the death of the husband, if in his life, then within twelve months after his decease and not before, unless with such consent; provided that if any of such younger children should die before his, her, or their portions should become payable, so that the number should be reduced to less than four, no more should be raised than what would make the whole sum for the portion of the survivor or survivors of such younger children equal to the sum originally limited for the portion of such child or children, if one, two or three. Three younger children only survived their father, but more than four had attained twenty-one. The sum to be raised is 10,000*l.* *Halls v. Walls*, 3 Ves. J. 51.

4000*l.* settled on marriage in trust after the decease of the husband and wife, to pay among all and every the child and children, other than an eldest or only son, at such time and in such proportion as he or she, or the survivor should appoint by deed or will, for want of appointment among such child and children, other than, &c. equally to be divided, if but one, to that one, payable at twenty-one or marriage, or as soon after as the life interest should drop, the shares of any dying before payable in the 4000*l.* or so much as should not be appointed, to go to the survivors at the same time. There were four children; the marriage settlement of one recited that she was entitled to 1000*l.* part of this fund; one-fourth of it was appointed to another on his marriage, and to a third 1000*l.* as her share of that portion, the fourth died above twenty-one before his father, who survived his wife and died without any further appointment. Held that 3000*l.* was well appointed, and that the remainder vested in all equally, according to the direction for want of appointment. *Wilson v. Piggott*, 2 Ves. J. 351. POWER, EXECUTION OF; INTEREST VESTED.

By marriage settlement 1500*l.* was provided for younger children in such shares as the parents should appoint in default of appointment to all the children after the death of the wife. The parents afterwards made an appointment excluding one child, this deed vests the portions in the children born or to be born; except the one excluded. *Mayhew v. Middleditch*, 1 Bro. C. C. 162. POWER, EXECUTION OF; INTEREST VESTED.

Estate settled on husband and wife for life, and then to trustees for a term to raise portions for daughter by leasing, assigning or mortgaging: the husband dies leaving daughters at his death and no issue male.

The portions shall be raised in the life of the mother out of the reversion. *Smith v. Evans*, Ambl. 633. PORTIONS WHEN RAISABLE.

Where portions were provided for daughters on failure of issue male, to be paid at twenty-one or marriage, after the death of the survivor of the father or the mother, the father having died, and there being an only daughter, who had attained twenty-one, it was held, from the clear indication of the intention, to postpone the raising till after the death of the survivor, that the portion should not be raised during the lifetime of the mother. *Verney v. El. Verney*, 2 Eden, 25. PORTIONS WHEN RAISABLE.

Covenant in marriage articles, that in case the father should happen to die leaving issue male, and one or more younger son or daughter, to raise portions, if but one then living 1000*l.*, if two, 1200*l.*, if three 1500*l.*, to be paid at their respective ages of twenty-one or marriage, in such proportions as the survivor of the father and mother should direct, in default of such direction, equally: Held, that the share of a son who attained twenty-one was vested, though he died in the father's lifetime. *Rooke v. Rooke*, 2 Eden, 8. INTEREST VESTED.

Term to commence after the father's death, to raise portions for younger children, in such shares and proportions as he should appoint, for want of appointment, equally, to sons at twenty-one, to daughters at twenty-one or marriage, to be paid immediately after the decease of the father, with survivorship in case of the death of a child before its portion should become due and payable. The father died without making any appointment. Held, the portions vested at twenty-one or marriage during his life. *Cholmondeley v. Meppick*, 1 Eden, 77. S. C. cited 3 Bro. C. C. 253.

#### II. PORTIONS, VESTING OF.

Term to raise daughter's portion to daughters of son, on failure of issue male of grandson, with power for grandson to jointure. Held, the portions not raisable, nor interest payable, till after the death of the jointress. *Churchman v. Harvey*, Ambl. 336. PORTIONS, WHEN PAYABLE.

Portions in a settlement by a term, after mother's death for defendants, to grow due and payable at twenty-one or marriage, &c. One daughter having, after twenty-one and marriage, died in life of mother, her portion shall go to her representatives, and not to her sister. *Emperor v. Rolfe*, 1 Ves. 208. PORTIONS, LAPSE OF.

On a settlement before marriage, the trust of a term was, that in case husband should have no issue male, and there should be daughters, to raise, if two daughters, 25,000*l.* to be paid at twenty-one or marriage, but not to be raised till the death of their grandfather: the father died, leaving two daughters, and then the grandfather died: the husband of one daughter claimed 12,500*l.* with interest from the time of the marriage. Decreed, with interest, as a vested portion in the words of the settlement. But upon portions, or interest on them, to be raised out of reversionary terms, especially upon construction or implication, the court reluctantly interfered. *Lyon v. Dk. of Chandos*, 3 Atk. 416. INTEREST VESTED.

Upon a marriage settlement lands are limited to the use of the husband and wife for their lives, remainder to the first and every other son in tail, and in default of issue male of the marriage, to trustees in trust, to raise 2500*l.* for daughters, payable at twenty-one or marriage, which shall first happen, and out of the profits to pay 100*l.* per annum for maintenance, the first payment of the maintenance to commence after the estate of the trustees shall have come into possession. Husband dies without issue male, leaving a daughter and a wife, who is jointured in the premises; the portion shall not be raised in the mother's lifetime.

*Brome v. Berkley*, 2 P. W. 484. affd. 6 Bro. P. C. 108. PORTIONS, WHEN PAYABLE.

By marriage settlement, maintenance for daughters is made payable half yearly, at Lady-day and Michaelmas, until the portions become payable, which was at eighteen or marriage. A daughter attained her age of eighteen the 16th of August: decreed to have her maintenance *pro rata* from the last Ladyday to the time of her attaining her age of eighteen. *Hay v. Palmer*, 2 P. W. 501. APPORTIONMENT; MAINTENANCE.

By a marriage settlement a term for years is created to raise 5000*l.* portion for daughters, payable at their age of twenty-one or marriage, proviso, that if any of the daughters attain the age of twenty-one, or marry in the father's lifetime; then the portion to be paid within a year after the father's death. Also, if any of the daughters die before her portion payable, or before her age of twenty-one or marriage, her share to go to the survivor. There was issue, a son and three daughters, the first of whom married, and received her portion; the second attained twenty-one, married, and died without issue, and her husband administered; the third daughter survived both her sisters. Resolved, the husband, as administrator of the second daughter, is entitled to her share of the 5000*l.* she having lived to twenty-one, so that the right vested in her, and the payment was only suspended till her father's death. *Pitfield's case*, 2 P. W. 513. INTEREST VESTED.

In a marriage settlement it was agreed, that if there should be but one daughter, she should have 500*l.* for her portion, and 200*l.* each should be paid to every of the other younger daughters. There were three daughters; held, each were only entitled to 200*l.* *Chamberlain v. White*, 6 Bro. P. C. 61.

Settlement wherein manor of D is settled to the use of grandfather for life, remainder to his son, the husband for life, remainder to trustees for 1000 years, for raising 20,000*l.* for a daughter, if but one, payable at twenty-one or marriage, and in the mean time 300*l.* per annum for her maintenance, and to be raised by trustees either by rents and profits, or by sale or mortgage and to be paid quarterly. The first payment to be made at such of the usual feasts as shall next happen after the father's death. Father dies, leaving one daughter, and the grandfather, living. Bill prayed a mortgage of the reversion for the infant's maintenance, but the court strongly inclined against it. *Pierpoint v. Cheney*, 1 P. W. 488. Prec. Ch. 503. INFANT, MAINTENANCE; MORTGAGE OF REVERSION.

Reversion never mortgaged to raise maintenance, where the mother was able to keep the child. *Id. ib.*

Lands are limited by marriage settlement, upon failure of issue male, to the daughters of the marriage, and their heirs, until the next remainder-man should pay them 3000*l.* There being four daughters only, they entered. Decreed at the rolls, they should account for the profits, and that the rents should be applied, first, to pay the interest, and then sink the principal, as in case of a common mortgage. Decree affirmed by the Ld. Ch. with this variation, that the principal should not sink till a third part was raised above the interest, and so again when another third part was raised. *Blagrove v. Chunn*, 2 Vern. 523. RENTS & PROFITS.

By marriage settlement lands are limited to husband and wife for their lives, remainder to the heirs male of their bodies, and if there should be no issue male of their bodies, and one or more daughters, then to trustees for 500 years from the decease of the survivor, in trust, by sale or mortgage to raise 1000*l.* for daughters' portions, but there is no time appointed for the payment of them. The father dies, leaving a daughter only. The portion vesting in the daughter in her lifetime of the mother, it was decreed to be raised by

a sale, with a reasonable maintenance in the mean time, though no maintenance is provided by a settlement. *Staniforth v. Staniforth*, 2 Vern. 460. PORTIONS, WHEN RAISEABLE; MAINTENANCE.

By marriage settlement a term is limited to raise 5000*l.* if but one daughter, to be paid at twenty-one or marriage, which should first happen after the death of the father and mother, or within six months after either of those days or times. There being one daughter only, and she having attained twenty-one, and her father being dead, her portion was decreed to be raised in the lifetime of her mother. *Gerrard v. Gerrard*, 2 Vern. 458. PORTIONS, WHEN RAISEABLE.

Where portions are provided for daughters by a settlement, the father cannot, by his will, annex any condition to the payment of them, or devise them over, in case of the death of any of the daughters before their portions become payable. *Aston v. Aston*, 2 Vern. 452. 1 Ch. Rep. 164. Prec. Ch. 266. S. C.

By a marriage settlement a freehold estate was settled on husband and wife for their lives, remainder to the first, &c. son in tail, remainder to trustees for 500 years, to raise portions for daughters, remainders over. Covenant from the husband to settle his copyhold estate to the same uses. A surrender is made, but no term is limited. The freehold estate not being sufficient to raise the daughter's portions, decreed the copyhold estate should be charged, and liable to raise the portions. *Shouldham v. Shouldham*, 2 Vern. 321. COPYHOLD CHARGE ON; PORTIONS, HOW RAISED.

On a marriage lands are limited to the husband for life, remainder to the wife for life, remainder to the first and other sons of the marriage in tail male, remainder to S in fee, provided, if there be no issue male of the marriage, and there be one or more daughters living at the husband's death, then the trustees to stand seised, subject to the intent such daughter or daughters should receive, out of the rents 10,000*l.*, and 100*l.* per annum for maintenance, but no time limited for payment of the portion. The husband dies, leaving only one daughter, who lives to seventeen, and by her will disposes of the 10,000*l.*: Decreed, this is a vested interest in the daughter, and well-disposed of by her will. *El. Rivers v. El. Derby*, 2 Vern. 72. INT. VESTED.

Lands are settled on marriage upon condition if there should be a daughter the persons in remainder should pay her 2000*l.* at sixteen, with power for the daughter, in case of non-payment, to distrain for the 2000*l.* and damages. Though no power to sell, yet a sale decreed for raising the portion. *Wharton v. Wharton*, 2 Vern. 1. POWER OF SALE; PORTIONS, HOW RAISED.

Term limited by a settlement to raise portions for younger children, payable at twenty-one or marriage. One of them dies under twenty-one and unmarried; her portion shall not be raised for the benefit of the administratrix: otherwise, if the portion was to be raised out of a personal estate. *Poulet v. Poulet*, 1 Vern. 204. PORTION, IF RAISEABLE.

## XII. WIFE'S RIGHTS AND POWERS UNDER SETTLEMENT, AND HOW THEY MAY BE LOST OR WAIVED.

The husband of a woman entitled to a fund in a cause, signed, after the marriage, a written agreement that he would settle half wife's fortune upon her. Held, that the agreement enured to the benefit of the children of the marriage, and that, therefore, the wife could not waive it. *Fenner v. Taylor*, 1 Sim. 169. PARENT & CHILD.

Articles of settlement of chattels real, of infant on marriage, will bind her husband, and although no settlement be made pursuant to articles, wife is not

entitled to any interest by survivorship. *Trollope v. Linton*, 1 S. & S. 477. INFANT.

A married woman cannot by consent, on examination in court, part with her interest in a fund settled on her marriage for her separate use for life, with remainder to survivor of her and husband. *Ritchie v. Broudbent*, 2 J. & W. 456. HUSB. & WIFE.

A trust term, created by a marriage settlement, to raise a sum of money on the decease of the survivor of the husband and wife, in case there should be no issue of the marriage living at her death, and to be paid as the wife, at any time or times during her coverture; and notwithstanding the same, by any deed or writing, &c. should appoint or devise, the power cannot be exercised during widowhood or a second marriage. *Horseman v. Abbey*, 1 Jac. & W. 381. POWER, EXECUTION OF.

Settlement by a husband of money in trust, to pay the interest to the wife during her life, with a proviso against anticipation. The husband joins with a surety in covenant to pay an annuity, secured by an assignment by the wife, of the interest to become due, and of the principal sum, in the event of there being no children of the marriage. Held, the surety not entitled to any remedy in equity under the assignment, in respect of his payment of the arrears recovered against him by an action upon the covenant, although he had no notice of the proviso against anticipation in the settlement; a charge of fraudulent concealment not sufficiently established: and even if fraud had been fully made out against the wife, it seems it would not be sufficient to support the assignment, which would be to give her a power of alienation against the intention of the settlor. *Jackson v. Hobhouse*, 2 Mer. 483. PRIN. & SURETY; HUSB. & WIFE; FRAUD, CONCEALMENT.

Settlement, by feme about to marry, of property to trustees for her own sole use, benefit, and disposition, gives a separate estate. *Exp. Ray*, 1 Mad. 199. HUSB. & WIFE; SEPARATE ESTATE.

Under a settlement in trust, to pay the rents and interest to the separate use, for the joint lives of husband and wife, if she survived, for her heirs and executors; if he survived, according to her appointment by will, in default thereof, a limitation over as to the real estate, and as to the personal, to her executors; the wife cannot, during the coverture, bind the capital surviving to her. *Lee v. Mugeridge*, 1 V. & B. 118. HUSB. & WIFE, SEPARATE ESTATE.

There is no jurisdiction in equity, by consent of married woman on examination, to transfer to her husband personal property settled in trust for her surviving her husband, absolutely. *Richards v. Chambers*, 18 Ves. 580. JURISDICTION; HUSB. & WIFE; CONSENT.

Settlement upon marriage of stock, the property of the wife, in trust from time to time, to receive the dividends and pay them into the hands of the wife for her sole and separate use, her receipt to be a discharge; after her decease, if the husband should survive, for him for life, and after the decease of the survivor, to transfer the principal among the children, according to her appointment by will; the trustees, with the privity of the wife, sold the stock and paid the money to the husband, taking his bond of indemnity. He died insolvent: upon the bill of the widow and children, the fund having been replaced by the trustees, and transferred to the accountant general, upon the trusts of the settlement; the trustees to pay the dividends to the widow from the death of the husband, with costs. *Whistler v. Newman*, 4 Ves. 129; see as to the authority of this case, 5 Ves. 17. n. and 694. n. TRUST, BREACH OF; HUSB. & WIFE; TRUSTEES, PERSONAL LIABILITY.

A father covenanted at his daughter's marriage to leave her at her death a full and equal share of his

personal estate with his son; he began and continued for some years to sell real estates, and vested the produce in Bank-stock, together with the produce of his personal estate, the whole of which he transferred into his son's name, who verbally promised to pay the father the dividends for life. The son sold out the Bank-stock and invested produce in India-stock, which produced a greater interest; but paid his father only the amount of former interest. The father died, and left personally only to a small amount. The India-stock held liable to the articles. *Jones v. Martin*, 6 Bro. P. C. 437. FRAUD; COVENANT TO LEAVE BY WILL.

Money invested in trust for a married woman, to pay her interest for life to her separate use, and after her decease to such person, and subject to such powers, &c. as she should by any instrument in writing from time to time, or by will appoint (during her present coverture). She cannot dispose of the principal at once by deed, but by a revocable act only. *Socket v. Wray*, 4 Bro. C. C. 483. POWER, EXECUTION OF.

Settlement in consideration of marriage, the wife's present fortune, and subsequent covenants, one of which was, that the mother should give to the wife, or any child, equal to what was given to the rest. The mother leaves her a legacy, and by law a part of the residue comes to her. Wife survives husband. What he had not reduced into possession, goes to her representatives by survivorship, not to his; there being no contract to give him a certain right. *Garforth v. Bradley*, 2 Ves. 675. HUSB. & WIFE; CHOSE IN ACTION, REDUCTION INTO POSSESSION.

Agreement to settle a jointure in consideration of a portion by the father; though the portion was never paid, yet the wife shall have her jointure. *Perkins v. Thornton*, Amb. 502. JOINTURE.

One by articles, previous to his marriage, covenants, in consideration of 3500*l.* portion, and on his intended wife's conveying her lands to him and his heirs, when she came of age, to settle certain lands of his own in jointure. Neither the wife nor her trustees executed the articles. After marriage, the husband settles his lands mentioned in the articles, and recites the settlement to be in performance of the articles, and in consideration of the marriage, and for a provision for the wife (to bar her of dower) and their issue; but never requires her to convey her lands to him; the wife is a party to, and executes this settlement. After the husband's death she enters on the settled lands. This settlement is a waiver by the husband of the proposed conveyance by the wife; and she shall hold as well her own estate as also the lands settled. *Lucy v. Moore*, 4 Bro. P. C. 343. INFANT; WAIVER.

Where in marriage articles, the lands agreed to be limited in jointure are expressed to be of the yearly value of 500*l.*, and afterwards prove deficient, this amounts to an agreement that they were of that value, and is a sufficient foundation for making up the deficiency. *Glegg v. Glegg*, 4 Bro. P. C. 614. JOINTURE; SPEC. PERF.

Lands settled on A for life, for her jointure, are covenanted to be of a certain clear yearly value: after the death of the husband, the jointure lands turn out deficient. The jointress is entitled to have the deficiency made good out of other lands, and to come in as a specialty creditor upon the husband's estate for the arrears of the deficiency with interest. *Parker v. Harvey*, 4 Bro. P. C. 604. JOINTURE, DEFICIENCY OF; SPEC. PERF.

Where lands are settled in jointure, and covenanted to be of 500*l.* per ann. value, but the husband afterwards discovering a defect in the title, settles other lands as an additional jointure, and declares them to be in recompence of all deficiencies, either in title or

value of the lands before settled; the jointress shall have lands of the full value of 500*l.* per ann. over and above the other lands, and all other provisions made for her by her husband's will. *Grove v. Hooke*, 4 Bro. P. C. 593. JOINTURE.

A, on his marriage, gave a bond of 600*l.* with a warrant of attorney to confess judgment thereon, defeasance on payment of 300*l.* to his wife, if she survived; afterwards she joined him in a conveyance by fine of his real estate. Held, that this extinguished her right, or any lien created by this judgment on the real estate. *Goodrick v. Shatbolt*, Pre. Chan. 333. S. C. Gilb. Eq. Rep. 18. HUSB. & WIFE; FINE.

Covenant, that wife shall be at liberty to dispose of her personal estate, does not extend to property acquired after marriage. *Pilkington v. Cuthbertson*, 2 Bro. P. C. 7. HUSB. & WIFE; SEPARATE ESTATE.

Where a woman by marriage agreement is to have the separate use of any estate during coverture, she shall have that and its produce after marriage, and if invested in any purchase, equity will regard it as the produce of what she ought to have. *Easby v. Eastby*, 2 Eq. Ab. 148. SEPARATE ESTATE.

A marries B, who has an estate in land and fortune in money; they being both infants, an act of parliament is obtained for settling a jointure on the wife in bar of dower; provided, that the jointure shall cease, if the wife, when of age, did not settle her land, but nothing said as to the personal estate. Part of the fortune is a mortgage for 1300*l.* taken in a trustee's name. The wife, when she came of age, settled her own land, and afterwards the husband dies. Decreed, the mortgage to the executors of A, and that it should not survive to his wife as a chose in action. *Hlois v. l's. Hereford*, 2 Vern. 501. HUSB. & WIFE, CHOSE IN ACTION.

I S made a settlement on his eldest son for life, remainder to his first &c. sons in tail, remainder over, with power for his son to jointure any wife he should afterwards marry, to the extent of 100*l.* per ann.; the father died, and the son married a woman, to whom, after marriage, he appointed certain lands in trust for her for a jointure; and he covenanted, that if they were not of the value of 100*l.* per ann., he would make good the deficiency at any time during his life; he lived several years, but no complaint was ever made of the value of the land, nor was he requested to make good any deficiency. Upon his death without issue, the widow brought her bill to have her jointure made up 100*l.* per ann.; and it was so decreed, a covenant to provide for a wife not being voluntary; and as to her not requiring it before, no laches can be imputed to a feme covert. *Fothergill v. Fothergill*, 2 Freem. 256.

A, on his marriage, settled a rent charge on his wife for her jointure, and afterwards devised to the wife part of the land charged with the rent charge. Bill is, that the rent charge might be apportioned. Bill dismissed. *Knight v. Calthorpe*, 1 Vern. 347. WILL, C. OF; RENT CHARGE, APPORTIONMENT OF.

A man settles land of 6*l.* per ann. to the use of himself for life, then to his wife for life, and agrees she shall hold the land until 100*l.* shall be paid by his heir to her executors, &c. She, by a writing purporting to be her will, disposes of this 100*l.* and dies in the lifetime of her husband. A good appointment in equity. *Hlewsow v. Sarner*, 1 Vern. 244. POWER TO DISPOSE BY WILL; FEME COVERT.

Feme covert may, in life of husband, dispose of money laid up out of her separate maintenance. *Id. ib.*

A charges land in D. with a portion for a daughter by a first wife, and then marries and settles part of these lands for the jointure of a second wife, who has no notice of the charge. A believing the portion would take place of the jointure, by will, gives other lands

in E. in lieu thereof. The wife, by combination with the heir, refuses to accept the devise. Decreed, the daughter should hold the lands in D. till her portion was paid. *Reeve v. Reeve*, 1 Vern. 219. 2 Vent. 363. S. C. differently stated. CHARGE OF LANDS.

### XIII. IN BAR OF DOWER, THIRDS, &c.

The personal estate of an honorary freeman of the city of London, is, in case of his dying intestate, distributable according to the custom of London; and his widow is not barred of her customary share by a settlement which is expressed to be in lieu of all dower, or thirds, or other portion at common law, or otherwise out of his freehold and copyhold lands. *Onslow v. Onslow*, 1 Sim. 18. WIDOW; CUSTOM OF LONDON.

Covenant in settlement by husband, in event of his death leaving his wife surviving, and children within six months after death, to pay, &c. one full and clear moiety of all such real and personal estates as he shall be seized, &c. of at his death. Held, on principle of part performance, the widow was not entitled, in addition to the moiety under the covenant, to a third of the residue of personal estate, by intestacy of husband. *Garthshore v. Chalie*, 10 Ves. 1. WIDOWS' THIRDS; COVT.; PART. PERF.

Provision by settlement in lieu, &c. of all dower or thirds, which wife might otherwise be entitled to of real or personal estate, held to bar her interest, in what was not disposed of by will of husband. *Druce v. Denison*, 6 Ves. 385. HUSB. & WIFE.

Provision by marriage settlement not held a purchase of all the property of wife, unless that is expressed or clearly imported. *Id. ib.* SEPARATE ESTATE.

A provision previous to the marriage of a female infant in bar of dower, thirds, and all claim upon the real and personal estate of the husband, if precarious and uncertain, as that the personal estate shall go according to the custom of London, does not bar her. *Smith v. Smith*, 5 Ves. 189. DOWER.

Dower barred by settlement previous to marriage, during the infancy of the wife, of stock and leasehold property, partly the husband's, partly the wife's. *Williams v. Chitty*, 3 Ves. 645. DOWER; INFANCY.

By the settlement made on the marriage of a female infant, an estate was settled on the husband's mother for life, remainder to the husband for life, remainder to the wife for life, with remainder over in bar of dower. The settlement will not bind the wife, in regard the mother might (which she did) survive the husband; the wife may therefore elect to take the provision under the settlement, or her dower and free bench. *Caruthers v. Caruthers*, 4 Bro. C. C. 509. DOWER; ELECTION.

Leasehold estate settled "in lieu of dower," is not a bar of thirds. *Cresswell v. Byron*, 3 Bro. C. C. 362. WIDOWS' THIRDS.

Provision in a settlement that the wife should not be barred of any thing the husband should give or leave by deed or will, he dies intestate and a freeman of London, her shares by the statute and custom are not a satisfaction of the covenant. *Kirkman v. Kirkman*, 2 Bro. C. C. 95. CUSTOM OF LONDON; SETTLEMENT; SATISF. OF.

Covenant by deed before marriage to settle on his wife, if she survive, part of the real estate for her jointure, and in full recompence of all dower, or thirds, which she can any way claim, &c. out of any lands, &c. of which he is or shall be seized of freehold or inheritance, she is hereby barred from claiming as her free bench, copyhold purchased afterwards. *Walker v. Walker*, 1 Ves. 54. WIDOW'S FREE BENCH.

L, previous to his marriage with A, covenanted that

he would, by will or by some good assurance, grant to D or her mother or her executors, &c. in trust for D, 1000l. to be paid to her after his decease for their separate use; and in case he should not by deed or will assure the same, then his executors, &c. should pay the 1000l. L died without such deed or will. Held that D was not entitled to the 1000l. and her distributive share of L's personal estate also; it being meant by L not as a debt, but a security only for his wife's provision. *Lee v. Cox*, 3 Atk. 419. S. C. 1 Ves. 1. PORTIONS, DURABLE.

A man by marriage articles covenants to pay his wife, if she survive him, 1500l. in full of dower, thirds, custom of London, or otherwise, out of his real and personal estate. A dies intestate. The wife is barred of her share by the statute of distributions. *Davilla v. Davilla*, 2 Vern. 724. DISTRIBUTION.

A jointure settled on wife by articles previous to marriage, but to whom she was no party will not bar her dower. *Daly v. Lynch*, 3 Bro. P. C. 478. DOWER.

Settlement in bar of all the wife's demands, out of her husband's personal estate, by the custom of the province of York, or otherwise, will bar the wife of her distributive, as well as customary part. *Benson v. Bellasis*, 1 Vern. 15. S. C. 2 Cha. Rep. 252. CUSTOM OF YORK, HOW BARABLE.

### SETTLEMENT OF FAMILY DISPUTES.

Agreement in settlement of family disputes, one party being guilty of gross fraud and concealment of the rights of the other, set aside after great length of time. *Gordon v. Gordon*, 3 Swan. 400. FRAUD; LENGTH OF TIME.

Family agreements not supported if founded in the mistake of either party, to which the opposite party is accessory. *Id.* 467. See *id.* 463. MISTAKE; FRAUD.

A family agreement concluded in honest error is binding; not if either party has been misled by the concealment of material information. *Id.* 470.

A family agreement may bind the parties, though neither of them had a valid title to the property in question. *Id.* 471.

Family agreements require communication of all material circumstances. *Id.* 473.

A deed executed by the members of a family to determine their interests under the will and partial intestacy of an ancestor, not enforced, it appearing on the face of the deed that the parties did not understand their rights, or the nature of the transaction, and that the heir surrendered an unimpeachable title without consideration, and evidence being given of his gross ignorance, habitual intoxication, liability to imposition, and want of professional advice, in the absence of direct proof of fraud, or undue influence, and after an acquiescence of five years. *Dunnage v. White*, 1 Swan. 137. FRAUD; IGNORANCE OR RIGHTS.

An estate being limited, under her marriage settlement, to A for life, with remainder to her children by her deceased husband in such manner as she should appoint, remainder, in default of appointment, to all the children as tenants in common, an agreement by the children that on her joining in suffering a recovery, the first use to which the recovery should enure, should be to A for life, without impeachment of waste, is, it seems, valid in equity; and the court therefore refused to continue an injunction to restrain her from cutting timber, unless security were given to her for the value of all which she might cut during her life. *Davis v. Uphill*, 1 Swan. 129.

In an arrangement settling the interests of all the branches of a family, children may contract with each other to give to a parent who had a power to distribute



property among them, some advantage which the parent, without their contract with each other, could not have. *Id.* 136.

Specific performance decreed of parol agreement as to land, made as a family compromise of doubtful right, where there had been part performance by possession and improvements and acquiescence, near nineteen years, a third person being permitted to act on his conception of the rights, not questioned at the time by defendant who had acquiesced under expectations from that third person, which were in part disappointed. *Stockley v. Stockley*, 1 V. & B. 23. See also *S. P. Stapilton v. Stapilton*, 1 Atk. 2. SPEC. PERF.; ACQUIESCENCE; LENGTH OF TIME.

Family compromise favoured, if reasonable, and upon a doubtful right; even in the strongest case; as where one party was drunk at the time. *Id.* 30. DRUNKENNESS.

But whether upon a mere supposition of right, proving erroneous. *Quare. Id. ib.*

The court will support contracts entered into to preserve the peace of families; and therefore, where a son upon his marriage joined with his father in re-settling the estate, and by a memorandum executed at the same time, agreed to secure 500*l.* to each of his sisters. Held, that there was sufficient consideration for the court to decree a specific performance of the agreement, an attempt to shew that it had been obtained by an undue exercise of parental influence having failed. *Wycherley v. Wycherley*, 2 Edm. 175. SPEC. PERF.; PARENT & CHILD.

An uncle in consideration of natural love, and in order to reconcile the family covenants to settle his estates on his nephew. This covenant shall be executed in specie, though objected that the remedy is at law. *Wiseman v. Roper*, 1 Ch. Rep. 158. SPEC. PERF.

#### SEVERANCE.

See ESTATE, VI. 2.

#### SEWERS.

See CANALS, &c.

#### SHERIFF.

By the 47th order of the Exchequer, where a sheriff neglects to return any process delivered to him, a rule may be given the last day of the term for him to return the writ by the seal day, or be amerced 40*s.* *Kirkly's Ord. Exch.* 25. See 1 Fowl. Exch. Pr. 155.

What the sheriff does in the case of a *regno* is upon his own responsibility. *Boehm v. Wood*, 1 Turn. & R. 340. NE EXEAT REGNO.

Where an injunction is issued after execution against the goods, the sheriff may proceed to sell, but the court will, in special cases, stay the money in his hands. *Hawkshaw v. Parkins*, 2 Swan. 549. PR. INJUNCTION.

If an injunction is obtained on bill filed, after execution executed, and at the time of the injunction being obtained, the goods are not yet out of the hands of the sheriff, if the sheriff proceeds to sell without process, he will be ordered to pay the money into court. It was formerly the practice to make the sheriff a party in such case by supplemental bill, if the money has come into his hands since the injunction issued, or by the original bill, if it was in his hands at the time, but we are now got into a much looser practice. *Dict. per Eldon, C. in Franklyn v. Thomas*, 3 Mer. 234.

Sheriff levying upon goods alleged to be in settlement, cannot maintain a bill of interpleader. *Slingsby v. Boulton*, 1 V. & B. 334. PR. INTERPLEADER.

Motion granted, that the sheriff of Kent might be ordered to pay the party money under an attachment

for not paying costs, with the costs of the motion. *Anon.* 11 Ves. 170. *Solly v. Greathead*, Beame's Costs, 353. *S. C. Levett v. Letteney*, *id.* 138. S. P.

So where on attachment, the sheriff returned *cepi corpus* and *languidus*, a *duces tecum* was awarded, upon which he returned *adhuc languidus*. On affidavit that defendant, neither at the time of the return nor since, was sick, but goes abroad, the sheriff amerced 5*l.* *Anon.* Wy. Pr. Reg. 394.

A sheriff amerced for not returning attachments, upon affidavit that they were now returned and delivered to the party, moved to discharge the attachments, they not being yet estreated, granted. *Id.* See *Harr.* Pr. 118.

An injunction against proceeding at law, extends to prevent a suit against the sheriffs, for not paying over money levied in the original suit, before the injunction issued. *Bolt v. Stowway*, 2 Anst. 556. INJUNCTION, TO STAY PROCEEDINGS.

Sheriff taking party on attachment for contempt, and not paying costs, and suffering party to go at large, ordered himself to pay those costs, and costs of contempt. *Solly v. Greathead*, 11 Ves. 170. S. P. *Levett v. Letteney*, Beame's Costs, 352. PR. COSTS.

Defendant, who resided in the county palatine of Chester, being in contempt for want of answer, an attachment issued, directed to the chamberlain of the county palatine, or his deputy, commanding him to issue a writ to the sheriff of the city of Chester to attach defendant. The writ not being returned, another order was made, directing the chamberlain, or his deputy, to return the writ forthwith, whereupon he returned that he had issued his writ, but that the sheriff had made no return. Plaintiff then moved that the sheriff might make a return on the writ, (which, however, could not be, as the writ was returned in court); and after searching precedents, the sheriff was ordered to return the chamberlain's mandate within six days, which he did accordingly. *Clough v. Cross*, Dick. 555. In *Seddon v. Curghey*, cited in S. C. plaintiffs sued out a *test. sci. fa.* against defendant, directed to the chancellor of the county palatine of Lancaster, or his lieutenant or deputy; the chancellor issued his precept to the sheriff of the county, who made no return. The question was, whether plaintiffs were to call on the sheriff in open court, or to move that the chancellor might return the writ of *sci. fa.* The latter method was adopted, and an order made accordingly. It was agreed that the next step must have been against the sheriff, praying that he might return the precept.

Three orders are said to be necessary to compel the sheriff to return the writ; 1st, that he do return it; 2d, that he return it in a certain number of days, or stand committed; 3d, that he do stand committed. *Id.*

The high bailiff of the West Riding of Yorkshire, after receiving a *hab. cor. cum causis* against defendant, discharged him under the insolvent act. He was ordered to stand committed for the contempt, unless cause shown, and such order was made absolute shortly afterwards. *Kendal v. Baron*, Dick. 89. See *Weldale v. Weldale*, 16 Ves. 378. where defendant, who had been charged with an attachment for non-payment of money, was discharged under an insolvent act, the marshal of the King's Bench, who had him in custody in an action of debt, refused to discharge him without leave of this court.

Where an attachment has issued against a person, and the sheriff takes a bail-bond for his appearance, and delivers it to the plaintiff, the court will discharge a rule made upon the sheriff to shew cause why he does not bring in the body; for the plaintiff is not without remedy, as he may move on a *cepi corpus* returned for a messenger to the county where the person lives. *Anon.* 2 Atk. 507.

Amorced *6l.* for return of *non est inventus*, he having been in defendant's company. *Stradling v. El. Pembroke*, Carv. 44. So in *Crompton v. Meredith*, and *Hankey v. Wight*, *id.* 109. the sheriff was amerced for not returning a writ.

### SHIP REGISTRY, AND REGISTRY ACTS.

Under a commission of bankruptcy against two partners, ship registered in the name of one of them, but in the ordering and disposition of both, forms part of the joint estate. *Exp. Burn*, 1 Jac. & W. 378. **BANKCY. REPUTED OWNERSHIP.**

Agreement between A, B, and C, that they shall purchase ship to be registered in names of A and B, is against public policy, and demurrer allowed to bill for account in such transaction. *Battersby v. Smyth*, 3 Mad. 110. **PUBLIC POLICY; AGREEMENT.**

The bill of sale passes the absolute property in a ship at sea, subject only to be divested in case of the indorsement on the certificate of registry not being made within ten days after the return of the ship to port; power of attorney to sign an indorsement on the certificate not revoked by bankruptcy of the vendor, subsequent to the execution of the power, but previous to the indorsement, being a power only to do a mere formal act, which the bankrupt himself might have been compelled to execute, notwithstanding his bankruptcy, and for a valuable consideration; therefore, in this case, the indorsement on the certificate being made within the ten days, under a power of attorney, the grantor of which had since become bankrupt: held a sufficient compliance with the terms of the registry act. *Dixon v. Ewart*, 3 Mer. 322. **POWER OF ATTORNEY, REVOC. OF; BANKCY. EFFECT OF.**

Agreement for sale of a ship void under the registry acts, 26 G. 3. c. 60., and 31 G. 3. c. 68. for want of the certificate of registry being duly recited in the memorandum of sale, although a copy of such certificate was thereto annexed. The policy of these acts prevents a court from looking on one who has not strictly complied with their provisions in the light of a purchaser. *Brewster v. Clarke*, 2 Mer. 75.

If on sale of a ship there is no bill of sale or indorsement of certificate of registry, no relief can be given in equity, on ground of accident or fraud. *Thompson v. Leake*, 1 Mad. 39. **MISTAKE; FRAUD.**

The registered owners of ship are *prima facie* alone liable for repairs; though so registered without their knowledge. *Exp. Machell*, 2 V. & B. 216. S. C. 1 Rose, 447. **REPAIRS.**

The registry of a ship is conclusive evidence of the property, even between creditors; excluding all trusts created by acts of the parties, as by payment of money on a purchase in the name of another. Distinction as to trusts arising by operation of law upon bankruptcy or death. *Exp. Houghton*, *Exp. Gribble*, 17 Ves. 251. S. C. 1 Rose, 177.

The registry of a ship is conclusive evidence of the property upon the policy of the registry acts; even against the claim of creditors upon a joint purchase and various acts of apparent ownership, within the bankrupt act, 21 Jac. 1. c. 19. s. 11. *Exp. Yallup*, 15 Ves. 60. **EVID.; BANKCY. REPUTED OWNERSHIP.**

Transfer of a share in a ship to another part-owner, void by not procuring the indorsement upon the certificate, within the time prescribed by the registry acts, after the arrival of the ship. *Speldt v. Lechmere*, 13 Ves. 588.

Lien of a master of ship by bills drawn, and payment made for necessary repairs abroad in the prosee-

cution of the voyage, though no hypothecation. *Hursey v. Christie*, 13 Ves. 594. **LIEN.**

Whether the legal title under an assignment of a share in a ship failing under the ship registry acts, 26 G. 3. c. 60., 34 G. 3. c. 68., or for want of the indorsement upon the certificate, within ten days after the return of the ship to port, if that was prevented by fraud, relief can be had in equity? in what form, and whether it may not be had as to the freight? if not as to the ship, though both were comprised in the same bill of sale. *Qu.?* *Mestuer v. Gillespie*, 11 Ves. 621. **FRAUD.**

Ships purchased by one partner, held separate property, as between creditors, after his bankruptcy, and death of the other, upon circumstances, particularly the registry being made in the name of one partner only, and being afterwards continued for a fraudulent purpose. *Curtis v. Perry*, 6 Ves. 739. **PARTNERSHIP; ADMON. OF ASSETS.**

No relief given to aid a defective contract, &c., not conformable to the ship registry acts. *Id.* 745. **MISTAKE.**

A bill of sale of a ship was made a collateral security, and the papers, &c. delivered, but there was no recital in the bill of sale of the registry, pursuant to act 26 Geo. 3. c. 60. This cannot be supplied against assignee of a bankrupt, and bill for that purpose dismissed. *Hibbert v. Rolleston*, 3 Bro. C. C. 571. **MISTAKE.**

An assignment of a ship by way of mortgage, which is defective by not having complied with the registry act, cannot be made good in equity. *Exp. Bulleel*, 2 Cox, 243.

### SHIP, AND SHIP OWNERS.

See also **JURISDICTION, IV.—PR. INJUNC. 20.—PRIZE.—STAT. C. OF, II. 39.**

Captain of ship may file interpleader where parties claim adversely under bill of lading; but otherwise where paramount to it. *Towse v. Henderson*, 3 Mad. 277. **PL. INTERPLEADER.**

Mortgage of ship at sea (the forms of registry act being observed) held valid, and an injunction granted to prevent an improper indorsement on certificate of registry of ship. *Thompson v. Smith*, 1 Mad. 395. **MORTGAGE; INJUNC.**

No lien on a ship abroad can be created by parol, nor by bills of exchange drawn by the master; unless upon mistake clearly established, the instrument can be corrected, as in the case of a joint bond intended to be joint and several. *Exp. Halkett*, 19 Ves. 474. **LIEN.**

Lien on a ship for repairs done abroad without hypothecation: as to advances for any other purposes, *Qu.?* S. C. 3 V. & B. 135. S. C. 2 Rose, 194. 229. **LIEN; HYPOTHECATION.**

A ship, while the possession of it is retained, is specifically chargeable in respect of the expense incurred in repairing it: but the possession parted with, the lien is lost. *Exp. Bland*, 2 Rose, 91. **LIEN.**

The owners of a ship are not interested in it as joint tenants, but as tenants in common: upon a bankruptcy, therefore, the bankrupt's share passes to the creditors under the bankruptcy, without being liable specifically to the claims of the other part owners, in respect of their disbursements and liabilities for the ship. *Exp. Harrison*, *id.* 76. **BANKCY. ASSIGNMENT, WHAT PASSES.**

Part owners of a ship are tenants in common, not joint tenants, the other partners have no lien, therefore, on the share of one, a bankrupt, having been

also managing owner for outfit, freight, &c. *Exp. Young*, 2 V. & B. 242. S. C. 2 Rose, 78. n. **BANKCY. LIEN.**

Lien for general contribution to individual loss by property thrown overboard for the safety of the ship under the right of the master to require security, not extended to an injunction against delivering the cargo, receiving the freight, and parting with any share of the ship. The mode of adjustment not confined by usage to arbitration. *Hallett v. Bousfield*, 18 Ves. 187. **CONTRIBUTION.**

The property in the freight may be distinct from that in the ship, and is an insurable interest. *Mes-tuer v. Gillespie*, 11 Ves. 629. **INSURANCE ON WHAT.**

Sale of a ship at sea valid, notwithstanding the bankruptcy of the vendor before her arrival in port; and, therefore, before the title is complete by the indorsement on the certificate of registry, if the other requisites of the ship registry act were previously complied with. *Id.* 639. **BANKCY. ASSIGNMENT.**

Sale of a share of a ship is good without actual delivery. Whether an executory agreement for the sale of a ship must recite the registry under the 26 G. 3. c. 18. s. 17. *Qu.?* *Addis v. Baker*, 1 Anst. 222. **SALE.**

Mortgage of a ship in the port of Dublin, and delivery of muniments, the mortgage secured her there, and made a second mortgage; the second mortgagor took possession as soon as he was informed she was in an English port: this is a sufficient possession to take it out of the stat. 21 Jac. c. 19. *Exp. Batson*, 3 Bro. C. C. 362. **BANKCY. REPUTED OWNERSHIP.**

A, by deed, assigns the cargoes of two ships to B and C, but has no charter-party or bill of lading to deliver to them. On the arrival of one of the ships he assigns to another person, and afterwards commits an act of bankruptcy: Held that B and C, not having been ready to take possession of the ship on her arrival, had thereby permitted A to continue reputed owner under the stat. 21 Jac. 1. *Philpot v. Williams*, 2 Eden, 231. *Id.*

Master being turned out of possession upon the vessel's being captured, does not deprive him of his lien for the freight in case of her re-capture. *Exp. Cheesman*, *id.* 181. **LIEN.**

Part owner of a ship in the E. I. Company's service is liable to pay the bills of the tradesmen employed by the husband of the said ship in fitting her out. *Tolson v. Hallett*, Amb. 269.

Mortgage of a ship at sea good in bankruptcy notwithstanding the stat. of Jac. 1. if the party procures the bill of sale, &c.; contra if he is incautious or negligent, as by suffering the ship to come back and go on another voyage. *Exp. Matthews*, 2 Ves. 272. **MORTGAGE; BANKCY. REPUTED OWNERSHIP.**

A ship pledged abroad by the master for expences, &c. well hypothecated, and the part owners liable. *Samson v. Braggington*, 1 Ves. 443.

No lien on a ship or proceeds from sale of it for repairs done, except in course of a voyage, liberty given to bring an action as to the personal liability of the part owners who received the benefit. *Ld.* Hardwick's decision in *Doddington v. Hallett*, *id.* 497. has been overruled, and now settled that part owners in a ship are not to be considered as partners. *Buz-ton v. Snee*, 1 Ves. 154.

Assignment of outward bound ship without possession and delivery of bills of lading, policies, &c. good against creditors. *Brown v. Heathcote*, 1 Atk. 160. **BANKCY. REPUTED OWNERSHIP.**

A ship being insured from London to Carolina was taken by a Spaniard and retaken by an English privateer, who carried her into Boston, where no person appearing to give security, she was condemned and

sold, and after the recaptors had their moiety, the residue remained in the court of admiralty at Boston. Defendant brought an action at law on the policy, and recovered; and plaintiff, by his injunction bill, insisted that defendant ought to have recovered no more than a moiety of the loss. The court refused the injunction, for as defendant had offered to relinquish the salvage, he was entitled to recover the whole money insured. By 13 G. 2. c. 14. s. 18. the recapture of a ship is the revesting of the owner's property, so that it is doubtful whether the act can operate when insurances are made, interest or no interest. Salvage must be deducted out of the money recovered by the policy, if come to the hands of the assured. *Pringle v. Hartley*, 3 Atk. 195. **INSURANCE; STAT. C. OF.**

On a ship's being repaired in the river Thames, and fitted out there with new rigging and apparel, the ship itself is not liable, but the owners; secus, if repaired or fitted out at sea, where the master alone may hypothecate. *Watkinson v. Bernadiston*, 2 P. W. 367.

T lent D 600*l.* D assigned a one-sixteenth in a ship, and by defalcance it was declared that T out of the earnings should pay himself 600*l.*, and should account to D for the surplus, but there was no covenant for payment of the money. The ship was lost, and T brought his bill against D's executrix for the debt; she denied assets *præter* to satisfy specialty debts: Decreed, she should account for testator's estate, and T to account for the earnings, and to be allowed for the outfit of the ship, though cast away. *Tyrral v. J. J. Thomas*, 1 Vin. 183. pl. 5. **ACCOUNT.**

In a voyage the master of ship is the owner's servant, and his duty requires him to provide necessities for the ship, and it is the owner's interest that they should be provided; therefore what the master necessarily takes up (though not on bottomry) and employs for that purpose, the owners must pay. *Cary v. White*, 5 Bro. P. C. 325. **PRINC. & AGENT.**

Master of a ship buys provision for the ship and has money from the owners to pay for the provisions, but fails without paying the money. The owners are liable to pay in proportion to their respective shares in the ship: master of the ship is but a servant to the owners. *Speerman v. Degraze Galloway*, 2 Vern. 643. **PRINC. & AGENT.**

A master of a ship, without the owner, entered into a charter-party with plaintiff to undertake a voyage on certain terms, and for due performance he bound the ship, tackle, &c. valued at 300*l.* The master deviated, and committed barratry, for which plaintiff obtained a sentence against him in Spain. The owner brought trover for the ship, and an action against plaintiff for the freight. *Per cur.* The master is liable for the deviation and barratry, but the owner is not liable beyond the sum at which the ship was valued in the charter-party. *Anon.* 2 Ch. Ca. 238.

## SIMONY.

See ECCLESIASTICAL PERSONS, &c. IV.

## SIMPLE CONTRACT.

See DEBTOR & CREDITOR, III.

## SMUGGLING.

See ILLEGAL TRANSACTIONS.

**SOLICITOR, AND SOLICITOR AND CLIENT.**

See also *BANKCY. N. 5.*—*PR. COSTS, 10. (ij).*—*PRINCIPAL & AGENT.*—*STAT. C. OF, II. 4.*

**I. CONSTITUTION OF CHARACTER OF SOLICITOR, AND ACTING AS SUCH.****II. PARTNERSHIP WITH UNQUALIFIED PERSONS.****III. STRIKING OFF ROLLS.****IV. JURISDICTION OVER, AND HIS LIABILITY AND PRIVILEGE; AND HEREIN OF HIS BILL OF COSTS, AND TRANSACTIONS BETWEEN HIM AND CLIENT. See also PR. COSTS, 10. (ij).****V. THE CONSTITUTION OF RELATIONSHIP BETWEEN THEM AND CLIENT HOW BOUND BY SOLICITOR'S ACTS, AND WHEN SERVICE OF PROCESS ON HIM IS GOOD.****VI. OF PROFESSIONAL CONFIDENCE.****VII. SOLICITOR'S LIEN.****I. CONSTITUTION OF CHARACTER OF SOLICITOR, AND ACTING AS SUCH.**

Master was ordered to tax costs of all parties, and amount was directed to be paid out of assets of testator in cause by his executors, who were to be at liberty to pay the costs of certain parties to A, their solicitor. A was an attorney of K. B. and C. P., but never had been admitted as a solicitor in chancery, and master for that reason disallowed the whole of his charges, except what he had paid to his clerk in court. He had, however, previously received from his clients to full amount of his bills. Petition of clients for order on master to review his certificate and tax A's bills dismissed. *Prebble v. Bughurst*, 2 Sim. 247.

Solicitor, who had become incapable of practising (without being re-admitted) in consequence of having neglected to obtain a certificate for one whole year, ordered to be re-admitted, on payment of a small fine only, without the arrears of duty. *Exp. Murray*, 1 Turn. & R. 56.

An attorney may practise, though a bankrupt. *Exp. Brown*, 2 Ves. J. 68. *BANKCY. EFFECT OF.*

Notice of motion given by one not allowed to act as a solicitor, not good. *Exp. Grosvenor*, 3 P. W. 104.

**II. PARTNERSHIP WITH UNQUALIFIED PERSONS.**

Granting a moiety of the profits of the business of an attorney to an unqualified person, for the mixed consideration of the good-will of the business, which descended from father of grantor, the advancement of money and family affection, is not contrary to the policy of the 22 G. 2. c. 46. s. 11. *Candler v. Candler*, 6 Mad. Rep. 141. S. C. 1 Jac. 225. *STAT. C. OF.*

But it is otherwise to enter into partnership with an unqualified person. *Tench v. Roberts*, cited id. 145. n. (a). *Id.*

An agreement to share profits, and act as a writer in the office, but not to be considered as a partner, is, in fact, a partnership, and within the above statute. *Id. ib.*

**III. STRIKING OFF ROLLS.**

Application to remove a solicitor from being or acting as a master extraordinary of the court of chancery, and to strike him off the roll of such court, though it may be properly made, by reason of his conduct in matter of bankruptcy, should not be made in bankruptcy, but should be addressed to the general jurisdiction of the court. *Exp. Lowe*, 1 G. & J. 78. *PR. INTITULING PROCEEDINGS.*

Solicitor falsely representing that an injunction was granted, liable to damages, an indictment, and to be struck off the roll. *Kimpton v. Ede*, 2 V. & B. 352.

Court will not strike solicitor off the roll at his own

request, without affidavit that there is no apprehension another party will apply for the same purpose. *Exp. Owen*, 6 Ves. 11. S. P. *Exp. Foley*, 8 Ves. 23.

**IV. JURISDICTION OVER, AND HIS LIABILITY AND PRIVILEGE; AND HEREIN OF HIS BILL OF COSTS, AND TRANSACTIONS BETWEEN HIM AND CLIENT.**

Where cause is struck out of paper by laches of attorney, motion to reinstate it cannot be made till attorney pay 13s. 4d. personally out of his own pocket. Reg. Gen. Feb. 24, 1795. *Exch. 1 Ridgw. L. & S. 601. LACHES; PR. RESTORING CAUSE.*

The court will not exercise its summary jurisdiction to compel a vendor's solicitor to perform an undertaking given by him at the sale, to do certain acts for clearing the title to the estate. *Peart v. Bushell*, 2 Sim. 38. *VENDOR & P.; JURISDIC.*

One of the two solicitors who were partners became bankrupt, the assignees excluded the other from interfering with the affairs of the partnership, the court nevertheless refused to order the assignees to deliver to him the papers belonging to the clients of the firm without consent of his clients. *Davidson v. Napier*, 1 Sim. 297. *BANKCY. ASSESS. POWERS OF; BANKCY. PARTNERS.*

Where a solicitor engaged in various suits obtained payment out of court of a sum of money, standing in trust in the cause, and retained it towards his costs, and upon a subsequent taxation of his bill, it appeared that at the time he obtained payment of the money he had in fact been already over-paid, the court refused, upon a motion for that purpose, to charge him with interest, the parties having made considerable delay before they taxed the costs, and there being no fraud or laches imputable to the solicitor. *Wright v. Southwood*, 1 Y. & J. 527. *TAXATION OF COSTS; INTEREST; LACHES.*

A sworn clerk may arrest a practising solicitor and attorney on attachment of privilege, and hold him to special bail. *Wainwright v. Smith*, 2 Russ. 568.

Where a solicitor has in his possession deeds and papers belonging to his client which he refuses to part with, the court has jurisdiction to order the solicitor to deliver the deeds and papers, and also his bill of costs, the party offering to pay what the master shall find to be due to him, though there is no cause pending, and though no part of the costs has been incurred in respect of any action or suit in law or equity. *In re Murray*, 1 Russ. 519. *JURISDICTION.*

Where the same solicitor acts for executor, and the other co-defendants, the estate will be charged in respect of the executor's costs, only with that proportion of the sum due to the solicitor from his clients, which the executors, as between himself and the co-defendants, ought to bear. *Harmer v. Harris*, 1 Russ. 155. *EXORS.; COSTS.*

If bill of costs is taxed after solicitor's death, his representative will not be ordered to pay costs of taxation, although more than a sixth is deducted. *In re Cole*, 2 S. & S. 462. *COSTS OF TAXATION.*

Defendants' solicitor may be a commissioner for taking his answer. *Bird v. Branker*, 2 S. & S. 186. *COMMISSIONER TO TAKE ANSWER.*

In a suit instituted against a solicitor, who had also acted in the capacity of steward, for an account and for delivery of title deeds, the court upon motion ordered the deeds to be delivered up to the plaintiff, upon payment into court of so much of the balance claimed by the answer, as was not covered by any security. *Bulch v. Names*, 1 Turn. & R. 87. See *Tyler v. Drayton*, 2 S. & S. 309. *PRODUCTION OF DEEDS.*

Where a client executes a deed in favour of a solicitor, reserving a life interest and a power of revocation, it is the duty of the solicitor to leave a counterpart of the deed in the hands of the client. *Id.* 92.

A solicitor cannot obtain the taxation of his agent's bill without bringing the amount into court. *Oste v. Christian*, 1 Turn. & R. 324. PR. COSTS, TAXATION; PR. PAYMENT INTO COURT.

Solicitor who advanced money to infant for subsistence of his family, and acted as his confidential adviser, is in nature of guardian to him, and an account settled between them within a month after infant became of age, and without latter having any assistance, was opened notwithstanding vouchers were delivered up. *Revett v. Harvey*, 1 S. & S. 502. INFANT; GUARDIAN; ACCOUNT; FRAUD.

A solicitor's bill having been partly taxed and paid, an order obtained as of course, referring the bill generally for taxation, was discharged with costs. The conduct of the solicitor cannot be adduced in support of such an order, and the costs of affidavits upon that subject were ordered to be paid as between solicitor and client. *Clutton v. Pardon*, 1 Turn. & R. 301. and see *Gretton v. Leyburne*. *Id.* 407. PR. COSTS, TAX. OF SOLICITOR'S BILL; PR. COSTS, WHO PAY.

Taxation of costs not ordered on application of the solicitor himself. *Seyer v. Walcutt*, 1 S. & S. 97. TAXATION OF COSTS.

Order for payment of money to the solicitor of the party refused. *Edwards v. Lane*, 6 Mad. 315. PR. PAYMENT OUT OF COURT.

As to opening settled account, between attorney and client, and the form in which such account should be delivered. See *Johnes v. Lloyd*, 10 Price, 62. ACCOUNT SETTLED.

Mortgage by client to attorney for costs due, and to become due, held a valid security for the costs then due only. *Williams v. Piggott*, 1 Jac. 598. FRAUD FID. SIT.; SECURITY FOR COSTS.

Held, that an attorney cannot take a mortgage from his client for securing future costs. *Jones v. Tripp*, 1 Jac. 322. SECURITY FOR COSTS; FRAUD, FID. SIT.

Attorney cannot take a mortgage from client for amount of future bill, but seems for disbursements and money to be advanced. *Pitcher v. Right*, 9 Price. 79. FRAUD, FID. SIT.

Where injunction is granted against proceedings at law, on instrument obtained either as a gift or purchase in fraud of the fiduciary situation of the donee or purchaser, the court will not impose the terms of paying money into court, if the relationship be that of attorney and client. *Goddard v. Carlisle*, 9 Price. 169. PR. INJUNC. TO STAY PROCEEDINGS AT LAW; PR. PAYMENT INTO COURT; FRAUD, FID. SIT.

Where a commission is taken out upon a debt due to a solicitor for costs, any creditor may have the bill of costs taxed, if the bankrupt, at the time of his bankruptcy, was not concluded. *Exp. Prideaux*, 1 G. & J. 28. BANKCY., PROOF IN; TAX. OF COSTS.

Allegation by client that costs have been occasioned by solicitor's negligence, is clear case of equitable set-off. *Piggott v. Williams*, 6 Mad. 95. SET-OFF.

The solicitor employed by the bankrupt to procure his certificate, neglecting to obtain the signature of the commissioners to the certificate, which had been long before signed by the proper number of creditors, ordered to deliver up the certificate and affidavits of the bankrupt, and to pay the costs of the application. *Exp. Houghton*, 1 G. & J. 14.

Bill of town solicitor cannot be ordered to be taxed, on motion of client. *Wildbore v. Brynau*, 8 Price. 677. PR. TAXATION OF COSTS; PRIN. & AGENT.

A settlement of a bill of costs during the continuance of the suit, while the client has no professional adviser except the solicitor himself, is not a bar to its taxation. *Crossley v. Packer*, 1 Jac. & W. 460. TAXATION OF COSTS.

Charges by a country solicitor for attending the cause in London, to be allowed in some cases; but the circumstance of their being undertaken by the di-

rection of the client, is not alone a sufficient ground for allowing them, as the solicitor himself is better able to judge of their necessity. *Id. ib.*

It is a contempt of the great seal, for a petitioning creditor to strike a docket at the instance of a solicitor who undertakes to prove the act of bankruptcy, and to guarantee him against any expenses he may be put to by issuing the commission; and the court, therefore, will not, upon the petition of such a creditor, tax the solicitor's bill of costs. *Exp. Wilson*, Buck, 306. BANKCY. COMM.; CONTEMPT; TAXATION OF COSTS.

In a cause which has been much delayed, the court will not, at the expense of farther delay, relieve the plaintiff from the consequences of the gross neglect of his solicitor. *Turner v. Turner*, 1 Swan. 156. LACHES.

Settlement of accounts between attorney and client is not conclusive, the nature of their connection taking their accounts from out the general rule of equity. *Leices v. Morgan*, 5 Price, 42. ACCOUNTS SETTLED.

Attorney acting as agent for mortgagor and mortgagee in mortgage, and as agent and quasi banker for mortgagor, will not be allowed to charge the mortgaged premises with a greater sum (although actually advanced by him on account of his principal and client, and within the amount of the sum to be borrowed on mortgage) than shall be proved to have been really paid to him in money by mortgagees on account of, and as agent for, the mortgagor; nor will the most minute fraction advanced by him to make up the integral sum of money be allowed to stand as a charge on the estate. *Id. ib.* ACCOUNT; MORTGAGOR & MORTGAGEE.

Generally, it is not necessary to make an attorney a party because he has title deeds in his possession, although it may become so under particular circumstances. *Fenwick v. Reed*, 1 Mer. 114. PL. PARTIES.

Solicitor who had instituted suit as plaintiff's solicitor, but was afterwards made defendant, after several years, not having put in an answer, ordered to answer within a week. *Motham v. Hale*, 3 V. & B. 92. PR. ANSWER.

Generally, a bond, taken by a solicitor from the client in the progress of a cause, is subject to taxation. *Plendleath v. Fraser*, 3 V. & B. 175. BOND; PR. COSTS; TAXATION.

Though the court will open a solicitor's bill, and order taxation, after several years, and a security given, or even payment, upon gross errors, fraud or pressure: where nothing appeared but a trifling inaccuracy, and under other favourable circumstances, the court would not restrain proceedings upon a security obtained while business was depending. *Cooke v. Setree*, 1 V. & B. 126. LENGTH OF TIME; SECURITY; PR. COSTS, TAXATION; FRAUD, FID. SIT.

A grant from a distressed man, in prison for debt, to his attorney, set aside as fraudulent in favour of children, they deriving as volunteers, yet having as fair a claim to be relieved against fraud as the heir at law. *Falkner v. O'Brien*, 2 Ball & B. 214. FRAUD, FID. SIT.

Grant of annuity void for want of a memorial registered, being charged on an estate of less annual value than the annuity, the grantor being the grantee's attorney, preparing the security and depositing the title deeds, but misrepresenting the value of the estate: proof admitted under his bankruptcy only for the money advanced, with liberty to file a bill to establish an equitable lien, upon the ground of fraud, and the deposit of the deeds. *Exp. Wright*, 19 Ves. 255. ANNUITY VOID; FRAUD; BANKCY. PROOF IN; BANKCY. LIEN.

Beneficial contracts and conveyances obtained by an attorney from his client during their relation as such, and connected with the subject of the suit, being also liable to the charge of champerty, decreed

to stand as a security only for what was actually due, and purchases by the attorney declared a trust. A subsequent deed not to separate independent voluntary transaction, but under the same pressure, and called for under the covenant for further assurance, no confirmation. *Wood v. Downes*, 18 Ves. 120. FRAUD, FID. SIT.; CONFIRMATION.

Attorney cannot take any thing from his client for his benefit pending the suit but his demand; nor a guardian from his ward pending the guardianship; nor at its close, nor until the relation and influence have ceased in either case. *Id.* 127. GUARD. & WARD; FRAUD, FID. SIT.

Purchase of a reversionary interest by an attorney from his client, though in the event advantageous, without fraud or any misrepresentation, the proposal coming from the client, and no confidence upon that subject, both ignorant of the value; the bill charging fraud and misrepresentation; confidence and knowledge on one side, with ignorance on the other, and bringing forward the only incorrect circumstance, the receipt taken as for money paid, though the consideration was by deduction from a bill of costs not then of that amount, dismissed with costs. *Montesquieu v. Sandys*, 18 Ves. 302. FRAUD, FID. SIT.; PR. BILL.

An attorney shall not take a gift or reward from his client while the connection subsists; it must, as in the instance of guardian and ward, be previously dissolved. *Id.* 313. FRAUD, FID. SIT.

Solicitor ordered to pay all the costs occasioned by his refusing to appear for defendant at the hearing pursuant to his undertaking, and the costs of the application. *Cook v. Broomhead*, 16 Ves. 133. PR. COSTS; PR. UNDERTAKING TO APPEAR.

A grant of a leasehold interest from a client to his attorney, a near relation, for whom, being on bad terms with all his other relations, he expressed great friendship, in consideration of 1000*l.* secured by bond, afterwards released, and in consideration of being indemnified from all costs, suits, and expenses, if the title should be impeached, the attorney re-demising the lands, at a nominal rent, for the lives of the client and his wife. Held, not such a dealing between attorney and client as is impeachable on a bill by the next of kin of the client, who acquiesced in it for several years till his death, and who, in his answer to a bill, recognised it as fair, and a mere preference of one relation to others who had disobliged him. *Bellou v. Russell*, 1 Ball & B. 96. FRAUD, FID. SIT.

All dealings between attorney and client are anxiously scrutinized in equity, in order to protect the client from his own acts done under the influence or ascendancy which an attorney acquires over him. *Id.* 107. FRAUD, FID. SIT.

Attorney cannot be changed without leave of the court: whether he can relinquish the suit, though not paid, and as to the effect of security, *quare?* *Cowell v. Simpson*, 16 Ves. 281.

The court refused to discharge the solicitor in the cause from a purchase before the master, with a view of preventing a sale at under-value. *Nelthorpe v. Pennyman*, 14 Ves. 517. SALES, JUDICIAL; PUFER.

Solicitor, allowed costs of taxation, the reduction of his bill being less than a sixth, charged with writs of proceedings before the master, creating useless expense. *Yea v. There*, 14 Ves. 154. PR. TAXATION, COSTS OF.

Attorney, quitting his client before trial, cannot bring an action for his bill. *Cresswell v. Byron*, 14 Ves. 273.

Independent of fraud, an attorney shall not take a gift from his client while the relation subsists. *Wright v. Proud*, 13 Ves. 138. FRAUD, FID. SIT.

Where plaintiff changes his solicitor, the former so-

licitor has no right to stop him from proceeding till his costs are paid. *O'Dea v. O'Dea*, 1 Scho. & L. 315.

A continued employment of an attorney by infant client, after the latter comes of age, may amount to an undertaking to pay a prior bill of costs. *Guy v. Burgess*, 1 Smith, 117. PR. COSTS.

A solicitor, assisting his client in obtaining a fraudulent release, is properly made a party, and liable to costs, if the principal be not solvent. *Bowles v. Stewart*, 1 Scho. & L. 227. FRAUD; PL. PARTY.

A solicitor suing for his bill need not state all the circumstances required by the statute 2 Geo. 2. c. 23. s. 22; being matter of evidence. *Worrall v. Harford*, 8 Ves. 9. STAT. C. OF.

Bill for general account lies against a solicitor and agent taking security without a settlement of accounts. *Detillin v. Gale*, 9 Ves. 584. ACCOUNT.

Sale of annuity by attorney to client, set aside under circumstances. *Gibson v. Jeyes*, 6 Ves. 266. FRAUD, FID. SIT.

Order, without cause in court, upon general jurisdiction over solicitor, that he shall deliver his bill for purposes of getting from him title deeds deposited with him for suffering recoveries, &c. *Exp. El. Uxbridge*, 6 Ves. 425. JURISDIC.

A settled account between attorney and client opened, upon general allegation by the client of error admitted, though no specific errors were pointed out. *Matthews v. Wallwyn*, 4 Ves. 119. ACCOUNT SETTLED.

An attorney being an officer assisting in the administration of justice, every dealing between him and his client is always a subject of jealousy in a court of equity; therefore, where an attorney obtains from his client a fee-farm lease of part of the lands which were the subject of a suit, equity will set it aside, and a fraudulent dereliction of a suit, by a solicitor, cannot be pleaded by him in defence of an imposition on his client. *Kenny v. Browne*, 3 Ridgw. P. C. 462. 504. 522. FRAUD, FID. SIT.

Where attorney uses his influence over his client to settle an unfair account between them, the court will open it at any time. *Lewis v. Morgan*, 3 Anst. 769. Affd. 4 Dow, 29. ACCOUNT; FRAUD.

Where an attorney has been seven years without getting his bills taxed, after an order so do to, and they are lost in the mean time in the master's office, the court will not allow it to go again to the master. *Yea v. Yea*, 2 Anst. 494. LACHES; PR. COSTS, TAXATION OF.

Securities taken by an attorney from his client during the time of their connection as such, for a present, the balance of accounts settled, for money lent and laid out, costs, and business done, and the price of a horse sold, void, as to the present; and the plaintiff submitting to pay what should be actually due, the accounts were opened as to the whole; the horse being sold, soon after he was purchased from the attorney, for a price much less than was then stipulated, inquiry into his value directed. *Newman v. Payne*, 2 Ves. J. 199. 4 Bro. C. C. 350. FRAUD, FID. SIT.

Order on the application of a solicitor to tax his own agent's bill. *Comer v. Lake*, 2 Cox, 173. PR. TAXATION OF COSTS.

It is an established rule in courts of equity, that no gift or gratuity to an attorney, beyond his fair professional demands, made during the time that he continues to conduct or manage the affairs of the donor, shall be permitted to stand; and more especially, if such gift or gratuity arises immediately out of the subject then under the attorney's conduct or management, and if the donor is at the time ignorant of the nature and value of the property so given. *Middleton v. Welles*, 4 Bro. P. C. 245.

And that without any proof of actual fraud. S. C. 1 Cox, 112. FRAUD, FID. SIT.

Upon the principles of policy, no attorney shall be permitted to purchase any thing in litigation, of which litigation he has the management. *Hall v. Hallett*, 1 Cox, 135. FRAUD, FID. SIT.

In a suit against an attorney for the purpose of having his bills of costs on the plaintiff taxed, and for an injunction against his proceeding at law in the mean time, defendants moved that the costs might be taxed as between attorney and client; but the court said, that the rules of taxation of costs, as between attorney and client, did not apply when they appear in the court as party and party in a cause, and that these costs therefore must be taxed as between party and party. *Spelman v. Woodbine*, 1 Cox, 49. PR. COSTS, TAXATION OF.

Solicitor in cause cannot act as commissioner in taking depositions. *Selwyn v. Gilt*, Dick. 563.

Solicitor not to be paid fees till he has settled clerk in court's bill. *Stevens v. Avery*, Dick. 224.

Costs of solicitor attending execution of commission abroad, not allowed. *Hamond v. Wordsworth*, Dick. 380.

Purchase from his client by a solicitor, who was also trustee for the sale of the estate for payment of debts, confirmed, upon the ground of his having attempted ineffectually to sell, of there being no fraud in the transaction, and of the purchase having been recognized and approved of by the *cestui que trust*. *Clarke v. Swaile*, 2 Eden, 134. FRAUD, FID. SIT.

Affidavits taken before a person who was a solicitor in the cause, cannot be read. *In re Hogan*, 3 Atk. 813. PR. PETITION AFFIDAVITS.

The petition dismissed, and the costs directed to come out of the solicitor's pocket who took the affidavits. *Id. ib.*

Gift of an attorney after the cause was over, without proof of any thing improper not set aside, it would have been otherwise if before the cause, as in contemplation of it, or during its progress. *Oldham v. Hand*, 2 Ves. 269. FRAUD, FID. SIT.

A solicitor employed on part of a lunatic, can have no action against him for his bill of costs. *Barnesley v. Powell*, Amb. 102. LUNATIC'S COSTS.

Solicitor in a cause charged with interest on money directed to be laid out for an infant's benefit, notwithstanding a deed from his grandmother giving other monies in trust for the infant, and directing that he should not be so chargeable. *Brown v. Pring*, 1 Ves. 407. FRAUD, FID. SIT.

Bond obtained from the infant's grandmother for the amount of bill of fees and disbursements, directed to stand as a security for money justly due on account, and the bill ordered to be taxed. *Id. ib.*

Where a solicitor has been negligent in attending to a client's business, the court can grant an attachment against him; and courts of law exercise the same summary jurisdiction over attorneys. *Floyd v. Nangle*, 3 Atk. 568. PR. ATTACHMENT.

A solicitor having taken a judgment of his client for 400*l.* whilst the cause was depending, also several extraordinary charges appearing in his bill. Bill, though adjusted and allowed seventeen years ago, referred to be taxed, and judgment and other securities to be delivered up. *Drapers' Company v. Davis*, 2 Atk. 295. ACCOUNT SETTLED.

An attorney's saying that he only followed directions in drawing deeds under fraudulent circumstances, will not excuse him from paying costs. *Bennet v. Vade*, 2 Atk. 328. S. C. 9 Mod. 312. COSTS.

Where a solicitor made an absolute conveyance to himself of 1000*l.* from the plaintiff's wife, whilst she was parted from her husband, the consideration expressed in the deed being for services done and favours shewn. On bill brought to set aside the deed as ob-

tained by fraud, decreed on all the circumstances of the case, that the deed should stand only as a security for such sum as was justly due to defendant. *Sanderson v. Glass*, 2 Atk. 296. FRAUD, FID. SIT.

If an attorney *pendente lite* prevail on a client to agree to an exorbitant reward, the court will either set it aside entirely, or reduce it to the standard of those fees to which he is properly entitled. S. C. *Id.*

Where a solicitor's bill of costs is taxed, he may take out an attachment for them without previously taking out a subpoena; but he must first serve his client with the order for taxing his bill of costs, and with the master's report of such costs. *Murphy v. Bulderston*, Barn. 266. 2 Atk. 114. PR. COSTS; PR. ATTACHMENT.

An attorney, executor to will, refusing to prove will, unless a large stated allowance was given to him, and which was agreed to, suing for the allowance it was refused him by the court. *Pomfret v. Murray*, 9 Mod. 230. SPEC. PERFE.; FRAUDULENT CONTRACT.

Court will order attorney's bill to be taxed, though he has a mortgage to secure payment of it. *Walmsley v. Booth*, 2 Atk. 29. TAXATION OF COSTS.

Upon the attorney's or solicitor's appearing to be guilty of a gross neglect, the court will order him to pay the costs. *Faukes v. Pratt*, 1 P. W. 593. PR. COSTS.

An attorney, having delivered up deeds to an executor, which he was not obliged to do till his bill was paid, and these deeds being of great use to the executor in several suits which were then carrying on; this is a sufficient consideration to make the executor liable to the attorney's whole demand, whether there be assets or not. Order of the exchequer, refusing an injunction to stay proceedings in a judgment at law, affirmed. *Hamilton v. Inledon*, 4 Bro. P. C. 4. EXECUTOR, LIABILITY OF.

Solicitor fined 20*l.* for forging counsel's name to scandalous answer. *Whitlock v. Marriot*, Dick. 16.

If solicitor grossly neglects client's interest, court will exercise its jurisdiction in summary way by attachment. *Lloyd v. Nangle*, *id.* 129.

Solicitor brings a bill for his fees; plea of stat. 3 Jac. that the plaintiff had not signed his bill, good plea. *Norris v. Bacon*, 1 Vern. 312. PL. PLA.; PR. COSTS.

A bill may be brought for solicitor's fees only, if for business done in this court; and so it may, where the business is done in another court, if it relates to another demand made by plaintiff in this court. *Hanleigh v. Thornhill*, 1 Vern. 203. S. C. 2 Ch. Ca. 153. PR. COSTS, BILL FOR.

The usual order for taxation empowers the master to examine the solicitor as to what money he had received only; but upon proper affidavit the court will order him to be examined as to his disbursements. *Anon.* Mos. 331. PR. TAXATION; PR. EXAMINATION BY MASTER.

And where, after an order of taxation and payment, the solicitor assigned his bill to a purchaser and absconded, the court was inclined to think that the purchaser could not stand in place of the solicitor until he had procured him to be examined under the order. *Wilson v. Williams*, Barn. 263. PR. TAXATION; PR. EXAMINATION BY MASTER.

Solicitor concerned in cause is not bound to testify, though served with process. *Bird v. Lovelace*, Cary, 62.

#### V. THE CONSTITUTION OF RELATIONSHIP BETWEEN THEM AND CLIENT, HOW BOUND BY SOLICITOR'S ACTS, AND WHEN SERVICE OF PROCESS ON HIM IS GOOD.

Master shall be at liberty to order any party to be

represented by a distinct solicitor. 77 Gen. Order, 3d April 1828.

Bill filed by a solicitor from instructions of brother-in-law of plaintiff, without any communication from plaintiff himself, dismissed with costs; solicitor ordered to pay costs, it appearing that plaintiff had absconded before bill was filed. *Hall v. Bennett*, 2 S. & S. 78. PR. COSTS.

Whether notice to an attorney in one transaction, shall be notice to him in another transaction, must, in all cases, depend upon the circumstances. *Mountford v. Scott*, 1 Turn. & R. 280. NOTICE; PRINC. & AGENT.

Court will not attach party for not appearing to injunction bill, according to undertaking of solicitor, who accepted subpoena. *Pemberton v. Galbraith*, 9 Price, 146. PR. ATTACHMENT; PR. UNDERTAKING TO APPEAR.

As to what constitutes a relationship of attorney and client. *Goddard v. Carlisle*, 9 Price, 169.

Two counsel appearing for the same party by different attorneys, petition to stand over, to verify retainer of the attorney by affidavit. *Butterworth v. Clapham*, cited 1 Jac. & W. 673. (n.) PR. COUNSEL, RETAINER OF.

Possession of defendant's attorney, of documents relative to plaintiff's title, is for that purpose possession of defendant. *Bligh v. Benson*, 7 Price, 205.

Infants are bound by conduct of solicitor in a cause. *Tillotson v. Hargrove*, 3 Mad. 495. INFANTS.

A solicitor may, in the exercise of the general authority given him by his client, defend a suit, but cannot institute one without a special authority for the purpose. *Wright v. Castle*, 3 Mer. 12.

Order to dismiss a bill, with costs to be paid by the plaintiff's solicitor, the bill having been filed without special authority from the plaintiff. *Id. ib.* PR. DISMISSAL OF BILL.

Attorney submitting to produce title deeds of his client, in his possession, as the court shall direct, may be called upon to produce them, if the principal could himself have been called upon to do so. *Farwick v. Reed*, 1 Mer. 111. PR. PRODUCTION OF TITLE DEEDS.

Court will order solicitor of party residing abroad, who had been employed to commence action at law, to accept subpoena on injunction bill, supported by affidavit of facts, and of subsistence of account between parties. *Wattkworth v. Pitcher*, 2 Price, 5. PR. SERVICE SUBSTITUTED.

How far attorney may contract to purchase from his client. *Cane v. Id. Allen*, 2 Dow. 289. FRAUD, FID. SIT.

The distinction between attorney and trustee to sell, as to contracts with client and *cestui que trust*, is, that an attorney retaining character, may contract, subject to onus of making it thoroughly manifest that he has taken no advantage of his confidential situation. But in trustee it is not sufficient to show he has taken no advantage, the general rule being, that he must divest himself of that character. *Id.* 299. TRUSTEE AND *CESTUI QUE TRUST*; FRAUD, FID. SIT.

An attorney on behalf of his client, the defendant, promises to pay 500*l.* to plaintiff, though being done by the authority of the client. Attorney not liable, but only client. Otherwise, if the attorney had no authority from client to make this engagement. *Johnson v. Ogilby*, 3 P. W. 277. PRINC. & AGENT.

Brokers and factors, who act or agree for their principals, not liable in their own capacities. § C. *Id.* 279.

Upon enlarging the time for making an award, all parties consenting in court, except one, whose solicitor consented for him: Held, this did not bind the client,

though admitted it would have been binding at law. *Colwall v. Child*, 1 Ch. Ca. 86. AWARD.

## VI. OF PROFESSIONAL CONFIDENCE.

The solicitor of a purchaser of an estate from the bankrupt, ordered to attend the commissioners for the purpose of being examined; without prejudice to any question of privilege. *Eap. Hodgson*, 2 G. & J. 21. BANKRU. WITNESS.

Protection of confidence between solicitor and client, extends to all communications made by client for professional assistance, but not where solicitor employed in matters not professional. *Walker v. Wildman*, 6 Mad. 47.

A clerk to a solicitor commencing practice for himself, not to be restrained from acting as solicitor for parties against whom his master was employed, upon general allegations of his having in his former service acquired information likely to be prejudicial to the clients of his master. *Bricheno v. Thorp*, 1 Jac. 300. INJUNCTION.

Motion to restrain a solicitor from giving evidence of confidential matters, refused; the propriety of his being examined being left to the consideration of the court before which he might appear as a witness. *Beer v. Ward*, 1 Jac. 77. PR. INJUNCTION.

A solicitor who has been discharged, may, upon proof of misconduct, be restrained from communicating information that came to him confidentially from his client. *Semble. Id. ib.*

Professional adviser not bound to discover knowledge communicated by client; but such as he knows *attunde*, he must. *Morgan v. Shaw*, 4 Mad. 57. PR. DISCOVERY.

How far solicitor may, after being concerned for one party, be restrained from being concerned for the opposite party. *Robinson v. Mallett*, 4 Price, 353.

An attorney, or solicitor, cannot give up his client and act for the opposite party in any suits between them. *Pl. Chalmersley v. Id. Clinton*, 19 Ves. 261.

Attorney is prevented from communicating his client's secrets, even by striking off the roll: not permitted to give evidence of them. *Id.* 263.

Solicitor in partnership, cannot dissolve their partnership, as against their client, without his consent, so as to enable the retiring partner as discharged, to act against him. *Id.* 273. PARTNERSHIP.

Practice of solicitors, partners, dividing business, considering one only as agent to the other, disallowed, the client being entitled to their united exertions. *Id. ib.* PARTNERSHIP.

Practice for one solicitor and clerk in court to be concerned for all parties, admitted; but disapproved by the 1*st* Ch. *Dyatt v. Anderson*, 3 V. & B. 177.

A solicitor may, by answer to a bill against him and his clients, refuse to discover any deeds or facts confidentially communicated to him. *Stratford v. Hogan*, 2 Ball & B. 164. PR. ANSWER.

Motion, to compel attorney to produce papers of his client, refused with costs. *Wright v. Mayer*, 6 Ves. 280. PR. PRODUCTION OF DEEDS, &c.

No subpoena *duces tecum* upon attorney to produce papers of client. *Id. ib.*

Attorney examined as a witness, must disclose acts done in his presence by his client, as execution of a deed, &c. not private confidential conversation with him, as the reasons for making it, &c. On motion to suppress the depositions, referred to see what part came to his knowledge, as confidential attorney, in order to have that suppressed. *Sanford v. Remington*, 2 Ves. J. 189. PR. DISCOVERY.

Attorney, &c. may object to answer as a witness, as



to a confidential communication. *Maddox v. Maddox*, 1 Ves. 61.

A solicitor ordered to be examined against his client in a case of fraud. *Cault v. Pickering*, 3 C. R. 66. WITNESS, COMPETENCY OF.

Solicitor of plaintiff to be examined, except as to things in his knowledge as solicitor. *Kelway v. Kelway*, Cary, 89.

## VII. SOLICITOR'S LIEN.

A solicitor has a lien for his costs on a fund in court, produced by his exertions; and therefore, where on a bill for discovery in aid of a defence at law, an injunction was granted on terms, one of which was the payment of money into court, and an answer was afterwards filed, and the action at law being subsequently tried, a verdict was found for the defendant, it was held, that the solicitor for the defendant in equity had had a lien on the fund for the costs of the discovery. But where the solicitor putting in the answer was removed, and his demand paid, and another solicitor employed, it was considered that the fund was exonerated to that extent, and the latter solicitor had no any for the costs of the former solicitor though paid by him. *Irving v. Fina*, 2 C. R. 10. FUND IN COURT.

Where plaintiff's solicitor, with notice, suffers the defendant to satisfy the demand of his client, without making effectual provision for payment of his costs; the court will not suffer him to proceed in suit against defendant for recovery of them. *Morse v. Cooke*, 1 McClell. 211. S. C. 13 Price, 473. COSTS.

Solicitor refusing to act longer in cause, ordered to permit client to inspect papers in his possession at all reasonable times, without any undertaking on his part to proceed to taxation of bill. *Moir v. Mudie*, 1 S. & S. 282. PR. INSPECTION OF DEEDS.

A solicitor who has declined to proceed with a cause, will be ordered, though his bill of costs is not paid, to deliver up the papers to the present solicitor of the party, the latter undertaking to hold them subject to the former solicitor's lien, for what shall be found due to him on the taxation of the bills. An offer on the part of the former solicitor, after the motion made to proceed with the cause, will not prevent the court from ordering him to deliver up the papers on the terms mentioned above. *Colegrave v. Manley*, 1 Turn. & R. 400. PR. PRODUCTION OF DEEDS.

Solicitor refusing to allow deed in his possession to be proved on behalf of plaintiff, because he had lien on it for costs due from defendant; ordered to produce deed at his own expense, and pay all costs consequential on his refusal. *Brassington v. Brassington*, 1 S. & S. 455. PRODUCTION OF DEEDS.

A solicitor has no lien upon the will of his client, and cannot refuse to produce a deed executed by the client in his favour, containing a reservation of a life interest, and a power of revocation. *Ratch v. Squares*, 1 Turn. & R. 37. See *Usher v. Drayton*, 2 S. & S. 309. PR. PRODUCTION OF DEEDS.

Solicitor's lien is superseded by taking a security. *Id.*, 92. SECURITY.

Where a party has a pressing necessity for papers in the hands of his solicitor, the court will order them to be delivered up, upon a deposit being made, sufficient to cover the amount of the solicitor's bill and the costs of the taxation. *Clutton v. Pardon*, 1 Turn. & R. 304. PR. PRODUCTION OF PAPERS.

A solicitor discharged by his client or his representatives is not bound to produce the papers in his possession for the purposes of the cause, his bill of costs not being paid. *Lard v. Warrington*, 1 Jac 580. PR. PRODUCTION OF DEEDS, &c.

Lien of solicitor upon fund, the 26th January, result of the proceedings, and the interlocutor of the subsequent insolvency of the bankruptcy issued 6 Mad. 462. INSOLVENCY.

Solicitor has lien on papers delivered to him as sequestrator but not on those delivered to him as solicitor. *Y. & J. 414. pernon v. Scott*, 6 Mad. 93.

Solicitor claiming lien on deed cannot produce it at hearing of cause, *duces tecum*. *Busk v. Lewis*, 6 Mad. 462. DECREE MADE: DUCES TECUM.

Whether the proceedings under a commission in bankruptcy that has been superseded, are subject to the solicitor's lien. *Qu.?* *Exp. Shaw*, 1 Jac. 270. BANCROFT'S LIEN.

Whether a solicitor's lien, for his costs on a fund in court is general; or is confined to costs of the particular suit, *qu.?* Solicitor having in his possession the instrument on which his client's right to the fund rests, he has a general lien on the fund. *Worrall v. Johnson*, 2 Jac. & W. 214.

Solicitor's lien does not extend to debts that are no due to him in his professional character. *Id. ib.*

Solicitor has no lien on fund decreed to be paid to his client beyond his costs in that suit. *Lawn v. Church*, 4 Mad. 391.

A clerk in court, and solicitor refusing to continue the conduct of a cause until his fees are paid; ordered to produce an office copy of the bill to be marked. *Magne v. Hawley*, 3 Swan. 93. PR. OFFICERS OF COURT; PR. PRODUCTION OF DEEDS, &c.

A solicitor declining to be farther concerned in a cause, is not entitled to compel payment of his costs, by refusing to permit such inspection of the papers in his hands, or such production of them before the court or the master, as may be necessary in the conduct of the cause. *Comacrell v. Poynton*, 1 Swan. 1. PR. INSPECTION OF DEEDS, &c.

The court will not order the personal representative of a deceased solicitor, to deliver the papers in the cause to another solicitor, without payment, or security for payment of the solicitor's bill. It seems that the summary jurisdiction of the court extends to the representatives of a solicitor. *Redfern v. Sowerby*, *id.*, 81.

Where town agent of country solicitor (since a bankrupt), had received papers from him belonging to his client, for purposes of his client's business, they have a lien against the client for amount of money due from him to solicitor, and from solicitor to them, on account of business done in that cause. And where client had, after the solicitor's bankruptcy, paid the agent his bill to obtain such papers, although an action had been previously commenced against him by assignees for recovery of it, the court granted and continued an injunction against the action, on the ground of agent's lien. *Baugh v. Hine*, 6 Price, 203. BANCROFT'S LIEN; PR. & AGENT.

An attorney (being concerned as well for mortgagee as mortgagor), had been appointed receiver of rents and profits of mortgaged estates; and on the order made for delivery of possession, there is found to be a balance remaining in his hands beyond what is sufficient to satisfy the mortgagee, he will be ordered to pay such balance into court, notwithstanding the general report has not yet been made on which there may possibly be found to be a greater sum of money due to him than the balance in his hands. *Lewes v. Morgan*, 5 Price, 42. PR. PAYMENT OF MONEY INTO COURT.

Though order be made on petition in bankruptcy, directing costs to be paid to petitioner personally, solicitor does not thereby lose his lien. *Exp. Bryant*, 1 Mad. 49. PR. ORDER.

A solicitor has a lien upon costs, ordered to be paid to his client upon a petition in bankruptcy, although

represented by 3d April 1877; nor can the client release Bill filed by to the prejudice of the solicitor in law of 1877. RELEASE; BANKCY. OR-plaintiff; DEBTOR & CRED. to pay, and to produce papers of his client for before bankruptcy for his assignees, though not in the cause, for purposes which he but not bound to deliver them up or shall any other business without payment. all on, 1 V. & B. 349. PR. PRODUCTION

nor an attorney's lien upon papers extends to final will of his client, *qu?* Ordered to produce before the examiner, and for the hearing of the without prejudice. *Georges v. Georges*, 18 Ves. 225. PR. PRODUCTION OF DEEDS.

Interpleader on an attorney's claim of lien upon a sum awarded as damages under a judgment obtained by the client against the plaintiff. — *v. Bolton*, id. 292. INTERPLEADER.

Deeds deposited with a solicitor for a particular purpose, and after that had failed, permitted to remain with him, subject to the general lien. *Exp. Pemberton*, id. 282.

Solicitor's lien on papers superseded by taking security. *Cowell v. Simpson*, 16 Ves. 275. SECURITY.

Attorney's lien generally on papers in his possession not limited to the occasion on which they were delivered, without special agreement. *Exp. Sterling*, id. 258.

Lien of the agent in town upon the papers in his hands, for what was due to him as agent in the cause, from the solicitor in the country. *Ward v. Hepple*, 15 Ves. 297. SOL. & AGENT.

In equity, the costs are arranged according to the equities of the parties, and the solicitor's lien is only upon the balance, under that arrangement. *Taylor v. Popham*, id. 72. PR. COSTS.

Solicitor's lien for costs upon a fund of assets appropriated, was subject to a debt, in respect of which the testator as a surety was creditor of the client to a greater amount. *S. C.* 13 Ves. 591. but reversed 15 Ves. 72.

A solicitor having declined to act for his client, has no lien for his costs upon a fund in court. *Creswell v. Byron*, 14 Ves. 271. LIEN.

A party changing his solicitor, the former solicitor has a lien for his costs upon papers in his hands, but cannot otherwise stop the progress of the cause till he is paid. *Mereweather v. Mellich*, 13 Ves. 161.

Party may discharge his solicitor who has a lien for his costs upon papers in his possession, but cannot, except by retaining them, prevent the progress of the cause until he is paid. *Trent v. Durrell*, id. 195.

A solicitor has a lien for his costs on all papers that come into his hands for the purpose of business, though not papers in the cause in which he makes the demand. *Exp. Nesbitt*, 2 Scho. & L. 279.

Solicitor has no lien against remainder-man on deeds put into his hands by tenant for life. *Id.* 15. TENANT FOR LIFE, AND REMAINDER-MAN.

Whenever a client is bound to produce a deed for the benefit of a third person, so also is his solicitor; though the latter may have a lien on it for costs against his client. *Furlong v. Howard*, 2 Scho. & L. 115. PRODUCTION OF DEEDS.

Upon an act of bankruptcy, by lying two months in prison, joint and separate commissions; the former being established, the latter superseded, the attorney employed by the bankrupt, and in sustaining the latter against the former, has no lien upon papers delivered to him by the bankrupt after the arrest; upon petition of the joint creditors, he was ordered to deliver them up. *Exp. Lee*, 2 Ves. J. 285. BANKCY. LIEN.

When there are costs in equity and at law due from

the opposite parties, the court will not set off the costs at law against those in equity, if the solicitor in equity claims his lien on the latter. *Smith v. Brocklesby*, 1 Anst. 61. PR. COSTS; SET-OFF.

A client cannot compel the executor of his attorney to produce his papers, &c. in court, though only for the purpose of using them there, unless the testator's bill of costs be paid or secured. *Magrath v. Muskerri*, 1 Ridgw. P. C. 477. VERN. & SERIV. 171. EXECUTOR.

Solicitor has lien on funds of lunatic. *Exp. Price*, 2 Ves. 407.

Solicitor prosecuting to a decree has a lien on the estate recovered, in the hands of the person recovering, for his bill; but not in the hands of the heir. But if the suit be revived, the lien revives. Committee of a lunatic has a lien on the lunatic's estate, the solicitor employed by the committee declared to stand in his place. *Barnesley v. Powell*, Amb. 102.

Voluntary release by a party to his adversary, not to defeat the clerk in court of his lien for costs. If the suit had ended on a *bonâ fide* compromise for a reasonable consideration paid, it would have been otherwise. *Anon.* 2 Ves. 25. RELEASE; PR. LIEN OF CLERK IN COURT.

A solicitor who is in disburse for his client, has a right to be paid out of a duty decreed to an administrator, and has a lien upon it before the bond creditors of the deceased; nor can the administrator controvert this rule, by insisting on applying the assets in a course of administration. *Turwin v. Gibson*, 3 Atk. 720. 727.

A solicitor may detain title deeds as against client till payment of his bill, but not against persons who have antecedent rights. *Marsh v. Bathoe*, Ridgw. 256.

A clerk in court who lends money to the solicitor is not entitled thereby to detain a client's papers as a pledge. *Gray v. Cockerill*, 2 Atk. 114. CLERK IN COURT.

Where a clerk in court had obtained an order for taxing the costs of the solicitor who employed him, and afterwards another order for payment of the costs of taxation, he was allowed to detain the papers of the solicitor's client till the costs reported due under the first order were paid, but not for the costs of taxation. *S. C.* Barn. 264. PR. CLERK IN COURT.

An attorney has a lien on all the papers of a bankrupt client received by him before the bankruptcy; and he may prove the debt, though he holds the papers. *Exp. Bush*, 7 Vin. 74. pl. 8. BANKCY. PROOF.

A country client employs an attorney or solicitor in the country in a cause in chancery, the solicitor employs a clerk in chancery, the client in the country pays his solicitor, but the clerk in chancery is unpaid. The client is not bound to pay the clerk in chancery, but if the latter has any papers in his hands, he may retain them. *Farewell v. Coker*, 2 P. W. 460. CLERK IN COURT; PRIN. & AGENT.

In what case an agreement made by a scrivener, on behalf of his client, to compound a debt, shall bind the scrivener, though not the client. *Parrott v. Wells*, 2 Vern. 127.

Scrivener not bound to disclose evidence obtained in professional confidence. *Harrey v. Clayton*, 2 Swan. 221. PROFESSIONAL CONFIDENCE.

## SOUTH SEA COMPANY AND STOCK.

### See also CORPORATIONS.

The provisions of this act shall extend to the E. I. company, and S. S. company, where they have stock standing in their books, which may become the sub-

ject of a suit in equity. 39 & 40 G. 3. c. 36. s. 4. STOCK, TRANSFER OF; E. I. COMP.

A bequeathed 1000*l.* capital S. S. stock to B; at the time of making his will he had 1800*l.* stock, which by sale he reduced to 200*l.* and afterwards increased it to 1600*l.*, and died after the making of his will, and before the act took place, which changed three-fourths of the capital S. S. stock into annuities: held, that this legacy was neither taken away or impaired by the sale, or by the act. *Partridge v. Partridge*, Ca. Temp. Talb. 226.

A, who is a trustee for B of 1000*l.* S. S. stock, at the desire of B, borrows 4000*l.* on this stock, of the company, and B receives the money: A pays the 10 per cent. on the late act, to be discharged of the loan, though B forbade the payment, yet he is liable. *Balsh v. Hyham*, 2 P. W. 453. TRUSTEE.

Bill for performance of articles for the purchase of an estate dismissed with costs, the title not having been laid before the vendee's counsel within the time limited, and the S. S. stock, from whence the money was to be raised, having fallen in the mean time 168 per cent. *Lewis v. Ld. Lechmere*, 10 Mod. 503.

A judgment at law was recovered against one of the late directors of the S. S. company, though all his estate was taken away from him by the late act, as a provision for his creditors, yet the court would not restrain plaintiff's proceeding at law. *Holditch v. Mist*, 1 P. W. 695.

10,000*l.* trust money was agreed to be laid out in land and settled, but the trustees bought S. S. stock with the money, which increased to 30,000*l.* As the trust would have suffered by the fall, so shall it have the benefit of the rise of this stock. *Anon.* 1 P. W. 648.

#### SPECIALTY DEBTS.

See DEBTOR AND CREDITOR, III.

#### SPECIFIC PERFORMANCE.

See AGREEMENT, XI.—COVENANT, I.—SETTLE. VII.

#### SPOILIATION.

See DEEDS, IX.

#### STAMPS.

Commissions, deeds, and other instruments relating to estates and effects of bankruptcy not liable to stamp duty. 6 G. 4. c. 16. s. 98. BANKCY.

A holder may recover in an English court on a bill drawn in France on a French stamp, though in consequence of its not being in the form required by the French code, he had failed in an action which he brought on it in France. *Wynne v. Jackson*, 2 Russ. 351. FOREIGN LAWS; JURISDIC.; BILL OF EXCHANGE.

Where there was a debt due for money had and received, and the same was secured by a promissory note on an improper stamp, the debt was held sufficient to support a sequestration in Scotland. Where petition for a sequestration against a party domiciled in Scotland, was on the 25th January, and the first

deliverance upon the petition on the 26th January, and the sequestration awarded by interlocutor of the 16th August, and a commission of bankruptcy issued on the 15th March, upon an act of bankruptcy committed on the 4th January: held, that the sequestration had the priority. *Exp. Coddie*, 1 Y. & J. 414. PRIORITY; SCOTCH SEQUESTRATION; BANKCY. COMMISSION.

Bill founded on letter unstamped; decree made: but directed not to be delivered out till letters were stamped and produced to registrar. *Chervett v. Jones*, 6 Mad. 267. PR. EVIDENCE.

When a pauper plaintiff obtains a decree for payment of money, it is to be drawn up on stamps as in a dives suit. *Hansard v. Kemeys*, Jac. & W. 189. PR. DECREE; PR. PAUPER.

A petition in bankruptcy praying distinct orders under several commissions, requires several stamps. *Exp. Wilson*, 18 Ves. 439. but see 6 G. 4. c. 16. s. 98. BANKCY. PETITION.

Bills purporting to be drawn abroad without stamps, but in fact drawn in England, though holder had given valuable consideration, and had no notice of above facts: held, they were not proveable. *Exp. Minners*, 1 Rose, 68. BANKCY. PROOF.

Bankrupt's certificate not requiring a stamp until complete by allowance, an objection from alterations after it had been stamped, before allowance, overruled. *Exp. Sawyer*, 17 Ves. 243. but see 6 G. 4. c. 16. s. 98. BANKRUPT'S CERTIFICATE.

Objection to an award to be ready to be delivered in writing to the parties by a certain day as not having a deed stamp, overruled. *Blundell v. Bretterich*, id. 232. AWARD.

Distinction between an agreement, that may be stamped, paying the penalty which the party will be permitted to stamp, pending the cause, and one upon which no action can be brought unless stamped. *Huddleston v. Briscoe*, 11 Ves. 595. AGREEMENT, STAMPING.

Receipt for purchase money allowed to be stamped as an agreement during the hearing. *Coles v. Trecothick*, 9 Ves. 234. S. C. 1 Smith, 233.

Legacies not paid under a charge upon real estate, in aid of the personal, without production of the stamp, under the legacy act 36 G. 3. c. 52. s. 7. until it is ascertained that there is no personal estate applicable. *Holme v. Stanley*, 8 Ves. 1. LEGACIES, PAYMENT OF; CHARGE ON REAL ESTATE.

No relief in equity upon a promissory note: void at law for want of a stamp. *Toulmin v. Price*, 5 Ves. 240. PROM. NOTE.

But where plaintiff had received a promissory note without a stamp, court directed a proper note to be made conformable to the agreement between the parties. *Aylett v. Bennett*, 1 Anst. 45. AGREEMENT; PROMISSORY NOTE; SPEC. PERF.

Depositions taken in India where no proper stamps could be had, ordered, on motion of course, to be engrossed on parchment and stamped. *Chitty v. E. I. Comp.*, 2 Cox, 199. BANKCY. COMMISSION TO EXAMINE ABROAD, EXECUTION OF; PR. ENGROSSMENT OF PROCEEDINGS.

If the terms of a contract are reduced into writing, the paper must be stamped in order to be read in evidence, though collaterally. *Heath v. James*, 2 Bro. C. C. 309. EVIDENCE.

An original letter allowed to be stamped after production to make it evidence. *Ford v. Compton*, 2 Bro. C. C. 32. PR. EVIDENCE.

Held, a stamp was equal to a seal in the execution of a power which requires sealing. *Sprange v. Bernard*, id. 585. POWER, EXECUTION OF.

Deeds altered by consent, require re-stamping. — *v. Lee*, 2 Eq. Ab. 414. DEEDS.

STATUTES, CONSTRUCTION OF.

See also DISTRIBUTION, I.; IV.—FRAUDS, VIII.—  
LEGACY DUTY.—LIMITATION, STAT. OF.—MORT-  
GAGE, V. 2.—NULLUM TEMPUS ACT.

I. GENERALLY, AND PRIVATE ACTS.

II. IN CASES OF, AND RELATING TO.

1. Accumulation.
2. Annuity Act.
3. Arbitration and Award.
4. Attorney.
5. Bank of England.
6. Bankers.
7. Bankrupt Act.
8. Bills pro Confesso.
9. Bills of Exchange, &c.
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11. Champerty and buying of Tithes.
12. Charities and Mortmain.
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15. Copyright.
16. Costs.
17. De Donis.
18. Dower.
19. Exchequer Bills.
20. Executors and Administrators and Dis-  
tribution.
21. Fines and Recoveries.
22. Forfeiture for Treason and Felony.
23. Fraudulent Conveyance and Deceit.
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26. Infant Lessor.
27. Infant Trustee and Lunatics.
28. Irish Tenancy Acts.
29. Land-Tax Redemption.
30. Lease by Tenant in Tail
31. Lunatic's Estate.
32. Marriage of Infants.
33. Mortgages.
34. National Debt.
35. Partition.
36. Popery.
37. Property-Tax.
38. Settlement of Poor
39. Ships.
40. Stock Jobbing.
41. Tenant in Tail and Money to be laid  
out in land.
42. Traders.
43. Uniformity.
44. Usury.
45. Witnesses.

I. GENERALLY, AND PRIVATE ACTS.

By 4 G. 2. c. 26. s. 1. all law proceedings must  
be in English.

No decree upon pretence of equity shall be made  
against the express provision of an act of par-  
liament. *Beane's Order*, 5.

As a general rule, the court requires, in all peti-  
tions under acts of parliament for local improvements,  
&c. for payment of money out of court, that the par-  
ties applying shall by affidavit shortly verify their  
title, and state that to their knowledge and belief  
no other person has any title to or claims any interest  
in the estate. *Exp. Shears*, 2 Y. & J. 493. *PR.*  
*AFIDAVIT OF TITLE.*

It is by no means unusual in construing a remedial  
statute to extend the enacting words beyond their  
natural import and effect, in order to include cases

within the same mischief. *Dean, &c. of York v.*  
*Middleborough*, 2 Y. & J. 196.

Under an act of parliament for making docks, the  
value or compensation for property taken for the pur-  
pose of the act was directed in certain cases to be  
paid into the bank in the name of the accountant-  
general; and to be laid out in bank annuities, and  
until such bank annuities should be sold, and the  
produce invested in other hereditaments, the dividends  
were to be paid to the person or persons who would  
be entitled to the rents and profits of the heredita-  
ments if unsold. The act also directed that the  
court, on the application of any person or persons  
making claim to the money awarded as a compensa-  
tion, by motion or petition, should, in a summary  
way of proceeding or otherwise, order the same to  
be laid out and invested in the funds or distribution  
thereof, or payment of the dividends according to the  
estate, title, or interest of the person making claim  
thereto. On the petition of an annuitant whose an-  
nuity was charged on the property, with powers of  
distress and entry, and farther secured by a term for  
payment of his annuity, and the arrears thereof, out  
a fund brought into court under the act, the court  
held that it had no authority to proceed in a sum-  
mary way on the petition of an incumbrancer, but  
only at the instance of the persons who would have  
been entitled to the rents if the property had been  
unsold: and dismissed the petition. *Exp. Back*, 2 Y.  
& J. 386. *JURISDICTION.*

The recitals in the disabling statute do not limit  
the force of the subsequent enactment to cases in  
which the mischief by the alienation is done to the  
personal interest of the successor of the alienor, for it  
is evident from the enactment that the legislature in-  
tended to apply the prohibition to the case of persons  
who were seised either as mere trustees, or in a great  
measure in trustees, and among other persons to the  
master or guardian of an hospital. *Dean, &c. of*  
*York v. Middleborough*, 2 Y. & J. 196. *LEASES.*  
*ECCLESIASTICAL.*

Clauses in local act providing that person ag-  
grieved by the commissioners appointed to carry it  
into execution should appeal to the quarter sessions,  
and that twenty-one days notice should be given be-  
fore any action or suit was commenced for any thing  
done in pursuance of the act, do not apply to the  
case of a person claiming as an incumbrancer of the  
rates which the act gave authority to assess and levy,  
and instituting his suit in order to give effect to his  
incumbrance. *Drewry v. Barnes*, 3 Russ. 94.

Courts of law and equity can only enforce the  
rights of parties under acts of parliament by the ap-  
plication of their known rules and principles; if they  
are inadequate to the purpose, the legislature alone  
can supply the defect. *Weale v. West Middl.*  
*Waterworks Comp.*, 1 Jac. & W. 371. *JURISDICTION.*

The statutes providing for the relief of subject  
accountants, who have equities against the crown,  
held not to be confined to cases where the subject  
be actually sued or impleaded; but he may proceed  
by bill in equity in the first instance, and as it were  
*quia timet*, and that during the passing of his ac-  
counts before the commissioners of audit. *Cole-  
brooke v. Att. Gen.*, 7 Price, 146. *PUBLIC AC-  
COUNTANT; P.L. BILL QUIA TIMET.*

One act giving final jurisdiction, and another act  
giving jurisdiction subject to appeal, the court can-  
not proceed on both acts. *In re Bedford Charity*,  
2 Swan. 513.

Construction of charitable bequest with reference  
to a local act of parliament concerning charitable  
bequests to the parish, &c. *Att. Gen. v. Freeman*,  
5 Price, 425. *WILL, C. OF; CHARITY.*

No inference from a statute designed in favour of  
the liberty of the subject, to the prejudice of that li-

berly. *Crowley's case*, 2 Swan. 68. S. C. Buck. 264.

No jurisdiction for taxing a solicitor's bill of costs for obtaining an act of parliament. *Exp. Wheeler*, 3 V. & B. 21. JURISDICT.; COSTS, TAXATION OF.

Effect of a private act of parliament, declaring an estate vested in trustees and their heirs in trust to sell, discharged from the trusts of a settlement; divesting the legal fee outstanding under a prior settlement. *Bullock v. Fladgate*, 1 V. & B. 471.

Purchasers for valuable consideration not bound by private act of parliament. *El. Pomfret v. Id. Windsor*, 2 Ves. 480. VEND. & PURCH.

Relief cannot be given against a forfeiture created by act of parliament. But a court of equity will see that the proceedings working the forfeiture have been regular. *Blennerhasset v. Day*, 2 Ball & B. 128. JURISDICTION.

The preamble of an act of parliament, though it may assist ambiguous words, cannot controul a clear and express enactment. *Lee v. Sumersgill*, 17 Ves. 508.

General words in a statute must receive a general construction, unless there is in the statute some ground for restraining their meaning by reasonable construction, not by arbitrary addition or retrenchment. *Beckford v. Wade*, 17 Ves. 91.

Where the words of a law in their ordinary signification are sufficient to include means, the virtual exception must be drawn from the intention of the legislature, manifested by other parts of the law, from the general purpose and design of the law, and the subject-matter of it. *Id.* 92.

Distinction between acts of parliament denying legal effect to instruments, as the act for enrolling bargains and sales, and the registry act 7 Ann. c. 20, and acts declaring instruments, void to all intents, as the annuity and the ship registry acts; notwithstanding the former, the party is bound in equity by the contract. *Davis v. El. Strathmore*, 16 Ves. 428.

Power under an act of parliament to lessee, his executors, administrators, and assigns, to grant building leases, does not extend to the tenant in the renewed lease, according to the usual course of church leases. *Collett v. Hooper*, 13 Ves. 255. COVENANT, C. OF.

If enacting part of statute will bear only one interpretation, preamble may be applied to throw light upon it. *Mason v. Arncliffe*, 13 Ves. 36.

A subsequent affirmative statute may repeal a prior one if the words are contrariant; but two affirmative statutes may stand, in points where they do not contradict each other. *Hayden v. Carroll*, 3 Ridgw. P. C. 599.

Under a private act of parliament, money to be paid to certain parties upon petition to the court: *Id.* Ch. refused to make an order to pay the money to persons deriving title from the original parties, and ordered them to file a bill. *Exp. King*, 2 Bro. C. C. 158. PETITION; EXORS. & ADMORS.

The word "purchasers" in the Irish statute 2 Ann. c. 6, means purchasers by bargain and sale for a valuable consideration only. *Aylmer v. Bellew*, Vern. & Scriv. 23.

Every act of parliament in which no particular time is specified for its commencement, is held to operate from the first day of session of parliament wherein it was made. *Punter v. Att. Gen.*, 6 Bro. P. C. 486.

The domestic statutes of a charitable foundation say, that the trustees "shall and may" turn out, &c. This shall be construed imperatively that they "must." *Att. Gen. v. Lock*, 3 Atk. 164. And the same words shall be construed imperatively in acts of parliament. *Id.* 166. *Stamper v. Miller*, 3 Atk. 212.

Enacting words, if they take in the mischief, shall

be extended for that purpose, though the preamble does not warrant it; and where a new statute is made to alter the law, the judges should so mould their practice as to render it conformable to the legislature. *Basset v. Bassett*, 3 Atk. 207.

The title of an act of parliament is no part of the act. *Att. Gen. v. Weymouth*, Amb. 22.

The enacting part of a statute extends further than the preamble in many instances, even in criminal matters. The 33 Hen. 8. c. 23., for trying treasons, &c. within the King's dominion or without, has been extended to trials in the West Indies. *Kinaston v. Clark*, 2 Atk. 205.

Subsequent statutes in the affirmative giving new penalties, do not repeal former methods of proceeding ordained by previous acts without negative words. *Middleton v. Crofts*, 2 Atk. 275. (Append.)

The preamble of an act of parliament is proper to explain the general body of it. *Copeman v. Gallant*, 1 P. W. 317. But see *Ryal v. Rolles*, 1 Ves. 365. S. C. 1 Atk. 175. where the opinion of *Id.* Cowper in *Copeman v. Gallant* against this doctrine is expressly disapproved.

Chancery cannot relieve against statute. *Carew v. Worsley*, Hob. 203.

## II. IN CASES OF.

1. Accumulation.
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1. *Accumulation.*

Trust of term during minorities of respective tenants for life or in tail, in possession, &c. to receive and lay out rents, &c. in stock to accumulate for such persons as should upon expiration of such minorities or death of minors, be tenants in possession, or entitled to the rents, and of the age of twenty-one, is too remote; and being void in its creation is incapable of modification, so as to establish it in extent to which it might legally have been carried. *Ld. Southampton v. Marq. Hertford*, 2 V. & B. 54.

Before the statute 39 & 40 G. 3. c. 98, accumulation might have been co-extensive with, but could not exceed the limits of executory devise; but a limitation to vest only in the first descendant of a person in being who might attain twenty-one, is too remote. *Id.* 61.

Accumulation exceeding the limits of the statute 39 & 40 Geo. 3. c. 98, void only for the excess. *Id. ib.*

Money by will for accumulation beyond the statute 39 & 40 Geo. 3. c. 98, is void, only for the excess. *Longdon v. Simson*, 12 Ves. 295.

Trust, by will, for accumulation during a life, contrary to the statute 39 & 40 Geo. 3. c. 98, is void only for excess, and is good for twenty-one years by that statute. *Griffith v. Vere*, 9 Ves. 127.

2. *Annuity Act.*

An equity of redemption is within the exception in the annuity act, stat. 17 Geo. 3. c. 26. s. 8. repealed, and see 53 Geo. 3. c. 141. s. 10. EQUITY OF REDEMPTION.

Annuity secured on dividends of stock standing in trust among other things for the grantor for life, not within the exception in the annuity act. *Dupuis v. Edwards*, 18 Ves. 358.

Agreement to grant an annuity, is not within the annuity act. Execution of such an agreement granted against the executor. *Nield v. Smith*, 14 Ves. 491. AGREEMENT; SPECIFIC PERFORMANCE.

Bill under the annuity act to set aside an annuity, dismissed, the objections not prevailing; viz. First, that the memorial expressed the consideration to have been paid at the date and execution of the deeds, one of the grantors only having executed on the day of the date and execution of the deeds, the other some days afterwards occasioned merely by the residence of the one in Wales, the other in London. Secondly, that 30*l.* was immediately after payment of the consideration, paid by the grantor to the attorney for the expense of the transaction, not by way of a colourable reduction of the consideration. Thirdly, that the consideration was paid by an agent, the fact though not stated in the body of the deed, appearing by the receipt indorsed and being stated in the memorial. *Phillips v. Cranford*, 13 Ves. 474.

Stock vested in trustees of a settlement annuity granted by the husband, out of the dividends to which he was entitled for life, the trustees giving a power of attorney to receive the dividends, and covenanting not to revoke it, and to execute any other, &c. requires a memorial, not being an actual transfer within the eighth section of the annuity act. *Duff v. Atkinson*, 8 Ves. 377.

The annuity act with respect to annuities subsisting at that time, only restrains the action till its provisions are complied with; not limiting the time, and does not as in the case of subsequent annuities make the security void. In the former case, therefore, the bond being by accident lost, the annuitant was admitted a

creditor for the arrears of the annuity, the real debt in equity. *Toulmin v. Price*, 5 Ves. 235.

Courts of common law, which will in their general jurisdiction enter into the validity of the warrant of attorney or judgment on motion, in the particular application under the annuity act, will only set aside the judgment or execution or warrant, but cannot order the bond to be delivered up. The word "such" in the first section of the annuity act, means every deed, &c. by which an annuity is granted, and does not refer merely to the instrument defectively stated in the memorial. *Dk. Bolton v. Williams*, 2 Ves. J. 154. 4 Bro. C. C. 297.

3. *Arbitration and Awards, (9 & 10 W. 3. c. 15).*

Award made under order of reference, need not be made rule of court, under stat. Will. 3. *Marq. Ormond v. Kynnersley*, 2 S. & S. 15.

Where it is one of the terms of agreement to refer to arbitration, that submission shall be made rule of court of common law, if either party require it this court has no jurisdiction to relieve against the award, though submission has not been made rule of court of common law within time limited by stat. 9 & 10 W. 3. c. 15. *Davis v. Getty*, 1 S. & S. 411. JURISDICTION.

Where accounts between trustee and cestuique trust are referred to arbitration, and the award is made a rule of a court of law, under the stat. 9 & 10 W. 3, though there be fraudulent misrepresentation by the trustee to the arbitrators as to particular items of the account, a bill cannot be maintained by the cestuique trusts, after the time limited by the statute has elapsed, to set aside the award as to the items impeached, leaving it to stand as to the remaining items; the award upon the face of it being entire. *Auriol v. Smith*, 1 Turn. & R. 121.

Jurisdiction in matters of award referred under 9 & 10 W. 3, is altogether transferred to court of which the submission is made a rule; and awards of that nature must be regulated by stat. with respect to period within which application to set them aside must be made: a case of fraud does not constitute an exception, sensible. *Id.* 126. JURISDICTION.

Parol submission to arbitration, not within the statute 9 & 10 W. & M. c. 15. — *v. Mills*, 17 Ves. 419.

No jurisdiction in equity by injunction, to stay process of a court of law upon an award, made a rule of court under the statute 9 & 10 W. 3. c. 15. *Gwynnett v. Bannister*, 14 Ves. 536. JURISDICTION; STAT. C. OF.

A submission may be made a rule of court after the award, and held within 9 & 10 W. 3. c. 15. *Pownall v. King*, 6 Ves. 10. S. C. *Featherstone v. Cooper*, 9 Ves. 67.

Bill lies to set aside for fraud an award, made a rule of a court of law under 9 & 10 W. 3. c. 15. An award in a cause depending, is not within the statute. *Jd. Lonsdale v. Littledale*, 2 Ves. J. 451. FRAUD, AWARD BY.

4. *Attorney.*

Granting a moiety of the profits of business of attorney to unqualified person for mixed consideration of the goodwill of the business which descended from grantor's father, the advancement of money and natural affection, is not contrary to the policy of 22 G. 2. c. 46. s. 11. *Candler v. Candler*, 6 Mad. 141. S. C. 1 Jac. 225.

But it is otherwise to enter into a partnership with

an unqualified person. *Tinch v. Roberts*, cited *id.* 145. n. (a).

An agreement to share profits and act as writer in office, but not to be considered as a partner, is in fact a partnership, and within the statute. *Id. ib.*

Stat. of taxation does not apply to country agency. *Binsted v. Hurefoot*, *Dick*, 112.

Stat. 5 G. 2. c. 25. must be complied with in respect of bills of revivor. *Att. Gen. v. Smith*, *id.* 135.

#### 5. Bank of England.

Application under 39 & 40 G. 3. c. 36. to restrain bank from making transfer without making them parties, must be upon notice to defendants, and on affidavit as in cases of waste. *Hammonds v. Maundrell*, 6 Ves. 772 a. note. *PR. INJUNC. TO RESTRAIN TRANSFER.*

#### 6. Bankers.

Bankers act not applicable to cases of mutual dealings between banker and customer. *Clancarty v. Latouche*, 1 Ball & B. 429. *ACCOUNT, ANNUAL RENTS.*

#### 7. Bankruptcy Act.

Upon a bill by assignees to set aside a settlement made by a trader in favour of his children on the ground that he was insolvent at the time of the execution of the settlement, the court considered that the insolvency mentioned in the late bankrupt act, 6 G. 4. c. 16. s. 73. must mean a total insolvency, such as a general inability to pay debts in the ordinary course of trade, or the entering into a composition with creditors, and that notice of inability to meet a particular demand was not notice of insolvency, and in the present case held that evidence that the bankrupt had accepted two bills prior to the date of the settlement, and which were from time to time renewed and ultimately not paid, was not alone sufficient evidence of insolvency within the meaning of the act. *Cullen v. Sanger*, 2 Y. & J. 459. *BANKCY. FRAUDULENT SETTLEMENT.*

The workmen of a coach-maker who worked by the piece and received a specified sum for each particular job under separate and distinct contracts, and where there was no hiring for a specified time, held to be servants within the meaning of the 6 G. 4. c. 16. s. 48. *Exp. Grellier*, 1 Mont. & M. 95. *MASTER & SERVANT.*

Sect. 132. of the 6 G. 4. c. 16. as to the allowance of interest to simple contract creditors is not retrospective. *Exp. Sheppard*, 1 Mont. & M. 67. *BANKCY. SURPLUS.*

The 6 G. 4. c. 16. s. 18. is applicable to a case not only of deficiency in the amount, but to any original defect in the nature of the petitioning creditor's debt. *Exp. Hall*, 1 M. & M. 39. *BANKCY. PETITIONING CREDITOR'S DEBT, SUBSTITUTION OF.*

Under 6 G. 4. c. 16. s. 18. where the computation of time is to be from an act done, the day when such act is done is to be included: for some purposes the court notices the fraction of a day. *Exp. Farquhar*, 1 M. & M. 7. *COMPUTATION OF TIME; FRACTION OF A DAY.*

Stock purchased by father, afterwards a bankrupt, in names of his infant son and a trustee, is within the mischief of 1 Jac. 1. c. 15. s. 5. *Brown v. Bellaris*, 6 Mad. 53. *BANKCY. REPUTED OWNERSHIP; PARENT & CHILD.*

The court is not empowered by the 49 G. 3. c. 121. s. 19. to determine the question of election of a lease by the assignees. Assignees in possession having

electd not to accept the lease, 'an issue of *quantum damnificatus* was directed. *Exp. Quantock*, Buck, 190. See as to this case, *Eden*, B. L. 240. n. (e). *BANKCY. ELECTION TO TAKE LEASE.*

A petitioning creditor who, with the knowledge of two or three of the creditors, received his debt from the bankrupt, held to have forfeited under the 5 G. 2. c. 30. s. 42. *Exp. Brins*, 1 Buck, 108. *BANKCY. PET. CRED.; FORFEITURE.*

To a suit instituted by assignees on behalf of a bankrupt, in the object of which the creditors have no interest, the assent of the creditors is not necessary under the stat. 5 G. 2. c. 30. s. 38. 6 G. 4. c. 16. s. 88. *Wilkins v. Fry*, 1 Mer. 244. S. C. 2 Rose, 371. *BANKCY. ASSESS.*

Parol agreement, although with part performance, not within 49 G. 3. c. 121. s. 19. 6 G. 4. c. 16. s. 75. *Exp. Sutton*, 2 Rose, 86. *BANKCY. LEASE, PAROL AGREEMENT.*

Order for payment of a dividend in bankruptcy with interest and costs on petition, under the stat. 49 G. 3. c. 121. s. 12., the assignees not being prepared to state their objection. *Exp. Atkinson*, 3 V. & B. 13. *BANKCY. PAYMENT OF DIVIDEND.*

Under 36 G. 3. c. 90. (repealed and re-enacted by 6 G. 4. c. 74. which see) on proof that one trustee had become bankrupt and had absconded and abroad, unlikely to return, the remaining trustee was ordered to transfer trust stock to himself and a new co-trustee. *Williams v. Bird*, 1 V. & B. 3. *TRUSTEE; STOCK, TRANSFER OF.*

Order for a transfer of stock within the statute 36 G. 3. c. 90. repealed and re-enacted by 6 G. 4. c. 16. s. 79. 80. as upon a refusal by a party appearing by counsel, and admitting that she had disobeyed an order to transfer. *Riderv. Kidder*, 13 Ves. 123. *BANKCY. ORDER FOR TRANSFER OF STOCK; TRUSTEE OF STOCK.*

Though debts, in general, were not within the 21 Jac. 1. c. 19. s. 11. mortgages of real estate whether original or by assignment, and though also secured by bond or covenant, were not. See 6 G. 4. c. 16. s. 72. *Jones v. Gibbons*, 9 Ves. 407.

Purchase in joint names of husband and wife by trader, afterwards a bankrupt, is void against creditors. See 6 G. 4. c. 16. s. 73. *Glaister v. Hewer*, 9 Ves. 12. See S. C. S. P. 8 Ves. 195. 11 Ves. 377. *HUSB. & WIFE; FRAUD ON CREDITORS.*

A mere gift of money by bankrupt to his son is not within the statute. See 6 G. 4. c. 16. s. 73. *Exp. Shortland*, 7 Ves. 88. *BANKCY. FRAUDULENT CONVEYANCE.*

Trustees under a foreign will dead, and no personal representation taken out in this country, not a case for relief by directing a transfer of stock within the stat. 36 G. 3. c. 99. See 6 G. 4. c. 16. s. 79. 80. 6 G. 4. c. 74. *Lee v. Bk. of England*, 8 Ves. 44. *TRANSFER OF STOCK; TRUSTEE.*

No point is more clear, than that a subsequent affirmative statute may repeal a prior one, if the words are contrariant; but it is equally clear, that if there be two affirmative statutes made on the same subject, in all points in which they do not contradict each other, both shall stand; therefore, in every case, where a banker commits an act of bankruptcy, and a commission of bankruptcy issues against him, it seems certain that the assignees under that commission will be bound by every clause in the acts of 29 & 30 G. 2. not altered or repealed by the bankrupt laws, as fully and effectually as trustees would be bound by the same clauses acting under a deed of trust executed under the authority of the latter act. So it is equally evident, that where the provisions of that act do so attach upon the property of the bankrupt as to prevent the operation of the bankrupt laws, that no commission of bankruptcy can issue against a banker;

and that in such case, though bankers are expressly named in the bankrupt laws, they cease to be the objects of them. Per 1d. Ch. Clare, in *Hayden v. Carroll*, 3 Ridg. P. C. 592. 600. Vide etiam *Hayden v. Rivers*, 1 Ridg. P. C. 448. (n.)

Plea to a bill of discovery in support of an action under stat. 9 Ann. c. 14. for money lost at play by the assignees of the loser, a bankrupt, that the action was not commenced, and the bill exhibited within three months, overruled. *Brandon v. Sands*, 2 Ves. J. 514. *PL. PLEA; GAMING.*

A written engagement to warrant the payment of a bill of exchange, although good to other purposes, is not within the stat. of 7 G. 1. c. 31. (6 G. 4. c. 16. s. 51.) which applies only to what arises on the face of the instrument. *Exp. Harrison*, 2 Cox, 172. S. C. 2 Bro. C. C. 614. *BANKCY. PROOF IN; BILL OF EXCHANGE.*

Under the stat 5 G. 2. (6 G. 4. c. 16. s. 8.), which provides against petitioning creditor's compromising commission of bankruptcy, the creditor forfeits the whole of his debt, whether the composition made by him extends to the whole or to part only. And the forfeiture takes place as well under a commission founded on any other act of bankruptcy, as upon the act thereby created. *Exp. Vernon*, 2 Cox, 61. *BANKCY. COMPOUNDING DEBTS. BANKCY. PET. CRED.*

A creditor in Scotland is within the meaning of stat. 5 G. 2. (6 G. 4. c. 16. s. 46.) as to the mode of proving debts under commissions of bankruptcy by creditors in foreign parts. *Exp. McDougall*, 2 Cox, 8. *BANKCY. PROOF IN.*

The stat. 21 Jac. 1. c. 19. extends to conditional as well as absolute sales of goods, and the general view of that statute is to prevent traders from gaining a delusive credit. The legislature has, therefore, explained the sense of the clause by putting words "true owner" in opposition to "reputed owner." *Ryd v. Rolfe*, 1 Atk. 165. S. C. 1 Ves. 348. *BANKCY. REPUTED OWNERSHIP.*

#### 8. Bills pro confesso.

See 1 W. 4. c. 36. and Appendix.

Bill against member of parliament, praying relief, may be taken *pro confesso*, under 45 Geo. 3. c. 124, which act is not confined to bills of discovery only. *Jagan v. Grant*, M. P. 1 Mad. 626. *MEMBER OF PARLIAMENT.*

The authority to take the bill *pro confesso* against a defendant, having privilege of parliament standing out process of contempt, under statute 45 Geo. 3. c. 124. s. 5. is confined to bill for discovery only. *Jones v. Davis*, 17 Ves. 368. In *Jagan v. Grant*, 1 Mad. 626. Sir T. Plumer, V. C. refused to follow this case. *MEMBER OF PARLIAMENT.*

Member of parliament refusing to enter an appearance, the court appointed a clerk in court to enter an appearance for him under stat. 45 Geo. 3. c. 124. *Read v. Phillips*, 10 Ves. 436. *MEMBER OF PARLIAMENT; PR. APPEARANCE.*

Defendant being outlawed, motion that he might appear within a limited time upon the equity of statute. 5 Geo. 2. c. 25. granted though he had not been in the kingdom for two years before the subpoena. *Clarke v. Right*, 2 Ves. J. 188. *OUTLAWRY.*

A bill cannot be taken *pro confesso* under statute 5 Geo. 2. without an affidavit of the defendant's absconding to avoid process. *Short v. Doucet*, 2 Cox, 84. see also S. P. *Burton v. Malloon*. Barn. 401. *AFFIDAVIT IN SUPPORT.*

Although a defendant has appeared and answered the original bill, if he cannot be found to be served with a subpoena, to answer a bill of revivor, the

plaintiff must proceed under 5 Geo. 2. c. 25. to have the bill taken *pro confesso*. *Henderson v. Meggs*, 2 Bro. C. C. 127. *PR. BILL OF REVIVOR; PR. SERVICE OF SUBPENA.*

The statute of 5 Geo. 3. for taking bills *pro confesso* against defendants, extends as well to cases where the party has been served with the former, but hath avoided the subsequent process, as to cases where it has been impossible to serve the party with any process at all. *Mawer v. Mawer*, 1 Cox, 104. S. C. 1 Bro. C. C. 388.

Defendant left kingdom two years' precoding filing of bill. On affidavit that defendant continued abroad to elude justice, defendant to appear under 5 G. 2. c. 25. *Mason v. Polier*, Dick. 401. *sed quare*, note Wyatt's edit. 1803.

After abatement, defendant absconding, 5 G. 2. c. 25. must be complied with. *James v. Dove*. Dick. 63.

Defendant applying on above statute within seven years to take answer, &c. must first give approved security for costs. *Bishop of Rochester v. Knapp*. Dick. 70.

#### 9. Bills of Exchange.

Promissory notes payable in cash or bank of England notes, held not to be promissory notes within the 3 & 4 Ann. c. 9. and 7 Ann. c. 25. s. 3. The holder therefore, who had received them from an intermediate person, held not entitled to prove them as a debt against the maker. *Exp. Imeson*, 2 Rose, 225. *BANKCY. PROOF IN; PROMISSORY NOTES.*

#### 10. British Claims on France.

Notwithstanding a decision of the commissioners appointed by the statute 59 G. 3. c. 31, and the conventions for liquidating the claims of British subjects on the French government, of the privy council, on appeal in favour of a claimant, his right may be disputed, and he may be declared a trustee of the sum awarded to him for other persons, showing themselves to be entitled. Semble, injunction refused the affidavits of the plaintiff's title, not being positive. *Hill v. Reardon*, 1 Jac. 84. *JURISDICTION.*

#### 11. Champerty and Buying of Titles.

Plea of the statute 32 Hen. 8. c. 9, against selling pretended titles, with the necessary accounts, of want of possession, &c. not being on oath, ordered, to be taken off the file, though set down by the plaintiff for agreement, this irregularity not admitting waiver. *Wall v. Stubbs*, 2 V. & B. 354. *PR. PLEA.*

#### 12. Charities and Mortmain.

The 53 Geo. 3. c. 101. was intended to give a more easy and less expensive mode of bringing before the court a clear abuse of a charity; but not where there is any question with respect to the persons interested in the trust, or what is in the nature of the trust, or in what manner the breach of trust is to be acted upon; this is a case for information and not petition. Where therefore a petition was filed against a corporation, who had improperly become trustees for pulling down a chapel and almshouses, and it did not appear whether the chapel was private or parochial, and the heir of the founder was not a party who was in fact the surviving trustee, nor could the court see in what manner the charity was to be carried into effect, and the petitioners had lain by for above forty years, the House of Lords reversed the judgment below. Upon a petition, under the act the attorney general is not precluded, by having signed the petition, from interfering to prevent injustice to any party, and



he may therefore be heard for respondents. *Ludlow Corp. v. Greenhouse*, 1 Bl. N. S. 17. CHARITY.

Court has no jurisdiction under 52 G. 3. c. 101. to direct upon petition an account of assets of persons who had been receiving proceeds of charity estate against his personal representatives. *In re St. Wam's Charity*, 2 S. & S. 66. JURISDICTION; CHARITY; ACCOUNT.

Grant of land to charity, where there is a resulting trust for the grantor during his life, is void under 9 G. 2. c. 36. s. 1. as not being an interest to take effect in possession immediately. *Limbrey v. Gurr*, 6 Mad. 151. CHARITABLE USES.

Jews are not entitled to the benefit of the Bedford charity. Whether that question could be decided on a petition presented under the statute 52 Geo. 3. c. 101. *quære*. *In re Bedford Charity*, 2 Swan. 470. BEDFORD CHARITY; JEWS.

Persons presenting a petition under statute 52 Geo. 3. c. 101. must have a direct interest in the charity. *Id.* 518. PL. PETITION; CHARITY; PL. PARTIES.

Persons presenting a petition under an act, empowering "any person or persons whomsoever" to petition against trustees of a charity, must be interested in the fund. *Id.* 525. PL. PETITION, CHARITY; PL. PARTIES.

On a reference in a petition under statute 52 Geo. 3. c. 101. the master may receive affidavits in evidence. *Exp. Greenhouse*, 1 Swan. 60. PL. PETITION, CHARITY.

The statute 52 Geo. 3. c. 101. was meant to extend only to cases of plain breach of trust, committed by persons in their character of trustees, not to the case of benefits derived from such breaches of trust by third persons. *Exp. Skinner*, 2 Mer. 453. CHARITY.

Constructive trusts held not within the 52 Geo. 3. c. 101. which gives relief upon petition in the case of charities. *Exp. Brown*, Coop. 295. CHARITY PETITIONS; TRUST CONSTRUCTIVE.

Relief for charities by petition, instead of information, under the statute 52 Geo. 3. c. 101. being limited to questions of abuse of trust, as between the trustees and the objects of the charity, not applicable to an adverse claim to land, as having formerly belonged to the charity. *Exp. Rees*, 3 V. & B. 10. PL. CHARITY PETITION.

The jurisdiction under the statute 52 Geo. 3. c. 101. substituting petition, or information in case of abuse of trusts for charity, and 40 G. 3. c. 56. as to money intailed, is discretionary. *Id.* 11. CHARITY PETITION, JURISDICTION.

Charity regulated on petition instead of information, under 52 G. 3. c. 101. *Exp. Berkhamstead Free School*, 2 V. & B. 134. PETITION; CHARITY.

Under the act of parliament, giving jurisdiction upon petition in charity cases, the trustees not approving, ordered to shew cause why the order prayed should not be made. *Exp. Seageurs*, 1 V. & B. 496. CHARITY PETITION.

No general appointment of visitor, excluding a commission of charitable uses, under the statute 43 Eliz. c. 4. from special powers that would fall within the general visitation power; as powers to the ordinary to interpret and determine doubts upon the statutes of amotion and punishment, and of appointment to the ordinary, and to the dean and chapter of York, in certain cases, &c.; the whole visitatorial power, particularly as to the administration of the landed property, not being intended to be given to the ordinary, as visitor. Objection to the decree under a commission of charitable uses, as having issued in a case not warranted by the statute 43 Eliz. c. 4. may be in the form of exceptions. *Exp. Kirkby Ravensworth Hosp.* 15 Ves. 305. CHARITY.

A conveyance of land to a charitable use, enrolled within the time limited by the statute of 9 Geo. 2.

c. 36. is not void by reason of any reservation to the grantor of a power of regulating the charity. It is sufficient that the deed is executed by the grantor at the time of the enrolment, and need not be executed by the grantees. *Greives v. Case*, 2 Cox, 301. S. C. 4 Bro. C. C. 67. 1 Ves. J. 548. CHARITABLE USES; ENROLMENT OF DEEDS.

Where A. by will executed before the statute of mortmain, directs B to settle a freehold estate to pay a sum not exceeding 100*l.* per annum, in such manner and upon such trust, on such a part of the poorer people of a parish as he should think proper; and B in pursuance thereof, by will executed after the statute, appoints a sum less than the 100*l.* per annum; held, 1st, that the appointment is not void by the statute, and 2dly, that the amount to be appointed was discretionary in B, and not to be increased under the 43 Eliz. to the whole amount given by the will of A. *Attorney General v. Bradley*, 1 Eden; 482. MORTMAIN; WILL, CONSTRUCTION OF.

The legislature intended by the exception in the statute of mortmain, to save devises for the benefit of particular members as well as of the whole body. The legislature intended to except such devises as were really and bona fide for the benefit of colleges, not those where the legal interest only passes to the college in trust for other charitable uses. The exception only extends to colleges established at the time when the statute of mortmain was enacted. *Atty. General v. Tancerd*, 1 Eden, 15, 16. S. C. Amb. 351. MORTMAIN.

### 13. Clergy.

An agreement for lease of a farm to a clergyman for purpose of occupation, is void, under 21 Hen. 8. c. 13., repealed and re-enacted by 57 Geo. 3. c. 99. *Morris v. Preston*, 7 Ves. 547.

The stat. 7 Anne, c. 18., enacting that the interest of the patron of an advowson shall not be displaced by usurpation, is not retrospective. *Att. Gen. v. Bp. of Lichfield*, 5 Ves. 828. ADVOWSON.

Plea of 13 E. c. 20. for non-residence, allowed to bill by lessee of tithes. *Bokenham v. Bentfield*, 1 Com. 392. PL. PLEA OF NON-RESIDENCE; TITHES.

Agistment title is not within the 2d and 3d Ed. 6. c. 13. s. 3. *Ellis v. Saul*, 1 Anst. 342. AGISTMENT TITHES.

An agreement between rector and parish for tithes, is not within the 13th or 14th Eliz. Semble. *Atkinson v. Folkes*, 1 Anst. 67. NON-RESIDENCE.

### 14. Copyhold.

The stat. 9 G. 1. c. 29, providing for the admission of copyholder, infants, or feme covert, is confined to the cases expressed, viz., title by descent or surrender to the use of a will, and does not apply to a title under a decree. *Ld. Kensington v. Mansell*, 13 Ves. 240.

### 15. Copyright.

One procuring a painter to draw a drawing, is not entitled to the protection of stat. 8 G. 2. c. 13. *Jeffrey v. Baldwin*, Amb. 164.

The act 8 G. 2. c. 13. for the encouragement of the arts of designing, engraving, &c., is not confined to works of invention only, but means the designing or engraving any thing that is already in nature. *Blackwell v. Harper*, 2 Atk. 93.

A print published of any building, house, or garden, falls within this act. *Id.*

The property in the print rests absolutely in the engraver, though the day of publication is not mentioned. *Id.*

### 16. Costs.

Attorney's bill of costs, though not delivered, &c.,

according to 2 G. 2. c. 23. s. 22., is sufficient debt to support commission of bankruptcy. *Exp. Sutton*, 11 Ves. 163. *Exp. Steel*, 10 Ves. 166. **BANKCY. PARTITIONING CREDITOR'S DEBT.**

Proceeding before Id. Ch., as exercising the visitatorial power upon a royal foundation, is not within 2 G. 2. c. 23. s. 23. as to taxation of bill of costs. *Exp. Dana*, 9 Ves. 547.

A solicitor, suing for his bill need not state all the circumstances required by the stat. 2 G. 2. c. 23. s. 22., being matter of evidence. *Worrall v. Harford*, 8 Ves. 9. **SOL. & CLIENT.**

#### 17. *De donis.*

Lands and tenements only within the stat. *de donis*. *El. Stafford v. Buckley*, 2 Ves. 180.

No remainder over of estate not within the statute. *Id.*

Possibility not grantable over, except by king. *Id.* Lease *pur autre vie*, is not within the stat. *de donis*. *Baker v. Bayley*, 2 Vern. 226. **LEASE PUR AUTRE VIE.**

#### 18. *Dower.*

A woman married under age of twenty-one, having before such marriage a jointure made to her in bar of dower, is thereby bound and barred of dower, within 27 H. 8. c. 10. *El. Buckingham v. Drury*, 3 Bro. P. C. 492. S. C. 2 Eden, 60. reversing Eden, 38. **INFANT.**

#### 19. *Exchequer Bills.*

Order for payment out of a bankrupt's estate, with interest to the time of payment, in preference to all other creditors, with costs, under stat. 54 G. 3. c. 15. s. 48. for an issue of exchequer bills to relieve commercial credit. *Exp. Holden*, 18 Ves. 436. **BANKCY. PRIORITY OF SECURITY.**

#### 20. *Executors and Administrators, and Distribution.*

See 11 G. 1. c. 18; 38 G. 3. c. 87.

The term "legal representatives" in 22 & 23 C. 2. c. 10. s. 6. signifies "descendants," and not "next of kin." *Pries v. Strange*, 6 Mad. 161.

Administration granted under 38 Geo. 3. c. 87. is not for a limited time, but for a limited purpose, viz.: to become, and be made, party to bills in equity, and to carry decrees into execution. *Barnsford v. Tynyton*, 7 Ves. 468. **ADMON. DURANTE ABSENTIA.**

A freeman of London, having a son by a former marriage, married a second wife, and died: she is entitled under the custom of London, which is not taken away by the stat. of 11 Geo. 1. c. 18. in this case. *Dansen v. Hawes*, Amb. 276. **CUSTOM OF LONDON.**

#### 21. *Fines and Recoveries.*

Where a lease and release were made to create a tenant to the *præcipe* in a recovery, and the lease was lost, held to be a case to which relief given by 14 G. 2. c. 20. s. 5. applies. *Holmes v. Ailsbie*, 1 Mad. 551. **LOST DEED.**

#### 22. *Forfeiture for Treason and Felony.*

A seised of a freehold lease for lives, is indicted and found guilty of coining: held, that the whole estate is forfeited to the crown, notwithstanding the proviso in the act 8 & 9 W. 3. c. 26. that no offence made treason or felony by that act, shall extend to make any corruption of blood. *Horton v. Kirtton*, 4 Bro. P. C. 141.

#### 23. *Fraudulent Conveyances and Devises.*

The statute of fraudulent devises would prevent a devise for legacies to the prejudice of creditors by special; but not devise for debts generally; though

that might be the effect. *Kidney v. Cousmaker*, 12 Ves. 154.

Under a covenant on marriage by husband with trustees, in case wife should survive him, to pay her a sum of money; she is a creditor within the statute against fraudulent conveyances. 13 Eliz. c. 5. *Rider v. Kidder*, 10 Ves. 360. **DEBTOR & CRED.**

To impeach a settlement after marriage, under the statute 13 Eliz. the husband must be proved to have been indebted at the time, and to the extent of insolvency. The creditor not producing any evidence, his bill was dismissed, with liberty to file another. *Lush v. Wilkinson*, 5 Ves. 384. **SETTLMT. AFTER MARRIAGE; FRAUD ON CREDITORS.**

Annuity in fee granted by K. Ch. 2. out of Barba- does duties, is not a rent nor realty, nor within statutes, either frauds or *de donis*, &c. Therefore, being settled on A, "and the heirs of her body," it was held to amount to a fee-simple conditional at the common law, the remainder over being void, and that A, having had issue, might bar the possibility of reverter. *El. Stafford v. Buckley*, 2 Ves. 171. **GRANT FROM CROWN.**

Conveyance by the king's tenant in chief, in consideration of natural affection to collateral relations, is not within 32 H. 8. c. 1. as conveyance to children's children is. *Dyer*, 286. pl. 46.

#### 24. *Friendly Societies.*

See 1 W. 4. c. 60. Appendix.

Stat. 57 G. 3. c. 39., empowers court to make summary orders without suit, in matters of charity or benefit, or friendly societies. *In re Friendly Society*, 1 S. & S. 82. **CHARITY; JURISDICTION.**

The preference given to friendly societies by the stat. 33 G. 3. c. 54. s. 10. over other creditors, is confined to debts in respect of money in the hands of their officers, by virtue of their offices, and independent of contract; therefore does not extend to money held by the treasurer upon the security of his promissory note, payable with interest upon demand. *Exp. Stamford Friendly Society*, 15 Ves. 280.

A person in habit of receiving money of friendly society, having no treasurer appointed, upon notes carrying interest, payable a month after demand, is not an officer of society, so as to entitle them to preference under 33 G. 3. c. 54. s. 10. *Exp. Ashley*, *Exp. Corser*, 6 Ves. 441. S. P. *Exp. Ross*, id. 802.

#### 25. *Habeas Corpus.*

The statute 31 Car. 2. is in all its enactments to be construed with reference to applications under it. *Cronley's case*, 2 Swan. 68. S. C. Buck, 264.

31 Car. 2. c. 2. s. 3. extends to persons committed during term. *Id.* 69.

#### 26. *Infant Lessees.*

It was referred to the master to inquire whether the infant lessee was within the act of the 29 G. 2, and if he were, whether it was for his benefit to surrender the old lease and take a new one. *Exp. Swaine*, Dick. 749.

#### 27. *Infant and Lunatic Trustees.*

See 1 W. 4. c. 60. Appendix.

A trustee, who is in a state of mind which renders him incompetent to the management of business, may refuse to transfer within the meaning of the 36 Geo. 3. c. 90. s. 1, (6 Geo. 4. c. 74. s. 7). *West v. Ayles*, 1 Turn. & R. 330. **TRUSTEE REFUSING TO CONVEY.**

Infant trustee for sale is not within the stat. 7 Anne, c. 19, (but see 6 Geo. 4. c. 74) though the persons entitled to the produce of the sale are adult, and join

in the petition, semble. *Exp. Chastaney*, 1 Jac. 56. TRUSTEE FOR SALE.

Infant heir of messenger to whom in bankruptcy provisional assignment had been made, and who died before choice of assignees; held to be a trustee within 7 Anne, c. 19. *Exp. Carter*, 5 Mad. 81.

The costs of a committee of a lunatic, mortgagee requisite to enable him to reconvey to the mortgagor under the stat. 4 Geo. 2. c. 10, including the costs of the reference, are to be paid out of the lunatic's estate, whether the application be made by the mortgagor, or by the committee, which is the usual course. *Exp. Richards*, 1 Jac. & W. 264. LUNATIC MORTGEE; COSTS.

If the mortgagor be ready to pay the committee of a lunatic, mortgagee should apply for a reference under the stat., and it seems he would not be allowed to bring an action. *Id. ib.* MORTGAGE, REDEMPTION OF; LUNATIC.

Construction of the act 36 Geo. 3. c. 90. s. 3. directing the transfer, in certain cases, of stock standing in the name of a lunatic or his committee, not to extend to stock standing in the name of another, to which the lunatic is entitled as administrator. *Exp. Adams*, 2 Mer. 112. LUNATIC TRUSTEE; TRANSFER OF STOCK.

Costs of the committee of a lunatic trustee conveying within the statute, must be paid out of the lunatic's estate. *Exp. Brydges*, Coop. 290. CONVEYANCE; COSTS; LUNATIC.

Lunatic trustee to be within the 4 G. 2. c. 10, (see 6 G. 4. c. 74) must be without interest or duty; therefore having an interest as creditor, trust being for payment of debt, is not within the act. *Exp. Tutin*, 3 V. & B. 149. LUNATIC TRUSTEES.

Mortgagee is within the statutes 7 Anne, c. 19, as to infants, and 4 G. 2. c. 10, (6 G. 4. c. 74) as to lunatics, though entitled as co-executor and residuary legatee to the mortgage money; the discharge of the other executor leaving a naked trust. *Id.* 151. MORTGAGEE.

Infant trustee within the statutes 7 Anne, c. 19, (see 6 G. 4. c. 74) notwithstanding an interest as co-executor and co-residuary legatee, entitled to the mortgage money, the receipt and discharge of the other executor leaving the infant as mere trustee. *v. Handcock*, 17 Ves. 383.

Infant trustee within the statute 7 Anne, c. 19, (see 6 G. 4. c. 74) must be a dry trustee. *Id.* 384.

A lunatic abroad under a judicial proceeding in nature of a commission of lunacy, is not within the stat. 36 G. 3. c. 99. s. 3, (see 6 Geo. 4. c. 74) which repeals and re-enacts this stat. *Sylvia v. Da Costa*, 8 Ves. 316. LUNACY, COMMISSION OF; LUNATIC TRUSTEE; FOREIGN LAWS.

Estate in Ireland ordered to be conveyed by an infant mortgagee, under the statute 7 Anne. The order under the statute for the reference to the master, as well as that for the infant to convey, must be on petition, not on motion, see 6 G. 4. c. 74. *Evelyn v. Forster*, 8 Ves. 96.

The Id. Ch. and M. R. inclined to think the legal estate in mortgaged premises passed by a general residuary devise by the mortgagee to A, who was also executor, his heirs, executors, administrators and assigns for ever, on the side of his mother. A being nineteen, the Id. Ch. would not order him to join in conveyance, under the statute 7 Anne, c. 19, but ordered the money to be paid into the bank, *ex parte* the infant, and said, when he should come of age, it would be very reasonable that he should join. *Exp. Sergison*, 4 Ves. 147.

An infant mortgagee is within the statute, notwithstanding he may be beneficially interested in the mortgage money. *Exp. Bellamy*, 2 Cox, 422. INFANT MORTGAGEE.

An infant directed to convey charity estates to new trustees, under the act of 7 Anne, (6 G. 4. c. 74) he having nothing to do but to make such conveyance; but where infant has any duty to perform as such trustee, beyond the mere conveyance, the case is not within the statute. *Att. Gen. v. Pomfrit*, 2 Cox, 221.

Where trust to be executed vests in infant, he is not trustee within above act, but must be decreed to convey on suit for that purpose. *Riggs v. Sykes*, Dick. 400.

Infant trustee within 7 Anne, c. 19; purchaser to enjoy, and infant to convey, at full age. *Chandler v. Beard*, Dick. 392. S. P. *Exp. Benton*, Dick. 394.

Infant devisee of land charged with payment of money, is a trustee in equity, but not within the stat. 7 Anne, c. 19. *Anon.* 2 Eq. Ab. 521.

## 28. Irish Tenantry Acts.

The six months given to tenants to redeem, under the statutes of ejectment for non-payment of rent, are calendar months, and the day on which the *habere* is executed is not to be included in the calculation. Where a right would be divested, or a forfeiture incurred, by including the day of the act done, the computation will be made exclusive of it. *Dapling v. Foxall*, 1 Ball & B. 193. 196. COMPUTATION OF TIME; LANDLORD & TENANT.

The Irish stat. 6 Anne, c. 2, does not enable a man to maintain an action of covenant at law for breach of a covenant for removal, contained in a lease which had been registered pursuant to the said stat. against one claiming the reversion and inheritance of the demised premises, as assignee of the covenantor by deed, executed prior to the lease and covenant which was not so registered; but whether such an action might be maintained at common law, with the aid of the statute, *quære?* *Chandos v. Brownlow*, 2 Ridgw. P. C. 345. IRISH LEASE, COVENANT FOR RENEWAL.

An unregistered deed of 1728, purporting to convey the reversion of certain premises for value; held, not to be valid to defeat the operation of a registered covenant, for renewal in a lease of 1729. *Id.* 383.

The registration of a deed does not extend the covenants beyond their original import. *Id.* 415. LEASES IN IRELAND.

## 29. Land Tax Redemption.

The court will not declare the land tax on an estate to have been redeemed, merely for the benefit of a trustee for sale, and to supply an alleged defect of title, although such redemption has in fact taken place. *Exp. Sparkes*, 1 McClel. 518.

## 30. Leases by Tenant in Tail.

Stat. 32 H. 8. c. 28. s. 2. gives tenant in tail power only to make leases for three lives absolutely, but not for ninety-nine years determinable on three lives. *Glanville v. Payne*, 2 Atk. 40. S. C. Barn. 18.

## 31. Lunatic's Estates.

Sales of copyhold estates of a lunatic are not authorized by stat. 43 G. 3. c. 75. The stat. 59 G. 3. c. 80. s. 2. extends the power of sale to estates, held by ancient demesne or copy of court roll. *Exp. Birch*, 3 Swan. 98. COPYHOLD.

## 32. Marriage of Infants.

Forfeiture by stat. 4 & 5 Ph. & M. on a woman marrying under sixteen, is during her husband's life, and not during her own. *Ridley v. Wilson*, Amb. 73. MARRIAGE, FORFEITURE BY.

Application to approve of infant's marriage under 26 G. 2. c. 33. s. 12. testamentary guardian being abroad. *Blake v. Blake*, Dick. 459.

### 33. Mortgages.

See 1 W. 4. c. 60. Appendix.

The court will not interfere under the 7 G. 2. c. 20. upon an application by the mortgagor to compel the mortgagee to reconvey the mortgaged premises, where the right to redeem is disputed upon the affidavits. *Goodtitle v. Bishop*, 1 Y. & J. 344.

Where mortgagor becomes bankrupt, and bill is filed for foreclosure against him and his assignees: court will not on application of assignees alone make an immediate decree under 7 G. 2. c. 20. s. 2. *Garth v. Thomas*, 2 S. & S. 188. BANKRU.

On bill of foreclosure, defendant submitting to same decree as the plaintiff, according to the case made by the bill, would be entitled to at the hearing, may at any time stay all further proceedings in cause under 7 G. 2. c. 20. *Praed v. Hall*, 1 S. & S. 331. PR. STAYING PROCEEDINGS.

The stat. 7 G. 2. c. 20. as to mortgages, gives no new power to courts of equity. *Id. ib.* JURISDICTION.

No relief to a mortgagor under the stat. 7 G. 2. c. 20. the mortgagee being entitled to execution. *Anis v. Lloyd*, 3 V. & B. 15. EXECUTION.

Time enlarged for appearance to a bill of foreclosure, under stat. 5 G. 2. c. 25.; notice in the parish church having been prevented while under repair. *Knowles v. Broome*, 1 V. & B. 305. PR. APPEARANCE; ENLARGING TIME.

Mortgagor defendant to a bill of foreclosure, being in contempt, cannot obtain the reference on motion under the stat. 7 G. 2. c. 20. *Hewitt v. McCartney*, 13 Ves. 560. CONTENT; REFERENCE.

A charge in the bill that A was of a weak and feeble understanding, approaching almost to idiocy, was an allegation sufficiently precise (no demurrer being taken) to put in issue, that A was of insane memory, it being proved that A was incapable of managing himself or his affairs, he was held to be within the saving of the stat. 7 G. 2. c. 14. s. 8.; but this allegation would not have been sufficiently precise on a plea, nor on a bill, if demurred to: the heir of the mortgagor only takes advantage of the saving in sect. 8. of the stat. *Carew v. Johnston*, 2 Scho. & L. 280. PL. BILL. LUNATIC; MORTGAGE FORECLOSURE.

The stat. 7 G. 2. c. 14. enabling plaintiffs to proceed where defendants refuse to appear, does not apply to defendant's labouring under incompetency, as idiocy, &c. *Id.* 292. LUNATIC.

The nine months allowed by the stat. 8 G. 1. c. 2. s. 4. to a mortgagee of an evicted lessee to redeem, are calendar months. *Biddulph v. St. John*, 2 Scho. & L. 521. COMPUTATION OF TIME.

Under stat. 7 G. 2. c. 20. s. 2. the time for payment of money on mortgage, may be enlarged on usual terms. *Wakerell v. Delight*, 9 Ves. 36. PR. ENLARGEMENT OF TIME.

No order under 7 G. 2. c. 20. s. 2. the bill not being confined to mere foreclosure, but including also another subject. *Bastard v. Clarke*, 7 Ves. 469.

A reference under the stat. 7 G. 2. c. 20. must proceed upon admission of the principal and interest due upon the mortgage, and the master cannot admit evidence. *Huson v. Henson*, 4 Ves. 105. PR. EVIDENCE.

If a mortgage by the stat. becomes irredeemable, it will remain so in the hands of the assignee, though assigned in consideration of the principal, interest, and costs, due thereon. *Stofford v. Seiby*, 2 Vern. 590.

If a subsequent mortgagee redeems such mortgage, he shall hold the estate irredeemable. *Id. ib.*

If there are more lands in the second mortgage than in the first, that seems to be a case omitted out of the stat.; but the adding an acre or two shall not exempt it, for that may be a contrivance to evade the stat. *Id. ib.*

### 34. National Debt.

The court upon petition under the stat. 56 G. 3. c. 60., will direct stock, which has been transferred to the sinking fund, to be re-transferred to the petitioners, where their title is clear, without any reference to the master to ascertain who is beneficially entitled to the stock. *Exp. Nicholl*, 1 Turn. & R. 119. PR. RE-TRANSFER OF STOCK TRANSFERRED TO SINKING FUND.

### 35. Partition.

Partition between tenants in common and joint tenants by stat. 31 Hen. 8. extended by stat. 32 Hen. 8. to limited interests, for life or years; and the same right in equity by bill as at law by writ. *Baring v. Nash*, 1 V. & B. 555.

### 36. Popery.

By an act of parliament made in Ireland, 2 Ann., to prevent the further growth of popery, no person professing that religion can be the guardian of an infant; but such guardianship, where the person entitled to it is a papist, shall be disposed of by the court of Chancery in that kingdom, to some near relation of the infant, being a protestant, and one to whom the infant's estate cannot descend; but if there shall be no such protestant relation, then to some other proper person, who will use his utmost care to educate the infant in the protestant religion, until the age of twenty-one. *Preston v. La. Ferrard*, 4 Bro. P. C. 298. GUARDIAN.

A papist being tenant in tail, suffered a common recovery, and declared the uses to himself and his heirs; this is not a purchase within 11 & 12 W. 3. c. 4. Appeal of *Ld. Derwentwater*, 9 Mod. 172.

### 37. Property Tax.

The Property Tax Act, 46 Geo. 3. c. 65. s. 112 & 115., in declaring covenants to pay the same, void, has a retrospective operation; therefore, covenant entered into before the act passed, void. *Buxton v. Monkhouse*, Coop. 41.

### 38. Settlement of Poor.

In statute 3 W. & M. c. 11., the apparent meaning of the word "unmarried," is "not married at the particular time," contrary to its usual import. *Mabery v. Strode*, 3 Ves. 452.

### 39. Ships.

A ship being insured from London to Carolina, was taken by a Spaniard, and retaken by an English privateer, who carried her into Boston, where no person appearing to give security she was condemned and sold, and after the recaptors had their moiety, the residue remained in the court of Admiralty at Boston. Defendant brought an action at law on the policy and recovered, and plaintiff by his injunction-bill insisted, that defendant ought to have recovered no more than a moiety of the loss. The court refused the injunction, for as defendant had offered to relinquish the salvage, he was entitled to recover the whole money insured. By 13 Geo. 2. c. 4. s. 18., the recapture of a ship

is the revesting of the owner's property; so that it is doubtful whether the act can operate when insurances are made, interest or no interest. Salvage must be deducted out of the money recovered by the policy, if come to the hands of the assured. *Pringle v. Hartley*, 3 Atk. 195. INSURANCE.

#### 40. Stock Jobbing.

Under the act against stock-jobbing, the six months in the first section, means lunar months, and no discovery lies where the cause of action arose prior to the expiration of six lunar months. *Windale v. Fall*, 3 Bro. C. C. 11. TIME, COMPUTATION OF.

#### 41. Tenant in Tail, and Money to be laid out in Land.

Although fund of which person is tenant in tail, is subject to certain charges, court will under 39 & 40 G. 3. c. 56., order it to be transferred to tenant, after providing for charges. *In re. Id. Somerville*, 2 S. & S. 470.

The stat. 39 & 40 (i. 3. (Lord Eldon's act), does not apply to money paid into court in the matter of a lunatic. *Exp. Verney*, 1 Jac. 234. LUNATIC.

A special jurisdiction under an act of parliament must be strictly followed; therefore, under an act preventing the necessity of recovery by tenant in tail of land to be purchased, each party must petition. *Baynes v. Baynes*, 9 Ves. 462. JURISDICTION.

Under 39 & 40 G. 3. c. 56., authorizing payment of money (left to be laid out in land to be settled) to tenant in tail, the order was qualified in case he should be living on second day of ensuing term, and an inquiry was directed as to incumbrances. *Exp. Bennett*; *Exp. Dolman*, 6 Ves. 116. S. P. *Exp. Hodges*, id. 576.

#### 42. Traders.

See 1 W. 4. c. 47. Appendix.

Where legacies were charged on real estate of trader, and his devisee and executor sold part of the real estates before the debts were paid; held that purchaser, notwithstanding the 47 G. 3. c. 74. s. 12, was liable to see to application of purchase money. *Horn v. Horn*, 2 S. & S. 448. VENDOR & PURCHASER; APPLICATION OF PURCHASE MONEY.

The act of 47 G. 3. sess. 2. c. 74. applies only to persons who were traders at the time of their decease, and not to persons who have *bona fide* left off trade before they died; consequently the real estates of such latter persons are not subject to simple contract debts. *Hitchon v. Bennett*, 4 Mad. 180. REAL ESTATE.

Motion, by simple contract creditors of one who had been a trader, but ceased to be so, and was not a trader at the time of his death, for a receiver, upon affidavit before answer, refused, not being within the stat. 47 G. 3. sess. 2. c. 74. *Keene v. Riley*, 3 Mer. 436. DEBTOR & CRED.; RECEIVER.

#### 43. Uniformity.

The meaning of the act of uniformity is, that the party is to subscribe the declaration as soon as it is in his power. *Semble. Case of Queen's Coll.* 1 Jac. 29.

An Irish papist conforming any where out of Ireland, cannot purchase lands in that kingdom, before he had complied with the several requisites of the Irish acts of 2 and 8 Anne. *Carrol v. Vicars*, 5 Bro. P. C. 396.

#### 44. Usury.

If a mortgage be drawn for 5 per cent. and the mortgagee takes 6, it would be void on the word "take" in the 12 Anne, stat. 2. c. 16. s. 1. *Adlington v. Cann*, 3 Atk. 154. MORTGAGE.

#### 45. Witnesses.

Legacy to a subscribing witness to a will, though of personal property only, void under the stat. 25 G. 2. c. 26. extending to all wills and codicils. *Lees v. Somersgill*, 17 Ves. 608. LEGACY.

### STIPULATED DAMAGES.

Where a lease has been granted upon lives renewable for ever, with a *nomine pence* in case of the lessor's neglect to renew, equity will not decree the lessor to renew, except upon the terms of paying the penalty. *Donerail v. Chartres*, 1 Ridgw. P. C. 122. LEASE, RENEWAL OF.

Lesser covenants not to plough up, &c. and if he does, to pay 5*l.* additional rent per acre. Held to be stipulated damages, and equity no jurisdiction. *Rolfe v. Paterson*, 2 Bro. P. C. 436. COVENANT; JURISDICTION.

A made mortgage to B for 1769*l.* payable by five equal payments, within the space of five years, with interest at five per cent. But mortgagor covenanted, that if the money should not be paid at those times, or within three months after, he would, for every sum so unpaid, pay 8 per cent. interest, until actual payment. The money was not paid, and on bill of foreclosure, court decreed an account of the principal money and interest at 5 per cent. only: but on appeal decree was reversed, and mortgagor ordered to be charged with 8 per cent. interest from the end of three months after each payment became due. *Burton v. Slattery*, 5 Bro. P. C. 233. MORTGAGE; INTEREST, WHAT RATE.

Mortgagor reserving 6 per cent. with proviso to take 5 per cent. if paid within three months after due, if a great arrear, court will not relieve; *scous*, if but a small slip of time. *Brown v. Burkhart*, 1 P. W. 652. MORTGAGE; AGREEMENT; SPEC. PERP.

A mortgagee lends money at 6 per cent. and in the deed agrees to take 5 per cent. if it be paid within three months after it has become due; if the mortgagee fail to pay at the precise time, he must afterwards pay 6 per cent. *Jory v. Coz*, *Proc. Chan.* 160. AGREEMENT.

A mortgage is made with interest at 5 per cent. provided that if the interest be not paid within two months after due, then to pay 5*l.* 10*s.* This is in nature of a penalty, and the court will relieve against it; otherwise if 5*l.* 10*s.* per cent. be reserved originally, and to be lessened to 5*l.* per cent. if duly paid within two months after due. *Strode v. Parker*, 2 Vern. 316. PENALTY, RELIEF AGAINST; MORTGAGE.

Interest reserved at 5 per cent. but if not duly paid then to answer interest at 6 per annum; great arrear of interest; mortgagor decreed to pay but 5 per cent. the reservation at 6 per cent. being only as *nomine pence*. *Holles v. Wynn*, 2 Vern. 289. AGREEMENT; INTEREST, WHAT ALLOWED.

But where interest was reserved at 6 per cent., and if duly paid, then agrees to take 5 per cent., interest not duly paid, and court allowed 6 per cent. *Id.* 290. AGREEMENT; INTEREST.

In a lease for years of land, lessee covenants not to plough pasture land, and if he does, then to pay after the rate 20*s.* per annum, for every acre ploughed. The

court will not grant an injunction against the tenant's ploughing; for the parties themselves have agreed the damage, and set a price for ploughing; nor will court relieve the lessee against the penalty, if he ploughs. *Woodward v. Gyles*, 2 Vern. 119. LANDLORD & TEN.; INJUNC. AGAINST WASTE.

Mortgage at 5 per cent. with covenant to pay 6, on default of paying the interest within sixty days after due. If the interest is behind sixty days, the mortgage shall carry interest at 6 per cent. and the court will not relieve against it. *Marq. Halifax v. Higgins*, 2 Vern. 134. MORTGAGE.

## STOCK, DIVIDENDS AND TRANSFER OF.

See also BANKRY. XI. 1. (b). — CHATELAIN, PERSONAL — RE-CONVEYANCE, &c. — SOUTH SEA COMPANY.

Any court of equity may order the bank of England to suffer a transfer of such stock to be made, or to pay dividends belonging to, or standing in the names of any party to a suit, or issue an injunction, to restrain such transfer or payment, although the bank be not a party; court being satisfied by the certificate of the account of the said corporation, duly signed by him, that the stock is standing in their books in the name of the person required to transfer the same, &c. and that, after due service of a short order upon the said governor and company, &c. which shall contain no recital of their pleadings, or other matter, than the title of the cause, and the ordering part of such decree, or order, which respects the said governor and company, and for which the sum of 18s. and no more, shall be paid, like process shall issue, to enforce such order or decree, as to enforce them against any party to a suit depending in such court. 39 and 40 G. 3. c. 36. s. 1. On request of the clerk in court and solicitor of the party, the bank shall deliver a certificate stating the amount of such stock, or demand, &c. for which the fees therein specified shall be paid; act not to extend any further discovery than herein-mentioned, nor to any case where the bank claim an interest in the fund, and the bank may state their objection to any transfer by motion on petition. *Id.* s. 2. P.L. PARTY; BANK OF ENGLAND.

Ld. Ch. &c. may direct costs to be paid. 6 G. 4. c. 74. s. 16. COSTS.

Stock belonging to lunatics may, in certain cases, be ordered by Ld. Ch. &c. to be transferred. 6 G. 4. c. 74. s. 13. JURISDICTION; LUNATIC.

Where stocks standing in the names of persons declared lunatics, resided out of England, Ld. Ch. &c. may direct transfer and payment. 6 G. 4. c. 74. s. 14. *Id.* *ib.*

Indemnity to the bank, and other companies. 6 G. 4. c. 74. s. 16. INDEMNITY.

What persons shall be named in orders of court for making transfer. 6 G. 4. c. 74. s. 15. JURISDICTION.

The provisions aforesaid shall extend to the E. I. Comp. & S. S. Comp. where they have stock standing in their books which may become the subject of a suit in equity. 39 and 40 G. 3. c. 36. s. 4. SOUTH SEA COMPANY; E. I. COMPANY.

Surplus stock, arising from sales under the acts for the redemption of the land tax, will be ordered to be transferred to the party, who, if it were laid out in the purchase of lands, would be entitled to have the lands conveyed to him in fee. *In mrs. Fortescue*, 3 Russ. 128.

Where a testator, possessed of stock in the government fund, bequeaths it specifically, the bank cannot refuse to permit the executor to transfer it, he not hav-

ing assented to the legacy. The bank having, under these circumstances, refused to permit the executor to transfer, a decree was made against them, with costs. *Franklin v. Bank of England*, 1 Russ. 575. BANK OF ENGLAND; COSTS.

A testator directed his executors to invest a sum of money in the 3 per cent. stock, and bequeathed the stock to the treasurer of a charitable corporation in Scotland, in order that the dividends might be applied to the purposes of the charity. The court ordered the stock to be transferred to the corporation. *Emery v. Hill*, 1 Russ. 112. CORPORATION; CHARITY.

Bequest of money to trustees in trust, to invest in public funds, and pay dividends to A until marriage, and then to transfer stock to her, but in case she should die unmarried, then as she should appoint by will, and in default of appointment, to her executors and administrators. Semble, she is not entitled to have fund transferred, while unmarried. *Wilson v. Mount*, 2 S. & S. 493. WILL, C. OF.

Where bill is filed merely to obtain transfer of stock standing in name of trustee, who is out of jurisdiction of court, order must be made at hearing of cause, and cannot be obtained on petition. *Burr v. Mason*, 2 S. & S. 11. TRUSTEE; PETITION.

A married woman being entitled to an annuity of 200l. out of the dividends of 10,500l. 4 per cent. stock, which, subject to the annuity, was devisable amongst the children of herself and her husband, as he should appoint. Husband appointed 2,500l. to his eldest son. Court refused to order that sum to be transferred to the son, although the remainder would have been much more than sufficient to pay the annuity. *Bretton v. Ld. Clifdon*, 1 S. & S. 363. ANNUITY; HUSB. & WIFE.

Bank having notice of bill refused to permit transfer of stock, though no injunction. Ordered that they should permit transfer on a certain day, unless plaintiff obtained injunction in the mean time. *Ross v. Sherer*, 6 Mad. 1. BANK; P.R. INJUNCTION.

Dividends of bank stock being choses in action cannot be sequestered. *McCarthy v. Gould*, 1 Ball & B. 387. SEQUESTRATION; CHOSE IN ACTION.

The purchaser of a life interest in stock sold before a master, is entitled to a dividend becoming due on the day following the sale. *Anson v. Towgood*, 1 Jac. & W. 637. VENDOR & PURCH.; INTERMEDIATE PROFITS.

Under 36 G. 3. c. 90. (repealed and re-enacted by 6 G. 4. c. 74. which see), on proof that one trustee had become bankrupt, and absconded, and was abroad, and not likely to return; order was made that remaining trustee should transfer stock into name of himself and another as co-trustees. *Williams v. Bird*, 1 V. & B. 3. TRUSTEE; STATUTES, C. OF.

Trustees under a foreign will dead, and no personal representation taken out in this country, is a case for relief, by directing a transfer of stock, within the stat. 36 G. 3. c. 90. See 6 G. 4. c. 16. s. 79. 80. and 6 G. 4. c. 74. *Lee v. Bank of England*, 8 Ves. 44. STAT. C. OF; TRUSTEE.

Legacy of stock at a particular age; order made upon the petition of one legatee having attained the age, for a transfer of his share to his attorney. *Hill v. Chapman*, 11 Ves. 239. LEGATEE; P.R. ORDER.

Specific bequest of stock to the executrix for life, and after her death, to her daughter absolutely, at twenty-one; the bank resisting a transfer according to an agreement to relinquish the life interest, without the direction of the court, are entitled to costs. *Austin v. Bank of England*, 8 Ves. 522. P.R. COSTS; BANK OF ENGLAND.

The bank of England are not to look beyond the legal title to the trusts of the will, and therefore cannot prevent the executor from selling out or transferring stock into his own name. *Bank of England v.*

*Parsons*, 5 Ves. 665. BANK OF ENGLAND; EXECUTOR.

Stock ordered to be transferred under the statute 36 G. 3. c. 90. the trustee being of unsound mind, though no commission had issued, and having actually refused to transfer, the refusal proceeding from mere weakness of mind: *Simms v. Naylor*, 4 Ves. 360. LUNATIC TRUSTEE.

Where assignee has absconded, &c. bank ordered to honour the cheques of the remaining assignees. *Exp. Collins*, 2 Cox, 427. BANK OF ENGLAND; BANKCY. ASSIGNEES ABSCONDING.

Though a residue is specifically given, the bank has no right to restrain the executor from transferring the funds. *Bank of England v. Moffat*, 3 Bro. C. C. 260. BANK OF ENGLAND.

Bequest of stock to executor for life, remainder to M W, the executor having bought M W's reversionary interest, and the bank refusing to allow a transfer, the court ordered a transfer to be made accordingly, but nevertheless gave the bank their costs. *Pearson v. Bank of England*, 2 Bro. C. C. 529. S. C. 2 Cox, 175, but see note there. BANK OF ENGLAND; COSTS.

The question being, whether the plaintiff has a lien upon stock, the court will not order the bank to permit a transfer. *Birch v. Corbyn*, 1 Bro. C. C. 571. BANK OF ENGLAND; LIEN.

Injunction not granted to restrain transfer of stock until defendants have appeared, or are in contempt, and upon notice. *Doolittle v. Walton*, Dick. 442.

One is bound to transfer 300*l.* stock before the 30th of September, then next; though the stock was much risen, yet the defendant decreed to transfer the 300*l.* stock in specie, and to account for all dividends from from the time it ought to be transferred. *Gardner v. Pullen*, 2 Vern. 394. SPEC. PERF.

### STOCK-JOBGING.

See GAMBLING.—STAT. C. OF, II. 40.

### STOPPAGE IN TRANSITU.

Injunction to restrain the sailing of a vessel containing goods sold to a person who had become insolvent, but over which the plaintiff retained a right of stoppage *in transitu*, refused. A court of equity has not jurisdiction, in any case, to stop goods *in transitu*, semble. *Goodhart v. Lowe*, 2 Jac. & W. 349. INJUNC.; JURISDIC.

Application to quash a writ of replevin, issued to try the right to stop goods *in transitu*, refused. *Farrell v. Beresford*, 1 Ball & B. 328. PR. WRIT OF REPLEVIN.

Where consignee becomes insolvent, consignor has a right to stop the goods at any time before they come to his hands. *D'Aquila v. Lumbe*, 2 Eden, 75. S. C. Amb. 399. CONSIGNOR & CONSIGNEE.

Stoppage no payment at law nor in equity, unless under special circumstances, and in case of mutual demands where the balance only is the debt. *Jeffs v. Wood*, 2 F. W. 128. PAYMENT, WHAT A SUFFICIENT.

A, being beyond sea, consigns goods to B, then in good circumstances in London, but, before the goods arrive, becomes a bankrupt. If A can, by any means, prevent the goods coming into the hands of B or the assignees, it is allowable in equity; and B or the assignees shall have no relief in equity. *Wiseman v. Vandepuut*, 2 Vern. 203.

### SUBSTITUTION.

See LEGACY, VII.—PR. SALES, JUDICIAL, 6.—WILL, XI.

### SUNDAY.

Subpoena served on Sunday irregular, attachment and injunction therefore set aside before appearance on entering appearance with the register. *Mackreth v. Nicholson*, 19 Ves. 367. PR. SERVICE OF SUBPOENA.

Denial on Sunday is not an act of bankruptcy. *Exp. Preston*, 2 V. & B. 312. S. C. 2 Rose, 21. BANKCY. ACT OF.

Arrest under chancellor's warrant, for contempt of court, good on Sunday. *Exp. Whitchurch*, 1 Atk. 55. ARREST.

In the language of the court, bail are the gaolers of the principal; mesne arrest by them good, even on a Sunday. *Exp. Gibbons*, 1 Atk. 239. BANKCY. BAIL.

As to arrest under bankruptcy on Sunday. *Exp. Kerney*, 1 Atk. 54. BANKCY. ARREST IN.

### SUPPLICAVIT.

See PR. WRIT, 5.

### SUPPRESSION.

See DEEDS, IX.

### SURETY.

See also PR. RECEIVER, 4.—PR. WRIT, 4. (c). PRIN. & SURETY.

### SURPLUS.

See also BANKCY. IX.

Where there is a direction to sell land and pay debts, &c., there is no instance of holding surplus after that purpose answered, to form part of personal estate, so as to pass by residuary bequest. *Naughton v. Mason*, 1 V. & B. 416. TRUST TO PAY DEBTS; ADMON. OF ASSETS.

Devise of real estate to be sold; the object being a provision for legacies, is not an absolute conversion, and is therefore a resulting trust for heir at law as to surplus, though a receiving executor is appointed. *Perry v. Usher*, 11 Ves. 87. RESULTING TRUST; HEIR AT LAW; CONVERSION; WILL, C. OF; DEVISE TO SELL.

Testator bequeathed the residue of his personal estate, in trust to pay 12*l.* per annum to the schoolmaster of R, and to apply the surplus, if any, in the clothing and putting out apprentice two children of R, and one child of W; and he made no further disposition of it. The residue being more than sufficient for the specific purposes of the will, the surplus is not considered as undisposed of, but must be applied in increasing the number of the objects of the charity. *Att. Gen. v. Hurst*, 2 Cox, 364. S. C. nom. *Att. Gen. v. Winchelsea*, 3 Bro. C. C. 374. WILL, C. OF; CHARITY.

A makes a will, and his son executor, but makes

no disposition of the surplus: the son dies without proving the will. The surplus shall be distributed amongst the next of kin, at the death of the testator. *Bell v. Smith*, 2 Vern. 634. ADMON. OF ASSETS.

Land is devised to trustees to sell, and out of the money arising by the sale, amongst other sums, to pay 100*l.* to his heir at law; and no disposition is made by the testator of the surplus of his estate. The land shall not be turned into personal estate, nor more sold than is necessary to pay the legacy, and the heir shall have the surplus. *Randall v. Bookey*, 2 Vern. 425. PRE. CH. 162. S. C. LAND DEVISED FOR SALE; RESULTING TRUST; HEIR AT LAW.

Devise of express legacies to the executors, and also to the next of kin, and no disposition of the surplus, how the surplus shall go? *Bayley v. Powell*, 2 Vern. 361. S. C. GILB. EQ. REP. 22. PRE. CH. 92. S. C. WILL. C. OF; DISTRIBUTION.

If lands are appointed to pay debts, the heir is entitled to them when the debts are paid, and if to be sold, he is entitled to the surplus; but if there be any abuse, his remedy is against the trustee, and not against the purchaser. *Culpepper v. Aston*, 2 Ch. Ca. 115. *Sed quare*, if a purchaser with notice might not be affected. HEIR AT LAW; DEVISE TO PAY DEBTS; TRUST, RESULTING.

### SURRENDER.

See COPYHOLD, IX.—LEASE, IV.

### SURVIVORSHIP.

See also EXECUTORS, IV. 2.—HUSBAND & WIFE, III. 2. (a); III. 2. (c).—PARTNERS, IX.—PORTIONS, V.—POWER, II. RESIDUE.

A testator gave stock to trustees to be divided, after the death of the two persons who had life interest in it, among A, B, C, D, and E, in equal shares; and he directed, that if any of them should die without issue, before their respective shares should become payable, the share of him, her, or them, so dying without issue, should go to, and be equally divided among, the survivor and survivors of them. A died, leaving issue, who were living at the time fixed for the distribution of the fund; B died, leaving a son, who died, without issue, before the period of distribution; shortly afterwards, and also before the period of distribution, C died, without issue. Held, that B's personal representative was not entitled to any portion of the fund; that the one-third of B's share, which, on the failure of her issue, survives to C, did not, on C's death, survive to the other legatees, but was transmitted to her personal representative; that the words "survivor and survivors" were to be construed in their natural sense, and not as equivalent to "other and others;" so that no part of the share of B and C went over to A's personal representative. *Crocker v. Stone*, 3 Russ. 217. WILL. C. OF; INTEREST, VESTED.

Devise of real estate, to be sold after the death of tenant for life, and bequest of specific sums out of the produce to several grandchildren and a child, and of the residue to other children, to be respectively paid at twenty-one, or marriage. "But if any of my said children or grandchildren shall happen to die before the time of such legacy becoming due and payable, then I give and bequeath the share or part of such child or children, or grandchildren, so dying, into and among those that shall be then living, share and share alike." Two of the children died before the

testator: their shares are to be divided among the other children and grandchildren equally. Another child and a grandchild, having survived the testator, and attained twenty-one, died before the tenant for life: their shares transmissible to their representatives. No implication that the survivorship was to take place, amongst the children and grandchildren distinctly, from the inequality of legacies, or from the bequest to each class being made by distinct clauses. *Walker v. Main*, 1 Jac. & W. 1. WILL. C. OF.

Words of survivorship are to be referred to the period of division and enjoyment, unless the contrary intent be specially shown. *Cripps v. Woolcott*, 4 Mad. 11. WILL. C. OF.

Survivorship may take place among executors. *White v. Williams*, 3 V. & B. 72. S. C. COOP. 58. EXON.; RESIDUE.

Bequest to the children of A, who should be living at the testator's decease, equally with survivorship, in case of death, without leaving issue; if leaving issue, the issue to have the parent's share. The survivorship cannot be restrained to the period of the testator's death, as, upon the construction, the clause would be repugnant. *Shergold v. Boone*, 13 Ves. 370. WILL. C. OF.

If joint tenants of leasehold or freehold lay out money jointly upon it in the way of trade, there is no survivorship. *Lyster v. Dolland*, 1 Ves. J. 435. JOINT TENANT; TRADE; REAL ESTATE.

Testator leaves a reversion in trust for four, with survivorship; two died. The survived shares shall survive as well as the original shares, being in case of an aggregate fund. *Wardidge v. Churchill*, 3 Bro. C. C. 465. WILL. C. OF.

Where feme sole conveys stock to trustees, to use of intended husband and self for life, with power to dispose of part. This power survives to wife. *Horne v. Beauloes*, 9 Mod. 335. POWER; HUSBAND & WIFE.

Baron and feme brings a bill to redeem a mortgage; defendants plead to the bill, and the plea overruled, and costs given to the plaintiffs, which, by the course of the court, are 5*l.*: baron dies. The feme, by survivorship, shall have the costs. *Coppin v. —*, 2 P. W. 486. HUSB. & WIFE; PR. TAXED COSTS; ABATEMENT & REPAIR.

Bond given to a baron and feme; during coverture, baron dies. The bond will survive to the wife. *Id. ib.*

J devises lands to be sold for payment of his debts and legacies, and the surplus to be laid out in the purchase of other lands, to be settled on A and B, and the survivor of them and their heirs, equally to be divided between them, share and share alike. A died in the lifetime of the testator; and the question was, whether his moiety should descend to the testator's heir at law as a lapsed devise, or should go to B, the surviving devisee? Held, that the first part of the devise made A and B plainly joint-tenants; and therefore B, by survivorship, became entitled to the whole for life; but that the inheritance being devised to them as tenants in common, one moiety having lapsed by A's death in the lifetime of the testator, shall descend to the testator's heir at law, expectant on the death of B, and that the other moiety shall go to the heir of B. *Barber v. Gyles*, 3 Bro. P. C. 104. WILL. C. OF, WHAT ESTATE; ESTATE, JOINT TENANCY; ESTATE, TENANCY IN COMMON.

A devises the surplus of his estate to his two nephews, equally to be divided between them, and appoints his executors to lay out for their benefit. One of them died in the testator's lifetime. The whole decreed to the survivor, not to the executors, the testator not intending them any benefit. *Cock v. Burris*, 1 Vern. 425. WILL. C. OF.

A gives 500*l.* to his executors on trust to pay an-



nunities to B & C for their lives exceeding the interest of the 800l., and gives the surplus to D and E. The annuitants being dead, the 800l. shall go to the residuary legatee, and not to the executors. *Cock v. Burdick*, 1 Vern. 425. **WILL, C. OF.**

Two persons occupy and stock a farm jointly. There shall be no survivorship. But if two take a lease jointly of a farm, the lease shall survive. *Jeffereys v. Small*, 1 Vern. 217. **PARTNERSHIP.**

Not necessary in articles of copartnership arises, there-  
vide against survivorship. *Id. ib.* as much attendant  
Where two are jointly interested in a husband's life upon  
survivorship takes place: otherwise, not either heir or  
dertaking in the way of trade. *Id. ib.* **WILL.**

**SUSPENSION.**

See POWERS, XI.

variation without  
term attendant,  
incumbrances.  
INCUM-

pro-

**TACKING SECURITIES.**

See MORTGAGE, IV. 2.—PRIORITY OF SECURITIES,  
II. 2.

**TAXATION.**

PR. COSTS, 9.

**TAXES.**

See LEGACY DUTY.—LAND-TAX.

**TENANT.**

See LANDLORD AND TENANT.

**TENANT AND TENANCY IN COMMON.**

See ESTATE, VII.—PL. PARTIES, 8.—PR. RE-  
CEIVER, 2. (f).

**TENANT AND TENANCY IN TAIL.**

See ESTATE, II.—PL. PARTIES, 20.

**TENANT AND TENANCY FOR LIFE.**

See PL. PARTIES, 20.

**TENANT IN TAIL AND REMAINDER-MAN.**

See ESTATE, II. 2. (c).

**TENANT FOR LIFE AND REMAINDER-MAN.**

See ESTATE, III. 3.

**TENANT BY CURTESY.**

See ESTATE, III. 5.

**TENANT IN TAIL AFTER POSSIBILITY, &c.**

See ESTATE, III. 4.

**TENDER.**

See also MORTGAGE, IX. 1.—PR. COSTS, 2. (c); 5.

Where defendant in tithe cause sets up modus, and is desirous of protecting himself from costs, he should move for an order that plaintiff accept sums admitted to be due by answer, or proceed at peril of costs, and

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court will notice such tender by minute. The motion may be made without notice, or payment of money into court. *Davis v. Moseley*, 9 Pri. 211. **MODUS**; **PR. COSTS**; **PR. PAYMENT INTO COURT.**

In creditor's suit, the plaintiff's solicitor having refused to attend accountant-general with master's report, unless a contribution was made to him of one shilling in the pound; on motion, he being ordered to attend, on payment to him of 6s. 8d. each creditor, and his claims disallowed, the costs thereof were allowed to such as had tendered him the 6s. 8d. but not otherwise. *Shortley v. Selby*, 5 Mad. 448. **PR. COSTS.**

Answer stating tender before suit, but not proved, will not save costs. *Milnes v. Davison*, 3 Mad. 374. **PL. ANSWER**; **PR. COSTS.**

In the case of a tender, if the party to whom it is to be made, says, "You need not make a tender to me, as I will not accept it;" it is considered as made. *Wallis v. Glynn*, 19 Ves. 380. **S. C. COOP.** 284.

Tender of payment by mortgagor to agent of mortgagee, and refusal to accept, and twenty-four years thereafter suffered to elapse without demand from mortgagee of principal or interest; payment of principal or interest for whole, decreed under the circumstances. *Mende v. El. Bandon*, 2 Dow, 268. **MORTGAGE**; **LENGTH OF TIME.**

Circumstances may make that amount to a tender in equity, which was not pleadable as such at law, e.g. a tender in bank notes during the restriction, as to the issue of cash, sensible. *Biddulph v. St. John*, 2 Scho. & L. 534.

After an assignment of a mortgage, payments to the mortgagee, with notice, must be allowed by the assignee; the registry, the premises being in Middlesex, is not notice for this purpose. Tender after the bill filed, of the balance, deducting the payments to the mortgagee, with costs, deprived the assignee of subsequent costs. *Williams v. Sorrell*, 4 Ves. 389. **REGISTRY OF DEEDS**; **NOTICE**; **COSTS**; **MORTGAGE**; & **MORTGAGEE.**

Bill for tithes; modus set up as defence. Motion by defendant to pay up arrearages of modus, with costs, up to time, refused. But plaintiff proceeding and then abandoning suit, costs, after tender, allowed to defendant. *Dean, &c. of Bristol v. Donisthorpe*, 1 Aust. 272. **COSTS**; **TITHES.**

Interest on mortgage, not stopped, but on a proper tender and notice. *Garforth v. Bradley*, 2 Ves. 678. **INTEREST ON MORTGAGE MONEY.**

Right to principal and interest generally carries costs. *Gannon v. Stone*, 1 Ves. 339. Tender must be very express and formal to prevent costs. *Id. ib.* **PR. COSTS.**

Where covenants are inserted in a deed of assignment on the part of a mortgagee, he may refuse to take the principal and interest, though tendered, till he had advised with his attorney on the safety of executing the assignment, being entitled to reasonable time. *Wiltshire v. Smith*, 3 Atk. 89. **S. C. 9 Mod. 441. MORTGAGE**; & **MORTGAGEE.**

As to a tender of mortgage money, there ought to

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no disposition of it of paying it in, and if the tender proving the will stop interest, the money must be amongst the next at time, because the party is to be *Ball v. Smith*, six months' notice given to pay. Land is devised, money at 11, though this be money arising by condition in the proviso of the deed; 100l. to his heir was lent in town, and no objection by the testator, no reason for a personal tender, or shall not be made carry a great sum to a person in the than is *Cyles v. Hall*, 2 P. W. 378. MORTGAGE. *Hayes* a bill for tithes defendant does not shew a previous tender, or make one by his answer, plaintiff shall have an account; if the tender be only by answer, defendant should account, with costs; but if made before, he shall save his costs. *Anon.* Bunb. 28. That a tender may be made after answer. Vide *Bp. Exeter v. Trenchard*, id. 47. TITHES; PR. COSTS.

If the mortgagor tenders the money to the mortgagee, and he refuses it, his interest shall cease from that time, and he ought not to keep the pledge. *Manning v. Burgess*, 1 Ch. Ca. 29. MORTGAGE; INTEREST, WHEN PAYABLE.

### TERMS.

See also ESTATE, IX. 2.—MERGER.

#### I. LIMITATION OF.

##### II. TERMS ATTENDANT.

###### 1. Nature of.

###### 2. When attendant by implication.

###### 3. When, and against what, a protection.

##### III. TRUST TERM, EFFECT OF MARRIAGE ON.

#### I. LIMITATION OF.

Term settled in trust for wife, if she should so long live, and after her decease, in trust for her husband, if he should so long live, and after his decease, in trust for the heirs of the body of the wife by the husband, their executors, administrators and assigns, and for default of such issue, remainder over. The husband died, never having had any issue, and the wife survived him: Held, that the term was not vested in the wife, and that the words heirs of the body were not words of limitation but purchase; and the lease was directed to be deposited in court for the benefit of all parties. *Hodgeson v. Bessey*, 2 Atk. 89. S. C. 9 Mod. 236. DEEDS, C. OF.

Words of limitation are improperly used in terms for years. *Id. ib.*

Heirs of the body here means the heir of the body living at the death of the husband, or born in a reasonable time after. *Id.* 92.

A, seised in fee, devises to B, his executors, &c. for ninety-nine years, in trust for himself and his wife for their lives, and the lives of the survivor, and after the death of the survivor, in trust for the heirs of their two bodies; and in default of such issue, then in trust for the heirs of the body of the husband; and in default of such issue, then in trust for the heirs of the survivor of the husband and wife. Husband and wife have issue a son, and the husband dies, and then the son dies in the lifetime of the mother, without issue: the mother administers to her husband and son, and assigns the term to the defendant. Decreed, her assignee well entitled, and that the term should not go to the heir of the husband as attendant on the reversion. *Hayter v. Rod*, 1 P. W. 360. WILL, C. OF. A, on his marriage, assigns a term for 1000 years, in trust for himself for life, remainder to his wife for life, remainder to the heirs of the body of the husband and wife, remainder to the husband's right heirs; the wife dies, leaving issue; the whole term vests in

the husband, and he may assign it. *Webb v. Webb*, 1 P. W. 132. 2 Vern. 668. SETTLEMENT, C. OF.

Term of years cannot be limited so as to create a perpetuity. *Fletcher's Case*, 1 Eq. Ab. 193. PERPETUITY.

Term *pur autre vie* may be limited to one and his heirs, and may be entailed and descend, though a term for years cannot. *Finch v. Tucker*, 2 Vern. 184. ESTATE *PUR AUTRE VIE*; LIMITATION.

The trust of a term cannot be entailed. *Ireland v. Payne*, Pollexfin, 25. ENTAIL.

#### II. TERMS ATTENDANT.

##### 1. Nature of.

##### 2. When attendant, by implication.

##### 3. When, and against what, a protection.

#### 1. Nature of.

Owner of an estate may sever a term assigned to attend the inheritance. *Willoughby v. Willoughby*, Ambl. 282. SEVERANCE.

Assignment of an *interesse termini* on the circumstances of the case, considered as an assignment to attend the inheritance. *Saltern v. Melhuish*, Ambl. 249.

A term attendant upon inheritance is part of it, and shall not be severed from it, nor can it pass without it. *Villiers v. Villiers*, 2 Atk. 72.

Term attendant is liable for king's debts. *How v. Nicholl*, Proc. Chan. 125. S. C. 2 Vern. 389. CROWN.

Tenant by curtesy shall have the aid of equity against a trust term, assigned in trust to attend the inheritance. *Snell v. Cloy*, 2 Vern. 324. TENANT BY CURTESY.

A term vested in trustees is not assets to pay debts; otherwise, if the term be in the party himself, and the inheritance in trustees. *Thurston v. Att. Gen.* 1 Vern. 341. EQUITABLE ASSETS.

#### 2. When attendant by Implication.

Devise to trustees for 99 years upon the trusts hereinafter expressed, and from and after the expiration or other sooner determination of the said term, in strict settlement; the term, no trust being declared, decreed to attend the inheritance, according to the limitations of the will, and no resulting trust for the heir upon the apparent intention to devise immediate estates subject to the term, not future estates expectant on its determination. *Sidney v. Shelly*, 19 Ves. 352. S. C. Coop. 206. WILL, C. OF; HEIR AT LAW; TRUST, RESULTING.

Where the term and freehold would, if legal estates, merge, being vested in the same person, the term in equity in such case is construed to attend the inheritance, unless there be a declaration or other act to evince an intention to sever them. *Kelly v. Power*, 2 Ball & B. 253. MERGER.

Where term would merge by its union with the inheritance in the same person, if he has in the one the legal, and in the other the equitable estate, the term will attend the inheritance. *Capet v. Girdler*, 9 Ves. 509. MERGER.

When purposes of trust of a term are satisfied, the term belongs in equity to the owner of the inheritance; whether declared by the original conveyance to attend the inheritance or not. *Maunderell v. Maunderell*, 10 Ves. 270.

Purchase of the fee simple in the name of the purchaser, and of terms in the name of a trustee, with an intervening reversion of eleven days, and a reservation of rent, &c. to the vendors, the terms are terms

in gross not attendant upon the inheritance. *Scott v. Fenhoulliet*, 1 Bro. C. C. 69.

A, possessed of a term of 500 years in B. acre, afterwards purchases the fee simple in C's name, and devises B. acre to J in fee; but the will is not attested by three witnesses; the term shall not pass, because attendant on, and part of the inheritance. *Whitechurch v. Whitechurch*, 2 P. W. 236. Gilb. Rep. 168. 1 Stra. 619. S. C. 9 Mod. 124. WILL, EXECUTION OF.

A woman who is *cestui que trust* of a term, having the inheritance in her; marries and dies; the term shall attend on the inheritance, and not go to the husband as administrator of the wife. *Best v. Stampford*, 2 Vern. 520. Prec. Chan. 252. 1 Salk. 164. 2 Freem. 288. S. C. better reported. ADMON. OF ASSETS; HUSB. & WIFE.

Term raised for a particular purpose, when that purpose is answered, the term shall be in trust for the heir. *Levet v. Needham*, 2 Vern. 139. RESULTING TRUST; HEIR AT LAW.

A man purchases land, and takes the fee in his own name, and an assignment of a term in a trustee's name, the term shall attend the inheritance, though not said in the assignment it should do so. *Tiffin v. Tiffin*, 1 Vern. 1. S. C. 2 Ch. Ca. 49. 55. S. P. *Dowse v. Percival*, id. 101. CONVEYANCE.

The custom of London shall not prevail at the attendance of a term on the inheritance. *Id.* 1 Vern. 2. CUSTOM OF LONDON.

The attendancy of terms on the inheritance is regulated by the discretion of the courts. *Nurse v. Yerworth*, 3 Swan. 612.

### 3. When and against what a Protection.

See also MORTGAGE, IV. 2.—PRIORITY OF SECURITIES, II. 2.—PR. INJUNE. 16.

An attendant term having become vested in the wife of the owner of the inheritance, as the administratrix of the trustee, and her husband becoming bankrupt, his assignees agree to sell the estate, and file a bill for specific performance of the agreement, pending which suit the husband dies; held, that the widow was not entitled to dower; that she was to assign the terms of the purchaser; and that he was bound to accept the title. *Mole v. Smith*, 1 Jac. 498. DOWER; ASSIGNMENT OF TERM; VEND. & PURCH.; TITLE.

Right of mortgages to the benefit of a term attendant on the inheritance, though the term was not assigned, nor the inheritance conveyed to them. *El. Buckinghamshire v. Hobart*, 3 Swan. 201. MORTGAGE.

Subsequent incumbrancer cannot protect himself by a satisfied term against a prior incumbrance, unless in some sense got in either by an assignment, or making the trustee a party to the instrument, or taking possession of the deed creating the term, nor if he has notice before he pay his money; distinction upon that as to the dowress upon no principle, but established by practice. *Maunderell v. Maunderell*, 10 Ves. 271. PRIORITY OF SECURITY.

At law all terms are considered terms in gross, and therefore, without regard to purpose, prevent dowress from any legal benefit from recovery in dower; as she recovers with stay of execution during the term; but equity regards the purpose for which the term is created and subsists; and if only for the benefit of the owner of the inheritance it is considered part of inheritance, not absolutely merged, but so attendant as to accompany it, and every right and interest growing out of it by operation or agreement: not to be used, therefore, against the owner of the whole or any part of the inheritance; every description of ownership having a use in the term commensurate with the in-

terest in the inheritance: when dower arises, therefore, the term in a proportion is as much attendant upon that interest as during the husband's life upon the inheritance, and protects it against either heir or purchaser. S. C. 7 Ves. 577. DOWER.

Purchaser for valuable consideration without notice, by taking an assignment of a term attendant, may protect himself from mesne incumbrances. *Willoughby v. Willoughby*, Amb. 282. INCUMBRANCES; VEND. & PURCH.

An attendant term is a creature of equity to protect real estates, and keep them in their right course. *Id.* 283.

At law there is no difference between an attendant term and a term in gross. *Id. ib.*

Before stat. 21 H. 8. tennor was in power of the owner of the freehold; since then the tennor in trust is affected as the owner of the inheritance shall think fit. *Id. ib.*

A *bond fide* purchaser without notice, if the term is in a trustee, may use it to protect or recover the possession; so if the term is in himself. *Id. ib.*

The term will protect against all intermediate incumbrances. *Id.* 284.

Defendant purchased a real estate of plaintiff's husband, and the estate being in mortgage for a term, it was paid off out of purchase money, and the term assigned to a trustee for the purchaser to attend the inheritance. Several years after husband's death, she brought her bill against defendant for an account of profits, and to be paid her dower. Sir T. Abney decreed dower, but *Id.* Chancellor reversed decree, and dismissed bill without costs. *Hill v. Adams*, 2 Atk. 208. DOWER, BAR OF.

Since the case of *Radnor v. Vandebendy*, it has been a settled rule, that if purchaser have taken a term precedent to the right of dower, be it a satisfied one or money for it, it is a bar to the wife's dower; but if the mortgage had subsisted at the husband's death, the wife might have redeemed, and been entitled to dower; or if he had paid it off, and taken an assignment of the term to attend the inheritance, and died seised, the wife would have been endowed. *Id.*

A dowress shall have the benefit of a trust term against an heir or devise, but not against a purchaser. *Banks v. Sutton*, 2 P. W. 707. See as to this case, Sugd. Vend. & P. 451. 7th edit. DOWER.

Whether a dowress shall be relieved in equity against a term for years. *Williams v. Wray*, 2 Vern. 689. S. C. Prec. Chan. 151. 1 P. W. 137. *Id.*

A purchaser of a man who had committed an act of bankruptcy, but without notice thereof; afterwards a commission is taken out, and there being a term standing out in trustees, the assignee brings a bill against them and the purchaser to have the term assigned to him: bill dismissed. *Wilder v. Bodington*, 2 Vern. 599. VEND. & PURCH.; BANKCY. ASSIGNMENT.

A purchaser without notice shall not be hurt in equity, not only where he has got a prior legal title, but where he has a better right to call for the legal estate than another who has obtained an incumbrance prior to his title. *Id. ib.*

A court of equity will not assist a dowress who has had judgment at law with a *cessit executio* in removing a trust term. *Brown v. Gibbs*, Prec. Chan. 97. DOWER.

Where lands escheat to the king, he shall have the benefit of a term to attend the inheritance. *Bodmin v. Vandebendy*, 1 Vern. 357. S. C. Prec. Chan. 65. 2 Ch. Ca. 172. ESCHEAT.

In *Att. Gen. v. Sands*, Hard. 488. 2 Freem. 129. 3 Ch. Rep. 33., it was held, that the trust of a term attending on the inheritance was not forfeited by the felony of the *cestui que trust*, because it was no more

than an accessory, to the inheritance, which was not forfeited. It is not denied however, that where a term is attendant on the inheritance, and the king extends the inheritance, he shall have a right to the term. *Nicholls v. How*, 2 Vern. 389. FELONY; FORFEITURE.

### III. TRUST TERM, EFFECT OF MARRIAGE ON.

Upon the question as to equity of a married woman, against an assignment of her separate interest by her husband for valuable consideration, whether the assignee has a more favourable case, where the object is a trust of a term for years, *querre?* *Franco v. Franco*, 4 Ves. 528. HUSB. & WIFE, SEPARATE ESTATE; ASSIGNMENT FOR VALUABLE CONSIDERATION.

Though a feme sole, *cestui que* trust of a term, shall have the term for her separate use, if she marries without any previous agreement with her husband, yet the husband may dispose of it for a valuable consideration after marriage, and it shall be good in equity as well as if he had had the term in herself and had married. *Sanders v. Page*, 3 Ch. Rep. 223. HUSB. & WIFE.

A term assigned in trust for the feme before marriage, without the knowledge of the husband, may be disposed of by the husband. *Pitt v. Hunt*, 1 Vern. 18. 2 Ch. Ca. 73. S. C. S. P. *Turner's Case*, 1 Vern. 7. HUSB. & WIFE.

A trust term is not merged in equity by the marriage of the trustee to a woman entitled to the freehold. *Thorn v. Newman*, 3 Swan. 603. MURGER.

### TESTAMENTARY GUARDIAN.

See GUARDIAN & WARD, II, 2.

### TIMBER, TREES AND UNDERWOOD.

See also PR. INJUNCTION, 23.

Tenant for life, without impeachment, restrained from cutting timber, planted or left standing for ornament; and whether ornamental or fanciful; the protection extending beyond the mansion-house to rides through a wood at a considerable distance; but not to the whole wood, to prevent cutting other parts for repairs and sale. *Wombrell v. Belhouse*, cited note, 6 Ves. 110 a. 2nd Edit. INJUNC. WASTE.

Wood springing from the roots or stools of trees is titheable, and neither its own age, nor the age of the trees from the roots or stools of which it sprung, will exempt it. *Chichester v. Sheldon*, 1 Turn. & R. 245. TITHES.

Court will restrain cutting underwood of insufficient growth. *Brades v. Stephens*, 6 Mad. 279. WASTE.

Where there is infant tenant in tail in possession, court will authorize cutting of all timber fit to be felled; but where there is tenant for life impeachable for waste, with remainder over, court will only authorize cutting of timber, where interest of succession requires it. *Hussey v. Hussey*, 5 Mad. 44. TENANT FOR LIFE AND IN TAIL.

Injunction to restrain mortgagor from cutting timber, not granted; unless security be insufficient or scanty without timber. *Hippesley v. Spencer*, 5 Mad. 422. MORTGAGE; INJUNCTION.

Devise of real estate to M for life, and direction "that the timber or wood which should be on his real estates, should from time to time be used for repairing the houses thereupon, or otherwise for the benefit and

advantage of his estate, or that the same should be sold, and the money arising therefrom should be applied," &c. Held, devise to M, carried the underwood, and that trustees leaving sufficient timber for repairs might cut all fit timber, except ornamental. *Butler v. Barton*, 5 Mad. 40. WILL, C. OF.

A mortgagee is entitled to an injunction to restrain a mortgagor in possession from cutting down timber, if the land without it, is a scanty security. It may be extended to cutting down underwood contrary to the usual course of husbandry, but not to underwood generally, although the mortgagor is insolvent. *Humphreys v. Harrison*, 1 Jac. & W. 581. MORTGAGOR & MORTGAGEE; INJUNC. TO STAY WASTE.

Chapter not being entitled to fell timber on the Deanery lands, except for the purpose of repairs, a lease granted by them of certain "woods, groves, hedge-rows, and springs," was construed not to include the right of felling timber; and a bill by the lessee for an account of timber felled during the lease by the lessors, was dismissed with costs. *Herring v. Dean &c. of St. Paul's*, 3 Swan. 492. LANDLORD & TENANT; ACCOUNT.

Timber on the estates of ecclesiastical corporations, is a fund for the benefit of the church. *Id.* 509. ECCLESIASTICAL CORPORATION.

Whether timber is intended for ornament, &c. by deviser of tenant for life, is to be proved from his conduct concerning it. *Lushington v. Bolders*, 6 Mad. 149. WASTE.

Ornamental timber, though decayed and injurious to other trees, is not to be cut unless essential to objects of such deviser. *Id.* *ib.*

A tenant for life, without impeachment of waste, not restrained from felling trees fit for the purposes of timber, though young and not such as would be felled in a course of husband-like management of the estate. *Smythe v. Smythe*, 2 Swan. 251. TENANT FOR LIFE.

Right of a tenant entitled to a life interest in a term of years, unimpeachable of waste, to fell timber for his own benefit. *Sir Samuel Bridges v. Stephens*, 2 Swan. 150. *Id.*

Tenant for life, without impeachment of waste, further than wilful waste, entitled to the interest of money produced by the sale of decaying timber cut by order of court. As to any further claim, a question at law. *Qu.?* The capital laid out in real estate to be settled to the same uses. *Wickham v. Wickham*, 19 Ves. 419. S. C. Coop. 288. *Id.*

Generally, if there is no custom for the tenants of a manor to cut timber, it belongs to the lord. *Whitechurch v. Hotworthy*, 19 Ves. 214. COPYHOLD.

It seems there may be, as to timber on copyhold premises, what may exist unquestionably as to mines, a custom that the lord cannot take without consent of the copyholder, and *vice versa*. *Id.* *ib.*

Copyholder may by custom have such an interest in the timber, that he may himself cut; so he may a special interest to prevent the lord's cutting; but such a custom ought to be proved by extremely strong evidence. *Id.* *ib.*

Devise in strict settlement, with a clause of forfeiture by cutting any trees. Upon a bill by the infant remainder-man in tail, an inquiry was directed, whether any trees, in the park, not ornamental, or affording shelter to the mansion-house, are proper to be felled; and whether it would be for the benefit of all parties interested, that they should be felled, and sold; and the money laid out in other estates, to be settled to the same uses. *Delapole v. Delapole*, 17 Ves. 150. WILL, C. OF; PR. INQUIRY BEFORE MASTER.

Settlement, on marriage, of lands of the husband to the use of husband for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the wife for life, for her jointure, and in bar of dower; remainder to the first

and other sons of the marriage in tail male; remainder to the daughters in the same manner; remainder to the heirs of the body of the husband and wife. The husband being dead without issue, as to the right of the widow to cut timber, and which would be a consequence to the property in it, when severed, as tenant in tail after possibility of issue extinct, either in possession, by the effect of merger, if the estates can unite, or if not, in remainder, *Qu?* A case directed. *Williams v. Williams*, 15 Ves. 419. WASTE; SETTLEMENT, CONSTRUCTION OF.

Settlement of estates on trustees and their heirs, during the joint lives of W II and his wife, without impeachment of waste, upon trust, out of the rents and profits, to pay all expenses and outgoings, and to raise and pay a sum by way of pin money to the wife, and subject thereto to pay the clear residue of the rents, &c. to W II, during the lives of himself and his wife; remainder to W II for life, without impeachment of waste; remainder over; with power for the trustees to sell and lay out the produce in the purchase of other lands to the same uses; the land being sold under the power, W II was held entitled to the produce of timber cut down by him previous to the sale, not to the value of timber then standing. *Wolf v. Hill*, 2 Swan. 149. SETTLEMENT, C. OF.

Where there is an executory devise out of a legal estate, this court will not permit the estate to be cut, more especially in the case of a trust estate. *Stansfield v. Habergam*, 10 Ves. 278. INJUNCTION TO STAY WASTE.

Injunction against cutting ornamental timber, confined to timber standing for ornament, or shelter; the court refusing to extend it by inserting the words, "contribute to ornament." *Williams v. McNamara*, 8 Ves. 70. *Id.*

Injunction granted to restrain tenant for life, without impeachment, from cutting timber and other trees, planted, &c. for ornament, &c., and from cutting, except in husband-like manner. *Ld. Tancorth v. Ld. Ferrers*, 6 Ves. 419. INJUNCTION, WASTE.

Injunction granted to restrain tenant, not impeachable for waste, from cutting chumpns of trees for ornament, two miles from house. *Marg. of Downshire v. Ld. Sandys*, 6 Ves. 107. INJUNC. WASTE, ORNAMENTAL TREES, &c.

A, tenant for life; remainder to his sons successively in tail male; remainder to B for life, and to her sons in the same manner, the trustees to preserve contingent remainders. A, being also seized of the reversion in fee, cut and sold before the birth of a son in tail; afterwards B had a son, who died soon after his birth, and another son who survived A; the produce of the timber was decreed to be laid out in the funds during the life of A, and upon his death, without having had a son, was decreed to be laid out in land, to be settled to the uses of the estate upon which the timber was cut. *Poulett v. De. Bolton*, 3 Ves. 374. TENANCY FOR LIFE; ACCOUNT.

Ld. Ch. thought, that notwithstanding the words of the stat. 17 Ed. 2. st. 1. c. 9, 10., the court has authority to order timber decaying on the estate of a lunatic to be cut, but did not absolutely decide the point, or whether the produce should be considered as real or personal estate, directing the point to be argued on a bill filed. *Exp. Bromfield*, 3 Bro. C. C. 510. Vide S. C. 1 Ves. J. 453. JURISDIC. LUNACY; ADMIN. OF ASSETS.

Tenant for life has no property in the underwood till his estate comes into possession; therefore, cannot have an account of what was cut wrongfully by a preceding tenant. *Pigot v. Bullock*, 1 Ves. J. 479. S. C. 3 Bro. C. C. 509. TENANT FOR LIFE; ACCOUNT.

A, tenant for life, without impeachment for waste, with power to sell, if he sells, is not entitled to the produce of the timber on the estate. *Doran v. Wiltshire*, 3 Swan. 699. TENANT FOR LIFE.

Bill, by tenant in tail in reversion, to have timber cut, ordered; and that the money be laid out in the funds, and the claim discussed, when tenant in tail of age. *Mildmay v. Mildmay*, 4 Bro. C. C. 76. REVERSIONER.

Tenant for life, punishable for waste, with power under an inclosing act, to mortgage for the expense of the inclosure, felled timber and applied the produce instead; decreed to account to owner of next estate of inheritance. *Lee v. Alston*, 1 Ves. J. 78. 3 Bro. C. C. 37. S. C. TENANT FOR LIFE; ACCOUNT.

Devise of real estates to A and B, and their heirs, to the use of them, and their heirs, in trust to permit C to receive the rents and profits for life, and after her decease to stand seised of the same premises, in trust for the second son of D, and the heirs male of his body; remainder in trust for the third, fourth, and other sons of D in tail male; remainder in trust for E for life, without impeachment of waste; remainder to trustees to preserve, &c.; remainder to the first and other sons of E in tail male, &c.; proviso, that in case there should not be a second son born, the said trustees should pay the rents and profits of the said estates to such person as was next in remainder, and should be entitled to receive the same in case no son should be born. C having cut timber, this was sold under an order of the court, and the produce paid into the bank. At C's death, D had no son, and E was dead, leaving F, his eldest son. The produce of the timber belongs to F absolutely, and shall not abide the event of D's having a son. *Dare v. Hopkins*, 2 Cox, 110. WILL, C. OF.

T D provided by a codicil to his will, that his wife whom he had made a tenant for life, might cut timber for her own use and benefit at seasonable times; what timber the tenant for life shall be restrained from cutting, *qu?* *Chamberlayne v. Dunmer*, 1 Bro. C. C. 166. S. C. 2 Dick. 600. *O'Brien v. O'Brien*, Anbl. 107, 108. WILL, C. OF; WASTE; TENANT FOR LIFE.

Devise of lands to be sold, and other lands to be purchased in another county, A to be tenant for life (sans waste) of the lands to be purchased, and the rents and profits of the lands to be sold to the same use; A cannot cut down timber on the lands to be sold, since he thereby would have the benefit of double waste. *Plimouth v. Archer*, 1 Bro. C. C. 169. WILL, C. OF; TENANT FOR LIFE; WASTE.

Where guardian of an infant tenant in tail cuts down timber, the money for it shall be personal estate of the infant; but if the infant has the fee, it shall be considered as real estate. *Tullit v. Tullit*, Anbl. 370. S. C. 1 Dick. 322. ASSETS.

The first owner of the inheritance in esse, shall have timber blown down; for the trees must become the property of somebody. *Garth v. Cotton*, 3 Atk. 755.

Injunction to stay tenant for life from committing waste by cutting trees growing for ornament; and saplings not proper to be felled. *O'Brien v. O'Brien*, Anbl. 107. S. C. 1 Bro. C. C. 168, in note. INJUNC. TO STAY WASTE.

Wind falls of timber and other casualties; to whom the property belongs, tenants for life, remainder men, &c. *Alston v. Alston*, 1 Ves. 396.

Tenant for life, sans waste, is restrained by injunction from selling timber; afterwards his creditors obtain an order for a sale, and a receiver is appointed for the money arising from the sale; but the tenant for life dies before the timber is felled. *Quare*, whether his representatives are entitled to the benefit of the

timber † *Partridge v. Pawlett*, *Ridgw.* 254. TENANT FOR LIFE AND REM.-MAN.

A, tenant for life, remainder to first, &c. sons in tail, remainder to B for life, remainder to first, &c. sons in tail, remainder to C in tail. A cut down timber; A and B having no son born, C is entitled to timber. *Rolt v. Ld. Somerville*, 2 Eq. Ab. 759. TENANT FOR LIFE.

A, tenant for life, remainder to B in tail as to one moiety, remainder to C an infant in tail as to the other moiety, remainder over. There is timber on the premises greatly decaying. B, the remainder man, brings a bill praying that the decaying timber might be cut down, sold, and the money divided betwixt him and the infant, and the tenant for life insists to have part of the money; tenant for life must have sufficient left for repairs, &c. and an allowance for all damage done to him on the ground, but to have no allowance for the timber, which, when severed by accident or by a trespasser, belongs to the first owner of the inheritance. Decaying timber, if for ornament or safety, not to be cut down; also where an infant is interested in the inheritance, no timber can be cut down but by the approbation of the master; and the infant's moiety of the money is to be put out for his benefit. *Burick v. Whitefield*, 3 P. W. 267. TENANT FOR LIFE AND REM.-MAN.

In a purchase, where timber is agreed to be valued, the custom of the country makes those trees timber, which in their nature are not so; as birch, beech, &c. Pollard trees, if the bodies are sound, to be valued as timber; walnut trees, where of considerable value, to be estimated as timber. Where trees are of value, and the parties cannot agree in the valuation of them as timber, the court will send it to be tried, whether by the custom of the country, any, and which of these are timber trees. *Dk. Chaudes v. Talbot*, 2 P. W. 606.

A, seised in fee of land, demised the premises to trustees, B, C, & D for three hundred years in trust to pay debts, &c. for a charity. B, one of the trustees, being in possession, and as a receiver appointed by the court, cuts down 1000l. worth of timber; D, one of the other trustees consenting. B, the trustee for the charity, or as receiver, ought not to take advantage of his having possession, without which he could not cut down the timber; yet the timber must be valued according to what it would be worth at the end of the term of five hundred years. *Bays v. Bird*, 2 P. W. 397. TRUSTEES, DUTIES OF

A mortgagee in fee may cut timber, &c. at law, but not in equity, unless his security is defective. *Withrington v. Cotesworth*. Sel. Ch. Ca. 31. MORTGAGE, & MORTGEE.

A, tenant for life, and remainder to his first, &c. son in tail; remainder to B for life, remainder to his first, &c. son in tail; remainder to C in tail; A cuts down timber. A and B having no son born, C is entitled to the timber both in law and equity. *Whitefield v. Bewit*, 2 P. W. 240. TENANT FOR LIFE AND REM.-MAN.

A devises lands incumbered with debts to B for life, remainder to C in fee; B cuts down timber from the estate; B decreed to pay two-fifths of the debts and C the remainder three-fifths, and B to account for the timber which he had cut, and this to be taken as part of the three-fifths which the remainder man was to pay. *James v. Hales*, 2 Vern. 267. Pre. Ch. 44. S. C. TENANT FOR LIFE; ACCOUNT.

A term for years is limited for payment of debts, remainder to B for his life, sans waste; remainder to his first, &c. sons in tail. A, being in want, the creditor gave him leave to cut timber for his support, not exceeding the value of 500l. *Aspinall v. Leigh*, 2 Vern. 218. TENANT FOR LIFE.

## TIME.

See also AGREEMENT, XII.—LENGTH OF TIME.—MORTGAGE, V. 7.—PR. EVID. 30. (b).

Under 6 Geo. 4. c. 16. s. 81. where the computation of time is to be from an act done, the day when such act is done, is to be included. For some purposes the court notices the fraction of a day. *Exp. Farquhar*, 1 Mont. & M. 7. BANKCY.; STAT. C. OF; FRACTION OF A DAY.

Where order allowed month's time to amend; held, that lunar month was meant. *Cresswell v. Harris*, 2 S. & S. 476.

An order for enlarging time to shew cause against the common order nisi for dissolving an injunction against proceedings at law, obtained on an undertaking to shew cause on merits confessed by answer, was discharged with costs for irregularity, the bill having been filed for discovery merely, notwithstanding it also prayed a commission and injunction. *Jackson v. Strong*, 13 Price. 309; and plaintiff must move to revive injunction, which becomes dissolved as of course. *Id. ib.* PR. INJUNC., DISSOLUTION OF.

Where, in foreclosure suit, exceptions are taken to the master's report, and the time appointed for payment of the mortgage money is likely to elapse before the exceptions are heard, the defendant should apply to the court, upon the exceptions being filed, to have the time enlarged until the exceptions are disposed of. *Renvoise v. Cooper*, 1 S. & S. 364. PR. MORTGAGE, FORECLOSURE; PR. EXCEPTIONS.

There is no precise time, beyond which, witnesses cannot be discredited. *Piggott v. Craxhall*, 1 S. & S. 467. PR. DISCREDITING WITNESSES.

Court cannot extend time mentioned in a commission to examine. *Hall v. De Tastet*, 6 Mad. 269. COMMISSION TO EXAMINE.

Notice was given of motion to dismiss on same day that motion was made; subsequent thereto replication was filed. Held bill not dismissed, and defendant not entitled to costs of motion. *Reynold v. Nelson*, 5 Mad. 60. See observation on this case, 10 Ves. 404. note. 2d Ed. PR. DISMISSAL FOR WANT OF PROSECUTION; REPLICATION; FILING PLEADINGS.

A fourth order for enlargement of time for payment of mortgage money made under the circumstances. *Edwards v. Cunliffe*, 1 Mad. 287. MORTGAGE.

Attachment returnable within eight days after the Purification. The eight days mean eight days entire. *Mootham v. Wuskett*, 1 Mer. 245. PR. ATTACHMENT, RETURN OF.

Deed of composition by creditors not signed within the time stated in it, though void at law; yet if the creditors act under it who have not signed it, it is good in equity. Plea of two creditors not having so signed it, therefore held bad. *Spottiswoode v. Stockdale*. Cooper. 102. DEED OF COMPOSITION.

In a country commission the party is not entitled to twenty-eight days, and as much more time as may be necessary for the post. See Gen. Ord. 26th June, 1793. *Exp. Henderson*, Cooper. 227. BANKCY. COMMISSION, COUNTRY; GEN. ORD. C. OF.

What is reasonable time in compliance with request of landlord, to pay fine on renewal of leases in Ireland. In considering what reasonable time is after demand, the previous transactions are to be taken into the account. *Jackson v. Saunders*, 2 Dow. 444. LEASE, RENEWAL OF.

Fraction of a day to support a commission of bankruptcy, by evidence that it was committed before the commission sealed on the same day. *Exp. Dufrene*, 1 V. & B. 54. BANKCY. COMMISSION.

Reasonable time in mercantile transactions not applicable to cases of contracts respecting real property. *Jessop v. King*, 2 Ball. & B. 95.

The time not enlarged upon a bill of redemption as upon a bill of foreclosure. *Novosielski v. Wakefield*, 17 Ves. 417. REDEMPTION OF MORTGAGE.

The six months given to tenants to redeem under the statutes of ejectment for non-payment of rent, are calendar months, and the day on which the *habere* is executed, is not to be included in the calculation. Where a right would be divested or a forfeiture incurred by including the day of the act done, the computation will be made exclusive of it. *Dooling v. Foath*, 1 Ball. & B. 193. 196. STATUTE, C. OF; LANDS, & TEN.

Bequest of residue in trust in case A shall within six calendar months after the testator's decease, give security not to marry B, then and not otherwise to pay to the children of A; with a proviso to go over if she shall refuse or neglect to give such security; a condition precedent: the six months are exclusive of the day of the testator's death; therefore as he died on the 12th January, between eight and nine in the evening, a security given on the 12th July about nine in the evening was held sufficient. *Lister v. Garland*, 15 Ves. 248. CONDITION PRECEDENT; WILL, C. OF.

No general rule in computing time from an act or event, that the day is to be inclusive or exclusive; depending on the reason of the thing according to the circumstances. *Id. ib.*

In the time from the presentment of a bill of exchange, the day of presentment exclusive. Other instances where the day of an act done, or an event happening, is sometimes inclusive, sometimes exclusive. *Id. ib.*

Fraction of a day allowed, in support of a commission of bankruptcy, by admitting evidence, that the act of bankruptcy, though on the same day, was previous to the issuing, i. e. the awarding and sealing the commission. *Wydown's Case*, 14 Ves. 80. BANKRUPTCY. COMMISSION OF.

The nine months allowed by the statute 8 Geo. 1. c. 2. sec. 4. to a mortgagee of an evicted lease to redeem, are calendar months. *Biddulph v. St. John*, 2 Scho. & L. 521. STAT. C. OF; MORTGAGE, REDEMPTION OF.

Under statute 7 Geo. 2. c. 20. s. 2. the time for payment of money on mortgage may be enlarged on usual terms. *Wakerell v. Delight*, 9 Ves. 36. STAT. C. OF; FORECLOSURE OF MORTGAGE.

Notice for payment of a mortgage at three o'clock, is not forfeited, where there is an attendance before four o'clock. *Knox v. Simmons*, 4 Bro. C. C. 443.

Under the act against stock jobbing, the six months in the first section means lunar months, and no discovery lies where the cause of action arose prior to the expiration of six lunar months. *Windule v. Fall*, 3 Bro. C. C. 11. STAT. C. OF; STOCK JOBBER.

Devise to A as soon as he shall accomplish his full age of twenty-one years. A was born on the 16th of August, 1725, and died on the 15th of August, 1746. Held, that he lived to attain his full age of twenty-one. *Toder v. Sansam*, 1 Bro. P. C. 469.

Months ought to be considered in equity as calendar months; but in acts of parliament it means lunar months, except in the case of *tempus semestre*, with regard to the lapse of livings, and other instances of six months, allowed to prohibition. *Franco v. Alvares*, 3 Atk. 346.

On tender of redemption of mortgage, mortgagee is entitled to have a reasonable time to peruse the assignment. *Wilshaw v. Smith*, 9 Mod. 441. MORTGAGOR AND MORTGAGEE.

After enlargement of the time for shewing cause against dissolving an injunction, the plaintiff cannot shew exceptions for cause. *Pinheiro v. Porter*, 3

Swan. 362. PR. INJUNCTION, DISSOLVING; PR. EXCEPTIONS.

Two bound jointly and severally, a day given to one for payment shall be extended to other. *Cary*, Rep. 1.

By 2 and 3 Edw. 6. c. 13. s. 5. all barren heath or waste land shall pay tithe after seven years' improvement and conversion into arable or meadow; and the suggestion for a prohibition against the spiritual court must be proved within six months after the prohibition granted, for it is an affirmative suggestion, which six months shall be computed by the calendar, and begin to run from the teste of the prohibition. *Thomas v. Gifford*, 2 Show. 92. *Straker v. Baynes*, id. 308. INCLOSURE OF COMMON.

## TITHES.

### I. GENERALLY.

#### II. THE TITLE TO, AND ENDOWMENT OF VICARAGE.

#### III. OF WHAT PAYABLE.

#### IV. SETTING OFF, AND HOW PAYABLE, AND CARRYING AWAY.

#### V. WHETHER GREAT OR SMALL.

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#### X. MODUS.

##### 1. Validity.

##### 2. Suits and Evidence thereon in establishing Modus by Bill, or as a Defence by Plea, &c.

#### XI. CUSTOM.

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### I. GENERALLY.

The word "tithes" is continually found in ancient instruments used to denote tithes, *qua* tithes, or a commutation for them, and may mean either one or the other, as the subsequent usage explains. *Norton v. Hammond*, 1 Y. & J. 94.

Canonical constitutions of ecclesiastical synods have no binding force or authority in this kingdom in questions of tithes between the clergy and laity in courts of law, without acquiescence. *Evans v. George*, 12 Price, 76.

Chancery has jurisdiction in case of sequestration of tithes during a vacancy, by reason of general jurisdiction of court in matters of trust. *Birch v. Rygrave*, 6 Mad. 158. JURISDICTION; PR. SEQUESTRATION.

A lease of tithes or other matter which lies in grants, for all the time the lessor should be vicar, is good, and conveys a freehold. *Brewer v. Hill*, 2 Anst. 414. LEASE.

Bill for partition will lie as to tithes. Demurrer overruled. *Gibson v. Montford*, 1 Ves. 404. PL. PARTITION.

#### II. THE TITLE TO, AND ENDOWMENT OF VICARAGE.

A party entitled to an impropriate rectory for life, and in possession, is entitled to receive the tithes, notwithstanding the legal estate is subject to a trust term to secure annuities, and to a mortgage. *Glegg v. Leigh*, 1 Dow, N. S. 98; and 1 Bli. N. S. 302.

In a suit by the vicar, where the endowment is lost, and it appears from the evidence that the rector has not received any small tithes, but that the vicar has received all the small tithes which have been

rendered, the court infers, in favour of the vicar, that the endowment conferred upon him, by a general expression, all small tithes whatsoever, carrying not only such small tithes as were then actually received, but such as were at that time neglected, or came afterwards into existence by the improvements in husbandry; but where the vicar never has received, or been entitled to receive the whole of the small tithes, then it cannot be so readily presumed that the endowment contained a gift to him in those general terms. *Willis v. Farrar*, 2 Y. & J. 217.

Where, on the dissolution of monasteries, the possessions of an abbey came to the crown, and the crown subsequently granted all the tithes yearly, renewing with all their rights, members, and appurtenances: Held, the crown being the rector, or in *loco rectoris*, the tithes granted must mean the rectorial tithes, or all the tithes except such as had been withdrawn by an endowment for the minister; but royal grants being strictly construed, the court would not hold that the grant extended to the rectory, the rectory being granted in express terms. *Pierrepont v. Scarlet*, 2 Y. & J. 330. GRANT FROM CROWN, C. OF.

Where a rectory was granted by the crown in 22 Edw. 6., with licence to appropriate, and a direction to appoint a vicar, and endow him with a dwelling-house, and on the appropriation to endow him also with a specified annual pension or portion for his food and sustentation, and it appeared that there had been a vicar through all subsequent time, and that such vicar had, for a great number of years back, received from the lessees of the rectory for the time being a larger sum than the pension specified by the grant; but no instrument of endowment, nor evidence of the existence of such was produced, from the absence of which it was contended that the terms of the grant had not been complied with, and that the payment by the lessees was a voluntary payment by the impropriators, and determinable at their pleasure, the court held, that after so long a possession it might be presumed that an endowment had been made according to the terms of the grant, and that the vicarage had been subsequently augmented. *Inman v. Whorby*, 1 Y. & J. 545.

An incumbent of one parish is capable of tithes in another as a portionist, or in nature of a portionist, but it is incumbent on him, as claiming against a common right, to prove his title strictly, either by producing an actual grant, or evidence of usage, affording by presumption legal evidence of a grant. Evidence of usage to receive certain mixed tithes by an incumbent in another parish as a portionist, or in the nature of a portionist, is not, of itself, evidence of a right to receive the tithes of all description which the lands may produce under any circumstances. *Carlisle v. Blain*, 1 Y. & J. 123. TITHES, EVIDENCE.

Bill by the impropriate rector of A for predial tithes of lands allotted under an inclosure act. The defence was, that the land allotted was awarded in lieu of a right of common in A, appurtenant to a tenement in the parish of B, and that the tenement in B was protected from all tithes by a farm modus of 20s. payable to the rector of B, and therefore that the modus for the tenement protected the allotment. The court, however, decreed an account. By the common law, and also by general presumption, all tithes are due to the incumbent of the parish where they arise; and therefore tithes arising upon a common, are due to the incumbent of the parish in which the common is situate, not to the incumbent of the parish in which the tenement to which the common is appurtenant is situate, if that same tenement be in a different parish. Custom may, however, vary this. When the tenement is in one parish, and the

common in another, the incumbent of the farm is not of right, and by the common law, independently of custom or prescription, entitled to the tithes arising upon the common; and if the common be enclosed, the allotment will become, by the general rule, for the purpose of tithes, parcel of the parish in which it is actually situate. *Id. ib.* INCLOSURE OF COMMON.

Commissioners under an inclosure act were to allot by their award to the rector of the parish so much of the lands so inclosed in the township of S, and of the titheable parts of the township of W, as should, quantity, quality, and situation considered, contain, or be equal in value, to 15 parts of the titheable places thereof, in lieu of tithes arising within the same lands. After enrolment of the award of the commissioners, all tithes arising within the lands enclosed were to cease; but there was a saving to all persons (other than the persons to whom any compensation by virtue of the act in respect of the interest for which such compensation should be made), all such interest as they had in respect of the said lands. Before passing of the act, an award, by which the commissioners allotted to the rector, in lieu of the tithes of S and A, lands more in quantity than two-fifteenths of the lands inclosed in S and A, but less than two-fifteenths of the lands inclosed in S, A, and W, without any allotment expressed to be in lieu of the tithes of W, is not a bar to the rector's claim of the tithes in W. *Cooper v. Thorpe*, 2 Russ. 78. INCLOSURE.

A title (admitted) in portioners to tithes of corn, grain, and hay, and some other, but not all the great tithes arising within the parish, in a case where nature and extent of title due did not otherwise appear than by an admission in those terms in the answer, the plaintiff giving no evidence of his claim, so that it could not be ascertained in what character, whether as rector or otherwise, he was entitled: Held not to give him a right also (as a necessary incident on the title to tithe of hay), to the tithe of clover, vetches, and other grasses, or food cut green, and applied for fodder for owner's cattle. Semble, that consumption of such titheable articles by owner's husbandry cattle, is not an available defence to a case to establish a right to the tithe of them. *Lewis v. Young*, 13 Price, 394. S. C. 1 McCl. 113. The judgment was reversed on appeal, 2 Bli. N. S. 63.

In suit for tithes, jurisdiction of equity is limited to discovery and account. Title must be tried at law, and if disputed, equity has no right to make a decree. *Norbury v. Meade*, 3 Bli. 211. JURISDICTION; TITLE.

Person suing as lay impropriator for tithes of a parish in which there has been within living memory a parish church and burial ground, in order to establish his title, must shew that there has been an appropriation, and when it was made. *Id. ib.* TITLE.

Upon lease of tithes by lay impropriator, if tithes of particular lands are excepted, it might admit of construction, that lessor is entitled to that which he excepts. But if former owner upon lease has made a parol declaration that he is not entitled to the tithes of those lands, that declaration is in itself important evidence, and gives a construction to the exceptions in the lease. *Id.* 212. PR. EVIDENCE; TITLE.

Vicar (claiming tithes) relying on a special endowment to support his case, is not precluded, by the enumeration therein of specific titheable matters, the tithe of which were assigned to him, from demanding from occupiers tithes of other articles *eiusdem generis*, usually called small tithes, where the vicar can shew that he has received some tithes not in-



cluded in the enumeration in his endowment, and they are not shewn to be payable to some other person. *Manby v. Lodge*, 9 Price, 231; confirming, *S.C.* 2 Price, 284. **ENDOWMENT.**

When a defendant in a suit for tithes by a rector makes out a clear defence as portionist, claiming under the successive grantors of the crown of the possessions of one of the dissolved monasteries a right to some of the great tithes of the rectory, yet, if neither can ascertain and shew specifically what were the tithes which belonged to the rector or to the monastery, the court has no means of assisting either party in availing himself of his title. The court will not decree an account in favour of the rector under such circumstances, where he has never had perception; but they will retain the bill to give him an opportunity of taking an issue, or proceeding by commission, ejectment, or by action on the statute. The *onus probandi* is not on the portionist, if there has been no perception on the part of the rector. *Boulton v. Richards*, 9 Price, 671. **JURISDIC.**

Usage of rendering one article of small tithe to the rector, will not support his title against the vicar; if it appears to have originated from a mistaken notion that the article in question was a great tithe. *Davis v. Benn*, 1 Jac. 95.

On cross bill, plaintiff cannot compel discovery of defendant's title to tithes, though defendant must answer whether they have or not been conveyed away to another person. *Glegg v. Leigh*, 4 Mad. 193. **TITLE; PL. DISCOVERY.**

"Grant of herbage," held not to mean agistment. *Scott v. Lawson*, 7 Price, 267.

The king in right of his crown, has a general right to the tithes of all lands situate in extra-parochial places. *Att. Gen. v. Ld. Eardley*, Dan. 271. *S.C.* 8 Price, 39. **CROWN.**

A vicar, by shewing a general right to the perception of tithes in kind, places himself in the situation of a rector, and throws it upon the occupier to prove the existence of moduses set up, and the lands to which they apply; and semble, that evidence of a general payment throughout the parish, of so much in the pound, in lieu of tithes regulated according to the poor's rate or rack rent, is sufficient evidence of a vicar's general right to tithes in kind. *Wright v. Southwood*, Dan. 137. *S.C.* not *S.P.* 5 Price, 607.

Where an adverse title to tithes is set up and established against a demand by rector, who offers no evidence to impeach title, he is not entitled to an issue. *Wilnot v. Hellaby*, 5 Price, 355. **RECTOR; ISSUE AT LAW.**

Under an act for inclosing lands in the townships of A, S, and W, directing the commissioners to allot to the rector of the parish of W, in lieu of the tithes of the townships of S and W, so much of the lands to be enclosed in the township of S, and of the titheable parts of the township of W, as should, quantity, quality, and situation considered, contain or be equal in value to two-fifteenth parts of the titheable places thereof, and to make to the rector of W, and the vicar of B, in lieu of the tithes of a part of the lands in the township of S, and A, to which they were entitled, a like allotment, equal to two-fifteenth parts of such lands, and declaring that after the enrolment of the award of the commissioners, all tithes arising within the lands enclosed should cease, an award by which the commissioners allotted to the rector of W, "in lieu of the tithes of S, and A," lands more in quantity than two-fifteenth parts of the lands enclosed in S, and A; but less than two-fifteenth parts of the lands enclosed in S, A, and W, without any allotment in lieu of the tithes of W, is a bar to the claims of tithes in W. The award would not be vitiated by error in the allotment. The act having directed the commissioners, in estimating

the proportion, to have regard to quality and situation; deficiency in quantity is not proof of error. *Cooper v. Thorpe*, 1 Swan. 92. **ALLOTMENT ON INCLOSURE; AWARD.**

Book from registry of Lincoln, containing *inter alia* what were called copies of endowments of certain vicarages, was received as evidence of an endowment of vicarages in Northampton. *Leonard v. Franklyn*, 4 Price, 264. **PL. EVIDENCE.**

The court will not make a decree in favour of rector claiming tithes in kind of lands not within his parish, for which he has for many years received a money payment by way of composition, which defendant does not pretend to insist on as a modus, nor will they grant a commission to ascertain boundaries of such lands without a previous inquiry; whether the plaintiff is entitled to any and what tithes on such lands by trial at law on an issue; nor can he take advantage from a former decree in favour of a predecessor of plaintiff, and a verdict obtained by him on an issue under it, especially if the intermediate rectors have taken no step of advantage from such suit. *Sanders v. Longden*, 4 Price, 117.

A rector (claiming tithe of seed against a vicar, endowed of all small tithes except hay, on ground of prescription, that, as the former has had perception of the tithe of seeds, notwithstanding the terms of the endowment of the latter who had also had immemorial perception of the tithe of corn of certain lands ultra his endowment, an ancient exchange must be presumed of vicarial for rectorial tithes) will be held to strict proof of his title to tithes sought, and of exchange or grant of the tithes. Nor is his perception of tithe in question available against perception by vicar, if it was ever doubtful whether they were rectorial or vicarial tithes, nor can rector insist on issue. *Dorman v. Curry*, 4 Price, 109.

Construction of endowment of vicarage, as to articles of modern introduction. Usage is the broad ground of presumption in favour of vicar's endowment, and if there be an endowment in proof, expressing of what tithes vicarage shall be endowed, and other tithes not so expressed are received by him, a subsequent endowment shall be presumed. *Williams v. Price*, 4 Price, 156.

Endowment produced, showing the vicarage expressly endowed of hay, not sufficient to support a bill for that tithe without usage, against evidence of money payment to rector in lieu of hay; but grant from crown subsequent to endowment, including all the tithes in general words, not sufficient to overturn vicar's right without proof of perception. A particular and minute enumeration of the several articles of endowment in that instrument does not preclude vicar's right to other small tithes not therein mentioned. *Manby v. Curtis*, 2 Price, 284. See this case confirmed, 9 Price, 231. **TITHES.**

The lessee of a rector, in whose lease there is an exception of various small tithes nominatim, and of all the tithes belonging to vicar, is not entitled to tithe of potatoes, though he has always received some of the small tithes in kind not mentioned in the lease *speciatim*, either as demised or excepted, and particularly for geese and pigs. *Cunliffe v. Taylor*, 2 Price, 329.

A grant of tithes of land will not be presumed from long non-payment, although lands be shown to have been once in the possession of a former lay proprietor, unless some evidence of the existence of a grant be offered, or the enjoyment of tithes be shown by at least something like actual perannuity, or dealing with the tithes as owner; nor will evidence of retainer only be sufficiently strengthened to support such presumption; by its being shown that a former proprietor had declared the lands in question to be exempt from tithes, or by instances of exception of tithes in

leases by impropriate rector. *Wood, B. dissentiente. Meade v. Norbury*, 2 Price, 338. PRESUMPTION OF GRANT.

An account of tithes is consequential upon the legal right, and therefore if the least doubt is thrown upon it by *prima facie* evidence, the account cannot be decreed till the right is established at law. *Forcroft v. Parris*, 5 Ves. 221. TITLE; ACCOUNT.

To establish the rector's right to tithes, and for an account, the defence though informally stated as a prescription *de non decimando* in a *que* estate was, as to two-thirds possession by the lord of the manor, under an apparent title by various conveyances, &c. stated by the answer, from 37 Hen. 8, of the lands with tithes generally, or two-thirds specifically, with evidence of reputation and notice to the plaintiff who had purchased the advowson and was lessee of the tithes, but the commencement of the title did not appear: the bill was dismissed with costs. *Sirutt v. Baker*, 2 Ves. J. 625.

An inclosure act directed part of a waste to be sold; tithe free, to defray the expenses of the inclosure: the rector was not otherwise a party; and the saving clause was, of all claims except of the lord and of the commoners; yet the rector's right to the tithes of the waste sold tithe-free, was gone. These inclosure bills are not to be considered as merely private acts. *Riddell v. White*, 1 Anst. 281.

In a suit by the vicar for agistment tithe, the endowment was lost; but he produced an old extent of the rights of the impropriators and tithers, in support of his claim to all small tithes, except wool and lambs; tithe of agistment had never been paid in the parish; the defendant was in the occupation of land in the parish, and also of the other tithes, which he claimed as rector. The court decreed for the vicar without an issue. *Garnons v. Barnard*, 1 Anst. 296. Decree reversed in H. of L. and issue directed, see 3 Anst. 926.

One entire payment may be due for many distinct sorts of tithes; it is no objection that it falls unequally on the parishioners by being as heavy on the occupiers of small, as of large tenements and farms. *Bennet v. Read*, 1 Anst. 327, 328.

A modus for agistment tithe paid to the rector, is a bar to the demand of that tithe by the vicar, although by the endowment he has all the small tithes. *Ellis v. Saul*, 1 Anst. 342. RECTOR & VICAR.

Where there is an old endowment of a vicarage, but the modern usage varies from it, there is ground to presume that the variance has arisen from the act of persons competent to make it. The endowment is not therefore conclusive evidence in favour of vicar, but his right is properly triable at law. *Curr v. Henton*, 7 Bro. P. C. 100. WAIVER, PRESUMPTION OF.

A modus bad in law, received by the vicar, is proof of endowment of the tithe for which the modus was paid. *Travis v. Orton*, 1 Anst. 309. MODUS; EVIDENCE.

If endowment of tithes be not followed by usage, the claimant as to such tithes as fail of usage shall not support his claim. *Anon. Loft*, 66. USAGE.

In what cases and under what circumstances a person claiming title to tithes must have his right established at law, before he can come into a court of equity for an account and satisfaction. *Hawtrey v. Daniel*, 7 Bro. P. C. 21. TITLE.

Representatives of a rector not permitted to enforce payment of tithes, which the rector never demanded. *Curt v. Hodgkin*, 3 Swan. 161. EXECUTORS.

In a suit by a vicar for tithes, the occupiers insist on certain exemptions, but the impropriator by his answer admits the vicar to be entitled to all tithes, except corn and grain. On this admission the court decreed for the vicar, without hearing the evidence touching the exceptions; but this decree was reversed

on an appeal, and the court was ordered to hear the cause upon the pleadings and proofs. *Berkley v. Fox*, 3 Bro. P. C. 618. ADMISSIONS OF TITLE.

A perpetual curate removable at pleasure, cannot maintain a bill for tithes. *Price v. Pratt*, Bunt. 273. TITLE.

Bill by a lay impropriator for tithe hay; he derived his title under a grant from Jac. 1, but it appearing that no tithe had been paid since the grant, the bill was dismissed. *Stone v. Rideout*, Bunt. 262. *Id.*

Tithe of peas and beans shall be paid to the impropriator, if the vicar doth not shew an endowment or usage to the contrary. *Gumley v. Burt*, Bunt. 169. *Id.*

Tithes for agistment of cattle, are payable by the owner of cattle. So in the case of commoners. *Pory v. Wright*, Hard. 182. *Id.*

A vicar has the same right to all tithes in his endowment as a rector has of common right. *Fox v. Rutty*, Bunt. 37. *See* *quare*, if a vicar has received for many years tithes, not mentioned in his endowment, whether subsequent augmentation or endowment, shall not be presumed. *Twiss v. Brazenrose Coll. Oxon*, Hard. 328.

### III. OF WHAT PAYABLE.

Wood used for hop poles upon the farm, for hurdles, for hurdling sheep, for repairing hedges, for land draining on the farm, and for fuel in the husbandry house, is not exempt from tithes by the common law, but may be so by custom. *Illys v. Storie*, 1 Y. & J. 262.

As to tithe for oak-wood springing from stumps or germins of eighty years old trees, formerly felled. *Evans v. Howe*, 1 McClell & Y. 577.

In construing the stat. of the 45th of Edw. 3. ch. 3, with reference to the law on questions of the tithe of wood, the phrase *gros-bois* or great wood, held to mean wood of the original trees which either are timber by common law, or are accounted timber by local custom when of twenty years' growth or upwards. *Evans v. George*, 12 Price, 76.

Of such timber trees, these only which are termed maiden trees or trees sprung from seed or mast, and have attained twenty years' growth, are exempt from tithe of wood as timber. *Id.*

Germins, or trees of whatever age or size they may be growing from old stools, stumps of roots of timber trees which have been felled; held, not to be so exempt by reason of the privilege of timber. *Id.*

Wood springing from the roots or stools of trees is titheable, and neither its own age, nor the age of the trees from the roots or stools of which it sprung, will exempt it. *Chichester v. Sheldon*, 1 Turn. & R. 245. TIMBER.

As to tithes of Mills, see *Manby v. Taylor*, 9 Pri. 249. MILLS.

It is a fraud in equity to remove sheep fed in one parish to another before shearing and lambing seasons, and then driving them back again without accounting for tithe in the parish wherein they were depastured. *Hall v. Maltby*, 6 Price, 240. FRAUD.

Agistment tithe is not claimable for after-pasture, where lands have been mown in the same year, and paid tithe. *Batchellor v. Smallcombe*, 3 Mad. 12.

As to payment for keep of tithe animals. See *Jenkinson v. Hayston*, 5 Price, 495.

Account of tithes decreed of ancient mills, altered by addition of two new mill stones. *Manby v. Taylor*, 3 V. & B. 71. ACCOUNT.

A water-mill is titheable as a predial and local tithe in respect of the person to whom it is due, but as

a personal tithe in the mode of accounting. *Hall v. Blachet*, 3 Anst. 915.

Stubble mowed, and used as fodder or manure, is not tithable. *Tennant v. Stubbing*, 3 Anst. 640.

Agistment is a predial tithe. *Scarr v. Trin. Coll.* 3 Anst. 760. **PREDIAL TITHE.**

Grass cut, and given green to the beasts of the plough, shall not pay tithe. *Collyer v. Howse*, 2 Anst. 481.

Where a tithable article has been introduced into a parish within time of memory, but the mode of tithing it has always been uniform, the court will support the established practice, *semble*. *Baker v. Athili*, 2 Anst. 492.

Horses kept on one farm for its cultivation, and used occasionally on another farm, in a different parish, shall not pay agistment-tithe; otherwise, if habitually so used. *Filwood v. Button*, 2 Anst. 498.

Sheep kept principally for the sake of folding, if sold out of the parish before shearing time, shall pay agistment-tithe. *Howse v. Carter*, 2 Anst. 500.

A modus of one penny for every sheep, and a half-penny for every lamb, brought into the parish after Candlemas, and sold out before shearing time, is a wool modus, not an agistment modus. *Garnons v. Barnard*, 1 Anst. 320. **MODUS.**

If a farm has a right of common appendant in another parish, tithe of wool paid for the same, discharges from agistment tithe of the sheep in both parishes. *Riddell v. White*, 1 Anst. 290. **RIGHT OF COMMON.**

Agistment tithe is not within the 2 & 3 Edw. 6. c. 13. s. 3. *Ellis v. Saul*, 1 Anst. 342. **STATUTES, CONSTRUCTION OF.**

Agistment tithe, is the tithe of the herbage eaten by cattle not tithable; it is not tithe of the improvement of the cattle. When grass has been cut for hay, no tithe is due for the after-pasture. *Id. ib.*

Lops and tops of ancient pollard oaks and ashes, are exempt from tithes; the use to which wood is applied, does not determine the right to tithes. *Walton v. Tryon*, Amb. 130. S. C. 1 Dick. 244.

All coppice woods are liable to tithes. *Id.* 131.

The circumstance of loppings being tenant right profits, and therefore not part of the inheritance affords no rule as to their liability to tithes. *Id. ib.*

The subsequent use of a thing cannot add a tithable quality to it, which he had not before. *Id.* 132. *Id.*

Wood cut, to be burnt in house, is not exempt of common right, but by special custom. *Id. ib.*

All timber trees of twenty years' growth, and their lops and tops are freed from tithes, to whatever use they are put, except in cases of fraud; and this is by the statute of *silva cædua*, 45 Edw. 3. *Walton v. Tryon*, Amb. 132. S. C. Dick. 244.

The statute of *silva cædua* is declarative of the common law. *Id. ib.*

Hornbeam not timber. *Id.* 133.

Germius growing from stools of old timber-trees pay tithes. *Id. ib.*

If timber-trees be cut before twenty years, the boughs and branches shall be always tithable. *Id. ib.*

Pollards that have once gained their privilege shall not lose it. *Id.* 134. *Id.*

It is a question of fact, whether beech of twenty years growth is timber. *Id.* 135.

By Edw. 6. c. 13, land in its own nature not fit for tillage, pays no tithe for seven years after improvement; but if not fit for tillage by reason of woods, &c. pays tithe presently after improvement. *Stockwell v. Terry*, 1 Ves. 115.

Tithes of fish are only payable by custom, and cannot be claimed as mere personal tithe *deductis expensis*. *Kellynack v. Graves*, 2 Bro. P. C. 446. **CUSTOM.**

Turkeys tithable; but if tithes are paid of eggs, then none to be paid for the chicken. *Carleton v. Brightwell*, 2 P. W. 462.

Mills are tithable, but they are only to pay a personal tithe of the clear gains, after all manner of charges deducted. *Id. ib.*

Acorns are small tithes, if gathered and sold; but if they drop from the trees in the season, and the owner's cattle eat them, they shall pay no tithe. S. C. *Et vide* Hett. 27.

Clover seed is a small tithe, and due to the vicar. *Wallis v. Pain*, Bunb. 344. 2 Com. Rep. 633.

Turnips (sown after the corn is cleared) fed with sheep and barren cattle, shall pay tithes. *Swinfen v. Digby*, Bunb. 314.

Vetches and clover are a great tithe, but when cut green for cattle used in husbandry, tithes are not due. *Hayse v. Douce*, Bunb. 279. But in *Dorman v. Currey*, (Dan. 206). Richards, C. B. said, this was a case which ought not to have been introduced into a book of reports. In *Hodgson v. Smith*, *ibid.* 279, (n.) it was held that tares, whether green or ripe, are a great tithe, and belong to the rector.

Tithe herbage shall not be paid for sheep shorn out of the parish, because they are *animalia fructuosa*. *Pow v. Seymour*, Bunb. 313.

Tithes are payable for the after-depasturing of sheep on turnips, &c. *Coleman v. Barker*, Gilb. Ex. Rep. 231.

Head-lands only large enough to turn the plough upon shall not pay tithe; neither shall an ancient mill. *Chapman v. Barlow*, Bunb. 184.

Black cherries growing wild in hedges, and used as fences, shall pay tithe. S. C.

Bill for tithe of lambs; the ewes were kept by defendant in the parish of D. (where the demand lay) all the year until Christmas; when they were ready to drop their lambs, he removed to the parish of S. (where there was only a small modus for lambs), and there kept until Lady-day, for the convenience of forage; and at Lady-day they were driven back to D. Plaintiff complained of this as a fraud in the tithing. *Per curiam*, here is not a sufficient proof of fraud, and plaintiff's bill was dismissed. *Boys v. Ellis*, Bunb. 139. Tithe of lambs is not divisible, as wool is. S. C. **FRAUD; EVIDENCE.**

Bill for tithe wood in the forest of Dean, by virtue of a grant of all tithes, issuing *de assartis*, within the forest, *de novo assartatis et assartandis*; upon proof, it appeared that the lands were always wood-lands and never grubbed up, and that no tithe was ever paid. The court construed the meaning of *assart* to be only such lands as have been grubbed up and made fit for tillage, and dismissed the bill. *Evans v. Newell*, Bunb. 128. *Bond v. Barrow*, *ibid.* 312.

Wood-ground grubbed up pays tithe, and is not exempt for seven years as barren land, within the statute Edw. 6. *Beardmore v. Gilbert*, Bunb. 159.

Timber trees above twenty years' growth are tithable, if cut and corded for fuel, *alteri nom.* *Greenaway v. Kent*, Bunb. 98. And it is not the growth of the trees alone that will privilege them, but the use that is made of them. *Buckle v. Vaucre*, *Aston v. Smith*, *Franklin v. Jones*, *Collier v. Leyfield*, Bunb. 99, (n.).

Lamb's wool shall pay tithe, though the lambs had paid tithe two months before; and tithe shall be paid for agistment of yearlings, because a new increase. *Baker v. Sweet*, Bunb. 90.

Whether tithe-wood was due of common right, the court would not determine. *Jordan v. Colley*, Bunb. 61.

Bill for tithe of fish, taken at sea, brought within the parish of H, and there sold, and also for fish sold at sea, and the vessel brought back to the parish of

**H.**, also for fish taken by the inhabitants, and sold at another port. Plaintiff was impropriate rector of the parish of H, and claimed the tithe as due by custom; but he did not prove his custom. Held, a good custom, for one tithe may be paid by custom, and another by common right. *J.d. Scarborough v. Hunter*, Bunb. 43.

Peas and beans planted in rows are small tithes. *Nichols v. Elliot*, Bunb. 19. Tithe milk should pay every tenth meal where there is no custom. *Bate v. Sprackling*, Bunb. 20.

All the garden ground in England shall pay tithe; and turnips, though pulled and sowed ever so often on the same land, shall pay tithe. So shall aftermath pay tithe, but not after-pasture, unless by custom, *ut semble, set quere? Benson v. Watkins*, Bunb. 10.

Hop-poles shall not pay tithe, nor hops till they are picked, and then every tenth measure before they are dried. *Bate v. Sprackling*, Bunb. 20.

Saddle horses shall pay no tithe, neither shall cattle for the plough or pale, nor cattle killed for the use of a man's own family. *Underwood v. Gibbon*, Bunb. 8. *Fisher v. Leman*, ib. (n).

If a man depastures unprofitable cattle, he shall pay tithe in proportion to the number of the cattle, and the value of the land, generally at the rate of two shillings in the pound; so if they are travelling cattle which come and go. *Smith v. Johnson*, Bunb. 1.

No are cattle fed on a meadow ground after it is mowed, unless a custom be to the contrary. *Smith v. Johnson*, Bunb. 1. And where tithe is payable, it shall be paid by the occupier of the ground, and not by the agistor. *Underwood v. Gibbon*, Bunb. 3.

Though beasts of the plough are exempt from tithe, because by the labour of such cattle, tithes of another kind arise; yet if oxen are turned to grass, and fattened for sale, they shall from such time pay tithe for the herbage they eat, being in no wise beneficial to the paison in any other tithe. *Edmond v. Sandys*, Show. P. C. 192.

By 2 & 3 Edw. 6. c. 13. s. 5, all barren heath or waste land shall pay tithe after seven years' improvement and conversion into arable or meadow; and the suggestion for a prohibition against the spiritual court must be proved within six months after the prohibition granted, for it is an affirmative suggestion, which six months shall be computed by the calendar, and begin to run from the teste of the prohibition. *Thomas v. Gifford*, 2 Show. 92. *Straker v. Baynes*, id. 308. INCLOSURE OF COMMON.

If a man has a nursery of trees, and sells them, and pulls them up himself, he shall pay the tithe, otherwise the vendee shall pay it, as in the case of corn sold standing; but if sold after severance, the vendor must pay it. *Grant v. Hedding*, Haid. 380.

Tithes for barren cattle are due of common right, according to the value of the land, but they may be paid for by custom or prescription. *Holbeech v. Whadcocke*, Haid. 184.

Tithes payable by custom, shall be paid though the lands be not rented. S. C.

Tithes are payable for herbage eaten by travellers' horses. *Guilbert v. Peersley*, Haid. 35.

Where vicar is by endowment entitled to tithes of peas and beans, set and planted in rows in garden-like manner, the use of plough instead of a spade makes no difference. *Austen v. Nicholas*, 7 Bro. P. C. 9.

Tithes of rectory which belonged to a dissolved abbey are due to the grantee of the crown, and not to the incumbent rector. *Turner v. Smith*, 7 Bro. P. C. 10.

Tithes are not due by particular custom. *Buxton v. Hutchinson*, 2 Vern. 46.

#### IV. SETTING OUT, AND HOW PAYABLE, AND CARRYING AWAY.

Where peas grown in fields, but gathered green, were gathered by women and children in small baskets or aprons, and from those emptied into sacks, each sack being computed and intended to contain three bushels, and when the sacks amounted in number to ten, one sack was set out for the tithe, and when there were not ten, each sack was calculated to contain three bushels, and upon that presumption a tenth of the whole was measured out and tendered for the tithe, and if there were a surplus over ten sacks, the surplus was measured in the same manner: held, that this was a good mode of setting out the tithe, though it was objected by the vicar, that the peas ought not to be put into sacks till the evening, and he had seen the whole measured, and by that means knew that he had the actual tenth; it being, however, shewn in evidence, that it was the usual mode of tithing in the neighbourhood, and that any other mode would greatly injure the peas, as exposure to sun and air for any time after they were gathered, would destroy their bloom, and diminish their value in the market; it being also shewn in evidence that the sack was a measure of three bushels, and that the occupier gave the vicar his choice of sacks, and did not insist upon his accepting the sack without giving him an opportunity of seeing and measuring the contents of any of the sacks he chose. *Fanshawe v. Brettain*, 2 Y. & J. 395. PEAS.

The incumbent is entitled to the milk of the tenth day, morning and evening, and not to the tenth meal, and the milk of the whole herd of cows must be rendered on one and the same day. *Id. ib.* MILK.

The tithe of lambs is due when the animals are dropped, but payable when they are able to live without their dams; and therefore, where the occupier removed lambs out of the parish, immediately after they were dropped, held that he was liable to pay for the value, when fit to be weaned. *Id. ib.* LAMBS.

It is easy to state the principle on which the tithe of vegetables in a garden, gathered for the consumption of a family, is to be rendered, but very difficult to imagine in what manner the principle is to be applied in practice, and therefore requires a mutual spirit of accommodation on the part of the vicar and the occupier. *Id. ib.* GARDENS.

Defendant in suit by bill in equity for tithes, relying on defence of tithes having been duly set out may, (notwithstanding cause be at issue,) bring action of trespass for not carrying them away. Court refused injunction to restrain him. *Bradley v. Bensted*, 13 Pri. 221. S. C. 1 McJel. 80. INJUNC. TO STAY PROCEEDINGS AT LAW.

The tithe of calves is to be set out when they are fit to be weaned, and to live alone on the same food with the cow. *Bearblack v. Tyler*, 1 Jac. 560. CALVES.

The proper mode of tithing hay is by the fork and rake. *Id. ib.* HAY.

The rule that involuntary rakings are not tithable, does not extend to hay. *Id. ib.*

The tithe of the clear profit being only due, the rent is the first deduction; and in the case of a new mill in the occupation of the owner, a yearly value in the nature of a rent, is to be set upon it and deducted. *Hull v. Mallett*, 3 Anst. 915.

A farmer may cut down a field in any portions most convenient, provided he sets out the tithe of all then cut down, before any is carried, and provided it be not done vexatiously. *Id. ib.*

Clover hay is tithable in the cock, not in the swathe. *Cottger v. Hooves*, 3 Anst. 954. CLOVER.

But where, by the usual mode of husbandry, clover-hay is not made into cocks at all, the farmer may set out the tithes in the swathe. S. C. 2 Anst. 481. S. P. *Baker v. Athili*, id. 491.

Setting out tithes cannot be dispensed with, even although the uncertainty of the weather prevents the corn from being put in shocks at all. *Franklyn v. Gooch*, 3 Anst. 682. CORN.

A custom of tithing, by throwing aside every tenth sheaf, as the corn is about to be carried, is bad. Tithes must be set out so that the rector may compare them with the other parts. Where, by the custom, notice of tithing is to be given, an hour's notice is not sufficient. *Tennant v. Stubbing*, id. 641. CORN.

Where tithe of milk is due in kind, it must be set out by every tenth morning's meal, and every tenth evening's meal. *Cullimore v. Bosworth*, 7 Bro. P. C. 57. MILK.

The tithe of hops is to be set out by the tenth measure after they are picked, and not by the tenth hill, as soon as the vines are severed from the ground. *Tyers v. Walton*, id. 18. HOPS.

Tithes of wool are due at shearing-time, and is a satisfaction for pasturage for the year past, ending at that time, but not for subsequent pasturage. If the farmer, after shearing-time depasture sheep, and sell them before the next shearing time, tithe of pasturage is due for them. — *v. Gold*, Anbl. 149. WOOL.

Tithes of wood must be set out on the spot at the time of felling; it is impossible at the time of cutting, to say to what use it will be applied. *Watten v. Truon*, id. 132. S. C. 1 Dick. 244. WOOD.

Tithe milk must be set out in vessels at the common milking place. *Carthew v. Edwards*, Anbl. 72. MILK.

Parishioners only bound to cut the grass, and to lay it into heaps or cocks, but not bound to make it into hay. *For v. Ayde*, 21 W. 523. GRASS & HAY.

Tithes of hay ought to be paid in grass cocks. *Smithson v. Dodson*, 9 Mod. 117.

The usual time for tithing lambs, is when they can live without a dam, (about Michaelmas) a custom therefore to tithe them on St. Mark's day, 25th April, was held unreasonable. *Reignolds v. Vincent*, Bunb. 133. CUSTOM; LAMBS.

If there be any custom in a parish for the manner of tithing milk, as to carry it to the church porch, or parsonage house, that must be observed by the parishioner; but if there be no particular custom, the parishioner is obliged, *de jure*, to pay a tenth meal, to milk the cows at the usual place of milking into his pails, and the parson is obliged to fetch it away from the milking place in his own pails, in a reasonable time; but if he does not fetch it before the next milking time, the parishioner may justify the pouring the milk on the ground, because he then has occasion for his own pails. *Dodson v. Oliver*, Bunb. 73. Vide *Carthew v. Edwards*, Anbl. 72. MILK.

Parishioners are only bound to cut the grass and lay it into cocks, but not to make it into hay. *For v. Ayde*, 2 P. W. 523. Vide *Woodnoth v. Ld. Cobham*, Bunb. 180. *Bennet v. Peart*, in Scacc. 1786. GRASS & HAY.

If trees in a nursery are sold after severance, the vendor must pay the tithe. *Grant v. Harding*, Haml. 380. NURSERY GARDENS.

In debt for not setting out tithes, the setting them out and taking them away by plaintiff himself, is not good within the statute 2 & 3 Edw. 6. c. 16. *Set serus*, if taken away by a stranger. *Anon.* 2 Show. 184.

#### V. WHETHER GREAT OR SMALL.

The tithe of tare seed held to be a small tithe. *Daws v. Benn*, 1 Jac. 95.

Agistment is a predial tithe. *Scarr v. Trin. Coll.* 3 Anst. 760. AGISTMENT TITHE.

The tithe of a horse malt-mill is a personal tithe, and the tenth part of the clear profits arising from corn ground in such mill, over and above all incidental

charges, is to be paid as the tithes thereof, and the corn ground therein is to be tithed by the tenth toll-dish. *Chamberlaine v. Neute*, 7 Bro. P. C. 3.

Tithes are by law denominated and adjudged great and small, according to the nature of the thing, and not from the mode of cultivation; therefore, tithes of beans and peas, whether sown in fields or gardens, are great tithes, and do not fall under the denomination of tithes of gardens. *Sims v. Bennet*, id. 29. S. C. 1 Eden, 382.

Potatoes being in their nature a small tithe, the sowing them in great quantities makes no alteration. *Smith v. Hyatt*, 2 Atk. 364. S. C. 9 Mod. 336.

The distinction between great and small tithes might arise at first from the former producing greater, and the latter smaller quantities. S. C. *ib.*

Though Lord Ch. J. Holt, in *Warton v. Lisle*, held tithes should be determined, whether great or small, from their quantity, the judgment was contrary. S. C. *ib.*

If potatoes in gardens should be called small tithes, and great in fields, it must vary every year in every parish. S. C. *ib.*

Where arable is turned into pasture, it is an agistment tithe, and become a small one, from a great one. S. C. *ib.*

Clover-seed is a small tithe, and as such, due to vicar. *Wallis v. Pain*, 2 Com. 633.

#### VI. SUITS FOR, AND PLEADING, AND EVIDENCE RELATING TO.

An account of tithes in kind decreed, notwithstanding evidence of payment of certain customary payments for upwards of a century, and evidence that numerous bills had been filed by vicars, but had been subsequently abandoned, it appearing from the depositions and proceedings in an old cause, rather more than a century back that the customary payments did not then exist, but that the then vicar had endeavoured to set them up. *Jackson v. Morris*, 1 Y. & J. 275.

The defendant having set up a farm modus, in answer to a bill for tithes, issues were directed to try whether the ancient farm consisted of the lands mentioned in the answer, and whether a certain modus had been immemorially payable for the tithes arising upon it. The jury found that the farm consisted of these lands, together with four other closes, and was covered by a modus. The circumstance, that the jury found the ancient farm to consist of other lands, besides those mentioned in the pleadings, is no ground for a new trial, unless the plaintiff can show that he has evidence with respect to those four closes, which, upon the supposition that they are parcels of the alleged ancient farm, might materially vary the substance of the case. *Baileu v. Sewell*, 1 Russ. 239. MODUS; NEW TRIAL OF ISSUE.

Court will not, on motion, order depositions in tithe cause in exchequer to be read in a tithe cause in this court, against other occupiers of land in same parish, though objects of both suits, and the interest of parties, were the same. *Goodenough v. Alway*, 2 S. & S. 481.

Where, in a suit for tithes, the question depends entirely on the construction of ancient documents, the judge in equity is more competent than a jury, and in such case, an issue will not be directed. *Fisher v. Ld. Graves*, 1 McCl. & Y. 362. ISSUE AT LAW.

Vicar after issue, directed to try modus, suffering modus, to be taken *pro confesso*, pays costs. *Drake v. Smith*, id. 380. ISSUE AT LAW; COSTS.

As to costs in general, of issue at law, relative to tithes, see *id. ib.*

An account of tithe hay being decreed, the defendant appealed from so much as directed an account in respect of lands in the township of S; and the decree was to that extent ultimately reversed, pending the appeal the plaintiff took the account as to all the lands, including those in the township of S; the court on application declining to restrain him from so doing. On an application for costs, held, that it was convenient that the whole account should be taken at the same time, and refused to make plaintiff pay costs of account, as to the township of S, but made him pay his own costs in respect of that part of the account. *Id. ib.* COSTS; ACCOUNT.

Particular course pursued on hearing of tithe cause. *Low v. Firkins*, 1 M'Clel. 595. S. P. *Drake v. Smith*, 5 Pri. 375. PR. HEARING.

Bill praying account of tithes, and merely stating that impropriate rector demised tithes to plaintiff, demurred to for want of title; but on argument plaintiff was allowed to amend by making impropriate rector a party, on payment of 5*l.* costs. *Jackson v. Benson*, 1 M'Clel. 62. S. C. 13 Pri. 131. PL. PARTIES; PL. BILL, AMENDMT.

It is not uncertain or multifarious in bill for account of tithes, bill having stated as the foundation for plaintiff's claim, a decree made pursuant to act of parliament, also to charge two other distinct sources from which he derives his right, and on which he rests his title, the basis of those two latter being, first an agreement anterior to decree, charged to have been confirmed by act of parliament passed ten years before former act; and secondly, custom founded on immemorial usage, there being nothing uncertain or real. *Owen v. Nodin*, 13 Pri. 478. S. C. 1 M'Clel. 238. PL. BILL, MULTIFARIOUSNESS.

If claim of plaintiff in tithe suit be larger than he can support, the court will give costs against him for the excess up to the time of his giving notice of abandoning any part of the excessive demand by the bill. *Wolley v. Brownhill*, 13 Pri. 500. S. C. 1 M'Clel. 317. PR. COSTS.

\* Plaintiff, in suit for tithes, having commenced action at law for treble value, ordered on motion to elect law, or equity within six days, with costs on either course abandoned, and of the motion. *Taunton v. Glude*, 10 Pri. 129. PR. ELECTION, LAW OR EQUITY.

Bill to enforce contribution under an agreement, by owners and occupiers of land in a parish, to defend and prosecute tithe suits at joint expence dismissed upon doubtful evidence, and long delay. *Stone v. Yea*, 1 Jac. 426. CONTRIBUTION; CHAMBERLIN.

Construction and effect of very ancient documentary evidence, (opposed to a case of uninterrupted non-payment,) in a suit for tithes, as applied to the claim, and to a defence of prescription in *non decimando*, on the ground of the lands having belonged to a religious house. To support such a defence, the lands must be shown to have belonged to a religious house before time of legal memory; it is not sufficient to show that lands were in the hands of religious house at time of dissolution. *Markham v. Smyth*, 11 Pri. 126. EVID.

In claiming an exemption from tithes for particular lands, they must be accurately described in defendant's pleadings and their local situation, &c. *Id. ib.*

Where defendant in tithe cause submits to part of plaintiff's demand, the court will, on motion for that purpose, on part of defendant refer it to master in any stage of proceedings, to ascertain what is due, and to tax costs, the defendant undertaking to pay the amount, without prejudice to any other question in the cause. *Low v. Firkins*, id. 453. PR. REFERENCE TO MASTER; PR. WITHDRAWING FROM CAUSE.

Where defendant in tithe cause sets up modus, and is desirous of protecting himself from costs, he should move for an order that plaintiff accept sums admitted to be due by answer, or proceed at peril of costs, and

court will notice such tender by minute. The motion may be made without notice, or payment of money into court. *Davis v. Moseley*, 9 Pri. 211. MODUS; PR. COSTS; PR. PAYMT. INTO COURT.

Vicar demanding certain specific tithes by his bill, *nominatim*, is not precluded from giving evidence of other tithes due to him for other titheable matters taken by defendants, where there is in the bill a general claim of all other tithes usually denominated small tithes. *Manby v. Lodge*, id. 231. PL. BILL.

A bill for an account of tithes received from the occupiers by a person claiming under an adverse legal title, will not lie. *Bp. of St. Asaph v. Williams*, 1 Jac. 349. ACCOUNT.

In a suit by an impropriate rector for tithes, when the defence is, that the tithe in question is vicarial, and vicar, who is a defendant, dies during the suit, it is not necessary to make the new vicar a party, if the plaintiff will waive the account subsequent to his induction. *Duvs v. Benn*, id. 95. PL. PARTY.

It is the duty of courts of equity to decree tithes in kind, when satisfied that modus is either bad, or has not immemorially existed. *Short v. Lee*, 2 J. & W. 464.

It is multifarious for rector and vicar to join in suit for tithes respectively due to them. *Exeter Coll. v. Rowland*, 6 Mad. 94. PL. MULTIFARIOUSNESS.

The vicar is a necessary party to a bill for tithes, by the impropriate rector against an occupier, when the defence made is, that the tithes in question are payable to him. *Duvs v. Benn*, 1 Jac. & W. 513. PL. PARTY.

Where evidence in support of tithes, and in support of modus, were very strong and conflicting, it was sent to issue to determine question. *Taylor v. Cook*, 8 Price, 650.

Defendant, in answer to bill for account of tithes in kind, must set forth an account of titheable matters taken by him, although he relies on a defence of a composition or modus; or it will be a ground of exception. *Whistler v. Wigney*, 8 Price, 1. MODUS; ACCOUNT; PL. ANSWER.

To bill against occupier for amount of tithes, arising from farms and lands situate within the township of K, in the parish of L; a plea, that defendant did not occupy any lands or farm within parish of L, or the titheable places thereof, allowed. *Warrington v. Mothersill*, 7 Price, 666. PL. PLEA.

If vicar, claiming an account of tithes throughout the whole parish, by bill in equity, prove his right in part of the parish only, the objection, that the claim is too largely laid, is not a ground for dismissing the bill. *Scott v. Lawson*, 7 Price, 267. PR. BILL DISMISSAL OF.

The court will not, on bill for tithes, praying discovery of documentary evidence, order the book of former rector, shown to have been in the possession of defendant's attorney, unless it clearly appear, from admissions in the answer, that it would assist plaintiff's case. But if there be enough shown to give colour for the application, court will not give costs to defendant. *Bligh v. Benson*, 7 Price, 205. PR. PRODUCTION OF DEEDS.

As to the preponderance of conflicting evidence as to title, in tithe causes. *Petch v. Dalton*, 6 Price, 232. EVID.

A defendant, insisting on a modus as an outner, must prove himself to have been such at the time his lands became titheable, his being so described in the bill not sufficient. *Lake v. Skinner*, 1 Jac. & W. 9.

As to evidence of money payments in tithe causes. *Drake v. Smyth*, 5 Price, 369. PR. EVID.

Defendant was permitted to go into evidence of his right to tithes, where his title appeared likely to be clearly established, although he had inaccurately

stated the subject matter of his defence in his answer. *Wilmot v. Hellaby*, 5 Price, 355. **PL. ANSWER.**

Vicar claiming title of hay may establish his right by sufficient proof of perception during living memory, where none can be shewn to have been enjoyed by rector, although his endowment actually negative his right to that title expressly, and state it to belong to rector, on presumption of a subsequent endowment, which the court is bound to adopt. *Parsons v. Hellamy*, 4 Price, 190. **EVIN.**

Perception of tithes by means of a composition which has always been understood by the parties to have been paid for tithes hay, is as strong evidence as if it had been paid in kind. And perception by vicar for a considerable period, where its inception cannot be shewn, and is not met by perception by rector, or any other person, is a sufficient proof of usage to ground a presumption of perception long anterior, and of its having been founded on subsequent endowment; nor will court grant an issue for the rector. A receipt for payment (by person sued by vicar for tithes) of plaintiff's bill of costs, is evidence of suit having resulted in favour of vicar. So also is an entry to that effect in a former vicar's books. *Id. ib.*

Evidence so old as to be unintelligible, issue was directed. Evidence of reputation of certain lands having been enclosed, in pursuance of agreement, not admissible. Copy of a lost terrier rejected. *Leathers v. Newitt*, 4 Price, 350. **EVIN.**

Rector ought not to be made defendant in vicar's suit, for an account of small tithes charged to be withheld by occupiers on a claim by rector. *Williams v. Price*, 4 Price, 156. **ACCOUNT; PL. PARTIES.**

Rector is entitled to an issue at law as a matter of right, where he sues alone. *Id. ib.* **ISSUE AT LAW.**

To make out a defence to a bill for tithes, of a composition real, it is not enough to shew that the same money payment has been constantly received in satisfaction of tithes for a considerable period before 13 Eliz. But evidence must be given of the existence of an agreement in writing, and made between all proper parties interested; nor will issue be granted on such evidence, or costs allowed to those defendants who are occupiers. *Bennett v. Sheffington*, 4 Price, 143. **EVIN.**

Vicar's books are evidence to show that the money payments received in lieu of tithes, are founded on, and regulated by, a criterion not in existence beyond legal memory, e. g. the poor rates. *Walter v. Holman*, 4 Price, 171. **IB.**

Courts of equity are not bound in title causes to any limitation, in point of time, for which tithes are sought, although, *a conventioni*, it has been usual to confine the account to the period of six years, where court sees no reason to depart from such usage. *Wardens, &c. of St. Paul v. Bp. of Lincoln*, 4 Price, 86. **ACCOUNT, HOW FAR BACK.**

The amount of money payments laid as moduses in answer to vicar's claim, being totally inconsistent with value of vicarage, as established by ancient documents, usually put in evidence, is not sufficient (where the payments have been uniform and uninterrupted) to induce the court to dispense with an issue. It seems no objection to lay a modus, that it excepts articles of modern introduction *speciatim*. See *v. Hockley*, 4 Price, 87. **PL. ANSWER.**

Non-perception of vicarial tithes, by either vicar or rector, (the latter admitting vicar's right, except as to certain titheable articles, there being no third claimant,) in certain parts of parish throughout which vicar receive some small tithes, is negative evidence in favour of vicar's right to all other than excepted articles. *Leathers v. Newitt*, 4 Price, 374.

Old terriers recording that title of hay is payable in kind, signed by rector and churchwardens, over-seers, and some of resident parishioners are good evi-

dence to rebut presumption of farm modus attempted to be established by proof of money payment having been uniformly rendered within living memory, and the absence of any evidence, even of reputation, that tithe had ever been taken in kind, and that, though such terriers are not proved to be signed by any persons interested in the farm. Wood, B. dissentiente. nor will the court grant an issue in such case. *Mytton v. Harris*, 3 Price, 19.

The ecclesiastical surveys are admissible to prove an ancient endowment, and aided by perception of small tithes (though not of all) will give the vicar a right to tithes of articles of modern introduction against the lessee of the rector. *Cunliffe v. Taylor*, 2 Price, 329. **PL. EVIN.**

Plea of title to bill by improper rector, for account of tithes, overruled. *Heathcote v. Aldridge*, 1 Mad. 236. **PLA.; TITLE.**

Endowment produced, shewing vicarage expressly endowed of hay, not sufficient to support bill for that tithe, without usage, against evidence of money payment to rector in lieu of hay. But grant from crown subsequent to endowment, including all tithes, in general words, not sufficient to overturn vicar's right without proof of perception. A particular and minute enumeration of several articles of endowment in that instrument, does not preclude vicar's right to other small tithes not therein mentioned. *Munby v. Curtis*, 2 Price, 284. See this case confirmed 9 Price, 231. **ENDOWMENT OF VICARAGE.**

In pleading, case proved should correspond with case laid. Therefore, where in answer to bill for tithes, certain customary payments were alleged, and some payments, which, from their smallness, appeared customary, were shewn in evidence, without making out moduses as laid, court of exchequer, without issue, decreed for plaintiff. *Blake v. Teyzie*, 3 Dow. 189. **PL. PLA.**

A receipt, even of more than fifty years old, offered to be put in to prove a money payment, purported by it to have been received in lieu of tithes, is not admissible in evidence of fact of such customary payment having been acted on, so as to establish a defence of a modus; unless it can be proved also who the parties to the receipt were, and in what character they stood, and unless proof be given of the handwriting, or death of the party giving it. Wood B. dissentiente. *Munby v. Curtis*, 1 Price, 225.

Rector is not entitled to issue, where defendant sets up a grant of a portion, and constant non-payment of tithes, which defence is not impeached by plaintiff. *Barker v. Parker*, Wightw. 397. **ISSUE AT LAW.**

Miller carrying on trade of mealman is obliged to discover, on suit for tithes, the quantity, though not the price of meal ground. *Chapman v. Picher*, Wightw. 15. **PL. DISCOVERY.**

To a bill to establish a customary payment in lieu of tithes, the ordinary must be a party. *Gordon v. Simkinson*, 11 Ves. 509. **PL. PARTY.**

A bill to establish a customary payment in lieu of tithes does not lie upon a simple demand of tithes without suit. *Id. ib.* **PL. BILL.**

Bill for tithes; answer admitting the right to one third, and submitting to account, and claiming the other two-thirds, under a title, devised from a grant by Queen Elizabeth, submitting to be examined upon interrogatories, but not setting forth a description of the lands, the defendants having gone into evidence in support of their claim, pressed to have the bill dismissed generally; the plaintiff pressed for a general account. The master of the rolls decreed an account as to one-third; and as to two-thirds, the plaintiff declining to try the right at law, dismissed the bill. *Foxcroft v. Parrie*, 5 Ves. 221. **PL. ANSWER, ACCOUNT.**

The right to compel an account for tithes being con-

sequential to the legal title, and a rector having *prima facie* a title to all the tithes in turns, it seems that, in questions between the rector and vicar, a court of equity ought not to make a decree in consequence of their opinion, of the vicar's title, and in derogation of that of the rector, until the title of the vicar has been established by the decision of a jury; unless such title is made out in the most clear and satisfactory manner. *Burnard v. Garnons*, 7 Bro. P. C. 105. ACCOUNT; JURISDICTION.

Where a title to tithes in a layman is clearly made out, though not supported by possession, the court will decree an account, without an issue. *Lygon v. Strutt*, 2 Anst. 602. ACCOUNT; ISSUE AT LAW.

On bill for title of agistment of "barren and unprofitable cattle," defendant, from plaintiff's loose mode of pleading, supposing it not to relate to sheep, made no defence as to them. Court refused the account as to them. *Turner v. Williams*, 3 Anst. 829. PL. BILL; ACCOUNT.

In suit for account of tithes, defendant cannot pay money into court before answer. *Hull v. Mathews*, 2 Anst. 444. PR. PAYMENT INTO COURT.

Where, in a suit for tithes, the title to the rectory is in issue, to a cross bill praying a discovery of the title, the rector cannot demur, although no other title is set up. *Bozman v. Lygon*, 1 Anst. 4. DEMURRER; DISCOVERY.

In a bill for the single value of tithes, it is not necessary expressly to waive the treble value. *Wools v. Wolley*, 1 Anst. 100. PL. BILL; WAIVER.

If more tithes are claimed than defendant has kinds of titheable goods, it is practice in exchequer to dismiss bill with costs. *Anon.* Loft. 66. PR. COSTS; PR. IN EXCH.; BILL, DISMISSAL OF.

Plaintiff sued for thirteen different species of tithes, and proved but one; yet the court decreed costs generally. *Smith v. Morgan*, Bunb. 335. But see reporter's note, *id.* PR. COSTS.

Where two defendants were sued for tithes, and one made default, the court decreed the whole costs against the other, and left him to get the contribution as he could. *Lloyd v. Mackworth*, Bunb. 138. PR. COSTS.

If to a bill for tithes, the defendant does not shew a previous tender, or make one by his answer, plaintiff shall have an account; if the tender be only by answer, defendant shall account with costs; but if made before, he shall save his costs. *Anon.* Bunb. 38. That a tender may be made after answer, Vide *Rp. of Exeter v. Trenchard*, *id.* 47. PR. COSIN; TENDER.

Bill for tithes by the bishop, and sequestration during the incapacity of the incumbent, dismissed, the incumbent not being a party. *Rp. London v. Nicholls*, Bunb. 141. PL. PARTY; INCUMBENT.

Bill by plaintiffs as lessees of the rector of W for a portion of great and small tithes in S a neighbouring parish; the vicar of S, who might be entitled to the small tithes, is a necessary party. *Bailey v. Worrall*, Bunb. 115. *Id.*

A bill for tithes, used formerly to waive the penalties, but not of late, because the single value is only prayed. *Att. Gen. v. Vincent*, Bunb. 393. PL. BILL, WAIVER OF PENALTIES.

The statute of limitations cannot be pleaded to a bill for tithes. *Marston v. Cleypole*, *id.* 213. PL. PLEA; STAT. OF LIMIT.

Plea of non-residence in bar to a bill for tithes, is good. *Quilter v. Mussendine*, Gilb. Exch. Rep. 228. *Mills v. Etheridge*, Bunb. 210. S. P. PL. PLEA; NON-RESIDENCE.

A plea of the statute of 13 Eliz. c. 20. is good to a bill brought by a lessee for tithes. *Bockenham v. Bentfield*, 1 Com. 392. PL. PLEA.

If a *modus* be pleaded in the spiritual court, and

they refuse the plea, a prohibition shall go. *Hucks v. Phelps*, Bunb. 8.

Where a bill is brought in the exchequer chamber to establish a *modus*, the spiritual court shall be enjoined. *Blackett v. Finney*, *id.* 176. *Salmon v. Rake*, *id.* (n.)

In an information for tithes, the value of them must be set forth. *Hardwicke v. Newre*, Hard. 4. PL. INFORMATION.

In a bill for vicarage tithes, plaintiff did not set forth whether they became due to him by prescription or endowment. Defendant, by answer, admitted that the tithes were the vicar's due; but the bill was dismissed upon the merits. *Button v. Honey*, Hard. 130.

In debt on the stat. of 2 Edw. 6. for tithes out of plaintiff's parish, a general allegation is sufficient, without shewing a title; defendant was not alleged to be *subditus domini regis*; yet held good, because he was called *occupator terræ*. *Phillips v. Kettle*, Hard. 173.

Bill for tithe of corn and grain. Demurrer, because the single value was not barely demanded, but the bill was for a discovery only, to enable plaintiff to recover the treble value: *non allocatur*, for that tithes were suable in the exchequer before the statute. *Sed quare*, because it is contrary to the practice to have such a bill, without alleging that plaintiff is content to receive the single value only. *Driver v. Man*, Hard. 190. WAIVER OR PENALTY; PL. BILL.

In a bill for tithes, complainant did not shew how he was entitled to them, yet held good. *Stone v. Ludlow*, Hard. 321. TITLE; PL. BILL.

Where a vicar has used for a long time to take tithes or other profits, he shall not be concluded by their not being expressed in the endowment of the vicarage. *Twisse v. Braceemose Coll. Oxon*, Hard. 328. TITLE.

A vicar need not set forth how he is entitled to tithe herbage, and small tithes. *Ayde v. Flower*, Bunb. 7. S. P. *Goole v. Jordan*, *id.* 144. TITLE; PL. BILL.

The court would not determine whether there was any difference between a lay and spiritual proprietor, in setting out his title to tithes. *Burwell v. Coates*, Bunb. 129.

To a bill for tithes, defendant must set out quantities and values of the tithes particularly; it is not sufficient to deny generally the taking the titheable matter. *Baker v. Planner*, Bunb. 108. PL. ANSWER.

In a bill for tithes by a lay impropiator, the title must be shewn. *Penny v. Hoper*, Bunb. 115. TITLE; PL. BILL.

A portion of tithe is distinct from tithe annexed to a rectory. *Downes v. Mooreman*, Bunb. 189.

Where defendant admits that a vicar is entitled to all sorts of tithes, but insists on a special exemption, the vicar shall not be obliged to shew any special title, either by endowment or prescription. *Pye v. Rea*, Bunb. 72. PL. BILL; TITLE.

To a bill for tithes by the bishop and sequestrator, during the incapacity of the incumbent, the incumbent must be a party. *Rp. London v. Nicolls*, *id.* 141. And if a sequestrator file a bill for subtraction of tithe during the vacancy, the bishop of the diocese must be made a party, because the sequestrator must account to him for his receipts. *Jones v. Barrett*, Bunb. 192. PL. PARTY.

To a bill for a portion of tithes in a neighbouring parish, the vicar of that parish must be a party. *Bailey v. Morrall*, Bunb. 115. *Id.*

#### VII. IMPROPRIATOR OF.

A being entitled to parcel of tithes, was made defendant in suit by person also claiming to be entitled



to tithes against occupiers, he joined with occupiers in answer, and insisted on his right of tithes, court retained bill for one year, with liberty to bring an action; if not, bill to be dismissed with costs. Action was brought against occupiers, and verdict for plaintiffs. On further hearing, account against occupiers decreed, and occupiers and A to pay costs. *Wing v. Murrell*, 1 M'Clel. & Y. 620. COSTS.

Tithe owners cannot controul the farmer in his mode of cultivation or consumption of produce of his ground, provided he act *bona fide*, and without fraud. *Lewis v. Young*, 1 M'Clel. 129. S. C. 13 Pri. 394.

Where impropriate rector, not being an occupier, is made party defendant to bill for tithes, and decree is made for plaintiff, he is not (but under particular circumstances, as to which see *Leathes v. Newitt*, 8 Price, 562.) liable to pay costs. *Petch v. Dalton*, id. 9. See also *Leathes v. Newitt*, id. 566. S. P. and *Williamson v. Hutton*, 9 Price, 187. PR. COSTS.

An impropriator is not a necessary party to a bill by a vicar against occupiers; and if made one, he may demur. Bill dismissed against him, but under circumstances, without costs. *Williamson v. Lt. Lonsdale*, Dan. 171. PL. PARTY.

Bill by heir suggesting a secret void trust for charity in residuary devise, but without evidence of a trust expressed, or of an engagement expressed or tacit, preventing it, dismissed with costs. Unless the heirs would take an issue to which he is entitled. *Paine v. Hall*, 18 Ves. 475. HEIR AT LAW; ISSUE AT LAW; WILL.

In a bill to establish a modus against the lessee of the impropriator, the owners of the impropriation must be parties. *Glanvil v. Trelawney*, Bunb. 70. PL. PARTY.

Impropriator of the small tithes bound to maintain a priest where there is no vicarage endowed. And in such case the king may assign to a curate such proportion of the small tithes as he thinks fit. Otherwise where there is an endowment, though never so small. *Bonsey v. Lee*, 1 Vern. 247.

#### VIII. IN LONDON.

The right of exemption from tithes, and the mode of computing them in the deanery of St. Paul's, London. *Wardens, &c. of St. Paul's v. Bp. of Lincoln*, Price, 65.

A certain customary payment in London in lieu of tithes, may be good so as to exempt an individual house, if usually made a sufficient time to acquire the character of customary in the ecclesiastical court, though within time of memory, and not general through the place or parish. *Warden, &c. of St. Paul's v. Kettil*, 2 V. & B. 1.

Mere non-payment of tithes under stat. 37 Hen. 8. c. 12. is no answer to a claim for them; as it would be no answer to a claim for tithes at common law. *Id.*

Decree under the stat. 37 Hen. 8. for payment of tithes in London as to warehouses erected by the East India Company upon the site of old buildings, and occupied by them, at 2s. 9d. in the pound upon the value, to be let, without an issue, no specific customary payment in lieu of tithes being alleged. *Autrobus v. E. I. Comp.* 13 Ves. 9.

Notwithstanding the statute and decree 37 Hen. 8. c. 12. the court of chancery has jurisdiction upon the subject of tithes in London. An account was decreed according to the improved rent. Another defendant setting forth his lease at a low rent and a fine, and alleging by answer that he had never heard of any greater rent being paid, there being no evidence against it, was held liable only according to

that rent. *Warden, &c. of St. Paul's v. Crickett*, 2 Ves. J. 563. JUNTS. MERRON; EVIN.

A parson sues for 2s. 9d. per pound for tithes of houses in London, under the stat. 37 Hen. 8. But an issue was directed to try whether less than that sum had ever been paid, although there was no proof of any regular modus. *Bennet v. Treppas*, 4 Bro. P. C. 650. ISSUE AT LAW.

By the stat. 37 Hen. 8. c. 1. all houses in London shall pay tithe according to their ordinances, except the houses of noblemen; therefore a surmise that a house in London was a priory, and discharged from tithe by the pope's bull, and by the stat. 31 Hen. 8. which gave the possessions to the crown, will not prevent a consultation being awarded on a prohibition prayed against a suit in the spiritual court. *Green v. Pipe*, Mos. 912.

A bill lies in the exchequer for non-payment of tithes in London, according to the decree in 37 Hen. 8. *Langham v. Baker*, Hard. 116.

Houses in St. Saviour's Southwark shall pay tithe, it being the only provision made for the minister. *Pacock v. Titmarsh*, Bunb. 102.

Bill by the vicar of Cripplegate for 2s. 9d. in the pound on the rent of houses, in the parish, pursuant to 37 Hen. 8. c. 12. Defendant set up certain customary payments in lieu: whereupon the court directed an issue to try the constant uniformity of such payments. *Bennet v. Treppas*, Bunb. 106. Gilb. Exch. Rep. 191.

The books of former rectors may be produced in evidence, upon an issue to try whether any variation had been as to sums paid for tithe in London. S. C. Bunb. 143.

#### VIII.\* EASTER OFFERINGS, &c.

Oblations, obventions, and offerings, are one and the same thing; though obvention is the largest word, and is in the nature of tithe. Offerings are reckoned among personal tithes, and such as arise from the labour and industry of the parishioner, are payable by custom to the parson or vicar, either occasionally at sacraments, marriages, burials, churching of women, &c. or at constant stated periods, as at Easter, &c. By stat. 2 & 3 Edw. 6. c. 13. they are to be paid to the parson of the parish where the party dwells. 2 Inst. 659. 661. *Grant's case*, 11 Co. 16. *Lawrence v. Jones*, Bunb. 173. *Egerton v. Still*, id. 198.

Easter offerings are due of common right, though demanded by custom, for they are a composition for common tithes. *Lawrence v. Jones*, Bunb. 173. *Egerton v. Still*, id. 198. *Carthew v. Edwards*, Amb. 72.

#### IX. EXEMPTION AND DISCHARGE FROM, AND PRESCRIPTION DE NON DECIMANDO.

An exemption from tithes was claimed, as to certain copyholds, on the ground of unity of possession of the rectory, manor and lands in one of the greater monasteries, dissolved by 31 H. 8.: other copyholds of the manor had belonged to the monastery at the dissolution, and were subject to tithe: held, nevertheless, that the exemption was good, because the monastery might have granted out the latter copyholds before the union of the rectory, and the former after it. *Monck v. Huskisson*, 1 Sim. 280.

An exemption from tithes on the ground of the lands having belonged to a monastery of a privileged order, does not rest on prescription; but the owner must shew satisfactorily, that the monastery was seized of the lands before the council of Lateran, and also at the time of the dissolution. In order to support a general exemption in *non decimando*, it must

be shewn, that the lands were part of the possessions of a monastery before the time of legal memory; but it is seldom that such fact can be distinctly proved, and therefore it must usually depend upon presumptive evidence. *Norton v. Hammond*, 1 Y. & J. 943.

Where a *non decimando* was set up for lands as part of the possessions of a monastery which was dissolved by, or came into the hands of Hen. 8., and the answer alleged, that such lands were, at the dissolution, in the hands or occupation of the abbot, discharged of all tithes, without stating in what manner they were discharged, whether by bull, order or prescription: the court, upon the effect of the whole answer, considered it might understand it to mean prescription. Where there are no ancient documents to support the presumption of a prescription *non decimando*, the modern evidence of usage must be carried back a great way to satisfy the court, that it is acting upon a presumption supported by usage of considerable antiquity. *Pritchett v. Honeybourne*, id. 135.

As to exemption of lands from tithes as having been part of possessions of abbey, at time of dissolution, which was also supported by evidence of non-payment, other parcel of the same man r, however, paying tithes. *El. Curyfort v. Wells*, 1 M'Clel. & Y. 600.

In making out a defence, grounded on an alleged discharge in the hands of the Hospitalers by prescription, it is not necessary to show possession by them at the time of memory: usage of non-payment, not, in the absence of all conflicting evidence, to be accounted for, except upon the hypothesis of such a discharge, constitutes a *prima facie* case of prescription. *Donnison v. Elstey*, id. 1.

The privileged orders were capable, like every other religious order, of having their lands discharged of tithes by a real composition or by prescription; the lessees, under the crown's grantee of lands, which had belonged to the knights of St. John of Jerusalem, and his under-tenant may defend themselves against a demand for tithes just as they might have done if their lands had belonged to an order not privileged. *Id. ib.*

Lands which were held discharged from tithes before time of memory, by one of the alien priories, and coming to the crown on their suppression, were granted to a lay person, and by him to one of the greater monasteries, in whose hands they remained till the dissolution, are no longer exempt. *Page v. Wilson*, 2 J. & W. 513.

A custom in part of a hundred, exempting hedges and hedge rows less than a rod in width from tithes of wood and underwood, is bad. *Id. ib.*

By common law all land is equally charged with tithe; there can be no exemption inherent in the land. *Id. 528.*

Lucerne, tares, clover, and all other artificial grasses cut green, and given severed to husbandry horses, &c. employed on the farm on which they are grown, are not, therefore, exempt by general custom, from the render of tithes, unless the farmer have no other fodder or sustenance of any sort on the farm on which such horses, &c. may be subsisted, without necessarily having recourse to such green food. *Dorman v. Sears*, 6 Price, 338.

The right of exemption from tithes, and the mode of computing them in the decimery of St. Paul's, London. *Wardens, &c. of St. Paul's v. Bp. of Lincoln*, 4 Price, 65. LONDON.

It is not sufficient for a vicar, who rests his case on presumption of an endowment from evidence of perception, to prove that he has received the tithes claimed, from the rest of the parish generally, and even from part of the district in which the defendant's lands are situate, unless he carry it to the parts for which the exception is claimed by the defence; and year not doing so, proof on the part of the de-

fendants, that no tithe has ever been paid for their lands, will entitle them to an issue; nor will the ecclesiastical survey, stating vicar to be entitled to tithe in parish, generally supply the absence of proof of perception from the particular lands. *Armstrong v. Hewitt*, 4 Price, 216. PR. EVIDENCE.

If exemption is pleaded for lands as having belonged to a dissolved priory, and it is proved they belong to a free chapel, it is sufficient. *Ward v. Shepherd*, 3 Price, 620. PLA.

Where exemption was claimed under 2 & 3 Ed. 6. c. 13. issue was directed as to facts entitling party thereto. *Kingsmill v. Billingsley*, 3 Price, 465.

Consumption of titheable article in the family of the land occupier, is not a ground of exemption. *Qu. as to green peas?* *Williamson v. Ld. Lonsdale*, 5 Price, 25.

Church being void and dilapidated, is no ground of discharge from payment of small tithes to the improper rector on the notion of an agreement having been entered into between the rector and the parishioners, by which the ecclesiastical duties have been dispensed with, in consideration of abandonment of small tithes. *Meade v. Norbury*, 2 Price, 338.

To a bill for tithes, even by a lay impropriator, prescription in *non decimando*, or presumption from mere retainer, without colour of title, is no defence, and will not be sent to law. *Berney v. Harvey*, 17 Ves. 119.

A prescription in *non decimando*, can only be set up for a large tract of country, well known as a distinct district. *Nagle v. Edwards*, 3 Anst. 703.

The lessees of the land cannot claim to hold discharged of tithes under any covenant with his lessor. *Brewer v. Hill*, 2 Anst. 414. LANDL. & TENANT.

There cannot be prescription in *non decimando* against a lay impropriator; but it is not necessary to produce the deed of severance; it is sufficient to show that it existed: where defendant and those under whom he claimed, had been upwards of 130 years in the pernaney of the tithes, a bill by impropriator was dismissed. *Fanshau v. Rotham*, 1 Eden, 276.

At common law no man could avail himself of a discharge from tithes by grant without producing it. *Id. 293.*

The stat. of H. 8. is silent as to the manner in which a person must make out his right to tithes against the church or patentees standing in the place of the church; and only provides for the assurance and recovery of them, like temporal possessions in the king's court. *Id. 294.*

If lands were in possession of a greater monastery at the dissolution, and no evidence of payment of tithe, they shall be considered discharged. *Lamprey v. Rooke*, Amb. 291.

Prescription in *non decimando* even against a lay impropriator, held not good. *Corp. of Bury St. Edmunds v. Evans*, 2 Com. 643.

A prescription in *non decimando* cannot be supported against a lay impropriator, any more than against a spiritual rector. *Charlton v. Charlton*, Bunb. 325. *Bury Corp. v. Evans*, Bunb. 345. 2 Com. Rep. 651.

Bill by a lay impropriator for tithes of part of the possessions of the priors of St. John of Jerusalem, which were exempt *quantum propriis manibus*, &c. and then defendant set forth the stat. 31 H. 8. with the clause of discharge, and also the stat. 32 H. 8. whereby these priories with all privileges, &c. were vested in the crown, and that no tithes in kind had been paid to the crown ever since: held, a good exemption. *Hanson v. Fielding*, Bunb. 214. Gilb. Rep. 225.

The long-contested question, whether constant non-payment of tithes is evidence of an exemption against a lay impropriator, was agitated in this case, but not

determined. *Fisher v. Dean and Chapter of Christ Church*, Bunb. 209.

Unity of possession of a manor and rectory will not exempt the demesne lands from tithes, when they come to be severed. *For v. Bardwell*, 2 Com. Rep. 498. Bunb. 327.

\* An exemption from tithe extends to a right of common as well as to the estate to which it is appurtenant. *Lambert v. Cumming*, Bunb. 138.

Lands which were parcel of a monastery of the Cistercian order are only discharged from tithes *quandiu in propriis manibus*; and the method to prove whether the lands were purchased before or after the council of Lateran, is to shew a payment of tithes, which will induce a presumption that they were purchased after. *Lord v. Turk*, id. 122.

Proof of exemption resting only on belief and hearsay, is not admissible. *Clark v. Dushwood*, id. 66.

Where an exemption from tithe is insisted upon, because the lands were parcel of one of the greater monasteries, plaintiff must show that the lands were in the abbot's hands, and that they were discharged in his hands; for the stat. 31 H. 8. extends only to such. *Hanking v. Gay*, id. 37.

Where the land in question is part of a bishop's palace, the exemption goes along with the land; but where the land was belonging to a monastery, the prescription must be set forth. *Com. v. Douce*, id. 26.

A county or a hundred cannot prescribe *in non decimando* for things titheable of common right; aliter if not titheable of common right. *Hicks v. Woodson*, 2 Salk. 655.

Trover for a lamb and a sheaf of wheat; upon not guilty pleaded, the jury found, that Fountain Abbey, being of the order of Cesteaux, was exempted from tithe of their lands, *quos propriis manibus excolerent*. That the abbot was seised of the lands in question before the council of Lateran. That between the years 1216 and 1261 there was a composition between the abbot of F and the prebendary of S under their common seals, whereby the abbey should be free from tithe of all lands, tilled at their own charge, within the grange of H, and they should pay as tithe for all other lands five marks yearly to the prebendary; and that another composition was made (which did not appear to be confirmed by the patron and ordinary) whereby the prebend and his successors in time to come, should yearly elect either to receive the tithes in kind, or five marks per ann. in lieu, to be notified to the abbot before St. Thomas's day; and if the prebend should elect to receive the money, his right to the tithes of lamb and wool should be paid as formerly; and they further found that the possessions of the abbey came to the crown by 31 H. 8. and that at the time of the trover defendants were proprietors of the lands in the grange of H, and that a lamb and sheaf were renovant upon the land, and whether or no tithes in kind should be paid for the lands was the question. Per Hale, C. B. By the first composition, the abbot only was discharged, but by the second, the abbot and his tenants were discharged of tithes of corn and hay only. The doubts in this case were, whether the second composition was good without a confirmation and an annual election, and also by whom and to whom notice was to be given since the dissolution. Afterwards this cause was argued again, when the court held that the second composition did not affect the successors of the prebend, and that therefore the abbot was not bound by it; for by the first composition the prebend and his successors were only bound *quandiu*, &c. and by the second composition the five marks go in recompense of all, whether *in propriis manibus*, or in the hands of the tenants. But to this it may be answered, that the successor may still elect whether to take the five marks

or tithes in kind, and therefore he is at no prejudice: held also, that the power of election is gone, for it cannot now be made according to the composition, and that therefore the first composition should stand *quoad terras in propriis manibus*, and for the others, that tithe in kind may be taken as before. Judgment for defendant. *Ingolsby v. Wivell*, Hard. 381.

In a suit for tithe, defendant by answer set forth, that the lands were parcel of a priory, whose lands were discharged by order, yet held good. *Page's Case*, id. 322.

The king's prerogative will not discharge him from tithes for the ancient demesnes of the crown, though he be capable of a discharge *de non decimando* by prescription. *Compest v. —*, id. 315.

Upon a bill for tithe, an issue was directed to try if the lands in question belonged to any religious order that claimed to be discharged, *quandiu in propriis manibus*: held, that if the lands were in lease at the dissolution, or an estate for life or in tail were upon them, the reversioner should have the benefit of the discharge, for that was only suspended during the particular estates; but if an escheat had happened, it was doubtful whether they would have been discharged, having been aliened by feoffment before the statute of *quia emptores terrarum*, by an abbey, to hold of them by certain services. *Secus*, of a discharge by unity, for that must be perpetual, and continue so at the time of the dissolution. *Wilson v. Redman*, Hard. 190. Vide *Harpur's Case*, 11 Co. 23. *Archbp. Canterbury's Case*, 2 Co. 46.

A tenant for life or years is not within the statute for discharging tithes heretofore part of the possessions of a Cistercian Abbey; but a tenant in tail having the inheritance, is discharged, *quandiu in propriis manibus*, &c. *Wilson v. Redman*, Hard. 174.

Unity of possession of manor and rectory, will not exempt demesne lands from payment of tithes, when they come to be severed. *For v. Bardwell*, 2 Com. 498.

Lands exempted from tithes, as being part of the demesnes of an ancient monastery, when enclosed by act of parliament, shall not be made liable to tithes by the general words of the act. *P Pratt v. Hopkins*, 7 Bro. P. C. 12. INCLOSURE ACT.

Plea of stat. 13 Eliz. c. 20. for non-residence, was allowed to bill by lessee of tithes. *Bokenham v. Benfield*, 1 Com. 392. PL. PLEA OF NON-RESIDENCE; STATUTES C. OF.

He who hath the inheritance of the Cistercians, Hospitalers, and Templars, is discharged from tithes, but his lessees &c. shall pay them. *Stathome's case*, Dyer, 277. pl. 60.

## X. MODUS.

### 1. Validity.

### 2. Suits and Evidence thereon in establishing Modus by Bill, or as a defence by Plea, &c.

### 1. Validity.

Moduses of three halfpence for every cow calving and being milked, within the year ending at Easter, in lieu of the tithe of milk and calf of every such cow; of one penny for every cow not calving, but being milked, within the year ending at Easter, in lieu of the tithe of milk of such cow; of four pence for every colt foaled; of three pence for every lamb; of one penny for every sheep shorn, in lieu of the tithe of wool; and of one penny for every garden, in lieu of tithes of the produce of such garden: Held good moduses, but issues offered. *Pierrepoint v. Scarlet*, 2 Y. & J. 330.

Issue directed to try a modus of 37l. a year, payable half-yearly, alleged to be payable in lieu and satisfaction of all the vicarial tithes of certain farms, constituting a particular hamlet within the parish, notwithstanding the presumptive rankness of the modus; and though it appeared from ancient documents that the whole tithes of the land in the parish, at a date long subsequent to the time of legal memory, were of less annual value than the sum pleaded as a modus, and notwithstanding there was no evidence of any payment of tithes; the validity of the ancient documents, and their application to the subject being, however, questioned, and a great deal of parol testimony being adduced in support of the modus, uncontradicted by any parol evidence to the contrary. *Strong v. Denchfield*, 2 Y. & J. 594.

Where a township modus of 5l. 3s. 10<sup>3</sup>4. was pleaded as covering all the lands in a particular township, in lieu of predial tithes, and it appeared from the evidence, that for a great many years several small sums, amounting to about the sum pleaded, had been paid by the inhabitants severally, and not collectively, to the rector, the court held that though some of the payments might be good moduses, or prescriptive payments for their respective farms, yet that they could not together make a good township modus. To render a township modus good, it ought to be payable by each and every of the inhabitants, and ought not to be collected by the rector. *Jackson v. Benson*, 2 Y. & J. 45.

The defendants to a bill by a rector for tithes of hay, set up a modus of two pence for each load of hay, of the weight of one ton, payable at Easter by the several occupiers in lieu of tithes of hay grown from Easter in the year preceding inclusive; and they, by their answer, further stated that the amount of the modus payable to the rector under such custom had been usually ascertained by a person on behalf of the rector inspecting the ricks of hay made within the parish in each year, and forming an estimate of the number of loads of one ton weight contained in each rick, upon which estimate the whole of the annual modus payable to the rector was calculated, but that this mode of estimating the weight formed no part of the custom. It also appeared, that, in a suit instituted in the exchequer by the same rector against some occupiers for the tithe of hay in the same parish, an issue had been directed, and the jury having found that two pence for every load of hay of the weight of one ton had been immemorially paid to the rector at Easter in each year, by the several occupiers of lands, in lieu of the tithes of hay, the rector's bill had been dismissed with costs. Held, that the alleged modus was bad in law, and the account ought to be directed against the defendants, without directing an issue as to the validity of the modus. *Goodenough v. Powell*, 2 Russ. 219. **ISSUE AT LAW.**

A modus of three halfpence for every milch cow, if under seven, kept and fed on the lands, in lieu of the tithe of milk and calves of such cows; 2s. 4d. if the milch cows and calves shall amount to seven; and not seventeen; and the like sum of 2s. 4d. for every ten milch cows after the first seven, in lieu of tithe of milk and calves of such cows, considered good. A modus of two pence for every house and garden, in lieu of garden stuff, considered good; but held to cover only gardens annexed to houses for the use of the houses, and not to market gardens or the like. *Pritchett v. Honeyborne*, 1 Y. & J. 135.

A modus of six pence in the pound, on an ancient rent, held good, as a shifting and uncertain modus. The following moduses were held good, viz.: two pence for every milch cow called a new cow, that is, a cow that had more than one calf, in lieu of the tithe of milk of such cow; one penny for every milch heifer, or for her first calf, in lieu of the tithe of

milk of such milch heifer or whey; one penny for every far cow or strip, that is, a milch cow that has not had a calf within the year, in lieu of the tithes of such far cow, and the milk thereof; one penny for every calf under five within the year; for five calves, the value of one halfpenny a calf; six calves, up to fourteen inclusive, a calf in kind, or its value; fifteen calves, a calf in kind, or its value, and the value of half a calf more; sixteen calves, to twenty-four inclusive, two calves in kind, or their value, and so on in proportion: the like modus for fowls; one penny for every garden; and four pence for a hen called a loak hen, in lieu of tithes of eggs and young poultry. The following moduses, viz.: for every number of lambs within the year, under five, nothing; five lambs, the value of one halfpenny a lamb; six lambs, and up to fourteen inclusive, a lamb in kind or its value, and the value of half a lamb more; sixteen lambs, up to twenty-four inclusive, two lambs in kind, or their value, and so on; the like modus as to fleeces; the same to geese; were considered bad, nothing being paid under five. *Norton v. Hammond*, 1 Y. & J. 94.

A district modus, to be good, must cover all the lands in the district; and therefore, where a modus was pleaded for a particular district, and it appeared from the evidence that certain farms within the district never paid or contributed, the modus was considered bad. *Miller v. Jackson*, 1 Y. & J. 65.

Modus for the cover of clover, *eo nomine*, as distinct from a modus for the acre of hay, held not objectionable, either on the ground of the former being an article of modern introduction in agriculture since legal memory, or as not being *per se* a subject matter of modus distinct from, and independently of, natural grass made into hay, and that although the modus for hay were laid generally as a parochial modus, without any exception, of hay made of clover. *Davies v. Moseley*, 13 Price, 423. S. C. 1 M'Clel. 143.

Moduses of seven pence for every milch cow, in lieu of tithe of calf and of milk of such cow; five pence for every heifer, in lieu of tithe of calf and milk of such heifer; four pence for every hogshead of cider, and so in proportion for a greater or less quantity, in lieu of tithes of apples, &c.; one penny for hoard or hoard-penny, in lieu of tithe of apples, hoarded, &c.: held to be legal, and issues directed to try them. *Holwell v. Blake*, 1 M'Clel. 559.

Modus of sum of money in gross, payable to vicar on his induction, in lieu of certain tithes during his incumbency, is bad. So also is such a payment, with a further annual payment of smaller sum in lieu of certain tithes during the same period. *Manby v. Taylor*, 9 Price, 249.

In a defence of modus for produce of an ancient farm, it is indispensably necessary to show, by evidence, that farm is ancient. *Stuart v. Greenall*, 9 Price, 106.

Tithe of milk held to be within the payment for cow and calf, laid as a modus in lieu of tithe of such cow and calf. *Id. ib.*

Modus of four pence for every milch cow and calf, and three pence for every heifer and calf, in lieu of tithe of calves and milk; and modus of three pence for every hogshead of cider, and one penny for fruit, in lieu of tithe of apples, pears, &c., are bad. The union of articles, distinctly titheable, in one modus, is objectionable. *Short v. Lee*, 2 J. & W. 464.

A modus of one penny, payable by every occupier of land, in lieu of the tithe of hay, held bad. A modus of one shilling for a milch cow, in lieu of the tithe of milk, held rank. *Busk v. Lewis*, 1 Jac. 363.

Modus for every occupier of land to pay a penny, in lieu of the tithes of calves, bad. *Id. ib.*

A farm modus for part of a farm, may be valid. *White v. Lisle*, 3 Swan. 344.

Modus for pasture land, stated to be in lieu of the tithes of all titheable matters, yearly arising, &c., covers too much. *Lake v. Skinner*, 1 Jac. & W. 9.

A modus of one penny, in lieu of the tithe of hay, of every inhabitant or occupier of a house, and having any land at, or belonging to, or used or enjoyed with any house, is invalid. The decree of the Master of the Rolls on the other moduses, affirmed. *Blackburn v. Jepson*, 3 Swan. 132. See this case further, 2 V. & B. 359.

Measure of oatmeal, payable in lieu of tithe of corn and grain, is a good modus. *De Whelpdale v. Milburn*, 5 Price, 485.

Modus of one penny, payable at Martinmas by every owner of a garden or garth within the parish, called a garth-penny, in lieu of tithes of articles produced in such gardens, as covering potatoes and turnips, is good. *Williamson v. Isl. Lonsdale*, 5 Price, 25.

A modus of one penny, commonly called a plough-penny, payable, &c., by the several occupiers of lands in tillage within the said parish, for and in lieu and satisfaction of all small predial tithes, arising, &c., upon lands so in tillage, as covering field turnips and potatoes, is bad. *Id.*

Modus of two pence for a day's mow of grass, is good, the quantum being matter of evidence. *Cockburne v. Hughes*, 3 Price, 403.

Modus of a penny a cow for milch cows summered on lands within a parish, disallowed, because of the uncertainty of the word "summered." *Rumney v. Beale*, Dan. 35. See 4 Price, 266. S. C. but see another point.

Modus of five shillings for every ten calves, where there happens to be ten, in lieu of tithe of such calves, and also of tithe of milk of cow belonging to such calves, called renew cows, or cows having had each a calf within the year, preceded by modus of three half-pence for every cow called a renew cow, or a cow that has had a calf within the year, and is full of milk, in lieu of tithe of milk of such cow, cannot be supported, as being inconsistent. *Wood, B. dissentiente. Layng v. Garborough*, 4 Price, 383.

One shilling for every tenth fleece, in lieu of tithe of the ten fleeces, is rank; three pence for a lamb, or two shillings and six pence for every tenth lamb, in lieu of tithe of such ten lambs, not held rank, but issue directed; so for every tenth pig; so as to geese. Modus for tithes of articles of modern introduction cannot be supported, because of the anachronism; eighteen pence, in lieu of tithe of ripe seed, when sold in seed, bad for uncertainty; four pence for messuage and garth; two pence for every cottage and garth; one penny for every strip cow; four pence for every foal; two shillings and sixpence for every tenth lamb, in lieu of tithe of such ten lambs, are good moduses. *Id.*

Modus of three pence a year for every cow, and six pence for every calf, in lieu of tithes of cows, calves, and milk, is good. A modus of one penny a year, in lieu of tithe of gardens, is good, and may be so pleaded without stating that it is payable for ancient gardens. *Preost v. Bennett*, 2 Price, 272.

Modus of 3l. payable for certain tithes within township, the occupiers of each farm or tenement within such township respectively, paying his rateable proportion, is bad for uncertainty, even in an answer. *Wolley v. Hadfield*, 3 Price, 210.

Modus of 10d. a score for agistment of sheep, bad. *Mytton v. Harris*, 3 Price, 19.

Modus may exist for artificial grasses used in improvement of hay; modus of 3d. for a lamb, not rank; modus of 4d. for a cow in lieu of milk not supported by proof of modus for every cow with calf; modus of 1s. for every seventh pig on the ninth day, held good

after some doubt. *Bertie v. Beaumont*, 2 Price, 303.

Account of vicarial tithes decreed against a modus of 1s. per acre for each acre of marsh land, for tithe of hay and all other vicarial and small tithes, the vicarage appearing to have been established by endowment in 1367, within legal memory. *Scott v. Smith*, 1 V. & B. 142. ACCOUNT.

Annual payment of a 1d. by each occupier for tithe of hay, a good modus, but an issue granted: modus for turnips, bad, being of too recent introduction into this country to be the subject of immemorial usage. *Leysen v. Parsons*, 18 Ves. 173.

Issue directed to try modus of 1s. an acre, in lieu of tithe hay; modus of 1s. 6d. and 2s. per acre for tithe hay, held rank. *Hendon v. Cooke*, Wightw. 281. ISSUE AT LAW.

Modus of 1d. for each lamb, where number did not exceed four; 1s. where number did not exceed five; 1s. 8d. where number did not exceed six, and so increasing, held not rank, and sent to an issue. *Askew v. Greenhow*, 2 Price, 314, note.

Issue directed on modus for certain lands amounting to 1s. per acre for all tithes, notwithstanding apparent rankness. *O'Connor v. Cook*, 6 Ves. 665. See 6 Ves. 535. ISSUE AT LAW.

Rankness of modus is only evidence as to the immemoriality of payment, and not an objection in point of law. Distinction as to rankness between modus for tithe of particular things and a farm modus. *Id.* 672.

A modus payable by the owners of the land covered by it, is good. *Ord v. Clarke*, 3 Anst. 631.

The court will not decree against a farm modus on the ground of rankness. *Atkins v. Lt. Willoughby de Broke*, 2 Anst. 397.

A modus of one penny for every sheep, and a half-penny for every lamb, brought into the parish after Candlemas, and sold out before shearing time, is a wool modus, not an agistment modus. *Garnons v. Barnard*, 1 Anst. 320. AGISTMENT.

A modus of every tenth day's cheese during twenty weeks from Holyrood day, in lieu of tithe of milk, is good, sensible. *Wake v. Russ*, 1 Anst. 295.

A modus of a penny, in lieu of tithe of hay, of the lands occupied with each house in the parish, is bad. *Travis v. Oxton*, 1 Anst. 308.

A modus of two pence, payable by every householder inhabitant in the parish, for all tithe of fuel, of fruits, of agistment, and of wood, is a good modus. *Bennet v. Read*, 1 Anst. 322.

Another modus of three pence for all sheep carried out of the parish, between Candlemas and shearing time, covering the same place and persons, does not contradict the former modus for agistment, but is only to be taken, as limiting it in the extent covered by the latter. *Id.* 323.

A modus covering a parish or district, is rather a custom than a prescription, and may often be good when a prescriptive modus covering particular lands, would be bad. *Id.* 329.

A modus bad in law received by the vicar, is proof of endowment of the tithe for which the modus was paid. *Travis v. Oxton*, 1 Anst. 309. ENDOWMENT; PR. EVIDENCE.

Modus set up, since 13 Eliz. does not bind the successor. *Anon. Loft. 66.*

If it appear that a pecuniary payment has been made for any sort of tithes, the court will help the imperfect manner of setting out the modus. *Mallock v. Brouse*, Ambl. 423.

Issue directed whether a modus extended to modern orchards; and was so found, and decree for account accordingly. *Butcher v. Hill*, Ambl. 376.

A father of hay as a modus in lieu of tithes, held uncertain and void. *Fenwick v. Lambe*, Ambl. 365.

Doubtful modus not determined by a court of equity without a trial at law. *Chapman v. Smith*, 2 Ves. 506. JURISDICTION.

An exception in the alleged modus, that it was not to be paid when the land should be planted with hops, not fatal on the face of it, in point of law. *Id. ib.*

A modus for rabbits, part in kind and part in money, may be good. *Walton v. Tryon*, Ambl. 135 S. C. 1 Dick. 244.

A modus to take part of the tithes for the whole, has always been held a void custom. *Abp. York v. Stapleton*, 2 Atk. 138.

In a suit by rector for tithe of lambs, the defendant insists on a modus of 3d. for every lamb, payable on St. Mark's day, or so soon after as demanded. This modus is not void at law, but its validity shall be determined by a jury. Where plaintiff claims tithes in kind, and defendant sets up a modus, if plaintiff declines trying the modus at law, it shall be taken against him *pro confesso*. *Giffard v. Webb*, 7 Bro. P. C. 15.

Modus pleaded in bar against tithe of hay, that within the parish of W there were several townships, and that the occupiers of each township, time out of mind, had paid certain sums of money in lieu of tithe of hay, which sums were respectively collected by constables, and then the whole, which amounted to 15s. 4d. was by some of them paid to rectors as a modus for the whole parish: modus held good. *Bp. of Hereford v. Couper*, 3 Swan. 158.

Modus of 5s. payable out of every yard of land, is valid. *Cart v. Hodgkin*, 3 Swan. 160.

Modus for foreigners to pay 4d. per acre yearly for herbage and hay tithe, is good. *Monson v. Chapman*, Fitzgib. 119. S. C. 2 P. W. 565. Mos. 266, 279.

A modus that in consideration the parishioners made the tithe grass into hay, therefore the parishioners inhabitants within the parish were to pay no tithes for the herbage of dry and unprofitable cattle, and though proved that the parishioners, time out of mind, had paid no tithe of its herbage, yet the court held it to be a material objection to the modus, that foreigners living out of the parish made the tithe grass into hay, and yet paid tithe herbage. *For v. Ayde*, 2 P. W. 520.

The court held it to be a void modus, that the making of tithe grass into hay should not only excuse that ground from paying tithes for herbage, but that perhaps a small quantity of meadow ground, by making the grass thereof into hay, should excuse the greater part of the ground of that parish from paying tithe herbage. *Id.* 521.

A modus in relation to the tithe due to the parson, may be a good bar to the payment of a small tithe due to the vicar, because all the tithes did at first belong to the parson, during which time he might agree to this modus. *Id.* 522.

A modus, that every occupier of land within the parish of A, living out of the parish, shall pay a penny an acre for all pasture land within the parish, but if he lives within the parish, to pay tithes in kind, a good modus. *Chapman v. Monson*, 2 P. W. 565. Mos. 266, 279. Fitzgib. 119.

A modus for tithe of corn, for the inhabitants of such a teneement, and the lands therewith, is usually enjoyed, void for uncertainty, in regard the teneement may be uninhabited, and the lands often shifted, and let with other farms. *Carteton v. Brightwell*, 2 P. W. 462.

A modus may extend to hops or clover (though lately brought into England) if it covers all small tithes. *Green v. Austin*, Lutw. 1071.

A parol agreement to accept a modus in lieu of tithes, will not bind the parson, but it will excuse the parishioners from the penalties of 2 Edw. 6. *Bremer v. Thornton*, Hardw. 203. AGREEMENT. PAROL.

Milk is exempt from tithe, by a custom, that the

parson shall for so many weeks, have the sole milking of all milch cows in the parish. And apples or other fruit in an orchard shall not pay tithes, if there be a modus to pay a groat for every hoghead of cider, or 2s. per annum in lieu. *Hill v. Harris*, 2 Show. 461.

Where a modus of 20s. was set up by a parishioner, and the parson had entered into a special agreement to accept that composition, and had for many years given a receipt for it, and had also agreed to be paid moreover 10l. yearly, a bill by the parson for tithes generally was dismissed, the court holding him to his agreement; but the lords reversed the decree, and ordered the court of exchequer to hear the cause on the right of tithe, notwithstanding the agreement. And the court having, on further hearing, directed issues to try the validity of the modus. The lords, on further appeal, affirmed the decree. *Dent v. Buck*, Colles' P. C. 182.

Where a parishioner insisted on a modus, and it appeared that the parishioners had usually paid differently, the alleged modus will be disregarded, and he will be decreed to account for the tithe in kind; and where the matter is plain, the court will not direct the modus to be tried at law. *Charleton v. Bayly*, Colles' P. C. 206. ISSUE AT LAW.

Where a modus is too rank, defendant must account for tithe in kind. *Benson v. Watkyns*, Bunb. 10.

For a milch cow and calf, 17d. is good for the calf and milk. So for a milch cow without calf, 11d., for the milk. So for an heifer and calf the first year, 13d., for the milk and calf; all payable at Michaelmas. For cider made of apples, grown in the parish, 8d. per hoghead. For hoard apples, 1d. For firewood spent on the farm, a hearth-penny. For fruit, herbs, roots, and other garden-stuff, a garden penny. For a colt, 1d.; all payable at Easter. *Roe v. Bp. of Exeter*, Bunb. 57.

12d. for a milch cow is too rank, and so is 6d. for any calf killed and sold. *Franklyn v. St. Cross Hosp.* Bunb. 78. But it has since been held, that 6d. for a calf is good. *Reynel v. Ackland*, *id.* 78. (n.)

A distributive modus is unreasonable, and not good. *Turton v. Clayton*, Bunb. 80.

1d. for orchards and gardens is good. *Franklyn v. St. Cross Hosp.*, Bunb. 79; but they must be ancient gardens and orchards. *Perrot v. Mackwick*, there cited.

1s. per acre for marsh, and 4d. per acre for upland; payable at Michaelmas for hay and all small tithes (except hops,) held good. *Bate v. Hodges*, Bunb. 125.

Work done by carrying a cart load of turf to the parson's house, in lieu of tithe of hemp, flax, and hay, was disallowed as a modus. *Tully v. Kitner*, Bunb. 126.

A modus is bad where the time of payment is uncertain. *Goddard v. Keeble*, Bunb. 105. *Phillips v. Symes*, *id.* 173. *Blacket v. Finney*, *id.* 198. but whether it can be supplied by evidence, vide *Taylor v. Walker*, Bunb. 267. It seems it may, if the day of payment be omitted in the answer. *Gibb v. Goodman*, Bunb. 328. Sed secus, if it is a cross bill to establish a modus. S. C.

4s. at Easter in lieu of tithe hay of a farm, is bad. *Burwell v. Coates*, Bunb. 129.

Where a customary manner of tithing is generally alleged, defendant cannot be let in to prove a particular manner of tithing. *Boughton v. Wright*, Bunb. 186.

1d. at Easter for hay, and 26s. 8d. for hay and small tithes, is good. *Finch v. Maister*, Bunb. 161.

8d. for a cow, and 4d. for an ewe, in lieu of milk and calves, is good. *Phillips v. Symes*, Bunb. 171.

1s. in the pound for pasture, according to the value

of the land, is too rank, and void. *Smith v. Roocliffe*, Bunb. 20. *Harrison v. Sharpe*, Bunb. 174.

Entries by the lord's steward may be admitted to prove a modus to the vicar in discharge, against the lay parson. *Woodnoth v. Cobham*, Bunb. 180.

Bill for tithe of fish according to the custom; plaintiff set forth a decree, temp. Car. 2. signed by 130 parishioners, and acquiescing in the custom, yet the court sent the plaintiff to law. *Guevau v. Kelgnar*, Bunb. 239. At law a verdict was found for plaintiff, and the barons decreed accordingly; but defendants afterwards appealed to the lords, by whom the decree was affirmed. Bunb. 258.

Nine cart-loads of log-wood, a hogshhead of cider, and 2d. per acre for eighteen acres, held good. *Woolferstone v. Manwaring*, Bunb. 279.

Usage as to tithes was admitted, to explain a lease of a farm, with all tithes, against the very word "tithe," the court considering it as a lease. *Quaintrell v. Wright*, Bunb. 274.

Bill for tithes, glebe, and right of common. Defendant insisted on a modus. Though the modus appeared to be too rank, yet the court would not determine upon any of the points until plaintiff had established his right at law. *Sweetapple v. Kingston*, Bunb. 238. *Chamberlain v. Spencer*, id. (n.)

4l. 10s. per annum for a farm of 30<sup>l</sup>. per annum, is too rank. *Kennedy v. G. duin*, Bunb. 311.

If a parishioner has ten lbs. the tenth is due to the rector on St. Mark's day; if nine, he shall have one, paying 1d.; if eight, he shall have one, paying 1d.; if seven, he shall have one, paying 3d.; but for less than seven, the rector shall have no lamb, but 1d. for each under seven. Where there were ten lambs, after the parishioner had taken two, the rector shall choose his lamb. And the like *modus decimandi* was established as to pigs; so as to poultry: for every cock and drake, three eggs, payable on Wednesday before Easter, and for every hen and duck, three eggs in lieu of tithe eggs, and chickens and ducks hatched in the parish. This modus was established without a trial. *Brinklow v. Edmonds*, Bunb. 309.

A halfpenny for each calf is good. So a halfpenny for each sheep dying before shearday. So a smoke penny for firewood. So 4d. per month for wool of each 100 sheep shorn in the parish. S. C.

Part of the milk of a farm for the whole is a bad modus. S. C.

Custom that the occupiers are to give notice of setting out tithes, or an allegation that there is some such custom, is uncertain and bad. *Heuer v. Spritley*, Bunb. 333.

6s. 8d. for one calf, if 10, but it was not said, and so less in proportion, if under 10; this is bad, but 4d. for milk payable at Easter is good. *Gibb v. Goodman*, Bunb. 329.

Modus of 12s. an acre for low meadow lands, and 8d. for high ones, in lieu of tithe hay, held good. *Pole v. Gardiner*, 7 Bro. P. C. 5.

## 2. Suits and Evidence thereon in establishing Modus by Bill or as a Defence by Plea, &c.

Where a district modus was pleaded, and it appeared from ancient documents that the modus could not consistently with those documents have existed at the time of legal memory, the court decreed an account of tithes in kind, and refused an issue notwithstanding the payments were proved to have existed for a great number of years. *Miller v. Jackson*, 1 Y. & J. 65.

Evidence that tithes had been collected from the inhabitants by a person employed by the parson, and from a list furnished by him, affords strong presump-

tion that the payments are farm moduses, and not a district modus. *Id. ib.*

Evidence of reputation cannot be received in support of a farm modus. The evidence required to establish a farm modus, is 1st, the clear identity of the farm by metes and bounds; 2dly, the antiquity of the farm; and 3dly, immemorial payment of the modus. But it cannot be expected that any testimony should be adduced that the lands comprising the farm were cultivated together before the year 1189, and that the payment was then made. It would be as reasonable to require the actual production of the deed of composition. There seems to be no reason why the same evidence which establishes a parochial modus; viz. usage as far back as can be reasonably traced of the payment being made on one side, and tithes in kind not having been demanded on the other, should not be good evidence of a farm modus, and such seems to be the result of the authorities. *Prichett v. Honeybourne*, 1 Y. & J. 135.

The defendant having set up a farm modus in answer to a bill for tithes, issues were directed to try whether the ancient farm consisted of the lands mentioned in the answer, and whether a certain modus had been immemorially payable for the tithes arising upon it. The jury found that the farm consisted of these lands together with four other closes, and was covered by a modus. The circumstance that the jury found the ancient farm to consist of other lands besides those mentioned in the pleadings, is no ground for a new trial, unless the plaintiff can show that he has evidence with respect to those four closes which upon the supposition that they are parcels of the alleged ancient farm, might materially vary the substance of the case. *Bailey v. Sewell*, 1 Russ. 239. TITLE; NEW TRIAL OF ISSUE.

Modus alleged in answer to be payable in lieu of tithes is not supported by proof of payment of a larger amount. *Fisher v. Graves*, 1 M'Clel. & Y. 362.

A modus established by verdict of jury on an issue is conclusive on judge in equity. *Davis v. Moseley*, 13 Price, 423. S. C. 1 M'Clel. 143. ISSUE AT LAW.

Seemle, an issue to try money payment set up as a farm modus, may be granted on the parol evidence of a single witness uncorroborated by other evidences, but his testimony must be positive and distinct, and should apply to every thing necessary to be proved before the jury in order to establish the fact intended to be tried. If it be insufficient or unsatisfactory in any of those respects, the court will not grant an issue, but will proceed to decree an account of the tithes. *Wolley v. Underhill*, 13 Price, 500. S. C. 1 M'Clel. 317. ISSUE AT LAW.

The application to equity by cross bill to establish moduses against a bill to overturn them being matter of favour, costs in equity are never allowed. *Morrrell v. Gregson*, 11 Price, 421. PR. CROSS BILL; PR. COSTS.

Where defendant in tithe cause sets up modus and is desirous of protecting himself from costs, he should move for an order that plaintiff accept sums admitted due by answer, or proceed at peril of costs, and court will notice such tender by minute. The motion may be made without notice or payment into court. *Davis v. Moseley*, 9 Price, 214. PR. PAYMENT INTO COURT; PR. COSTS.

Modus set up for hay, hemp, and flax, is so far proved by receipts for money payment made for hay, hemp, and flax, for forty-five years back, although earlier receipts describe it as payable for hay only, which would have otherwise been conclusive against the occupiers, as that the payment must be made the subject matter of an issue. The payment being called a hay-rent in receipts is no objection to them as evi-

dence of the existence of a modus. *Manby v. Lodge*, 9 Price, 231.

Where a modus is pleaded for a particular description of lands, it must be alleged in the answer that defendants occupy such lands. *Stuart v. Greenall*, 9 Price, 106. PL. ANSWER.

Ordinary is a necessary party defendant to bill for establishing modus. *Cook v. Butt*, 6 Mad. 53. PL. PARTY.

Modus of a sum of money laid as payable in lieu of tithe of hay and all small tithe, is not supported by proof of payment for hay and non-payment of hay in kind, or any small tithe either in kind or sub modo. Payments laid as moduses and proved to have been always paid within memory and not opposed by evidence of their origin, held sufficiently proved to establish them on a defence of moduses, although all the witnesses called them compositions. *Drifffield v. Orrell*, 6 Price, 324.

Money payment alleged to be a modus in lieu of tithe of lambs and of the wool of the first shearing of such lambs, or in lieu of tithe of such lambs, held ill pleaded in the alternative; so also if pleaded as a composition. Such money payment may be relied on at hearing as a composition if charged to be so in the answer in case it should not be a modus. *Leech v. Bailey*, 6 Price, 504. PL. PLEA.

Defendant in answer to bill for account of tithes in kind, must set forth an account of titheable matters taken by him, although he relies on a defence of a modus or composition; or it will be a good ground of exception. *Whistler v. Wigury*, 8 Pri. 1. PL. ANSWER; TITHES; ACCT.

If a modus be laid in an answer to a case resting on endowment as covering several titheable articles, it must be proved to be payable for all of them. A doubt from evidence as to that extent is not sufficient for issue to be directed. *Kempson v. Yorke*, 8 Price, 13. PR. EVID.; PL. ANSWER.

Terriers alone not sufficient to prove a modus. *Lake v. Skinner*, 1 Jac. & W. 20. EVID.

Where defendants had described their farms by so many acres, and an objection was taken at hearing to want of sufficient description of locality. The court permitted the cause to proceed, suggesting that if the objection was insisted on, leave would be given to defendant to file interrogatories for purpose of enlarging the description. *Wright v. Southwood*, 5 Price, 607. PL. PLEA.

Moduses introduced by stating that they are payable by occupiers in lieu of tithes within and throughout parish (except the occupiers of several other farms and lands) not otherwise describing them than by their respective names, held ill pleaded for uncertainty. *Id. ib.*

A bill to establish a modus should be filed by certain owners and occupiers of land within the parish, on behalf of themselves, of all other owners, occupiers, &c. And the ordinary should always be a party. *Hales v. Pomfret*, Dan. 142. PL. PARTY.

A modus being clearly invalid as laid, the question of law is decided without directing an issue on the question of fact. *Blackburn v. Jepson*, 3 Swan. 132. ISSUE AT LAW.

Modus laid to be payable "by certain occupiers," uncertain and insufficient. *De Welpdale v. Milburn*, 5 Price, 485. PL. PLEA, UNCERTAINTY.

On bill to establish modus against dean and chapter as rector, the ordinary and patron are necessary parties. *Id. ib.* PL. PARTIES.

Where tithe of corn has never been paid within memory in the parish, and a contributory payment comprising the whole parish is paid by certain, though

not all of the owners and occupiers of estates, the question whether it is a farm or district modus, must go to issue. *Id. ib.* ISSUE AT LAW.

Defence to bill for tithes of a district modus where the defendants do not state on record, and prove by evidence an occupation therein, must fail. *Jenkinson v. Royston*, 5 Price, 496.

Money payments in lieu of tithes, although made as for such as living memory can reach: Held not to be moduses where they were apportioned by reference to the poor rates. An issue will not be granted to try the character of such payments. *Walter v. Holman*, 4 Price, 171.

Modus of 15s. payable on Easter Monday by all the occupiers of land in the township, &c. or some or one on behalf of all in lieu of tithe of grass growing within the same township, whether the same be mown or made into hay, or eaten by barren and unprofitable cattle covering the tithe of agistment, if there be evidence given of its having been paid, and for the tithe of agistment, will be sent to an issue. *Williamson v. Ld. Lonsdale*, 5 Price, 25. ISSUE AT LAW.

Uncertainty as to metes and bounds in pleading modus, is bad. *Gillebrand v. Scotson*, 4 Price, 267. PL. PLEA, UNCERTAINTY.

Modus of 1s. for a Welch cow in lieu of tithe of milk of such cow sent to issue. Modus of 1½d. for every calf fallen or dropped in the parish in lieu of tithe of such calf, is not proved if evidence add a qualification to custom. *Leathes v. Newitt*, 4 Price, 356.

An old receipt of former rector in hands of a defendant for a money payment in lieu of tithes where there was a probability of its having come to him from a predecessor in the same way, admissible evidence to support modus. A valuation of tithes made by surveyor at instance of rector with reference to certain money payments reputed to have been always made in lieu of such tithes, is not evidence to fix the rector with an acknowledgment of such money payments, unless it can be distinctly proved that surveyor was expressly required by rector to make the valuation with reference to such payments. *Bertie v. Beaumont*, 2 Price, 303. PR. EVID.

If it is not stated in an answer to bill for tithes which sets up modus, in respect of what titheable article the modus is laid, it is bad for uncertainty, and no evidence can supply it. But it is sufficient if from whole answer it can be collected to what article it refers. *Bourke v. Isaac*, 2 Price, 299. PL. ANSWER.

Where defendant states in his answer, that modus has been immemorially paid to vicar in lieu of tithes, and vicarage is shown to have been endowed within time of legal memory, court will allow modus to be re-stated so as to take issue to try modus. *Prevost v. Bennett*, 1 Price, 236. PR. PLEA, AMENDMENT OF.

Defendant to a bill for tithes, puts himself upon one modus in his defence and proves another. There must be a decree against him. *Warden, &c. of St. Pauls v. Morris*, 9 Ves. 164. PL. PLEA.

One owner of lands in a township may sue for himself and the others, to establish a contributory modus for all the lands there. *Chaytor v. Trinity College*, 3 Anst. 841. PARTIES.

Modus claimed for hay was described in terriers to be for all grass, "except clover and the like." Held, this was no proof of modus being modern. *Franklin v. Spelling*, 3 Anst. 760. TITHES, EVIDENCE.

Rector of M claiming tithes in kind, the occupier and landlord filed a cross-bill to establish a modus, payable to the rector of S, by the lord of the liberty of which the lands were parcel. It was objected, first,



that the rector of S, not disputing the modus, a bill would not lie to establish it: second, that the other owners of lands in the liberty should have been parties; bill dismissed. *Woolston v. Wright*, 3 Anst. 801. PL. CROSS-BILL; PL. PARTY.

Modus claimed for lands as part of an ancient estate, without naming ancient estate, or setting forth the abutments, or any description of it, or of the lauds of defendant in it, is bad. *Wood v. Wray*, 3 Anst. 838.

A bill to establish a farm-modus, setting out the abutments of the farm, and stating that the modus had immemorably been paid for the said farm, is good, without stating it expressly to be an ancient farm. *Ld. Stowell v. Atkins*, 2 Anst. 564. PL. BILL.

If an action is brought by the lessee of tithes for subtraction, it is a sufficient ground for filing a bill to establish a modus. *Id.* 566.

A bill to establish a modus will not lie, where the person has not sued for tithes in kind. *Id. ib.*

Whether notice is necessary to determine a composition, where a modus is insisted upon. *Qu?* *Atkins v. Ld. Willoughby De Brooke*, 2 Anst. 397. TITHES COMPOSITION, NOTICE TO DETERMINE.

Bill for tithes; modus set up as defence. Motion by defendant to pay up arrearages of modus with costs up to time, refused; but plaintiff proce. lib. on then abandoning suit, costs after tender allowed to defendant. *Dean, &c. of Bristol v. L. Austhorpe*, 1 Anst. 272. TENDER; COSTS.

A bill to establish a modus for every ancient farm, stating, that the whole parish consisted of ancient farms, but not setting forth the abutments of each, is bad. *Scott v. Allgood*, id. 16. PL. BILL.

Unnecessary words used in the laying a modus which would make it indefinite, may be expunged. *Ellis v. Saul*, id. 341. MODUS; PL. SURPLUSAGE.

Plea of former decree, for payment of tithes, where a modus of lands alleged to be covered by it were improperly stated, so that the court could not direct an issue, is not a good plea in bar to bill brought for establishing modus. *Collins v. Gough*, 7 Bro. P. C. 94. PL. PLEA OF FORMER DECREE.

Where a modus is set up, but not proved by clear legal evidence, a court of equity ought not in the first instance to decree an account, but should direct issue to try the validity of modus. *Whitehead v. Travis*, 7 Bro. P. C. 49. ACCOUNT; ISSUE AT LAW.

Mispleader of modus in exchequer, always occasions decree for tithes in kind. *Anon. Loft*. 60.

Modus for clover, instead of saying modus for grass, held sufficient, and issue directed to try modus for grass. *Wood v. Harrison*, Anbl. 563. PL. ANSWER.

Not necessary to use the word modus in laying it; nor a particular day of payment. A modus may be over-ruled for rankness, if for a specific thing; if otherwise, will be sent to trial. *Richard v. Evans*, 1 Ves. 39.

As to the propriety of bill to establish moduses. See *Rudge v. Chapman*, 2 Com. 697.

On issues directed by a court of equity to try a modus, though established by two verdicts, the plaintiff is entitled to his costs at law only, and not in equity. *Clifton v. Orchard*, 1 Atk. 610. COSTS.

If a modus *decimandi* be alleged no otherwise than by answer to a bill for tithes, defendant must answer all other parts of the bill; but if he pleads it, he need not answer any other matter. *Langham v. —*, Hard. 130. PL. ANSWER.

Bill for tithes of *crops* by custom, to pay every tenth coney, or the value of it; defendant, by his answer, denied the custom, whereupon the court

directed an issue to try it. *Randall v. Head*, id. 188. ISSUE AT LAW.

Impropriator must be party to bill against his lessee to establish a modus. *Glanvill v. Trelawney*, Bunb. 70. PL. PARTY.

Though modus be pleaded, yet the quantities and values of tithes must be set forth. *Gunley v. Fontleroy*, id. 60. PL. ANSWER.

The court will direct an issue to try a modus, though not proved exactly as laid in the bill. *Laithes v. Christian*, id. 340. ISSUE AT LAW.

After a suit in the ecclesiastical court for a subtraction of tithes, defendant there brought a bill in equity to establish a modus, and on the bare suggestion of a modus, moved for an injunction. Injunction denied, as it would be a precedent for tripping up both the ecclesiastical and common law courts. So the K. B. will not grant a prohibition, unless it be shewn that a modus has been pleaded in the ecclesiastical court, and refused there; and equity grants an injunction on the same ground that a court of law grants a prohibition. *Rotherham v. Fanshawe*, 3 Atk. 628. P. N. INJUNCTION.

In a suit for tithe hay, the defendants by their answer only set up several moduses by the name of straw-tithes; an issue is in this case proper to try, whether the moduses insisted on by the defendants, in their answers, have been time out of mind paid and payable for, and in lieu of tithe-hay in kind. *Harrington v. Horton*, 4 Bro. P. C. 624. ISSUE AT LAW.

Bill lies to perpetuate the testimony of witnesses to prove a modus; but *qu.* if it will lie to establish a modus. *Somerset v. Fotherby*, 1 Vern. 185. PL. BILL TO PERPETUATE.

## XI. CUSTOM.

A custom to pay the seventh lamb, pig, fleece, or gosling, if there be seven, instead of a tenth only of the value of the lambs, pigs, fleeces or goslings, in lieu of the tithes of such lambs, &c., and if there be seventeen, then a lamb, pig, fleece or gosling, and so an additional lamb, &c. for every successive ten: held void. *Pritchett v. Honeyborne*, 1 Y. & J. 135.

It is not correct to plead, that by custom used and approved in P., and nineteen other parishes, no tithes of a particular kind were due and payable to rector of P. *Page v. Wilson*, 2 J. & W. 521. PL. PLEA.

No custom in *non decimando* can be good, unless for wood, and for a known and ancient district, not less than a county or hundred. *Id.* 524.

Semble. A custom of rendering one in ten parcels of corn set up together in the quantity of ten sheaves to each, called kivers or riders, in lieu of corn and hay produced in the same year, is not good. *Lagh v. Glegg*, 8 Price, 492.

Custom that land-owner should take the two best lambs out of ten, and the tithe-owner the next best, is bad. *Hall v. Malby*, 6 Price, 240.

Uncertainty and unreasonableness as to time of taking tithe, and payment for keep, if not taken at that time, vitiates custom. *Jenkinson v. Royston*, 5 Price, 495.

Custom to pay for every ton, 1d.; for every milch cow, 2s., and for every heifer that had but one calf, 1d., for and in lieu of milk, and "all profit arising by such cow or heifer, except the calf," is good, notwithstanding the redundancy of expression. *Id. ib.*

As to money payment for pigs and geese, dependant in amount on their number. As to custom as to tithe of wool, hemp and flemble, rape seed, onion seed, reeds, eggs, &c. *Id.* 496.

As to validity of custom of taking eleventh instead

of tenth of article, in consideration of labour bestowed, and where there is an option on part of farmer, which of two ways tithe shall be taken in. Issues will be granted to try such questions. *Cockburne v. Hughes*, 3 Price, 408.

The established course of setting out tithe milk, is, that the entire meal of the whole herd of cows shall be set forth every tenth day, both morning and evening, and where a custom to the contrary is alleged, it must be formally pleaded or supported by such evidence as will warrant a court of equity in directing an issue to try its validity. *Full v. Hutchings*, 7 Bro. P. C. 78.

A lessee of rectory for three lives, who had made a derivative lease, brings a bill for tithe in kind, and to establish a custom of setting out corn in shocks: Held, the bill is properly brought, though the tithes are out in lease, to prevent collusion between lessee and occupiers. *Archbp. of York v. Stapleton*, 2 Atk. 136. PL. BILL FOR TITHE; LESSOR & LESSEE.

A modus to take part of the tithes for the whole, has always been held a void custom. *Id.* MODUS.

Tithes of fish are only payable by custom, and cannot be claimed as a mere personal tithe, *deductis expensis*. *Kelyack v. Gwares*, 2 Bro. P. C. 446.

The usual time for tithing lambs is when they can live without a dam, (about Michaelmas), a custom therefore to tithe them on St. Mark's day, 25th April, was held unreasonable. *Reignolds v. Vincent*, Bunb. 133. TITHES, SETTING OUT.

Custom that owners of cattle, fed on common lying in two parishes, should pay tithes for agistment in parishes where they respectively reside, held good. *Mickleburgh v. Crisp*, 2 Bro. P. C. 444.

### XIII. COMPOSITION.

By letters patent, a rectory with the appurtenances, was granted to dean, &c. of York, and their successors, for the support and maintenance of a grammar school; in 1712, an arrangement was entered into between the dean and chapter and their lessee of the rectory, and the lord of the manor of a district within the rectory, to take a perpetual composition in lieu of the tithes of that district, and such arrangement was carried into effect by deeds of covenant executed by the dean and chapter and their lessee, and the lord of the manor: and the latter granted a perpetual rent-charge to the amount of the composition out of his estates. The composition or rent continued to be received by the lessees of the dean and chapter for upwards of a century, when the dean and chapter, the rectory being then in their own hands, refused any longer to receive it, and filed their bill for tithe. The court held that the deed of covenant of 1712 was void under the disabling statute, and that the covenant was not binding on the dean and chapter, and that they were entitled to the tithes. *Dean & Chap. of York v. Middleborough*, 2 Y. & J. 196. CHARGE ON BENEFICE.

Where a money payment has been set up as a defence of a modus, it is a denial of plaintiff's title, and therefore cannot (failing as a modus), be used *pro hac vice* to defeat the immediate claim as being a composition undetermined for want of six months' notice. *Wolley v. Brownhill*, 13 Price, 501. S. C. 1 M'Clel. 317. PL. ANSWER.

Deed creating composition real will not be presumed from payment for 200 years of 20l. in lieu of tithes. *Escourt v. Kingscote*, 4 Mad. 140. PRESUMPTION; LENGTH OF TIME.

Composition for tithe puts an end to lien on the land; therefore, where produce of land is taken by sequestration and sold, tithe owner cannot demand

payment thereof out of that fund. *Dickinson v. Smith*, 4 Mad. 177. LIEN; PR. SEQUESTRATION.

Notice to determine composition should be reasonable in point of time, and suited to convenience of farmer. A notice by parol at time of settling annual amount of the tithe due, the tithe owner telling the farmer that "for the time to come," he requires the tithes to be paid in kind, sufficient. When the farmer pleads the composition as a modus, he cannot insist on no notice to determine having been given. *Leech v. Bailey*, 6 Pri. 504.

A composition real, or grant of tithes made by a vicar to the lord of a manor, in consideration of his finding a priest to officiate in a chapel, &c. previously to 32 Hen. 8. c. 7., and supported by evidence of constant perception and compliance with the conditions on which it was made: held to be valid. *Ridley v. Storey*, Dan. 157.

Defendant in tithe cause having set up defence of composition real, cannot afterwards rely on its being in fact a modus; such defence being double and too uncertain. *Ward v. Shepherd*, 3 Price, 608. PL. PLEA, DOUBLE.

Composition for tithes, received after the death of the incumbent by the successor, apportioned with reference to the respective periods of enjoyment. *Aynsley v. Wordsworth*, 2 V. & B. 331. APPORTIONMENT.

General allegation, in answer that defendant could not be affected by notice to determine a composition in any way, is not sufficient intimation to plaintiff that defendant intended to rely on insufficiency of notice. *Bennett v. Neale*, Wightw. 324. PL. ANSWER.

Lessee of tithes agreed with the owner of lands, for certain collateral considerations, not to take tithes in kind from the tenants of the lands for twelve years, but to accept a reasonable composition not exceeding 3s. 6d. per acre; and thereto bound himself and his assigns. His under-lessee sued (in the name of a trustee, to whom he had nominally again under-leased) for tithes in kind against the tenant of the land, and had a decree. Such an agreement is void for the uncertainty of the sum to be paid. *Breuer v. Mill*, 2 Anst. 413. COVENANT, WHO BOUND BY.

Whether notice is necessary to determine a composition where a modus is insisted upon, *quære?* *Atkins v. Ld. Willoughby De Brooke*, 2 Anst. 397. MODUS.

A composition of twenty shillings yearly, out of the profits of T manor, in lieu of tithes of J park, is good. *Sawbridge v. Benton*, 2 Anst. 372.

The consent of the ordinary to composition real may be presumed from length of time, *id. ib.* LENGTH OF TIME; CONSENT.

A real composition cannot be established without shewing the deed by which it was created, or proving its existence. *Heathcote v. Mainwaring*, 3 Bro. C. C. 217.

In order to establish a real composition for tithes, the evidence must be such as to distinguish it clearly from a prescriptive payment. *Haves v. Swaine*, 2 Cox, 179. EVIDENCE.

The same notice must be given to determine a composition for tithes as between landlord and tenant, and that although the defendant set up modus. *Bishop v. Chichester*, 2 Bro. C. C. 161.

A vicar may avail himself of his general title for tithes in opposition to a pecuniary composition, even though established by deed: executed by parson, patron, and ordinary. *Mortimer v. Lloyd*, 7 Bro. P. C. 44.

Peremptory composition requires notice to determine it. *Anon. Loft. 66.*

An agreement was made between the rector and inhabitants of a parish, allotting lands in lieu of the ancient glebe with some additions, on account of the rector's losing certain rights of common by an enclo-

sure, and also providing an annual stipend or pecuniary compensation in lieu of tithes. The successor declined abiding by the agreement, unless on an increase of stipend, and an amicable suit was instituted in chancery, to which the ordinary (but not the patron, who was the king) was made a party, and the parishioners agreeing to increase the stipend, a decree was made by consent to ratify the articles of agreement. This agreement was acquiesced under for eighty years (forty of which the rector, against whom the decree was made, remained incumbent.) Held that as to the pecuniary composition, the agreement was not binding, the patron not having been party thereto, and the composition being made as respected the past value of tithes, without any regard to the future increasing value. *Cholmley v. Att. Gen.*, 7 Bro. P. C. 34. S. C. 2 Eden, 304. Amb. 510. LENGTH OF TIME.

A composition by way of retainer by parol, is good only for one year; but a parol lease of tithes, even for one year, is void. *Kedlington v. Bridgman*, Bunb. 3.

A composition for tithes cannot be determined as to part, and continued as to the rest. *Reynel v. Rogers*, Bunb. 15.

### TITLE.

See also FRAUD, V.—PL. P. C., 17.—L. R. MASTER, REFERENCE, &c. 1. (c).—PR. SALES JUDICIAL, 4.—PRESUMPTION, I.—PRIVITY OF CONTRACT, &c.—VENDOR & PURCH. IV.

#### I. TITLE DEEDS.

II. WHEN TITLE MUST BE FIRST ESTABLISHED AT LAW, BEFORE RELIEF WILL BE GIVEN IN EQUITY.

#### III. PLEA OF.

IV. DISCOVERY OF. See also PR. PRODUCTION OF DEEDS.

V. AS REGARDS RELATIONSHIP OF LESSOR AND LESSEE.

VI. WHEN EVIDENCE OF TITLE PRESUMED.

VII. RELIEF AND PROTECTION, GENERALLY.

#### 1. TITLE DEEDS.

The court does not usually compel party to produce his title-deeds as evidence; but where a party produces them to defeat his adversary, the opposite side is entitled to an inspection of them. *Gruge v. Cass*, 2 Y. & J. 241. PR. PRODUC. OF DEEDS; PR. INSPECTION OF DEEDS.

Bill for delivery of title-deeds, and injunction to restrain setting up of outstanding term, to which no affidavit as to title-deeds was annexed. Plea overruled, because it should have been confined to so much of bill as related to outstanding terms, and because that part of bill which related to title-deeds should be demurred to for want of affidavit. *Hook v. Dorman*, 1 S. & S. 227. PL. PLEA; PL. BILL AFFIDAVIT; PL. DEMURRER.

Purchaser not bound to complete purchase without the title-deeds, unless he has legal covenant to produce them. *Barclay v. Raine*, 1 S. & S. 449. VENDOR & PURCH.

Receiver granted against tenant for life, subject to term for raising portions, he refusing to produce title-deeds necessary to raise such portions. *Bristoke v. Mansel*, 3 Mad. 47. PR. RECEIVER.

Semble. Bill does not lie by purchaser from contingent remainder-man, for inspection of title-deeds in hands of tenant for life. *Noel v. Ward*, 1 Mad. 322. TENANT FOR LIFE; DISCOVERY.

Where adult female before marriage agrees to accept in lieu of dower a rent charge, she is bound to

see that grantor has title to lands charged therewith. And, therefore, a purchaser of other lands of grantor, which might otherwise have been liable in case of failure of such security, is not entitled to see by title-deeds that grantor has title to such charged lands. *Simpson v. Gutteridge*, 1 Mad. 609. VENDOR & PURCH.; DOWER.

Where title-deeds cannot be delivered, assignees must, like any other vendor, give attested copies of them at the expense of the estate; but their covenant, for the production of the deeds should be confined to the time of their continuance as assignees. *Exp. Stuart*, 2 Rose, 215. BANKCY. ASSIGNEES, DUTIES OF; VENDOR & PURCH.

Purchaser of small lots entitled to attested copies of the title-deeds, accompanying the principal purchase, at the expense of the vendor. No stipulation having been made upon the subject. *Boughton v. Jewell*, 15 Ves. 176. VENDOR & PURCH.

Tenant for life entitled to the possession of the title-deeds. *Boules v. Stewart*, 1 Scho. & L. 223; but see 2 P. W. 471. TENANT FOR LIFE.

Title-deeds are incident to the possession under a freehold title. *Strode v. Blackburne*, 3 Ves. 225.

*Prima facie* title-deeds are property in the custody of tenant for life, and may be taken from a jointress upon her jointure being confirmed. *Ford v. Peering*, 1 Ves. J. 76. JOINTRESS.

Where tenant for life is satisfied, and does not care about the title, but remainder-man is not; court will take care of the deeds, and not leave them in the hands of a third person who has no right to prejudice of remainder-man. *Id.* 78.

Title-deeds in possession of court delivered to tenant for life. *Webb v. Webb*, Dick. 298. See vide *Hicks v. Hicks*, Dick. 650. CONTRA.

A purchaser made an objection to a title for want of a deed which had been enrolled at a public office, but could not be found; a copy taken in 1632, attested by five witnesses, was produced in court, and *Ld.* Hardwicke said, it would have been sufficient without an attestation. *Harvey v. Phillips*, 2 Atk. 541. VENDOR & PURCH.

A devised 10,000*l.* to trustees in trust, to be laid out in land, and to be settled on B for life, without waste; remainder to trustees and their heirs for the life of B to support contingent remainders, with a power to B to make a jointure; remainder to the heirs of the body of B; remainders over; and by the same will, devised lands to B to the same uses and dies, leaving C executor. B sues C, the executor, for the deeds relating to the lands that are in his hands, and to have the money laid out in lands and settled. Decreed by the Master of the Rolls, that B had but an estate for life in the lands, and so not entitled to the deeds, but that they were to be brought into court, and that the lands to be bought with the money were to be settled on B for his life only; remainder to his first &c. son; but by the opinion of *Ld. Ch. King*, B was decreed to have an estate tail in the lands devised, and consequently to be entitled to the deeds relating thereto, though as to the lands to be purchased, that being executory and in the power of the court, B was to be but tenant for life, with remainder to his first &c. son. *P. Milon v. Voise*, 2 P. W. 471. 2 Kel. 27. But see 1 Sch. & L. 223. WILL, C. OF, WHAT ESTATE; ESTATE TAIL.

One who lends money on a security, which he is advised by a lawyer to be a good one, yet if it proves otherwise, and he has notice that another made title to it, he must deliver up all the writings relating to it, but not the mortgage deed, for there may be covenants in that for the payment of the money. *Opie v. Godolphin*. PREC. CHAN. 548. NOTICE; DELIVERY UP OF DEEDS.

## II. WHEN TITLE MUST BE FIRST ESTABLISHED AT LAW BEFORE RELIEF IN EQUITY GIVEN.

An issue directed to try a plaintiff's right, though no adverse claim is set up, and strong uncontradicted evidence is produced on his part. *Moons v. De Bernat*, 1 Russ. 301. **ISSUE AT LAW.**

Court will not on petition under 56 G. 3. c. 60, order a retransfer of unclaimed stock that has been transferred to sinking fund, when title is disputed. *Eip. Latell*, 2 J. & W. 397. **RETRANSFER OF UNCLAIMED STOCK.**

Bill by devisees, praying a conveyance, upon the ground of an alleged equitable title in the testator, originating in an agreement which was denied by the answer, but supported by evidence of ownership, as the receipt of rents and profits, &c. Issue directed to try whether the testator was, at his death, beneficially entitled. *Burkett v. Randall*, 3 Mer. 466. **DEVISEES; ISSUE AT LAW.**

Copyright in music. Copyright not asserted against violations by several persons for fifteen years, not protected by injunction until established at law. *Platt v. Button*, 19 Ves. 447. **COPYRIGHT, INFRINGEMENT OF; LACIES; INJUNC.**

Injunction against cutting timber, refused, where the title was disputed, as between the devisee and heir at law. *Smith v. Collyer*, 8 Ves. 89. **INJUNC. TO STAY WASTE.**

Court will not determine in whom is the right to appoint a steward on petition for delivery of deeds, &c., to the appointment of one of the parties. *Mott v. Buxton*, 7 Ves. 201. **PR. DELIVERY UP OF DEEDS; PR. PETITION.**

Injunction against infringement of copyright, depending on effect of agreement, refused, till recovery in action. *Walcot v. Walker*, 7 Ves. 1. **INJUNC.; INFRINGEMENT OF COPYRIGHT.**

The court will not interfere, even to secure the fund, upon the application of a person who does not show any title. *Brown v. Dudbridge*, 2 Bro. C. C. 321.

When a bill filed for an account of tithes against one who had a lease of his own and the other tithes in the parish, and the whole question in the case turns upon the validity of the lease, and of the notice given to determine it, this court will not proceed till those points are settled at law. *Bousher v. Morgan*, 2 Anst. 404. **LEASE; ISSUE AT LAW.**

A patentee claiming an exclusive right of printing bibles, must establish his right at law before he can have an injunction in equity. *Grierson v. Jackson*, 1 Ridg. L. & S. 304. **INJUNCTION; PATENT.**

Plaintiff prayed a discovery, injunction, and delivery, of a bill of exchange; upon the answers and evidence, the right being clear, the court refused an opportunity of trying it at law, and decreed an immediate delivery. *Newman v. Milner*, 2 Ves. J. 483. **DELIVERY UP OF DEEDS; ISSUE AT LAW.**

Upon a bill to redeem, a *prima facie* title is sufficient; and an issue shall not be directed, though the title is complicated, if uncontradicted. *Pym v. Bowerman*; *Bowerman v. Pym*, 3 Swan. 241. **MORTG.; REDEMPTION; PR. EVID.**

Bill stated the plaintiff to be lessee of an ancient mill, and that defendant had erected flood-gates and other works on the river, which obstructed plaintiff's mill, and prayed that defendant might be decreed to pull down these works, and be restrained from erecting new ones, such works having been erected above three years. Such a bill will not lie until the right be established at law, and a demurrer for want of equity is good. *Weller v. Smeaton*, 1 Cox, 102. **S. C. 1 Bro. C. C. 572. PL. DEMURRER; NUISANCE.**

Whenever the question of right in a suit commenced in a court of equity, is a mere legal question, the

court does right in sending it to law to be tried upon a proper issue; even though the whole of the evidence is written evidence, and the question depends upon the construction of that evidence. *Collins v. Saurcy*, 4 Bro. P. C. 692. **PR. ISSUE AT LAW.**

Bill for account of goods landed at a certain quay, the plaintiff claiming a right of toll by prescription. Defendant denied plaintiff's title, and refused to discover the goods: held he was not compellable till plaintiff had established his right at law. *Northleigh v. Lascombe*, Amb. 612. **PL. DISCOVERY.**

Injunction against stopping lights until trial of the right, which was directed on the motion. Court will never, on motion, make an adverse order to pull down what has been done. *Ryder v. Bentham*, 1 Ves. 543. **INJUNCTION, IRREMEDIAL DAMAGE.**

Account of profits of coal-mines not decreed without shewing possession; the bill retained with liberty to bring ejectment. *Sayer v. Pierce*, 1 Ves. 232. **ACCOUNT.**

Where a title depends on the words of a will, this is as properly determinable in equity, as by a judge and jury at Nisi Prius. *Tanner v. Wise*, 3 P. W. 296. **Ca. temp. Tal. 284. JURISDICTION.**

On bill stating intent of defendant to encroach on plaintiff's land, &c. by building; defendant by answer claiming title to land himself; motion for injunction was refused, not being sufficient to try title on. *Bateman v. Johnson*, Fitzgib. 106. **INJUNCTION.**

Bill for tithes, glebe, and right of common; the two latter points being proper at law, the court retained the bill until plaintiff had ascertained his title, and in the meantime would not decree the tithes. *Sweetapple v. Kingston*, Bunb. 238. **JURISDICTION.**

J S agreed to sell a wood upon his estate to W, and to give him a certain time for cutting and carrying it away. The purchaser being interrupted by persons who pretended a title to the estate after the death of J S, who, they insisted, was only tenant for life, and therefore had no power to sell, brought his bill for a performance of this agreement. The court, upon the hearing, were of opinion that this was only a colourable agreement, set up in order to try the defendant's title in equity, which was properly triable at law, and therefore dismissed the bill with costs: but on an appeal, the decree was reversed, and an issue directed to try the title. *Stone v. El. Anglesea*, 1 Bro. P. C. 218. **ISSUE AT LAW.**

Bill against an executor for a debt due from the testator, and though the debt was proved, yet plaintiff sent to law, but bill retained till after the trial, in order to take the account of assets, if verdict for the plaintiff. *Gorray v. Uetrich*, 2 Vern. 192. **ADMON. OF ASSETS.**

An infant shall have an account of profits against an intruder; but when a verdict has passed against his title, he shall have no account of profits until he has recovered at law. *Newburgh v. Bickerstaffe*, 1 Vern. 295. **INFANT; ACCOUNT.**

A bill to examine witnesses in *perpet. rei mem.* is not proper until the party has established his right at law. *Parlet v. Ingres*, 1 Vern. 308. **PR. BILL TO PERPETUATE.**

Upon a bill to perpetuate the testimony of witnesses touching a right to a way, the plaintiff must set out the way exactly in his bill, *per et trans*, as he ought to do in a declaration at law; but such a bill ought not to be brought for such trivial things as right of common, or for ways or water-courses, or at least not till after a recovery at law. *Gelt v. Hayward*, 1 Vern. 312. **PL. BILL TO PERPETUATE.**

Injunction denied to stay an interloper's trading to the East Indies till the validity of the E. I. Company's patent has been tried. *J. Comp. v. Sandys*, 1 Vern. 127. **INJUNC.**

Motion by the king's patentees, for an injunction to

stop the sale of English bibles printed beyond sea, denied till the validity of the patent had been tried at law. *Anger*, 1 Vern. 120. INJUNC.; COPYRIGHT.

### III. PLEA OF.

Plea which negatives plaintiff's title, though it protects defendant generally from answer and discovery as to the subject of the suit does not protect him from answer, and discovery as to such matters as are specially charged as evidence of plaintiff's title. *Sanders v. King*, 6 Mad. 65. PL. PLEA; PL. DISCOVERY; PL. ANSWER.

Where bill is for discovery in aid of defence at law, and for equitable relief, plea of title in defendant in equity to whole bill, is bad. *Gait v. Osbaldeston*, 5 Mad. 428. But overruled on appeal, S. C. 1 Russ. 158. PL. PLEA; PL. DISCOVERY; PL. RELIEF.

To a bill to set aside a conveyance for fraud, &c. plea of title paramount under a former conveyance of all the estate and interests under which the plaintiff claimed, allowed. *Hove v. Duppa*, 1 V. & B. 511. PL. PLEA.

Bill by tenant for life in possession, for discovery and delivery of the title-deeds; plea, a mortgaged fee by a former tenant for life, alleging "himself to be seised in fee, without notice, ordered to stand for an answer, with liberty to except." *Strade v. Blackburn*, 3 Ves. 222. PL. PLEA; PLEA ORDERED TO STAND FOR ANSWER.

A plea of a negative, that a plaintiff is not the person, or in the situation alleged, as of "no partner nor heir," is good. *Hall v. Noyes*, 3 Bro. C. C. 483. PL. PLEA.

Plea of purchase, from one having a reversionary estate, and consequently not in possession, overruled, because it did not set out how the person, from whom the title was deduced, became entitled. *Hughes v. Garth*, 2 Eden, 168. S. C. Amb. 421. *Id.*

Where the statute of mortmain, 9 G. 2. is pleaded to an information by a defendant who is in possession, he need not show title in himself, but only want of title in the relators. *Att. Gen. v. Weymouth*, Amb. 22. PL. PLEA; MORTMAIN.

Where one party sets up a title, inconsistent with the title set up by another, though he fail in his own claim, yet if he appear to have a right to something under the other's claim, the court will not deprive him of it. *Bennet v. Lee*, 2 Atk. 533.

Plaintiff entitles himself as administrator; defendant pleads plaintiff is not administrator: a good plea in abatement in equity, as well as at law. *Winn v. Fletcher*, 1 Vern. 473. PL. PLEA.

### IV. DISCOVERY OF.

General demurrer to bill by widow and infant, customary heir of copyholder, for discovery of title of defendants in possession, allowed for defect of sufficient case for the interference of the court. *Baker v. Booker*, 6 Pri. 379.

Bill prayed that the defendant might state the particulars of his pedigree, as heir, and of the births, baptisms, marriages, deaths, or burials; demurrer allowed. *Ivy v. Kekewich*, 2 Ves. J. 679. PL. FISHING BILL.

After twenty years' possession, and a descent cast, the heir at law of a former owner filed a bill for discovery of title of occupant, suggesting pretended devise from his ancestor; demurrer allowed. *Mutloe v. Smith*, 3 Anst. 709. DEMURRER; LENGTH OF TIME.

A court of equity will not compel tenant to make a discovery which may invalidate his title in a court of law. *Lowther v. Troy*, 1 Ridg. L. & S. 192.

Bill lies to discover the title of a person bringing ejectment, and to see if it is not in some other. *Metcalf v. Harvey*; 1 Ves. 249.

Claimant under a marriage settlement, without notice of prior incumbrances, shall not be compelled to a discovery. *Williams v. Lane*, 8 Bro. P. C. 291.

One claiming under a voluntary conveyance from tenant in tail not compellable by the issue in tail to discover the deed of entail. *Bunce v. Phillips*, 2 Vern. 50.

### V. AS REGARDS RELATIONSHIP OF LESSOR AND LESSEE.

The act of a tenant disclaiming his landlord's title, and admitting title in a third person, shall not affect his landlord's title if the landlord have no knowledge of, or does not acquiesce in such act. *Hovenden v. Ld. Annesley*, 2 Scho. & L. 624.

But if the landlord, having notice of such act of disclaimer, does not proceed for the forfeiture, but acquiesces, the statute of limitations will run against him as in ordinary cases. *Id. ib.*

Whether, without express stipulation, a person under a contract with a lessee for years, to purchase the term, can insist upon a production of the lessor's title, and whether the lessee can compel such production, *Quære?* The lessee's bill, for a specific performance, dismissed, his interest described as fifty-years, the residue of a term free from incumbrances, being a few years only of an old term, and a reversionary term from another lessor, and old incumbrances not shewn to be discharged. *White v. Foljambe*, 11 Ves. 337. VENE. & PURCH.; SPEC. PERF.

A, gaining possession under an assignment of a lease for years, and paying rent under it, shall not be allowed to change the nature of such possession, and to set up a title to the fee by accepting a conveyance of the fee from persons claiming adversely to those under whom the lease is held, although the right be in such person; nor will the acts of A, and those under whom he derives, treating such interest as freehold for several years, conveying and settling it as such, give a title different from that under which the possession was originally gained. *Saunders v. Ld. Annesley*, 2 Scho. & L. 73.

If a person, having the mere right, obtains possession by contract with him who has it, he cannot be remitted to his mere right, but must hold the possession according as he received it, because it was his folly to take possession in that manner without recovering it by lawful means. *Id.* 103.

Non-payment of rent reserved on a lease, though for upwards of twenty years, shall not bar the lessor from recovering possession at the expiration of the term. *Id.* 106. RENT, NON-PAYMENT OF; LENGTH OF TIME.

Lessee of tithes filing bill for satisfaction of them, need not set forth his lessor's title. *Cruthorne v. Taylor*, 2 Bro. P. C. 512. PL. BILL.

### VI. WHEN EVIDENCE OF TITLE PRESUMED.

Where from the answer itself there is strong presumption against defendant's title, and which is impeached by the bill, court will grant a receiver. *Stitwell v. Williams*, 6 Mad. 49. ANSWER; PL. RECEIVER.

No presumption of a grant of mines against an express reservation of a sale many years ago, merely from permitting expenditure without claim. *Norway v. Roe*, 19 Ves. 156. LENGTH OF TIME; MINES.

The court must govern itself by a moral certainty

upon title, for it is impossible there should be a mathematical certainty. *Hillary v. Waller*, 12 Ves. 252.

Possession is the criterion of title to a personal chattel; the property therefore changed by sale in market overt. That rule adopted by the bankrupt law; distinction as to landed possession not even *prima facie* evidence. Legal title in contemplation of bankruptcy, protected by the previous equitable title. *Hiern v. Mill*, 13 Ves. 122.

To make good a title to the residue of an old term, mesne assignments, which cannot be produced, will be presumed even at law. *White v. Foljambie*, 11 Ves. 350.

Upon possession for many years, the origin of it not appearing, and no title except as *cestui qui trust*, under a term to raise a sum of money, the court would not presume any other title, and therefore decreed the plaintiff to be let into possession on payment of the charge, but with reluctance, and upon the laches, refused an account of the rents even from the filing of the bill. *Acherley v. Roe*, 5 Ves. 565. LENGTH OF TIME; ACCOUNT; LACHES.

## VII. RELIEF AND PROTECTION GENERALLY.

Plaintiff in equity must state his title in bill, and unless admitted by defendant, must prove it. *Norbury v. Meade*, 3 Bli. 211. BILL.

Demurrer allowed to a bill, stating the alternative, a title at law, or in equity. *Edward v. Edward*, 1 Jac. 335. PL. BILL, UNCERTAINTY.

Where the possession of an estate can be referred to a good and valid title, equity will not refer it to a title obtained by fraud or disseisin. *Conray v. Caulfield*, 2 Ball. B. 255.

Persons doubting their rights and compromising them, are thereby bound. *Burke v. Crosbie*, 1 Ball & B. 504. COMPROMISE.

Where title is defective and acquiesced in, with knowledge of its being so, then the possession is quieted. *Shine v. Gough*, 1 Ball & B. 444. PL. BILL OF PRACE.

Question of title in King's printer in Ireland to print Irish statutes, not proper for equity. *Grierson v. Fyfe*, 9 Ves. 341. JURISDICTION.

Injunction obtained on affidavit against pasturing cattle and cutting in a wood, the plaintiff prayed the injunction as tenant in fee or as lord of the manor, inclosing under the statute, the defendants denying the former title, and as to the latter, claiming common of pasture and estovers, and stating that after inclosure, sufficient common of pasture would not be left, the plaintiff having before the bill filed, been nonsuited in an action of trespass, and entered into an agreement with some of the tenants. The injunction was dissolved on the answer. *Quare*, Whether the original and new affidavits would be read in such case. *Hanson v. Gardiner*, 7 Ves. 305. PR. INJUNC. TO STAY WASTE.

In a bill to perpetuate testimony of a right of common and way, the plaintiffs claimed in right of their estates, or otherwise; this is too loose; a demurrer therefore allowed. *Cressett v. Mutton*, 3 Bro. C. C. 481. Vide S. C. 1 Ves. J. 449. PL. BILL, AMBIGUITY.

Where bill is brought to establish title and for perpetual injunction, it is the established practice to dismiss bill, though defendant has answered and insisted on matter of title. *Welby v. De Rutland*, 2 Bro. P. C. 39. INJUNC.

A subsequent title which is both legal and equitable, destroys a prior equitable title. *Hayshaw v. Yates*, 1 Str. 240. MERGER.

## TOLERATION ACT.

As to this act and doctrine of religion, condemned by law, see *Att. Gen. v. Pearson*, 3 Mer. 353.

No new right is given by the toleration act, but only an exemption from the penal laws. *De Costa v. De Paz*, 2 Swan. 490. S. C. Dick. 258. Amb. 228.

The act of toleration, 1 W. & M. c. 18, was made to protect persons of tender consciences, and to exempt them from penalties; but to extend it to clergymen of the church of England, who act contrary to the rules of discipline of the church, would introduce the utmost confusion. *Trebec v. Keith*, 2 Atk. 501.

## TOLLS.

Though validity of custom of toll has been established in a former suit, yet this court has jurisdiction to decree an account of toll. *Norfolk v. Myers*, 4 Mad. 83. JURISDICTION; CUSTOM; ACCOUNT.

Plaintiff having first established his title to tolls at law, equity will decree account of such as are subtracted. *Mayor, &c., Reading v. Winkworth*, 5 Price, 473. ACCOUNT; JURISDICTION.

If a turnpike keeper levy an extra toll, and upon adjudication by two magistrates (under the Bath act) it is determined that the toll was not due, the money may be recovered back in an action for money had and received, and notice of action need not be given; for where a power is given to justices to determine, it is final, unless an appeal is expressly given. *Parsons v. Blandy*, Wightw. 22.

Money secured on mortgage of turnpike tolls, is an interest in land, and within the statute of mortmain; but there is another sort of toll which gives no right at all in the land, and that is a toll thorough. *Knapp v. Williams*, 4 Ves. 430. (n).

Bill by the lord, claiming a prescriptive right to tolls for goods landed, and praying a discovery of the goods landed; he is not entitled to a discovery till he has established his right at law, *aliter* where the title is in equity. *Northleigh v. Laiscomb*, Amb. 612.

Bill stating a right to a toll out of every bushel of corn brought to a market, and an evasion thereof by defendant and others by selling at his own house; demurrer allowed, the remedy being at law. *Hawley v. Taylor*, 3 Atk. 816.

Bill to establish a right to tolls for carts coming into a manor, dismissed, it not appearing that the toll bars stood within the manor. *Att. Gen. v. Ayre*, Bunb. 68.

Bill for tolls for landing goods in plaintiff's manor, dismissed as proper at law. *Disney v. Robertson*, Bunb. 41.

So a bill for beaconage, which plaintiff claimed by letters patent, and defendants admitted to have paid, though they insisted they had paid it in their own wrong. *Boston Mayor v. Jackson*, Bunb. 101.

## TRADE.

See also GOODWILL.

Specific performance of agreement to sell goodwill of trade, and exclusive use of secret therein. *Bryson v. Whitehead*, 1 S. & S. 74. SPEC. PER. ; GOODWILL.

The sole proprietor of a recipe for making a medicine assigned it, on the marriage of his daughter, to trustees in trust for her and her husband for their lives, and directed that after their decease it should be sold for the benefit of their children. The mother destroyed the recipe, and verbally communicated

the contents, to the eldest son for the benefit of the other children. On a bill by some of younger children against him, he was declared to hold the secret upon the trusts of the settlement, and was decreed to account for the profits made by the sale of the medicine after his mother's death; and as a sale was impracticable, an issue was directed to ascertain the value of the secret. *Green v. Folgham*, 1 S. & S. 398. TRUST; ACCOUNT; SETTLEMENT.

Trader may sell secret in trade, and restrain himself generally from use of it. *Bryson v. Whitehead*, 1 S. & S. 74. PUBLIC POLICY; TRADE, RESTRAINTS ON.

Specific performance decreed of agreement to sell goodwill of trade, and exclusive use of secret therein. *Id.* SPEC. PERF.; GOODWILL; TRADE, SECRET IN.

Injunction to restrain a defendant from communicating certain recipes for medicines, and vending them, granted, on the ground that he had obtained a knowledge of the mode of preparing them by a breach of trust. *Youatt v. Winyard*, 1 Jac. & W. 394. INJUNCTION AGAINST BREACH OF TRUST.

Contract with the proprietors of a theatre not to write dramatic pieces for any other, legal, as a similar restraint of a performer would be; not resembling a covenant restraining trade generally. *Morris v. Coleman*, 18 Ves. 437. CONTRACT.

Covenant restraining trade within particular limits, or partners from carrying on the same trade for their private benefit, good. *Id.* *ib.*

Sale of a trade with the goodwill does not prevent the vendors setting up again a similar trade, without express covenant or fraud, by representing it as a continuation of the old trade, by conduct encouraging others to involve themselves, in the confidence that he would not trade again, &c. Sale under a commission of bankruptcy of the waggon trade from B to L, with the goodwill, another concern from B to W and S, being purchased in trust for the bankrupt, who having obtained his certificate commenced trade again to L, by that road, soliciting customers by advertisement and cards, stating generally that being reinstated by his friends in the carrying business, his waggons set out at the usual hours, &c. an injunction was refused. *Crutwell v. Lye*, 17 Ves. 335. VEND. & PURCH.; GOODWILL.

As to a validity of a bylaw of corporation, the company of Whitstable fishermen, that any freeman engaging in any other oyster fishery on the coast of Kent, should forfeit 10*l.*, and until payment should be excluded from all share of the profits which should in the meantime be derived, as if he had wholly ceased to be a freeman, and whether such suspension is open to a mandamus as a temporary disfranchisement, Quære? *Adley v. Whitstable Comp.*, 17 Ves. 313. See further 19 Ves. 304. S. C. 1 Mer. 107. BY-LAW OF CORP.

The statute of frauds does not require that a trust shall be created by writing, but that it shall be proved by writing, which may be subsequent to its commencement; therefore a trust may be raised by implication from letters, and a paper referred to by them in the handwriting of the party, though not signed or dated, and by operation of law from advances of money; but when letters are to raise a trust, there must be a demonstration that they relate to the subject; in this case, M. R. said, the court had gone too far in taking cases out of the statute of frauds, on the ground of part performance, or the relief ought to be confined to compensation. On appeal, Ld. Ch. affirmed the decree at the Rolls, and determined that this case was not within the statute of frauds, the question being a question of fact, whether a partnership subsisted in a colliery: but the evidence from books and papers being admitted, and the interest in

the lease of the colliery passing as an incident to the trade, by operation of law, his lordship refused to direct an issue. *Foster v. Hall*, 3 Ves. 696. 5 Ves. 508.

If joint tenants of leasehold or freehold lay out money jointly upon it, in the way of trade, there is no survivorship. *Lyster v. Dolland*, 1 Ves. J. 435. JOINT TENANT; SURVIVORSHIP; REAL ESTATE.

All contracts relating to matters of trade shall be expounded by usage of trade. *Baker v. Paine*, 1 Ves. 459.

An injunction to restrain a man in the exercise of his trade refused before answer. *Jackson v. Barnard*, Ridgw. 259. INJUNC.

Transactions with a foreign prince and his government do not concern the trade of merchandise. *Sturt v. Mellish*, 2 Atk. 612. STAT. OF LIMITATIONS.

A letter of attorney from one merchant to another to get in debts will not make the person so deputed a merchant within the exception of 21 Jac. 1. c. 16. s. 3. *Id.*

Charles T. having granted a charter to the card-makers' company to use the Mogul stamp on cards; plaintiff suggesting a sole right, as having appropriated it to himself conformable to the charter, moved for an injunction to restrain defendant: but Ld. Ch. refused it. The objection of the defendant taking away the plaintiff's customers by using the same mark (the Mogul stamp on his cards) is of no more weight than if one inn-keeper should set up the same sign as another. But a cloth-worker may maintain an action against another of the same trade for using his mark, where it is done with a fraudulent design to put off bad cloths, or to draw away customers. The court, however, will never establish a right claimed under a charter only from the crown, unless the right has been first tried at law. *Blanchard v. Hill*, 2 Atk. 484.

A goldsmith, without any directions from the proprietors, subscribed lottery orders into the S. S. Comp. he was held indemnified by the act 6 Geo. 1. c. 4. s. 23. empowering all trustees, guardians, executors, &c. to make such subscriptions, and it would have been the same if the *estui que* trust had forbid him to subscribe. *Trenchard v. Wanley*, 2 P. W. 165. And in the next term in *Weaver v. Fowler*, Ld. Maclesfield made the same resolution. 2 P. W. 170. TRUSTEE.

## TRADER.

See also BANKCY. III.—STAT. C. OF, II. 42.—and see post, Appendix.

When a trader shall die entitled to any real estate in lands, &c., the same shall be assets to be administered in for payment of all his debts, &c. Creditors by specialty, in which heirs are bound, shall be first paid. Act not to repeal Irish act of 33 G. 2. c. 14. 47 G. 3. sess. 2. c. 74. s. 1, 2. ADMON. OF ASSETS.

Where legacies were charged on real estate of trader, and his devisee and executor sold part of the real estates before the debts were paid, held, that purchasers, notwithstanding the 47th G. 3. sess. 2. c. 74., were liable to see to application of purchase money. *Horn v. Horn*, 2 S. & S. 448. VEND. & PURCH.; STAT. C. OF.

The act of 47 Geo. 3. sess. 2. c. 74. applies only to persons who were traders at the time of their decease, and not to persons who have *bond fide* left off trade before they died; consequently the real estate of such latter persons are not subject to simple contract debts.

*Hitchon v. Bennett*, 4 Mad. 180. REAL ESTATE; STAT. C. OF.

Motion, by simple contract creditors of one who had been a trader, but ceased to be so, and was not a trader at the time of his death, for a receiver, upon affidavit before answer, refused, not being within the 47th Geo. 3. sess. 2. c. 74. *Keene v. Riley*, 3 Mer. 436. DEBTOR & CRED.; RECEIVER; STAT. C. OF.

### TRANSFER.

See ASSIGNMENT.—POWERS, XIII.—PR. INJUNC. 18.  
—STOCK.

### TRAVERSE.

See LUNACY, IV. 2.

### TREASON.

See ATTAINDER.—FORFEITURE.—PL. PLA. 4.—  
STAT. C. OF, II. 22.

### TREES.

See TIMBER.

### TRESPASS.

See PR. INJUNC. 22.

### TRIAL.

See PR. HEARING, &c.—PR. INJUNC. 12. (c).

### TRUSTS.

See also CHARITY, II. 4. — LENGTH OF TIME.—PR. INJUNCTION, 14.

- I. GENERALLY.
- II. HOW CONSTITUTED.
- III. EXECUTORY.
- IV. IMPLIED.
- V. PRESUMED.
- VI. RESULTING.
- VII. VOID OR FRAUDULENT, LAPSED, OR SUBSISTING.
- VIII. DECLARATION OF.
- IX. CONSTRUCTION OF.
- X. THEIR INCIDENTS.
- XI. ASSIGNMENT OF.
- XII. EXECUTION AND SATISFACTION OF.
- XIII. BREACH OF.
- XIV. NOTICE OF.
- XV. TO PAY DEBTS.
- XVI. USES AND TRUSTS.

#### I. GENERALLY.

<sup>A</sup> Where defendant admits by answer, that there is a trust fund in his hands, court will always, on interlocutory application, order payment into court. So, here executor is a debtor to testator at testator's

death. *Rothwell v. Rothwell*, 2 S. & S. 217. PAYMENT INTO COURT; PL. ANSWER, ADMISSION.

Court will not order clause "enabling trustees to appoint others," to be inserted, in conveyance, there being no provision to that effect in trust deed. *Bayly v. Mansell*, 4 Mad. 266. TRUSTEES.

If land or money be properly given for maintaining "the worship of God," without more, the court will execute the trust in favour of the established religion; but if it be clearly expressed, that the purposes, are for of maintaining dissenting doctrines, so long as they are not contrary to law, the court will execute the trust according to the express intention; and where, as in this case, the intention clearly appears *aliunde*, though not expressed in the instrument creating the trust; the court will also carry the manifest design of the founder into execution, so far as it is consistent with law. *Att. Gen. v. Pearson*, 3 Mer. 409. DISSIDENTERS.

It is clear that a suit may be maintained against a public officer having in his hands money issued by government for the use of an individual, for the recovery of such money: but where government had ordered the money to be withheld, the question is only between government and the individual or his assignees, and the court has no jurisdiction. *Priddy v. Rose*, 3 Mer. 102. PUBLIC OFFICER; JURISDICTION.

Constructive trusts held not within the 52 G. 3. c. 101. which gives relief upon petition, in the case of charities. *Epp. Brown*, Coop. 295. CHARITY PETITIONS; STAT. C. OF.

Regulation of trust charity, supported by voluntary contribution, is proper subject for bill, not of information. *Davis v. Jenkins*, 3 V. & B. 151. CHARITY.

In cases of personal trust under a will, the court never interferes, unless the trust be corruptly executed. *Potter v. Chapman*, Amb. 99. S. C. 1 Dick. 146.

It would be dangerous where a person enters on the foot of a trust, and never makes any declaration of his having performed the trust, in pursuance of the will, to construe this such an entry, as that a fine and non-claim would bar the right of plaintiff, a remainderman. *Shields v. Atkins*, 3 Atk. 560. FINE AND NON-CLAIM.

Deed of trust for payment of such creditors as come in within a year, a creditor will not be excluded, though he doth not come in until after the year; but a bill may be exhibited after the year, to compel the creditors, who stand out, to come in or renounce the benefit of the trust. *Dunch v. Kent*, 1 Vern. 260. DEBTOR & CRED.

#### II. HOW CONSTITUTED.

Where A, having certain funds standing to his credit at his banker's, by letter directed them to carry some parts of such funds to the account of certain persons as trustees for his wife, and, after her decease for his son, and other parts thereof to the account of certain persons as trustees for his son; and such sums were accordingly carried over by the bankers to the account of such persons in their books, and the dividends were from time to time carried to the same accounts, but the testator never communicated the facts to the trustees, and there was some evidence that the testator had directed the transfer under an impression that he should be able by that means to evade the legacy duty, and that he had shewn an intention to exercise some acts of ownership over the funds: the court held, that the appropriations were void; and that the testator might at any time have revoked them. *Gaskell v. Gaskell*, 2 Y. & J. 402. ADMON. OF ASSETS; APPROPRIATION.

A testator having given an annuity to one of his



next of kin, and expressed a reason for giving nothing to the others, gave the residue of his property to his wife, recommending to her, and not doubting that she would consider his near relations as he would have done if he had survived her; held that there was no trust for the next of kin, but that the wife took the residue absolutely. *Sale v. Moore*, 1 Sim. 534. WILL, C. OF, WORDS PRECATORY.

Lease was granted to W, who afterwards committed act of bankruptcy, and executed declaration of trust in favour of R. On issue directed by court, it was found that W's name was used in trust for R. Held, lease did not pass to W's assignees. *Gardner v. Rowe*, 2 S. & S. 346. BANKRY. REPUTED OWNERSHIP.

Testator, after giving his real and personal estates to his wife in fee, said that he had so given the same to her unfettered and unlimited, in full confidence that in her future disposition thereof she would distinguish the heirs of his late father by devising the whole of his estate, together and entire of his father's heirs as she might think best deserved her preference: Held, that no trust was created. *Meredith v. Henrager*, 1 Sim. 542. WILL, C. OF WORDS PRECATORY.

The sole proprietor of a recipe for making a medicine, assigned it on the marriage of his daughter to trustees in trust for her and her husband for their lives, and directed that after their deaths it should be sold for the benefit of the children. The mother destroyed the recipe, and verbally communicated the contents to the eldest son for the benefit of the other children. Upon bill by some of younger children against him, he was declared to hold the secret upon the trust of the settlement, and was decreed to account for the profits made by the sale of the medicine after his mother's death: and as a sale was impracticable, an issue was directed to ascertain the value of the secret. *Green v. Folgham*, 1 S. & S. 298. TRADE, SECRETS IN; ACCOUNT; SETTLEMENT.

Testator gave to his wife all his personal estate, relying that if she should marry again she would secure whatever she should possess under her will for her separate use; and he recommended her to give by her will what he should be possessed of under his will to certain persons named: Held, that the wife's executor was trustee of the whole property possessed by her under the will for those persons named. *Horwood v. West*, id. 387. WILL, C. OF.

A recommendation by a testator to his son to continue his nephews in the occupation of their farms as heretofore, and so long as they continue to manage the same in a good and husband-like manner, and to duly pay their rents, is imperative. *Tibbits v. Tibbits*, 1 Jac. 317. WILL, C. OF; WORDS PRECATORY.

Power of appointment in grantee for life, though in favour of particular objects, is not a trust, and may be extinguished by a recovery. *Smith v. Death*, 5 Mad. 371. RECOVERY; EXTINGUISHMENT OF POWER.

Request in will, will raise a trust if the objects and property are described with such certainty that the court can execute it; but otherwise the devise takes absolutely. *Eade v. Eade*, id. 119. WILL, C. OF; WORDS PRECATORY.

Bequest to A B "trusting she would use it" to indefinite purposes, creates no trust for those purposes. *Curtis v. Hippom*, id. 434. Id.

Tenant in possession procured a grant of the copyhold to son in remainder, and at same time surrendered it to use of will. Held not an advancement, and son only a trustee. *Prankerd v. Prankerd*, 1 S. & S. 1. ADVANCEMENT; PAR. & CHILD; COPYHOLD, SURRENDER.

The position that the mortgagee is a trustee for the mortgagor, to be received with considerable qualification.

*Cholmondeley v. Clinton*, 2 Jac. & W. 182. MORTGAGE.

Transfer of stock of intestate into name of himself jointly with that of husband of one of his two nieces, accompanied with proof of his having said in his lifetime that it was his intention to give husband stock at his death in consideration of affection, &c. and that he had transferred it for that purpose (if not repelled by counter testimony), held to be sufficient proof of gift of such stock, and no trust; and the court will not continue injunction granted to restrain husband, who had administered, from disposing of it. *George v. Howard*, 7 Price, 646. GIFT; EVIDENCE.

W, landlord to P, having the power to distrain for rent in arrear, and having distrained for part, and being a creditor of P for money lent, as well as for rent in arrear, upon P's representing to him that he is also indebted to G to the amount of about 900*l.* for which he is in fear of arrest, and about to leave the country, undertakes that if P will give up to him the farm and execute an assignment of all his property, he will pay G's debt in the first instance out of the proceeds, and apply the residue in satisfaction of his own demand, and pay the surplus (if any) to P, who executes a bill of sale to W accordingly on the faith of such undertaking. Upon the bill of G and P, this agreement was enforced against W to the extent of 900*l.*, the alleged amount of G's debt, but no further, the actual debt having proved to exceed that amount; and not prevented from having effect, either by the circumstance that P's property fell short of the estimated amount, or of P's being at the time indebted to other persons besides G and W, which formed no part of the consideration for the agreement, although noticed in W's undertaking as having been represented otherwise. The engagement to pay G in the first instance not being made directly to G, but through the medium of P, by whom also the consideration was furnished, P held, in a court of equity, to be a trustee for G. But *quære*, if the plaintiffs could recover at law upon such agreement? *Gregory v. Williams*, 3 Mer. 582.

A invests, in name of trustees, stock as security to B against certain payments. Stock remains for a long time uncalled upon. A cannot have it re-invested in himself, but dividends ordered in future to be paid to A. *Linton v. Hyde*, Mad. 91. SECURITY, RE-TRANSFER OF.

Words of entreaty in a will held, on construction, to raise a trust. *Prevost v. Clarke*, id. 458. WILL, C. OF; WORDS PRECATORY.

Devise to a son, recommending him to continue his cousins A and B in the occupation of their respective farms in the county of W as heretofore, and so long as they continue to manage the same in a good and husbandlike manner, and to duly pay their rents; a trust for the cousins, who had been tenants at will; and the son being the heir, was put to his election. As to the effect of election against the will, whether compensation or forfeiture. *Qu?* *Tibbits v. Tibbits*, 19 Ves. 656. WILL, C. OF; ELECTION; HEIR AT LAW.

Recommendation in a will, where the object and subject are certain, amounts to trust. *Id.* 664. WILL, C. OF, WORDS RECOMMENDATORY.

No trust under words of recommendation and confidence applied to an uncertain subject, as what shall be left after the death of a person to whom the property is given in the first instance. *Id.* ib.

Direction to trustees to cut trees in aid of testator's real and personal estate, held not a trust, but a mere power upon the whole of the will. *Gower v. Eyre*, Coop. 156. POWER; WILL, C. OF.

Codicil requiring and entreating the executor, who was also residuary legatee, by will or deed to settle

and secure 500*l.* to be paid at his decease; the testator declaring that he had omitted to express it in his will, not doubting that the executor will readily comply with the request; a trust by way of legacy out of the assets: not a condition enforced independent of them. *Taylor v. George*, 2 V. & B. 378. WILL, C. OF; WORDS PRECATORY.

Appointment of a sum of money by will: the appointee to pay an annuity, and give bond for the payment: the appointment lapsing by the death of the appointee in the life of the testator, the annuity is a trust by way of legacy, not a condition. *Id.* 381. WILL, C. OF.

A tenant for life of a leasehold interest, the subject of settlement, surrendering the lease and taking a new one for his own benefit, is a trustee for those entitled to estates in remainder under the settlement; and an accumulation of rent from the death of the tenant for life to the expiration of the new lease, belongs not to his devisee but to the person next entitled under the settlement. *Eyre v. Dolphin*, 2 Ball & B. 290. TENANT FOR LIFE & REMAINDER; SURRENDER OF LEASE.

Trustee of lease renewing for his own benefit, is considered as still holding for his *cestui que trust*, though it is clear the lessor would not have renewed for *cestui que trust*. *Fitzgibbon v. Scanlan*, 1 Dow, P. Rep. 269. LEASE, RENEWAL OF.

Devise to a nephew in fee, "not doubting in case he should have no child, but that he will dispose and give my said real estate to the female descendants of my sister, in such part or parts and manner as he shall think fit, in preference to any descendant on his own female line;" a trust in the event described for the sister's children. *Parsons v. Barker*, 18 Ves. 476. WORDS, PRECATORY.

Precatory words held imperative where the object and subject are certain. *Dashwood v. Peyton*, 18 Ves. 41. WORDS PRECATORY.

Lease of premises where a partnership trade was carried on, renewed by one partner in his own name clandestinely, is a trust for the partnership, to be accounted for as joint property. *Featherstonhaugh v. Fenwick*, 17 Ves. 298.

Lease obtained by a person interfering with the assets, and compelling the surrender by executors of a leasehold interest, bequeathed to minors, a graft on the former lease so surrendered. *Mulcahy v. Dillon*, 1 Ball & B. 409. LEASE.

Devise and bequest of real and leasehold estates to the deviser's widow and her heirs for ever, in fullest confidence that after her decease she will devise the property to my family: held, an estate for life only, with remainder in trust for the deviser's heir as *persona designata*. *Wright v. Atkyns*, 17 Ves. 255. Affd. 19 Ves. 299. See also *Cooper*, 111. 1 Ves. & B. 313. 1 Turn. & R. 143. WILL, C. OF; PRECATORY.

A new lease obtained by a mortgagee of a leasehold interest which had been evicted for non-payment of rent, taken after the expiration of six and nine months, allowed to the lessee and mortgagee to redeem by 3 G. 4. c. 2. s. 4., but in pursuance of a contract entered into in the period between the six and nine months, if the parties interested did not redeem, is not a graft on the former lease, nor a trust for the lessee, the mortgagee not being in possession nor procuring the lease behind the back of the lessee. The principles on which courts of equity act in considering renewed interests obtained by mortgagees, trustees, &c., to be grafts are, that the advantage was procured either by being in possession, or, when out of it, by a contrivance to oust the lessee of the benefit of renewal. *Nesbitt v. Tredennick*, 1 Ball & B. 29. LEASE, GRAFT; MORTGAGE & MORTGEE.

Conveyance to B of an estate, the money being paid by A; B is a trustee, and C taking from B with

notice, is also a trustee. *Mackreth v. Symonds*, 16 Ves. 350.

Purchase in the name of another is a trust for the party, who pays the consideration except by a parent in the name of his child, which is presumed an advancement, the presumption capable of being rebutted; but does not give way to slight circumstances. *Finch v. Finch*, 15 Ves. 43.

If trust is mentioned but is not expressed, or is ineffectually created or fails, the next of kin are entitled; but if the person taking has a discretion whether to make the application or not, it is an absolute gift and not a trust. *Morice v. Up. Durham*, 10 Ves. 535.

No trust arises on words of request or recommendation, unless the objects and subjects are certain. *Id.* 536. WORDS PRECATORY.

An executor to a tenant by sufferance or at will, obtaining a larger interest, is a trustee for the residuary legatee, like the case of general occupancy. *James v. Dean*, 11 Ves. 392. Affd. 15 Ves. 236. EXECUTOR; RENEWAL OF LEASE.

Renewal of a lease taken by a trustee, shall accrue to the benefit of the *cestui que trust*. *Griffin v. Griffin*, 1 Scho. & L. 352. LEASE, RENEWAL OF.

When a testator expresses a desire as to the disposition of property, and the objects to which he refers are certain, the desire so expressed amounts to a command. *Cary v. Cary*, 2 Scho. & L. 189. WILL, C. OF; WORDS PRECATORY.

Renewal obtained by a party having a rent charge on leasehold interest, evicted for non payment of rent, is a trust for the original lessee, and a graft on the former lease. *Fitzgerald v. Rainsford*, 1 Ball & B. 27. note. RENEWAL OF LEASE.

There are three requisites to constitute a trust, viz. sufficient words, a definite subject, and a certain object. *Crucys v. Colman*, 9 Ves. 323.

Words of recommendation or precatory, or expressing hope, &c., if the objects and subject are certain, are imperative, and create a trust. *Paul v. Compton*, 8 Ves. 380. WILL, C. OF.

Words of recommendation are not considered imperative, unless the objects and subjects are certain. *Moggridge v. Thackwell*, 7 Ves. 85. Affd. 13 Ves. 416.

Legacy to a father, the better to enable him to provide for his younger children: he consented to secure the capital, but was held entitled to the interest. *Brown v. Casamajor*, 4 Ves. 498. LEGACY; PARENT & CHILD.

When letters are to raise a trust, there must be demonstration that they relate to the subject. *Forster v. Hale*, 3 Ves. 708. EVIDENCE.

Testator in India gives all his estates and effects to A in England, in trust, and directs his property to be remitted to him; and, after several legacies, he gives A 800*l.*, and requests him, as soon as the property is remitted, to lay out the same in the funds or other securities, which shall appear most advantageous for those who shall be benefited by it hereafter. The 800*l.* is a beneficial legacy, not in trust. *Wadley v. North*, 3 Ves. 364. WILL, C. OF.

Bequest to A for life, with power, on her marriage, to appoint the interest to her husband for life, and a recommendation to dispose of the principal after her own death and the determination of the preceding trusts, among the children of B. The recommendation being held an absolute trust, it is a vested interest in all the children, subject to be divested by appointment; and there being no appointment, children born after the death of the testator, and those who died in the life of A, are entitled with the rest. *Malin v. Barker*, 3 Ves. 150. WILL, C. OF; WORDS PRECATORY; INTEREST VESTED.

Provision by will increased, upon evidence of the testator's request to the executor and residuary lega-

tee, and his promise; upon which the testator refused to make a new will, and said he would leave it to the generosity of the executor. *Barron v. Greenough*, 3 Ves. 162. EVID. PAROL.

Testator gave the residue of his personal estate to his wife, desiring her to provide for his daughter, A, out of the same, as long as she, his wife, should live, and, at her decease, to dispose of what shall be left among his children, in such manner as she shall judge most proper. This is not an absolute trust for the children after the death of the wife. *Pushman v. Filliter*, 3 Ves. 7. WILL, C. OF.

Trust raised, under a recommendation by will to a legatee to dispose of her legacy among certain persons after her death. *Malem v. Keighley*, 2 Ves. J. 529. WILL, C. OF; WORDS PRECATORY.

Testator, by shewing his desire, creates a trust, unless plain words or necessary implication that there is a discretion to defeat it. *S. C. Id.* 335. WILL, C. OF; WORDS PRECATORY.

If a father purchases an estate in the name of a younger son, and the eldest disclaims a trust on his part, unless a creditor interpose, it shall be deemed an advancement for the son in whose name it was made. So is the rule laid down in *Grey v. Grey*, Finch, 338, where there is no clear proof of a trust between father and son, the law will not imply a trust. If a son is married in his father's lifetime, and by him fully advanced, as in a manner emancipated, there a purchase by a father in the name of a son, may be a trust for the father; but where the son is not advanced, or is advanced or emancipated but in part, in such case, there is no room for any construction of a trust by implication; without clear proof to the contrary, it must be taken as an advancement for the son. *Redington v. Redington*, 3 Ridgw. P. C. 176. 179. PARENT & CHILD; ADVANCEMENT.

Parol evidence not admissible to raise an equity, that a pension granted by the crown to the defendant was in trust for the plaintiff, against the oath of the defendant in his answer. *Fordyce v. Willis*, 3 Bro. C. C. 577. EVID. PAROL.

A devise to A for life, with liberty to leave the same to whom she thought most deserving of it, recommending to her to have a due regard to the testatrix's mother's relations, is not mandatory as to the objects of the appointment. *Randel v. Hearle*, 1 Anst. 124. WILL, C. OF; WORDS RECOMMENDATORY.

Residuary legatee dying in life of testator, executors are trustees of residue for next of kin, though no legacy to them, except 10l. to one for mourning. *Bennett v. Batchelor*, 1 Ves. J. 63. S. C. 3 Bro. C. C. 28. LEGACY LAPSED; EXORS. BENEFICIALLY INTERESTED.

Copyhold granted to A, and B his wife, and C his son, to take in succession for their lives and the life of the survivors. The purchase money was all paid by A. C is not a trustee of his life interest for A, but takes it beneficially as an advancement from his father. *Dyer v. Dyer*, 2 Cox, 92. ADVANCEMENT; PARENT & CHILD.

A, possessed of a church lease for three lives, devised it to trustees for certain purposes till his son, R, should attain twenty-one; and when his said son should attain that age, he directed his trustees to stand seized of it to the use of his said son, and the heirs of his body: and, by a codicil, he directed, that if his son, R, should die without issue, his son, P, should inherit the estate in the same manner as R was to inherit it. R, being quasi tenant in tail, if he surrender this lease, and take a new one to himself and his heirs for three new lives, there is no equity on behalf of P, to make R or his devisees trustees of the new lease for P. *Blake v. Blake*, 1 Cox, 266. TEN. IN TAIL; LEASE, RENEWAL OF.

Words of desire will raise a trust where the property and object are certain. *Pierson v. Garnet*, 2 Bro. C. C. 38. S. C. Prec. Cha. 201. See S. C. ib. 226. WORDS PRECATORY.

Husband lends out money, in the names of himself and his wife, upon mortgages and bonds, and dies. The wife is entitled to this by survivorship, if there are assets sufficient without this money to pay debts. *Christ's Hospital v. Budgin*, 2 Vern. 683. HUSB. & WIFE; ADMON. OF ASSETS.

Where a tenant for life of leaseholds under a marriage settlement suffered the lease to expire, and obtained another lease, and died, it was held, that the renewed lease must be held upon the trusts of the settlement, and not enure for the benefit of his representative. *Pickering v. Towles*, 1 Bro. C. C. 197. LEASE, RENEWAL OF; TRUST.

Words of confidence, desire, or request, in order to raise a trust, not only attach on a precise subject of property, but also describe with precision the objects of bounty. In this case, a bequest of leaseholds to a brother, "hoping he will continue them in the family," was held insufficient. *Harland v. Trigg*, 1 Bro. C. C. 442. WILL, C. OF.

Devise to testator's wife, "not doubting she will give what shall be left to my grandchildren," not sufficiently certain to raise a trust. For such purpose, the objects must not only be defined, but the subject of property precisely ascertained, so as to be incapable of diminution by the party. *Wynne v. Hawkins*, 1 Bro. C. C. 179. WILL, C. OF.

Estate devised to a body corporate, which cannot take by the statute of mortmain, in trust to sell land, and apply the proceeds for persons competent to take; though the devise of the legal estate is void at law, yet the trusts shall not be defeated; the heir at law therefore considered as a trustee for the purpose. *Sonley v. Master, &c. of Clock Makers' Comp.* 1 Bro. C. C. 81. MORTMAIN; CORPORATION; HEIR AT LAW.

Deputation procured by father for a natural son, on security of his estate in J, held to be for son's own benefit, and not in trust. *Beckford v. Beckford*, Loft, 490. ADVANCEMENT; BASTARD; PARENT & CHILD.

Tenant for life, with remainders over, of a crown lease for years, applies for a further term: a powerful opponent applies for a grant: the tenant for life gives up her pretensions for a sum of money. The money shall be settled to the same uses as the estate was. *Owen v. Williams*, Amb. 734. LEASE, RENEWAL OF.

One bequeathed several leasehold estates, held for years under the Duchy of Cornwall, to his wife, during so many years of the term as she shall live, and, after her decease, if the terms of the several leases be then in being, unto and amongst, &c. The wife got an additional term; and held, it shall not be for her own benefit, but should go to the uses of the will. *Haw v. Chichester*, Amb. 715. WILL, C. OF; LEASE, RENEWAL OF; TEN. FOR LIFE.

If trustees or mortgagees renew, the new lease is always subject to the trust and limitations of the old lease. *Id.* 719. RENEWAL OF LEASE.

C, having two sons, and being engaged in the sugar trade, devised his sugar houses, &c. to his eldest son; nevertheless, he gave his eldest son should die without a son or sons of his body, then he recommended to him to give and devise the sugar houses, &c., to his brother, the testator's second son. The eldest son died without issue male, leaving a daughter, and without devising to his brother. Held, not a trust for the brother, but a mere recommendation. *Cunliffe v. Cunliffe*, Amb. 586. WILL, C. OF WORDS PRECATORY.

Tenant for life of a lease from the crown, in settlement, got an additional term in reversion, in his own

name. This shall be a trust for the uses of the settlement. *Tarter v. Marriott*, Amb. 668. *Reuk v. Sandford*, Sel. Ch. Ca. 2.

Land surrendered to lord, is not vested in him as a trustee. *George v. Jew*, Amb. 628. *Coryhold*, SURRENDER OF.

The court is cautious in following money into land, but will do it if proved that the money was laid out in land; the doubt is on the proof; always done, when admitted on the answer of person laying it out. *Lane v. Dighton*, Amb. 413. *VEND. & PURCH.*

Sale declared to be made, subject to the trusts of the testator's will, where under a decree that his real estate, (which was devised in strict settlement, subject to debts) should be sold; the sale had been effected by collusion between the creditors and tenants for life. *Alcanton v. Molesworth*, 1 Eden, 18. *SALE.*

One seized of an estate, subject to several equitable incumbrances, sells it to a purchaser, and conveys the legal estate to him free from incumbrances, which were later in date to the others: the purchaser having no notice of the other incumbrances, was held a trustee for the excepted incumbrances only, and they were preferred to the other creditors. *Ingram v. Pelham*, Amb. 153. *VEND. & PURCH. NOTICE.*

Devise to L., in consideration of her promise to give, &c. is a trust. *Clifton v. Lamb*, Amb. 519. *WILL, C. OF; WORDS PRECATORY.*

Devise, not doubting but she will give, &c. is a trust. *Massey v. Shearman*, Amb. 520. *Id.*

Devise of real and personal estates to trustees, their executors, &c. out of rents and profits, to pay certain annuities and legacies: held, a trust not a chattel interest in the trustees. *Gibson v. Rogers*, Amb. 93. *S. C.* 1 Ves. 485. 4 Ves. 238. (n). *WILL, C. OF.*

The word "heirs" is not necessary to give an inheritance to trustees, if a less estate would not answer the purposes of the trust. *Id.* 95. *WORDS OF INHERITANCE.*

A father having provided for his eldest son, but not for the rest, takes a security for the proceeds of an estate, sold in the name of himself and eldest son: held, a trust for the father's personal representatives. *Pole v. Pole*, 1 Ves. 76.

Where a man enters into a treaty with a mortgagee for the purchase of his interest, but finding he has not the legal estate, procures it to be conveyed to himself without privity of the mortgagee, equity will consider such person as a trustee for the mortgagee. *Houres v. Wadhwa*, Ridgw. 199.

A trust is, where there is such a confidence between parties that no action will lie, but is a case merely for the consideration of equity. *Start v. Mellish*, 2 Atk. 612.

Where, in execution of power, cestuique trust appoints trustees to convey to use of A, and charges estate with annuities; it is a conveyance of the legal estate to A and not a trust, so that length of time will run against annuities if not demanded. *Weston v. Bous*, 9 Mod. 309. *PL. PREFA; LIMIT. STAT. OF; LENGTH OF TIME.*

R, the last life in a bishop's lease, agrees with C to surrender this lease, on a promise of the bishop to grant a new one for the lives of R & C, and the son of C; and in consideration of C surrendering the old lease, it was agreed the new one should be in trust for the infant son of C. The whole purchase money was paid by C to the bishop, but the legal estate was granted in the new lease to R and his heirs during his own life, and the heirs of C; and his son C, after the death of R, took upon him to dispose of it: R, by a deed, dated the day after the lease, declares his intention to be, that C and his son should, after his decease, hold to them and the heirs during the remainder of the term: held, that R had a valuable share in the consideration of the new lease, giving up his interest in the

old, and that having a right to declare the trust, C had his life only in the lease. *Crop v. Norton*, 2 Atk. 74. *S. C.* 9 Mod. 233. *Barnard*, 179. *CONSIDERATION; LEASE; SURRENDER OF.*

The person in whose name S. S. stock is entered in the company's book, is with regard to them the proprietor. *Stuckdale v. S. S. Comp.* 2 Atk. 141.

J had a rent charge granted to him and his assigns for three lives; J and his wife mortgaged it to A, his executors, administrators, and assigns, habendum to him, his heirs and assigns, during the three lives upon trust, that A, his executors, administrators and assigns, should enjoy 100l. per annum out of it, till the mortgagee was satisfied. A made an unattested will, and appointed plaintiff his executor, who brought his bill against the heir of A for this 100l. per annum: decreed, that the heir of J should take this rent charge, but for the benefit of the executor agreeable to the trust in the mortgage deed. *Kendall v. Miffield*, Barn. 46. *RENT CHARGE; DEEDS, C. OF.*

A devises lands to B, on condition to pay a sum of money, and no clause of entry; the legatee at law has no lien on the lands, but the heir of the testator shall enter for breach of condition, and yet in this court is but trustee for the legatee. *Wigg v. Wigg*, 1 Atk. 382. *CONDITION.*

There can be no constructive trust, but where the intent of testator is apparent. Willing and desiring G to sell, &c. are more properly words of injunction than trust. *Hill v. Bp. of London*, 1 Atk. 619.

A buys a copyhold estate for his own use and two lives in the manor of M, where the custom was, that whoever purchases in it the estate shall go in succession, and by his will devises all his real and personal estate to his wife: held, that though the legal interest was according to the custom of the manor, yet A has an equitable interest from being the sole purchaser, and shall be construed as a trustee for him, he having advanced the money. *Smith v. Baker*, 1 Atk. 385. *COPYHOLD CUSTOM.*

If mortgagee and mortgagee deposit deeds with A, A is a trustee for mortgagor before condition broken, and for mortgagee afterwards. *Anon.* 2 Eq. Ab. 284. *DELIVERY OF DEEDS.*

Where two purchase in equal moieties between them, and one has abatement in price, &c. made to him, he shall account as to it to the other. *Carter v. Horn*, 1 Eq. Ab. 7. *ACCOUNT.*

If a person be twenty-seven years in possession of lease, it shall not be taken to have been held in trust, although he declare it to have been so by his will, it being suggested that testator and cestuique trust were both papists. *Winter v. Birmingham*, 9 Mod. 146. *LENGTH OF TIME.*

Two persons article that whatever J S shall leave to either of them, shall be equally divided between both; such agreement good, and shall be carried into execution by this court; also, if after this, one of them contrives that J S shall lease part of his estate to a third person in trust for him, this is within the articles. *Beckley v. Newland*, 2 P. W. 182. *AGREEMENT TO DIVIDE WHAT LEFT BY WILL.*

Mother gave bond to son conditioned to surrender copyhold to him, of which she was heiress: held, that she became trustee for son. *Alison's Case*, 9 Mod. 62. *COVENANT; PARENT & CHILD.*

A by marriage article covenanted that all lands, he should afterwards purchase in the parish of K, should be to the uses of the articles. He purchased lands in K, and took a conveyance in fee in the name of his youngest son; but there was no declaration of trust: held, that youngest son was a trustee as to the lands for the parties entitled under the settlement. *Blake v. Blake*, 7 Bro. P. C. 241. *PARENT & CHILD; TRUST, DECLARATION OF.*

Where in a grant of a copyhold for three lives, viz.

to the husband and wife and a third person, the fine was mentioned to be paid by the husband and wife. This, there being no full evidence to the contrary, made the third person only a trustee for the husband and wife and the survivor of them. *Benger v. Drew*, 1 P. W. 781.

If A devise all her personal estate to B, to be disposed of as B shall think fit, and add by parol, "You may, if you please, give 100*l.* to my niece;" B, on a bill, in the answer to which the parol declaration is admitted, shall be decreed to pay the 100*l.* to the niece. *Nab v. Nab*, 10 Mod. 404. WILL, CONSTRUCTION OR; WORDS PRECATORY.

A agrees for a beneficial lease of forty-one years, B advances money towards paying the fine, &c. and lease is taken in B's name without any declaration of trust: held, that B was a mere trustee for A, and upon being repaid his advance with interest, should assign the lease to A, account with him for the profits, and pay his costs: held also, that the trust being proved by letters of B's own hand writing, takes the case out of stat. of frauds. *O'Hare v. O'Neill*, 7 Bro. P. C. 227. STAT. OF FRAUDS.

In copyhold estates, the lord is a trustee for the heir, and is bound to admit him, though the lord be the original grantor; yet it is only in virtue of the trust reposed in him by the law. *Mason v. Dixon*, 13 B. Eq. R. 77. COPYHOLD.

A disinherits his son, and will gives the greatest part of his estate to B, and tells B, if his son behaved well, he might pay him 20*l.* a quarter; and if he used that well, he might make it up 40*l.* a quarter. Decreed 40*l.* a quarter to the son. *Kingsman v. Kingsman*, 2 Vern. 559. WILL, C. OF.

A devises land to his brother, and makes him executor, and wills, that out of the personal estate, and half a year's rent of his real estate, he should pay his legatees, and gives an annuity to his nephew to maintain him at college. It being proved that the brother promised the testator to pay the annuity, otherwise he would have charged his real estate therewith, decreed the real estate to be charged with the annuity. *Oldham v. Litchfield*, 2 Vern. 506. 2 Freem. 284. S. C. FRAUD, WILL PREVENTED BY.

Vendee under contract for purchase dying before conveyance, vendor is trustee for him. *Darris' Case*, 3 Salk. 86. VEND. & PURCH.

An executor by the very will empowered to purchase lands for the heir, yet the purchase being in his own name, and he dead, insolvent as to the other assets, the heir could not follow the land to make a trust for him; though the executor had told the mother of the purchase he was about to make, and had her consent; and so the executor's heir went away with the land for want of express proof of the application of the trust money. *Hullott v. Markant*, Piec. Chan. 168.

Though in the purchase deed, the consideration money is mentioned to be paid by the purchaser, and there is no express declaration of a trust, yet upon the circumstances of the case decreed a trust, though to the disappointment of the purchaser's will and of his creditors. *El. Plymouth v. Hickman*, 2 Vern. 167.

A, jointly seized with two others, conveys his third part to the use of himself for life; remainder to his wife for life, remainder to his son in fee, and at the same time makes his will and gives the same lands to his son in tail, charged with his debts. The son not a trustee for the father in the settlement; otherwise it would have been, if the entire fee had been conveyed to the son. *Baylis v. Newton*, 2 Vern. 28. SETTLEMENT, C. OF.

Three lessees of a church lease; one renews in his own name; it shall be a trust for all. *Palmer v. Young*, 1 Vern. 376.

A, having made his will and his wife executrix, the

son prevails with the mother to get his father to make a new will, and that he might be made an executor, and promises to be a trustee for his mother: trust decreed. *Thynn v. Thynn*, 1 Vern. 296. WILL OBTAINED BY FRAUD.

If a grandfather takes a bond in the name of his grandchildren, their father being dead, this shall be deemed an advancement, and not a trust; for by the death of their father, the grandchildren are under the immediate care of their grandfather. *Ehrand v. Dancer*, 2 Ch. Ca. 26. PARENT & CHILD; ADVANCEMENT.

If an executor renews a lease, he shall account for the new lease, as well as the old one, for the benefit of the creditors. *Anon*, 2 Ch. Ca. 208.

It seems that any words of a testator intimating a "request, wish, desire, recommendation," &c. are sufficient to create a trust, provided there be certainty of the gift and of the object to be benefited thereby. *Brst v. Offen*, 1 Ch. Rep. 246. *Parry v. Juron*, 3 Ch. Rep. 38. WILL, C. OF; WORDS PRECATORY.

If I give money to purchase lands to B and his heirs, and to permit me to take profits during life, B shall be compelled by subpana. *Cary*, 10.

A sells lands to B for 20*l.* in trust (understood) for A's use; A has no remedy; apparent consideration on face of indenture is an estoppel. *Cary*, 14.

Devise to wife "on confidence," that she will leave, &c. to his son, not relievable. *Cary*, 22.

### III. EXECUTORY.

A trust created by will to purchase land to be added and closely entailed to testator's family estate, in the possession of T B, testator declaring that his object was to have a head to the family, and that if T B should die without male issue, or dispose of the family estate, the residue of his fortune should go to A B, or his nearest relative in the male line; how to be executed. *Wadhams v. Burrows*, 1 Sim. 512. WILL, C. OF.

Devise of copyhold estates, the legal estate being outstanding, "to my son R W G, to be entailed upon his male heirs, and failing such, to pass to his next brother, and so on from brother to brother, allowing 2500*l.* to be raised upon the estates for female children each." Whether a trust executed or executory; and if the latter, whether an estate tail in R W G, *quæ?* The point too doubtful to compel a purchaser to take the title. *Jervise v. R. Northumberland*, 1 Jac. & W. 559. VEND. & PURCH.; WILL, C. OF.

In executory trusts the court considers the intention of the testator, and acts according to it. In the latter this court follows the law. *Id.* 570.

No difference between marriage articles and executory trusts in wills, except that the former afford *prima facie* evidence of intent which does not belong to the latter. *Id.* 574.

Devise in trust for a son of the testator's nephew A, at the age of twenty-four; if he have no son, to A, son of the testator's great nephew B; but if neither have a son, then to a son of the testator's great niece's daughter, taking his name, whoever should take not to be put in possession of any part of the testator's effects until twenty-four, nor the executors to give up their trust till a proper entail be made to the heir male by him; is an executory trust in tail for an only son of A, in reversion at the testator's death; and not void for uncertainty, nor too remote. *Blackburn v. Stubbs*, 2 V. & B. 367. WILL, C. OF; WILL, UNCERTAINTY; LIMIT, TOO REMOTE.

No distinction between executory trusts by marriage articles and will, except the inference from the object of the former, to provide for the issue, that the father should not have the power to defeat it; therefore,

estate for life, with remainder to the heirs of the body, a strict settlement in the one case, an estate tail in the other, unless clearly not meant in their technical sense: *Id.* 369. *Sed vide* 1 J. & W. 571. *contra*.

Conveyance to trustees, in trust to sell and purchase other estates to be settled. Those entitled under the limitations directed of the estates to be purchased, have equitable interests co-extensive until a sale; therefore, a specific performance was decreed of an agreement for partition against an objection to a title under a fine by a person who would have been tenant in tail of the estates to be purchased; the effect being an election to keep the estate, binding the trustees, though it may be questionable, whether they could take upon themselves to convey in fee to a person entitled to an estate tail only. *Pearson v. Lane*, 17 Ves. 101. PL. PARTY; SPEC. PERF.; TENANT IN TAIL.

In an executory trust to be effected by the court, it is sufficient if it can satisfy itself of the testator's intention to carry it into execution; therefore, where testator gave his real estate to A, to devise in strict settlement, and ordered other estates to be sold and converted into personality, and the produce, with the residue of his property to be laid out in lands in A, contiguous and convenient to his estate in A, and by strong expressions, (though without direct words,) showed he intended it to be to the same uses, it was decreed so to be. *Brown v. De Laet*, 4 Bro. C. C. 527. WILL, C. OF.

Testator directs his executors to invest personal estate in the purchase of real estates, which when purchased, he devises to A, to him and the male heirs of his body for ever, and if A should die without issue male, then he devised the same to the heir male of the body of B, after tail to A, the court will insert a limitation to trustees to preserve contingent remainders. *Harrison v. Naylor*, 2 Cox, 248. S. C. 3 Bro. C. C. 108. WILL, RECTIFYING MISTAKE IN.

Where testator directed that money should be laid out in lands to be conveyed after the expiration of a term to the use of B for life, and his first and other sons in tail male, remainder to several others successively for life, with like limitations; remainder to his own right heirs, and there were no trustees to preserve contingent remainders: decreed, that such trustees should be inserted in the conveyances, to be settled by the master, of the lands purchased with the money. *Baskerville v. Baskerville*, 2 Atk. 279.

Lord Hardwicke said, in the directions he gave in this case, that he adhered to the rules of conveyancing laid down by the great men before the restoration, and during the usurpation. S. C. *Id.*

Upon a trust in equity, no estate can be gained by disseisin, abatement, or intrusion, while the trustee continues in possession of the land, neither will equity suffer a merger of the trust estate; for uses and mere trusts stand on very different foundations, and are not governed by the same reasoning. All trusts are executory, and the court must follow the intent of the parties, as far as the rules of law will admit, howsoever improperly a will may be penned; therefore, if a testator intended a strict settlement, the court will direct it; and where the court makes use of the words "strict settlement" in an order, it implies a direction to the master to have trustees to preserve contingent remainders inserted, and whether a conveyance be directed or not, the court must decree one, when asked at a proper time. *Hopkins v. Hopkins*, 1 Atk. 593. *Vide* *Ld. Chalmersley v. Ld. Clinton*, 2 Meriv. 173. 358. and 2 Jac. & W. 18. S. C. where the report of this case is corrected from a MS. note. *MENON*.

Where trust is executory, and to be carried into execution by the court of equity, they will direct a conveyance of lands, notwithstanding they are gavel-

kind, according to the rule of common law. *Roberts Dinwell*, 1 Atk. 608. GAVELKIND.

#### IV. IMPLIED.

Testator expressing his will and desire, that one third of the principal of his estate and effects should be left entirely to the disposal of his wife, among such of her relations as she may think proper after the death of his sisters, a trust for her next of kin at the time of her death, having made no disposition. *Birch v. Wade*, 3 V. & B. 198. WILL, C. OF.

Trust by implication, without the word "trusts." *King v. Denison*, 1 V. & B. 273.

The statute of frauds does not require that a trust shall be created by writing, but that it shall be proved by writing, which may be subsequent to its commencement; therefore, a trust may be raised by implication from letters, and a paper referred to by them, in the hand-writing of the party, though not signed or dated, and by operation of law, from advances of money; but when letters are to raise a trust, there must be a demonstration that they relate to the subject; in this case the M. R. said the court had gone too far in taking cases out of the statute of frauds, on the ground of part performance, the relief ought to be confined to compensation. On appeal, *Ld. Chancellor* affirmed the decree at the Rolls, and determined that this case was not within the statute of frauds, the question being a question of fact, whether a partnership subsisted in a colliery; but the evidence from books and papers being admitted, and the interest in the lease of the colliery passing as an incident to the trade by operation of law, his lordship refused to direct an issue. *Foster v. Hall*, 3 Ves. 696. 5 Ves. 508. FRAUDS, STAT. OF.

Testator, on renewal of a lease, takes it in the names of his brother and himself, paying the fine, and receiving the profits himself. Held, not to be assets, but vested in the brother beneficially, upon the ground of intention, though proved but by one witness. *Maddison v. Andrew*, 1 Ves. 58. LEASE, RENEWAL OF.

Trusts by implication arise where one party pays the purchase money, and the conveyance is taken in the name of another; but the rule is not so large as to extend to every voluntary conveyance. *Young v. Peachy*, 2 Atk. 256.

Trusts never implied or presumed without necessity. *Cook v. Fountain*, 3 Swan. 592. TRUSTS PRESUMED.

#### V. PRESUMED.

Presumption against intending an infant to be a trustee. *King v. Denison*, 1 V. & B. 278. INFANT. A purchase by A in name of B, a stranger in blood, is a trust for A, unless presumption is expelled by evidence. *Rider v. Kidder*, 10 Ves. 360.

Trustee for the purchase of land died without personal assets, but having purchased land, the estates purchased were held not liable to the trust, the circumstances affording no presumption that they were purchased in execution of the trust. *Perry v. Philips*, 4 Ves. 108. AFFID. 17 Ves. 173.

Payment made in the name of A with his money, raises a trust, but it is an equity which may be rebutted by evidence. *Graham v. Graham*, 1 Ves. J. 275.

Nature of presumptive trusts. *Cook v. Fountain*, 3 Swan. 591.

Trusts never implied or presumed without necessity. *Id.* 592. TRUSTS IMPLIED.

## VI. RESULTING.

Where deviser directs that after payment of 800*l.* to charity, to be raised by sale of real estate, residue thereof should go to residuary devisee, legacy to charity being void, goes to heir, and not to residuary devisee, costs to be equally borne by each party. Question arising on residuary clause of will concerning lapsed legacy. *Jones v. Mitchell*, 1 S. & S. 290. WILL, C. OF; HEIR AT LAW; LAND DEVISED FOR SALE.

Devisee of an estate for charitable purposes, with a direction that the rents should not be raised: held, that this discretion was void, and that there was no resulting trust for the heir at law as to the increased rents. *Att. Gen. v. Catherine Hall, Camb.* 1 Jac. 381. WILL, C. OF; CHARITY; HEIR AT LAW.

Under a devise of all the residue of the testator's effects, whatever and wheresoever, of what nature or kind soever, to trustees, upon trusts applicable only to personal property: held, that a real estate passed, with a resulting trust for the heir. *Dunnage v. White*, 1 Jac. & W. 583. HEIR; WILL, C. OF.

Question of a resulting trust only arises between the real and personal representative of the testator, not between the representatives of a party taking under the will. *Ashby v. Palmer*, 1 Mer. 296.

Devise to trustees for ninety-nine years upon the trusts hereinafter expressed, and from and after the expiration or other sooner determination of the said term, in strict settlement: the term on trust being declared, decreed to attend the inheritance, according to the limitations of the will, and no resulting trust for the heir, upon the apparent intention to devise immediate estates subject to the term, not future estates expectant on its determination. *Sidney v. Shelley*, 19 Ves. 352. S. C. Coop. 206. WILL, C. OF; TERM TO ATTEND; HEIR AT LAW.

Wherever land, &c. which would descend to heir at law, is devised for purposes which law will not suffer to take effect, the heir at law shall have the benefit of the interest so devised, as undistributed of; whether testator meant he should have it or not. *Tregonwell v. Sydenham*, 3 Dow, 194. HEIR AT LAW; WILL, C. OF.

Testator limiting remainder to his right heirs, shews his intention, that, failing the devise, the heirs should take. *Id.* 208. *Id.*

Resulting trust by a joint advance upon a purchase in the name of one. *Wray v. Steele*, 2 V. & B. 388.

Money produced by sale of real estate bequeathed for charitable uses, is a resulting trust for the heir. *Gibbs v. Rumsey*, 2 V. & B. 294. MORTGAGE; HEIR AT LAW.

Renewal of a college lease by tenant for life, with a power of appointment, in her own name, and at her expence, has not the effect of an appointment in her own favour; and therefore, by the death of the appointee, in the life of the tenant, there will be a resulting trust by lapse for the representative of the author of the power. *Brookman v. Hales*, 2 V. & B. 45. POWER, EXEC. OF; LEASE, RENEWAL OF.

Devise of freehold estate in trust to sell and apply the money towards payment of the legacies; the residue of the personal estate, after payment of debts, legacies, &c. upon trust to convert all the said residue of his personal estate into ready money, to be laid out in freehold property, to be settled. The personal estate, leaving a residue beyond the charges, the real estate a resulting trust for the heir at law; and charged with the legacies, not primarily, but only as an auxiliary fund to the personal estate. *Alaugham v. Mason*, 1 V. & B. 410. WILL, C. OF; CHARGE ON REAL ESTATE; TRUST TO PAY DEBTS.

Devise after payment of debts, legacies, &c. of specific freehold and leasehold estates to A, subject to incumbrances, and of all other his freehold and lease-

hold estates, together with all his personal estate, to trustees, to sell; and out of the money, in the first place to pay their expences in execution of the will or trust, and without farther disposition, appointing the trustees executors: a resulting trust as to the produce of the real estate for the heir at law. *Hill v. Cook*, 1 V. & B. 173. WILL, C. OF.

Construction of a devise in fee, subject to and chargeable with annuities, upon the intention, collected from the whole will; a beneficial devise and not a trust resulting to the heir as to the surplus beyond the annuities. *King v. Denison*, 1 V. & B. 260. WILL, C. OF.

Distinction between a devise, charged with debts, and on trust to pay debts: the former a beneficial devise, subject to the particular purpose; the latter limited to the particular purpose; and therefore the interest not exhausted a resulting trust for the heir. *Id.* 272. WILL, C. OF; TRUST TO PAY DEBTS.

No resulting trust for an heir taking a benefit by the will; but subject to circumstances. *Id.* 273. HEIR.

Conversion directed by will of real estate into personal, not to all intents, but for the purpose only of answering legacies and annuities subject to that as to the real estate, a resulting trust for the heir, which cannot be effected by an unattested codicil bequeathing a lapsed share of the residue. *Hooper v. Goodwin*, 18 Ves. 156. WILL, C. OF; HEIR AT LAW; CONVERSION OF REAL ESTATE.

Residuary bequest cancelled by striking through with a pencil all the general descriptions, with notes in pencil in the margin, indicating alteration and a different disposition of certain articles, a resulting trust for the next of kin. *Mence v. Mence*, 18 Ves. 348. WILL, C. OF; NEXT OF KIN.

Devise when the devisee attains twenty-one, a resulting trust for the heir until that period, and by the previous death of the devisee, the remainder accelerated. *Chalmers v. Brailsford*, 18 Ves. 369. WILL, C. OF; HEIR AT LAW.

Where in a will the intention of the testator being to provide an auxiliary fund for legacies, and not a complete conversion out and out; the residue of the real estate after making good the deficiency of the personal in payment of legacies, is a resulting trust for the heir, notwithstanding a legacy given him, and the testator appointed and devised residuary legatees. *Kellett v. Kellett*, 1 Ball & B. 533; *Affid.* 3 Dow, P. C. 248. WILL, C. OF; HEIR AT LAW.

Conversion of real estate into personal by will, particular purpose which failed, a resulting trust for heir. *Williams v. Code*, 16 Ves. 500. CONVERSION OF PROPERTY; HEIR AT LAW; WILL, C. OF.

Resulting trust for the heir; the only express devise being to convey to the deviser's son, from and after his age of thirty; which he did not attain; and no devise by implication from a declaration, that he shall have no power over the estate until his age of thirty. *Nash v. Smith*, 17 Ves. 29. HEIR AT LAW; WILL, C. OF.

Devise of real estate in trust to sell, if a conversion to the personal property, not absolutely but for partial purposes, as the payment of debts, a resulting trust as to the surplus for the heir, but as personal property. *Wright v. Wright*, 16 Ves. 188. DEVISE OF LANDS TO BE SOLD; HEIR AT LAW.

General devise and bequest upon trust, not sufficient to exhaust the whole property, a resulting trust for the heir and next of kin. *Dawson v. Clarke*, 15 Ves. 416; *Affid.* 18 Ves. 247.

Resulting trust for the heir, a special disposition of the money to be raised by sale of real estate failing by lapse. *Gibbs v. Ougier*, 12 Ves. 416. HEIR AT LAW.

Trust of an annuity for a charity charged upon a

devised estate, being void under the act 9 Geo. 2. c. 36. does not pass by a residuary disposition, but sinks for the benefit of the specific devisees. *Baker v. Hall*, 12 Ves. 497. RESIDUE; DEVISEE; MONTMAYN; TRUST VOID.

Devise of real estate to be sold, the object being a provision for legacies, is not an absolute conversion, and is therefore a resulting trust for the heir at law as to surplus, though a residuary executor is appointed. *Berry v. Usher*, 11 Ves. 87. HEIR AT LAW; SURPLUS; CONVERSION; WILL, C. OF; DEVISE TO SELL.

Testator devised a copyhold estate to his wife, upon trust to sell, and invest the money in the funds, and gave and bequeathed the interest and dividends to her use. He also gave and bequeathed to her all his effects, whatsoever and wheresoever, for her maintenance, upon full trust and confidence in her justice and equity, that at her decease she would make a proper distribution of what effects might be left in money, goods, or otherwise, to his children, accounting what they had already received in money or effects as part of their shares. The widow, executrix, held entitled to the produce of the copyhold estate for life only, with a resulting trust as to the capital for the heir. The widow entitled to the absolute interest in the personal estate. *Wilson v. Major*, 11 Ves. 205. WILL, C. OF, WHAT INTEREST; HEIR AT LAW.

The distinction between a direction to sell real estate out and out, for payment of debts, and a charge for payment of debts is exploded, as to any effect in exempting the personality; in either case, the residue if undisposed of goes to the heir, unless there be a disposition made demonstrative of an intent that it shall change its nature, and become personal. *Cleland v. Shaw*, 2 Scho. & L. 523. LANDS DEVISED FOR SALE; HEIR AT LAW.

Bequest, in trust, for such objects of benevolence and liberality as trustee in his own discretion should most approve, cannot be supported as a charitable legacy, and is therefore a trust for the next of kin. *Morice v. Bp. Durham*, 9 Ves. 399; aff'd, 10 Ves. 522. WILL, UNCERTAINTY; CHARITY.

Purchase in the name of a wife, or child, ordinarily, not a resulting trust, being considered an advancement. *Gluster v. Hunt*, 3 Ves. 199. ADVANCEMENT.

Bequest of various particulars, comprising all the testator's personal estate to his wife for life, then, after specifically disposing of and charging with legacies certain parts after the death of his wife, he appointed her executrix, she paying debts and funeral expences. Held a resulting trust, as to the residue, there being no further disposition and no evidence. *Dicks v. Lambert*, 4 Ves. 725. S. C. 4 Bro. C. C. 326. WILL, C. OF; EXOR. BENEFICIAL INTEREST.

Devise in 1719 to charitable purposes, limiting the sum, there not being objects sufficient to exhaust the whole rents according to the directions of the will, and the whole being appropriated to the charities specified, the surplus was applied to increase them against the claim of the heir. *Att. Gen. v. Minshull*, 4 Ves. 11. HEIR AT LAW; AUGMENTATION OF CHARITY.

Devise upon a future contingency, and no intermediate disposition of the rents and profits; a resulting trust for the heir. *Att. Gen. v. Buryer*, 3 Ves. 725. HEIR AT LAW; FUTURE PROFITS.

Devise to A and her heirs, but if she dies under twenty-one and unmarried, to B and her heirs. A dies in the life of the testator under twenty-one, and without issue, but having been married, the heir is entitled. *Williams v. Chitty*, 3 Ves. 546. WILL, C. OF; HEIR AT LAW.

Testator gave real estates to be sold, and the produce to be considered as part of his personal estate, and thereout, and out of his personal estate, gave le-

gacies to his next of kin, heir, and others; he gave other estates to be sold, and the produce to be considered from thenceforth as other part of his said personal estate, and to be disposed of in manner following: he then gave legacies and some estates specifically, and other legacies out of his said trust monies, and personal estate; and gave his executor 1000*l.* to be disposed of according to any instructions he might leave in writing; and gave all the residue of his goods and chattels, personal estate and effects, whatsoever, subject to debts, legacies, &c. No instructions being found, the heir is entitled to the 1000*l.* *Collins v. Wakeman*, 2 Ves. 683. *Id. ib.*

Land devised to be sold, the produce to be applied as after-mentioned, if no disposition is made, the heir shall take. *Sheldon v. Barnes*, 2 Ves. J. 447. WILL, C. OF; HEIR AT LAW; LAND DEVISED FOR SALE.

Settlement, upon marriage, of the wife's property only, upon certain trusts, for the husband, wife, and children, in one event for the husband absolutely, but making no provision for the event that happened; a resulting trust for the wife. *Langham v. Nemy*, 3 Ves. 467. SETTLEMENT, C. OF.

Where an estate is given to a charity, and the rents are afterwards increased, there is no resulting trust for the heir at law, but the charity shall have the advantage of the surplus rents. *Att. Gen. v. Haberdashers' Comp.* 4 Bro. C. C. 103. S. C. 2 Ves. J. 1. S. C. not S. P. 1 Ves. J. 295. CHARITY; ACCRETION.

Resulting trust for the heir at law, as to the produce of the sale of real estate not exhausted by a trust, in which it was combined with the personal. *Robinson v. Taylor*, 1 Ves. J. 44. RESIDUE; HEIR AT LAW.

A, by will, gave lands to trustees for terms, remainder to T. Lord Foley, and E. Foley for life. The trusts of the terms were for payment of scheduled debts, and to make an allowance to Lord Foley and E. Foley. The debts being stated to be paid, a trust results to the tenants for life. A demurrer by the trustees to a bill by creditors for an account as having no interest, therefore overruled. *Davidson v. Foley*, 2 Bro. C. C. 203. WILL, C. OF.

W conveyed estates in fee to trustees to sell and pay debts, &c., and afterwards to apply the residue, as follows: to raise a sum of 1500*l.*, and pay the interest to D till marriage, and pay the principal to D within twelve months after marriage, then to divide the residue in shares among the plaintiffs. By will, he gave out of other lands, a charge for another daughter, the residue to plaintiffs. D died unmarried, the 1500*l.* resulted to the settlor as a resulting trust, but in his hands was personal estate, and passed as the residue thereof, under the will, and not under the deed. *Hewit v. Wright*, 1 Bro. C. C. 86.

By will, real and personal to be sold. Legacies, &c. therewith to be paid; residue by fifths to five persons. One dies before testator. Held to be real estate to heir of testator. *Digby v. Lingard*, Dick. 500.

Where lord of manor by feoffment, grants certain parcels of common, &c. to trustees, for benefit of themselves and the rest of tenants of manor, in lieu of recompence for their several claims of common in all the rest of the common lands, &c. in the manor, the whole interest passes from the lord, and there is no resulting trust for him as to the ownership of the soil. *Ireton v. Simpson*, 7 Bro. P. C. 306.

A grants lease to B, which is intended to be in trust for A, and B declares in trust accordingly. B afterwards surrenders the lease to A, who makes a new lease to C without a declaration of trust. Held, that C was entitled to full benefit, and that no trust existed for A. *Pilkington v. Bayley*, 7 Bro. P. C. 383.

If A buy land in name of B, A may prove he paid



the money, and there will be a resulting trust for him. So, where there is a declaration as to part of the land, the rest results. *Lane v. Dighton*, Ambl. 411.

Resulting trusts of coppholds, as well as of freeholds, are within the statute of frauds and perjuries. *Withers v. Withers*, Ambl. 152. STAT. OF FRAUDS; COPPHOLDS.

Where a resulting trust is insisted on in opposition to the legal operation of a will, parol evidence may be admitted to rebut the equity. *Lake v. Lake*, Ambl. 127. WILL, C. OF; EVIDENCE, PAROL.

Rents and profits undisposed of belong to the owner of the inheritance, or persons entitled to the enjoyment. *Hopkins v. Hopkins*, 1 Ves. 268. Ca. temp. Talb. 44. RENTS AND PROFITS.

If in voluntary deeds and wills there is no declaration of trusts of term, they result to donor; but secus, if for valuable consideration, and in nature of contract for benefit of wife and issue. *Brown v. Jones*, 1 Atk. 190. DEEDS, C. OF; VOLUNTARY DEEDS; LIMITATION OF TERM.

A bare intention, or even negative words, will not exclude an heir at law from insisting on a resulting trust; but a man, by empowering other persons to dispose of his estate, disinherits his heir as much as by his own actual disposition; therefore where a testator appoints his executor to sell his estate, it is turned into personal assets, and leaves no resulting trust for the heir; but if the testator says, "I will my heir shall sell the land," he is not obliged to sell it. *Cook v. Duckenfield*, 2 Atk. 566. 568. POWER OF SALE; ASSETS.

He who pays purchase money has a resulting trust, but he must clearly prove payment. *Willis v. Willis*, 2 Atk. 71.

Parol evidence admitted to shew a trust from the mean circumstances of the pretended owner of the real estate. *Id.* PAR. EVIDENCE.

Nothing is a resulting trust under the stat. of frauds and perjuries, but what are called trusts by operation of law. *Lloyd v. Spillet*, 2 Atk. 150.

When an estate is purchased in the name of one person, and the money is paid by another, he has a resulting trust; or when it is declared only as to part, and nothing said as to the rest, what remains undisposed of, remains to the heir at law. *Id.* CONSIDERATION.

In neither instances had the court declared resulting trusts by operation of law unless in cases of fraud, and where transactions have been carried on *multi bit*. *Id.*

The heir at law does not want an express intention to take by will, though it is otherwise with regard to a deed. *Id.*

W II, by will, devised the perpetual advowson of S to W C, upon trust to present his son to the living, and that if the church shall next after his death be full of an incumbent, then to sell the perpetuity, and to apply the profit arising from the sale first to the payment of debts, and then to distribute the surplus in thirds to his daughters. The trustees presented the son, who died before the advowson was sold, leaving an infant daughter, who brought her bill, insisting upon a resulting trust in the advowson to her, as heir at law, after debts and legacies paid. Held, that the whole legal estate being devised away, there could be no resulting trust for the heir. *Hawkins v. Chappel*, 1 Atk. 621.

At common law, where an estate is devised to trustees and their heirs, the whole is gone from the heir; but in equity there may be a beneficial interest remaining to the heir upon the trust. *Id.* 622.

It is a certain rule in equity, that where an estate is charged with an incumbrance for payment of debts, and after such payment, the surplus is given over,

the whole property vests in the residuary legatee. *S. C.* *Id.*

R S, rector of B, devised his perpetual advowson of B to G S, willing and desiring her to sell it to Eton college, and on their refusal, to Trinity college, and on the refusal of both, to any other college in Oxford or Cambridge, being the best purchaser. This is not a resulting trust of the advowson to the heirs of the testator, but a devise of the beneficial interest therein to G S, with an injunction only to sell to particular societies, and on an avoidance by the death of the testator, the devise and not the heir shall present. *Hill v. Bp. of London*, 1 Atk. 618.

Where a real estate is devised to be sold for payment of debts, and no more is said, there is clearly a resulting trust; but if a particular reason occurs why the testator should intend a beneficial interest to the devisee, there is no precedent that it shall not be held a beneficial interest. *Id.* 619.

It seems to have been a general rule, that where lands were devised for a particular purpose, that which remains after the purpose is satisfied, results. *Id.*

Lands devised to his wife and her heirs, to be sold for the payment of debts and legacies in aid of the personal estate, and not being sold, if the personal estate is sufficient to discharge the whole, the heir shall have the lands as a resulting trust. *Buggins v. Yates*, 9 Mod. 122. HEIR.

A directs that his estate should be sold after his death for several purposes, and amongst others, that 200*l.* should be disposed of as he, by a note, should appoint, and dies intestate, having given no directions. This 200*l.* shall be a resulting trust for the heir at law. *Lamblyn v. Freeman*, Prec. Chan. 541. WILL, C. OF; HEIR AT LAW.

One devises lands to his executors (who are not relations) to sell for the best price, and to pay debts, legacies, and funerals, so far as the same will extend, and gives legacies to his heirs at law, and 100*l.* to the children of one of his executors, but nothing to his executors; in such case, the executors shall be but trustees for the heirs at law, after debts paid. *Starkey v. Brooks*, 1 P. W. 390. EXORS. BENEFICIALLY INTERESTED; HEIR AT LAW.

A devised to his wife a rent charge of 200*l.* for thirteen years, in trust, nevertheless, for the payment of his debts and legacies; he also devised to her certain lands in augmentation of her jointure. The surplus of this rent charge, after debts and legacies paid, is not a beneficial trust for the wife, but a resulting trust for the heir. *Wych v. Packington*, 3 Bro. P. C. 44. WILL, C. OF; HEIR AT LAW.

Upon settlement of lands to be sold in trust for several purposes, the residue is given to B and his heirs, reserving only 200*l.* to appointee of settlor; settlor died without appointing; the 200*l.* shall go to his heir, and not to B or his assignees. *Anon.* 1 Com. 345. SETTLER, C. OF; HEIR; POWER TO APPOINT.

Lands are devised to three persons and their heirs, to the use of them and their heirs, upon the trusts after mentioned, and then the testator directs them to convey part to A for life, and other part to B in tail, but gives no direction as to the remainder in fee, though two of the trustees were related to the testator, yet the remainder in fee will not belong to them, but be a resulting trust for the testator's son. *Hobart v. Cs. Suffolk*, 2 Vern. 644. WILL, C. OF; HEIR AT LAW.

A, by will, devises his lands to trustees to sell and dispose of the money as he by writing should appoint, and for want of appointment, to his four nephews, and by writing appoints his trustees to pay several sums to several persons, but not near the value of lands: decreed the surplus to the heir, and not to the nephews, as an interest resulting and not disposed of. *City of*

*London v. Garraway*, 2 Vern. 571. WILL, C. OF; HEIR AT LAW; LANDS DEVISED TO BE SOLD; POWER.

Land is devised to trustees to sell, and out of the money arising by the sale, amongst other sums to pay 100*l.* to his heir at law; and no disposition is made by the testator of the surplus of his estate, the land shall not be turned into personal estate, nor more sold than is necessary to pay the legacy, and the heir shall have the surplus. *Randall v. Bookey*, 2 Vern. 425. PR. CH. 162. S. C. LAND DEVISED FOR SALE; SURPLUS; HEIR AT LAW.

A grant of the next avoidance to one without his privity, held a resulting trust for the grantor, no other trust being declared. *Norfolk v. Browne*, Prec. Chan. 80. GRANT.

A mortgagee assigns over his mortgage to J, and declares a trust by parol for other persons. J acknowledges the trust; there being an express trust declared, though by parol only, shall prevent a resulting trust to the assignor. *Belasis v. Compton*, 2 Vern. 294. TRUST, DECLARATION OF.

Devise of lands to his cousin A, and his heirs, in trust to be sold for payment of his debts and legacies, and makes A executor, the surplus after debts and legacies, no resulting trust for the heir, as it would have been in a like case on a conveyance executed. *Conningham v. Mellish*, Prec. Chan. 31. S. C. 2 Vern. 246. WILL, C. OF; HEIR AT LAW.

Term raised for a particular purpose, when that purpose is answered the term shall be in trust for the heir. *Levet v. Needham*, 2 Vern. 139. TERM SATISFIED; HEIR AT LAW.

If lands are appointed to pay debts, the heir is entitled to them when the debts are paid; and if to be sold he is entitled to the surplus, but if there be any abuse, his remedy is against the trustee and not against the purchaser. *Culpepper v. Aston*, 2 Ch. Ca. 115. *Sed quare*, if a purchaser with notice might not be affected. HEIR AT LAW; DEVISE TO PAY DEBTS; SURPLUS.

If a *feme covert* joins with her husband in a fine and mortgage of her jointure lands, there results a trust for her when the mortgage is paid, to have the lands again; so if a jointure is made of lands which are mortgaged, the wife may redeem, and her executor shall hold over till repaid with interest. *Bertie v. Stile*, 1 Ch. Ca. 271. *Hussey v. Hayner*, 2 Vent. 343. S. P. MORTGAGE; HUSB. & WIFE.

#### VII. VOID OR FRAUDULENT, LAPSED OR SUBSISTING.

If a testator means to create a trust, and the trust be ineffectually created, or fails, the next of kin take. *Omnanney v. Butcher*, 1 Turn. & R. 270. NEXT OF KIN.

Residue to trustees on trust for purposes too general for court to execute. Next of kin shall take. *Vezey v. Jamson*, 1 S. & S. 69. RESIDUE; NEXT OF KIN.

Where estate is devised in trust for two daughters for life, with remainders in each moiety for their children at twenty-one, and a power of sale is given to trustees, the power of sale subsists though one daughter is dead and her children have attained twenty-one. *Traper v. Knightley*, 6 Mad. 135. POWER OF SALE.

Trust of an annuity for a charity charged upon a devised estate being void under the act 9 G. 2. c. 36. does not pass by a residuary disposition, but sinks for the benefit of the specific devisees. *Baker v. Hall*, 12 Ves. 497. RESIDUE; MORTMAIN; TRUST RESULTING; DEVISEE.

A, being in insolvent circumstances, suffers another person to become the apparent owner of his farm (though under a secret trust for him.) A shall not have against the landlord, a specific execution of an

agreement made by him with the trustee, the landlord supposing the trustee to have been the rightful owner, and confiding in his solvency. *O'Hertthy v. Hedges*, 1 Scho. & L. 123. FRAUD; SPEC. PERF.

Devise by will, attested by three witnesses, to A, B and C, and the heirs of the survivor; the bill stated that it was upon a secret trust for a charity declared by an instrument executed at the same time as the will, and attested by two witnesses only, which was admitted by the answer: Held, that the devise was void under the statute of mortmain. *Bosson v. Statham*, 1 Eden, 508. S. C. 1 Cox, 16. MORTMAIN.

Devise held to be void, being proved to be upon a secret trust for a charity; conveyances having been made by the devisees, and the trust declared, though they denied by their answer, having made any promise. *Edwards v. Pike*, 1 Eden, 267. MORTMAIN.

Money directed to be laid out in lands for an illegal purpose shall not be laid out for the heir, but the trust is void altogether. As to the testatrix's real estate, which was devised to be sold, partly for such purposes, the heir was declared entitled to the surplus proceeds. *Mogg v. Hodges*, 2 Ves. 52. HEIR AT LAW.

Devise to trustees for a charity, the trustees die in the testator's lifetime, this subsists in equity though lapsed at law. *Att. Gen. v. Hickman*, W. Kel. 4. CHARITY.

Bill for a discovery whether in a mortgage made by A to B, which had been assigned to the defendant, there was not some trust declared for the benefit of the plaintiff; defendant by answer denied that there was any trust declared for the plaintiff. The answer being replied to, the question at the hearing whether the defendant should be obliged to produce the deed, the court would not compel him to do it. *Qu.?* *Hall v. Atkinson*, 2 Vern. 463. PR. PRODUCTION OF DEEDS; DISCOVERY.

#### VIII. DECLARATION OF

On lease for lives to the lessee and her heirs, another to her and her executors; as to the effect in equity of a declaration of trust for A simply; *quare?* but if the leases were merely renewals by a guardian, the trust must follow the actual interest of the infant, viz. in one estate to the heir, in the other to the executor. *Milner v. Id. Harewood*, 18 Ves. 274. DISTRIBUTION.

All declarations of trust under the statute must be in writing. *Willis v. Willis*, 2 Atk. 71. FRAUDS, STAT. OF.

A purchases an estate in name of B, and suffers him to execute lease thereof, and gives receipt for rents in name of B, but no declaration of trust was executed by B. Bill by A's heir for conveyance and account dismissed. *Delane v. Delane*, 7 Bro. P. C. 279.

A, being in possession of lands for a long term of years, contracts for the purchase of the reversion and inheritance, but to prevent merger of the term takes conveyance to B absolutely and without declaration of trust from B. The title deeds remain throughout in the custody of A and those claiming under him. B held to be a trustee only for A. *Lever v. Andrews*, 7 Bro. P. C. 288.

Though there can be no parol declaration of a trust since 29 Car. 2. yet parol evidence is proper in avoidance of fraud. *Hutchins v. Lee*, 1 Atk. 448. EVIDENCE PAROL.

A, being in possession of the office of clerk of the crown, &c. in the King's Bench, in which B has also an estate for life, procures B to surrender, and solicits a patent

for himself and C, and takes a note from C, promising to declare a trust for A. The patent afterwards is obtained; A dies in debt, and without calling for a declaration of this trust; this note was held to be a sufficient declaration of trust. *Bellamy v. Burrow, Forbes. 97.*

C lends money upon mortgage of copyhold, but being infirm, &c. surrender, &c. is taken in name of D, who executes a declaration of trust. C after purchases the equity of redemption, and second surrender is made in the name also of D, but without a declaration of trust: Held sufficient trust within the statute of frauds without a second declaration of trust. *Acherley v. Acherley, 7 Bro. P. C. 273. STAT. OF FRAUDS.*

A by marriage articles covenanted that all lands he should afterwards purchase in the parish of K, should be to the uses of the articles. He purchased lands in K and took a conveyance in fee in the name of his youngest son, without a declaration of trust: Held that youngest son was a trustee as to the lands for the parties entitled under the settlement. *Blake v. Blake, 7 Bro. P. C. 241. PARENT AND CHILD; TRUST.*

A, a freeman of London purchases in the name of B, but no trust declared. A dies, and B gives a declaration of trust, this is good against the custom. *Ambrose v. Ambrose, 1 P. C. 321. CUSTOM OF LONDON.*

A, by will, gave lands to S, and having afterwards purchased other lands, he on his death-bed desired B his heir at law, not to hinder S from enjoying the new purchased lands, though he had not by any writing declared the trust for S. B suffered S to enjoy the lands eleven years, and then pretended he thought the after-purchased lands had passed by the will; decreed that this was out of the statute of frauds, and that B letting S enjoy it so long, was an execution of the trust, and though no express fraud was proved against B, (as in *Lester v. Foxcroft, Colles' P. C. 108.*) yet the possession for eleven years was a strong presumption that he suffered it in execution of the testator's declaration. *Harris v. Hurwell, Gilb. Eq. Rep. 11. FRAUDS, STAT. OF.*

A purchases lands in his eldest son's name, and puts him into possession, &c. the son falling sick takes a declaration of trust from him, and after the son's recovery he is permitted to continue in possession. The son marries and dies, and then father gets a conveyance from his younger son. The eldest son's wife shall have dower in these lands. *Bateman v. Bateman, 2 Vern. 436. DOWER; PARENT & CHILD.*

Mortgage in fee 700*l.* paid by A, but half of the money was B's, yet for want of a declaration in writing, B was not admitted to read the proof of it so as to create a trust for him, being against the statute of frauds. *Newton v. Preston, Prec. Chan. 103. PR. EVIDENCE.*

A mortgagee assigns over his mortgage to S, and declares a trust by parol for other persons; J acknowledges the trust, there being an express trust declared though by parol only, shall prevent a resulting trust to the assignee. *Belasis v. Compton, 2 Vern. 294. TRUST RESULTING.*

Devise of 1500*l.* to A and B for such uses as testator had declared, to them, and by them not to be disclosed. A in the life of B writes a letter disclosing the trust. This is a good declaration of the trust. *Crooke v. Brookeing, 2 Vern. 106.*

A purchases in the name of B, and pays the purchase-money; B claims the estate; there being no declaration of trust, A may be admitted to read proofs that he paid the purchase-money, but then those proofs must be very clear to make it a trust arising by im-

plication of law. *Gascoigne v. Thwing, 1 Vern. 366. PR. EVID.*

### IX. CONSTRUCTION OF.

Power to trustees to lay out money on securities, includes power to give discharges to borrowers. *Wood v. Harman, 5 Mad. 368. TRUSTEES, POWERS OF.*

Trust to pay the dividends from time to time into the proper hands of a man, or on his proper order or receipt, subscribed with his own hand, that they should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived payment, or any part thereof; on his decease, the principal to be paid to such persons, as in a course of administration would become entitled to his personal estate, and he had died intestate; an interest for life in the dividends, assignable under a commission of bankruptcy, with a limitation over of the principal to those entitled under the statute of distributions. *Brandon v. Robinson, 18 Ves. 429. BANKRU. ASSIGT.*

A fee will pass without the word "heirs," where a trust of land can be satisfied in no other way. *Villiers v. Villiers, 2 Atk. 72. FEE.*

### X. THEIR INCIDENTS.

Devise to a corporation upon trust, "from time to time yearly for ever," to lay out the yearly rents and profits in the repairs of a road, "at their discretions." Upon an information against the corporation, at the relation of the trustees of the road, under a turnpike act, an account was directed from the time of passing the act. No analogy in case of trust to the statute of limitations. *Att. Gen. v. Brewer's Comp., 1 Mer. 495. LENGTH OF TIME; ACCOUNT.*

Though no time bars a direct trust, as between cestuique trust and trustee, a constructive trust may be barred by long acquiescence; though the true state of the fact may be easily ascertained, and the ground of original relief was clear, and even arising out of fraud. *Beckford v. Wade, 17 Ves. 97. LENGTH OF TIME.*

Insurable interest exists in a trustee in respect of the legal interest in a ship, as in the *cestui que trust*, in respect of the equitable. *Exp. Yallop, 15 Ves. 67. INSURANCE.*

With respect to the operation of the statute of limitations upon cases of trusts in equity, the distinction is, if the trust be constituted by act of the parties, the possession of the trustee is the possession of the *cestui que trust*, and no length of such possession will bar; if a party is to be constituted a trustee by the decree of a court of equity, founded on fraud or the like, his possession is adverse, and the statute of limitations will run from the time that the circumstances of the fraud were discovered. *Hovenden v. Ld. Annesley, 2 Scho. & L. 633. LIMIT. STAT. OF.*

Where question arises on interest in a trust fund, separated from general residue, the costs must come out of the particular fund, and having been given by decree, as specifically prayed by bill, out of the general personal estate, the decree, although affirmed in other respects, was corrected in that particular, being considered as relief prayed, and therefore not within the rule against appeal for costs only. *Jenour v. Jenour, 10 Ves. 562. COSTS; APPEAL.*

Rule that trust estate will pass by a general devise, is confined by objects, appearing on will inconsistent with that intention. *Exp. Morgan, 10 Ves. 101. WILL, G. OF, WHAT PASSES.*

By a devise in general terms, a trust estate will

pass, unless an intention to the contrary can be collected from expressions in the will, or purposes, or objects, of the testator. *Ld. Braybrooke v. Inskip*, 8 Ves. 417. WILL. C. OF, WHAT PASSES.

A renewal taken by tenant for life, of a lease for lives, is a trust for the benefit of those in remainder, and a fine levied by the heir of such tenant for life keeping possession of the title deeds will not bar those in remainder; nor will any length of time during such a suppression of deeds. *Bowles v. Stewart*, 1 Scho. & L. 209. LEASE, RENEWAL OF; SUPPRESSION OF DEEDS.

Under residuary disposition by will to natural son, his heirs, executors, administrators and assigns for ever, to and for his and their own use and behoof; a trust estate did not pass. *Exp. Brettell*, 6 Ves. 576. WILL. C. OF, WHAT PASSES; BARTARD.

A general devise by a trustee did not pass the trust estate. *Att. Gen. v. Butler*, 5 Ves. 339. WILL. C. OF, WHAT PASSES.

Trust legacy cannot lapse by death of trustee. *Moggeridge v. Thackwell*, 1 Ves. J. 475. S. C. 3 Bro. C. C. 517. affd. 13 Ves. 416. LAPSED LEGACIES.

Costs of course out of the fund to agents, receivers, and trustees, who have accounted fairly, and paid money into court; costs cannot be given to a college individually, nor as a corporation, unless proved so. *Att. Gen. v. City of London*, 1 Ves. J. 246. S. C. 3 Bro. C. C. 171. Pn. COSTS.

A rule that trusts are not within the statute of limitations, applies only as between trustee and *cestui que trust*, and will not hold where a claim is made after a great length of time against a trustee by implication of law, more especially where such implication is to be raised upon a doubtful equity. *Townsend v. Townsend*, 1 Cox, 28. S. C. 1 Bro. C. C. 551. quod vide. LIMIT, STAT. OF.

If a trust goes too far, it is void only for the excess, if capable of being clearly distinguished. *Phipps v. Kelynge*, cited, 2 V. & B. 57, note (b). EXCESS.

In a manor, the custom was to grant for three lives successively; A, being the last life in an old copy, obtained a fresh grant to B & C; A, paying the whole fine, B & C were held trustees for A. *Withers v. Withers*, Amb. 151.

Trust to take effect, according to the whole intent or not at all. *Mogg v. Hodges*, 2 Ves. 541.

Where the legal estate is in trustee, copyhold lands will pass under the will of *cestui que trust*, without surrender before the statute. *Gibson v. Rogers*, Amb. 94. S. C. 1 Ves. 485. 4 Ves. 288. (n). COPYHOLD; SURRENDER TO USE OF WILL.

Where legal interest in copyhold is in one, and equitable interest is in another, court can order, in bankruptcy, trustee to surrender without consent of *cestui que trust*. *Exp. Butler*, 1 Atk. 215. BANKCY. CONVEYANCE; SURRENDER OF COPYHOLD.

A wife is not dowable out of the trust of a customary freehold. *Godwin v. Wismore*, 2 Atk. 526. DOWER OF WHAT.

That a wife is not dowable of a trust estate is now an established doctrine. S. C. *Id.*

In *Banks v. Sutton*, 2 Plo. 705, 717, Sir John Jekyll took a distinction in regard to a trust, where it descended to the husband from another, and not created by himself, but *Ld.* Talbot afterwards, in the case of the *Att. Gen. v. Scott*, Forbes 138, determined directly contrary to this distinction. S. C. *Id.*

Trust estate in copyhold unsurrendered will pass by will unattested. *Tuffnell v. Page*, 2 Atk. 37. S. C. Barnard. 9 Dick. 76. COPYHOLD; WILL.

The trust of a copyhold not necessary to be surrendered. *Macey v. Shurmer*, 1 Atk. 390. COPYHOLD, SURRENDER.

A devises a trust estate to B and his heirs, and

dies; B dies; the wife of B cannot be endowed of it *Att. Gen. v. Scott*, Forbes. 138. DOWEN.

A trust or equity of redemption of a copyhold cannot pass by a will, unless attested by three witnesses. *Wagstaffe v. Wagstaffe*, 2 P. W. 261. *Appleyard v. Wood*, Sel. Ch. Ca. 42. But see *Tuffnell v. Page*, Dick. 76. S. C. 2 Atk. 37. WILL, ATTESTATION OF; COPYHOLD; EQUITY OF REDEMPTION.

Statute of limitations cannot be pleaded where legal estate is in trustees. *Lawley v. Lawley*, 9 Mod. 33. PL. PLEA; STAT. OF LIMITATIONS.

There shall be a tenancy by the curtesy of a trust, as well as of a legal estate. *Watts v. Bule*, 1 P. W. 108. TENANCY BY CURTESY.

The widow of the *cestui que trust* of a copyhold estate shall have her free-bench as well as if her husband had had the legal estate; money is to be invested in land, and settled on a woman in tail; she marries, has a child, and dies, before the money is laid out. The husband shall have the interest of the money for his life. A man shall be tenant by curtesy of a trust, as well as of a legal estate. *Outaay v. Hudson*, 2 Vern. 585. HUSB. & WIFE; CHOSE IN ACTION; TENANT BY CURTESY.

A and his wife being assignees of a lease, mortgage to B; A becomes insolvent, and the title, not being good, C, who had the real title, in compassion to A's wife, makes a lease in trust for her. Decreed, the trustees to make a new mortgage to B. *Seabourne v. Powell*, 2 Vern. 11.

Statute of limitations does not run against a trust. *Holles' case*, 2 Vent. 345. STAT. OF LIMITATIONS.

Plaintiff, who was made chief justice at Oxford during the differences between the king and his parliament, but never sat at Westminster, brought his bill against the prothonotaries for an account of the monies received by them, by an implied trust, *virtute officii*, to which they pleaded the statute. Plea over-ruled. *Sir Ed. Heath v. Henley*, 1 Ch. Ca. 21. 3 Ch. Rep. 8; for the statute of limitations does not extend to a trust. *Sheldon v. Wildman*, 2 Ch. Ca. 26. 2 Freeman. 156. STAT. OF LIMITATIONS.

#### XI. ASSIGNMENT OF.

A trust for sale vested in A and his heirs cannot be executed by an assignee of A. *Bradford v. Belfield*, 2 Sim. 264.

Bill against a trustee who has assigned his trust; the assignee ought to be made a party as the decree should be first against him, and the trustee to stand as a security. *Burt v. Dennet*, 2 Bro. C. C. 225. PL. PARTY.

Trust estate will pass by a general devise. *Hawkins Obern*, 2 Ves. 559. WILL. C. OF, WHAT PASSES.

Trust of copyhold passes by unattested will. *Tuffnell v. Page*, Dick. 76. S. C. 2 Atk. 37. Barn. 12. But see contra, 2 P. W. 261.

A being impropriator of a parish, demised part of the tithes to certain parishioners as trustees for 1000 years, who re-demised it to him for 999 years under the yearly rent of 50*l.* payable to the trustees, as a provision for a preacher, to be nominated by the trustees. The heir of A afterwards sold the rectory to B, and the representative of the surviving trustee was prevailed upon to assign to B, the right of nominating a preacher. From the date of the original demise, and for forty years after the latter transaction, the preacher was constantly nominated by the parishioners; but upon a contest between them and B, it was held that the right of nomination was absolutely in the trustees, and that the assignment of that right was a breach of trust; and directions were given by the house of lords for the re-establishment of the trust in trustees to be impartially chosen. *Foley v. Att. Gen.*, 7 Bro. P. C. 249. BREACH OF TRUST.

A, seised of the manor and patronage of W, by will gives 100*l.* per annum rent-charge, and the advowson to six trustees, and those trustees when reduced, to choose others; B, the only surviving trustee assigns his trust to others who nominate to the church, being a donative; decreed the assignees of the trust, though the assignment was made by one only who survived, had the right to nominate to the church and not the owner of the manor. *Att. Gen., v. Floyer*, 2 Ves. 748. ADVOWSON.

A, by will, gives 300*l.* to a feme covert without creating any separate trust of it, made payable out of a reversion expectant on an estate for life. The legatee's husband makes an assignment of this legacy to trustees for the benefit of his children, and after by will taking notice of the legacy, devises it in like manner for the benefit of his children, and makes his wife executrix and dies. The estate for life drops, and the widow applies to the executor of the first testator for the 300*l.* legacy, the widow and executor come to an agreement that she should accept of 200*l.* in full, and the land was sold. The widow joined in the sale and the 200*l.* was paid, and the widow gave a release; bill brought by the children for the 300*l.* legacy under their father's assignment and will; decreed that the husband had a power to extinguish or release the legacy, and had made a good assignment of it in equity, (though not at law as a chose in action) which he confirming by his will, had bound his wife the legatee. The widow giving no notice of this assignment, the executor should be answerable for the 200*l.* to the children, but as to the 100*l.* which the executor had drawn her in to release, he should stand charged with, for he ought at first to have paid the whole legacy; and though this legacy was charged on a fund which was not immediate for raising it, yet being given to the wife *in presenti*, when the fund comes in, it shall carry interest from testator's death, which must likewise go to the children. *Atkins v. Darbury*, 1 Gillb. Eq. Rep. 88. Vide 1 Ch. Ca. 232. 3 Ch. Rep. 90. 1 Roll. Ab. 380. HUSB. & WIFE; ASSIGNMENT OF CHOSE IN ACTION.

## XII. EXECUTION AND SATISFACTION OF.

Where parent is tenant for life with remainder over to trustees for 500 years, upon interest to raise portions for younger children, and parent has power to appoint portions by deed or will, they cannot be raised during parent's lifetime, and whole sum cannot be raised until they have attained twenty-one. *Hagben v. Bold*, 1 S. & S. 507. PORTIONS.

A trust to be carried into execution by the court, must be of such a nature that it can be under the control of the court. *Omnunney v. Butcher*, 1 Turn. & R. 270.

Infant died seised of equitable estate descended *ex parte maternâ*. His incapacity to call for conveyance of legal estate, (whereby course of descent might be changed,) is not reason for it to be considered as actually done, it being trustee's duty not to convey till called upon. *Langley v. Sneyd*, 1 S. & S. 45. INFANT; DESCENT; ESTATE LEGAL; ESTATE EQUITABLE.

"I give to A C 500*l.*, and it is my will and desire that A C may dispose of the same amongst her relations, as she by will may think proper." Held a trust for the relations of A C, and the 500*l.* well bequeathed by the will of A C to her sister, and her sister's children, though made without reference to the will of the first testator. *Forbes v. Ball*, 3 Mer. 437. WILL, C. OF; WORDS PRECATORY.

Residuary devise and bequest for such of the testator's relations and kindred in such proportions, &c. as his executors should think proper, recommending and advising his said trustees and executors to give the greatest share to such person and persons who in

their opinion and judgment should appear to them to be his nearest relations and most deserving, declaring his intention not to control their discretion, but that every thing relative to that disposition, who were his relations, and the proportions, should be entirely in the discretion of the said trustees and executors, and the heirs, executors and administrators of the survivor of them: held, a trust and a power: the ground of the power being personal confidence, it is *prima facie* limited to the original trustees, not without express words passing to others to whom by legal transmission the same character may happen to belong; and cannot be executed by the devisees and executors, for that specific purpose only, of the surviving trustee; a trust, therefore, executed by the court for the next of kin at the death of the testator according to the statute of distributions. *Cole v. Wade*, 16 Ves. 27.

The real estate, except what was converted in execution of the power, taken by the next of kin as real, the will not operating a conversion out and out; the representative, therefore, the trust being disappointed, taking the respective estates as they find them, have no equity against each other, the costs apportioned according to the value of the real and personal estates. *Walter v. Maunde*, 19 Ves. 424. WILL, C. OF TRUSTEES, DISCRETIONARY POWER.

Where a term for years was by settlement vested in trustees to raise, by sale or mortgage, money to discharge the debts of the tenant for life, who, soon after with his own money pays the debts, without taking assignments of the securities: a mortgage of it by the trustees, several years after, by direction of the tenant for life, is a due execution of the trust. Tenant for life has, during his own life, a right to call for an execution of the trust, and to stand in the place of creditors. After an express declaration of the tenant for life to charge, it cannot, from the debts being paid by him, from no assignment of the securities being taken, or from length of time, be presumed he intended to exonerate the estate. *Reddington v. Reddington*, 1 Ball & B. 131. MORTGAGE; TENANT FOR LIFE.

This court cannot execute a mere power, but will execute a trust which fails by the death of the trustee or accident. *Brown v. Higgs*, 8 Ves. 570. JURISDIC.; POWER.

Power, which by the will the party is requested to execute as a duty, he is a trustee for the exercise of it, and has no discretion as to the exercise of it or not: the court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances, to disappoint the interest of those for whose benefit he is to execute it. *Id.* 574.

Where by neglect the number of trustees in a trust to present to a living was not filled up at the time of an avoidance, the court would not by injunction prevent the effect of a presentation under the legal title of the heir of the surviving trustee, without a special ground; but the court will take care as to the future, that the trust shall be properly filled up. *Att. Gen. v. Bp. Litchfield*, 5 Ves. 825. PRESENTATION TO LIVING; LACHES; INJUNCTION.

Under a commission of charitable uses, it was agreed, that copyhold lands formerly surrendered for maintenance of a minister in W. Chapel should be let, and the rents employed towards maintenance of the minister to be chosen and appointed by the inhabitants, and presented and allowed by the lord of the manor, who, upon complaint, might give the minister half a year's warning, and if he had not reformed by that time, remove him; the information prayed, that the lord might be decreed to allow and approve the candidate who had the majority of votes, which was refused on the ground of misconduct, and the evidence clearly proving it, a new election was directed, upon which the same

candidate being returned, and producing strong affidavits of good conduct for the last six years, the decree stating the affidavits declared, that in consequence of them, the relator deserved the approbation of the trustees. *Att. Gen. v. Mary. Stafford*, 3 Ves. 77. CHARITABLE USES.

Trustees of copyholds in trust for repairing the church of A, and chapel of B, in that parish, by desire of the parishioners bought new ground and built a new chapel, the old being too small, and in ruins: this was held not a deviation from the trust, and the trustees were allowed to apply the rents and savings towards it, but not to mortgage the estate. *Att. Gen. v. Foyster*, 1 Aust. 116. CHARITY.

A trust fund is created by will to be laid out in the purchase of lands: an estate is purchased, and trust money is laid out in repairs and improvements; this is a misapplication, and shall not be allowed; part of the trust money was sold out just before a dividend was payable; no allowance can be made to the tenant for life who would be entitled to the dividend in the price: where a trustee sells out trust money, the *cestui que* trust may elect whether he will have it replaced, or be paid the produce of it. *Hosbeck v. Blakeney*, 2 Bro. C. C. 653.

Archbishop P. devised his options to trustees, regard being had in the dispositions of them according to their discretion, to his eldest son, Dr. P., the husbands of his daughters, his present and former chaplains, &c.: held a personal trust, and the trusteeship of C. being vacant, one of the trustees might present the other, he being within the description in the will. *Potter v. Chapman*, Amb. 98. S. C. 1 Dick. 146. WILL, C. OF; PRESENTATION TO BENEFICE.

A collegiate body compellable to execute a trust as a private person, and though the bill not brought recently. *Green v. Ruthforth*, 1 Ves. 468. COLLEGE; LACHES.

Presentation to a living; twenty-five trustees were to meet and to present and elect a clergyman; one dies, the rest are equally divided, half being in favour of A, the rest voting for B: upon the death of the supporters of the latter, the friends of A meet and sign a presentation for him: this is void at law, and cannot be supported in equity: there should have been a distinct notice for the meeting of all; a direction, that the trustees should meet for such purpose within "four months," from the death of an incumbent, does not prevent their meeting after that time: trustees cannot make proxies to vote in such a personal trust as the above, though if a choice were regularly made at a proper meeting, they might, for the mere purpose of signing the presentation. Disusage evidence of abandonment by consent, as to part of a constitution, which arose from consent. *Att. Gen. v. Scott*, 1 Ves. 413. PRESENTATION TO BENEFICE.

Trustees for a parish having the right of electing a vicar, cannot vote by proxy, for it is a personal trust. *Wilson v. Dennison*, Amb. 82.

J S, by will, lent 8784l. to A, in trust, to be invested in lands, and settled on herself for life; remainder to the heirs of B. A decree was had against A, to lay out the money in lands, and to settle the same according to J S's will. A purchased land to the value of 3300l. and devised those lands to C (who was heir at law to B) and her heirs, and gave several legacies, which could not be paid if the devise were not to be taken as part satisfaction, and for that reason it was so decreed. *Gibson v. Scudamore*, Sel. Ch. Ca. 63.

Where office of justice or profits is in trust, the majority of *cestui que* trusts may bind the rest. *ounger v. Welham*, 3 Swan. 180. PUBLIC OFFICER.

## XIII. BREACH OF.

Court ordering loss on trust estate, in consequence of conduct of trustees, to be made up by trustees personally, refused interest on account, which was comparatively but a small sum. *Bone v. Cooke*, 13 Price, 343. S. C. 1 M'Clel. 168. INTEREST.

Where a person, executor and trustee of legacy to be laid out in stock, has fully administered estate and assented to legacy, and retains legacy in his hands not as assets but as trustee, he is liable for breach of trust, and ordered to purchase stock at price of time when he was first able to invest. *Byrchall v. Bradford*, 6 Mad. 235. LEGACY; TRUSTEE AND EXOR.

Where act of sale by trustees takes place, under circumstances of breach of trust, court will not decree specific performance in favour of *bona fide* or innocent purchaser. *Ord v. Noel*, 5 Mad. 438. SPEC. PERF.

Bankers, the agents of executors, and authorized by them to receive certain assets, but prior to receiving them, advancing the amount to executors, in the course of their duty as agents, and afterwards applying the assets when received in payment of the amount of such advances, are not responsible in respect of a misapplication by the executors; agents not being privy to any intention of such misapplication. *Kenne v. Roberts*, 4 Mad. 332. EXOR.; PRIN. & AGENT.

Charity estate given for the maintenance of ten decayed householders, applied to the poor of the parish generally; whether a breach of trust, if amongst the poor maintained, there have been as many as ten, who would have been proper objects of the charity; *Qu?* *Exp. Fowler*, 1 Jac. & W. 70. CHARITY.

Where some of the members of a firm are trustees of funds which they misapply, by making use of them for partnership purposes; if such misapplication be with the knowledge of the other members of the firm, the *cestui que* trusts may prove against the joint estate. *Exp. Heaton*, Buck, 386. BANKCY. PROOF IN.

A deed of compromise executed by *cestui que* trust, with the representatives and creditors of a deceased trustee, guilty of a breach of trust, rescinded, and co-trustees declared responsible. *Walker v. Symonds*, 3 Swan. 2. COMPROMISE; FRAUD.

The investment of money on personal security is a breach of trust. S. C. *Id.* 63. INVESTMENT; PERSONAL SECURITY.

*Cestui que* trust concurring or acquiescing in a breach of trust, not entitled to relief; subject to inquiry into the circumstances which induced concurrence or acquiescence. *Id.* 64. *CESTUI QUE TRUST; ACQUIESCENCE.*

Right of a *cestui que* trust to proceed separately against one trustee implicated in a joint breach of trust. *Id.* 75. PL. PARTIES; CO-TRUSTEES.

Trustees having committed breach of trust by granting longer leases than they had power by deed to do; the fact of *cestui que* trust receiving rents from the lessees, in ignorance of the invalidity of the leases, does not operate as a new agreement. But account only directed from filing of bill, without costs to plaintiff. *Boues v. East London Waterworks*, 3 Mad. 373. ACQUIESCENCE; ACCOUNT; TRUSTEE & *CESTUI QUE TRUST.*

Statute of limitations cannot be pleaded to breach of trust. *Milnes v. Cusley*, 4 Pri. 103. PL. PLA.; STAT. OF LIMITATION.

Breach of trust of charity, by pulling down chapel and selling materials, and converting burying-ground to other purposes; relieved, and conveyance to new trustees directed. *Exp. Greenhouse*, 1 Mad. 92. CHARITY.

A trust fund of 15,000l. created under marriage settlement, by which certain lands were limited to husband for life; remainder to first and other sons in tail, with power to husband of leasing for forty-one years, or three lives at best rent, was directed by

deed to be laid out with all convenient speed in purchase of lands in fee, to be conveyed, &c. to same uses, &c., and in meantime, trustees with consent of husband, were empowered to lend money on certain security. Husband purchased leasehold for 8,911*l.* to which he took the assignment to himself alone, and obtained purchase money out of trust fund to amount of 11,696*l.* taking security for 1400*l.* less than 11,696*l.* Husband granted lease at great undervalue for his own term to attorney who managed the purchase, which purchase proved very beneficial: Held, that first son of marriage was entitled to follow that part of trust fund which had been misapplied, and to have benefit of purchases, and to have lands sold discharged of lease to attorney, whose equity against him, (the son), as personal representative of father, was barred by notice of settlement and breach of trust. *Phaure v. Peree*, 3 Dow, 116. S. C. 1 Bli. N. S. 594. VENDOR & PURCH.; NOTICE.

A person who has notice cannot avail himself of an act of trustees in breach of their trust. *Id.* 129. NOTICE.

Trustee to preserve contingent remainders joining in a recovery with the remainder-man in tail, having attained twenty-one: Held no breach of trust, and no objection to a specific performance. *Biscoe v. Perkins*, 1 V. & B. 485. FINE & RECOVERY; TRUSTEES TO PRESERVE.

Trustees to preserve continue, it remainders joining in a recovery, held, with reference to the circumstance and occasion, no breach of trust. *Moady v. Walters*, 16 Ves. 283. TRUSTEES TO PRESERVE, DUTIES OF.

Generally, trustees joining to destroy the contingent remainders before the tenant in tail is of age, a breach of trust. *Id. ib.*

Where tenant for life under will, with remainder in tail, is also made trustee to preserve remainders over, he is not guilty of breach of trust by joining with remainder-man in tail, to destroy remainders over. *Osbrej v. Bury*, 1 Ball & B. 58. BARRING REMAINDERS.

Trustees and executors charged with loss occasioned by breach of trusts, by joining in a transfer and sale, and lending the produce to a partnership in which one of them was engaged, the other receiving no benefit; decree for account against all for the funds. *French v. Hobson*, 9 Ves. 103. TRUSTEES, LIABILITY OF.

Executor and trustee having been guilty of a breach of trust, by selling out stock and dealing improperly with the money, the *cestui que trust* have an option to have the stock replaced, or the money produced by the sales with interest of five per cent., or more, if more has been made by it, and the costs occasioned by his misconduct. *Pocock v. Reddington*, 5 Ves. 794.

An estate having once borne a charge in favour of legatees or creditors, is discharged, though the fund has been misapplied by the trustees. *Omerod v. Hardman*, 5 Ves. 736. CHARGE ON LAND.

Trustee of stock sells it: the *cestui que trust* has an option to have the stock or the produce, with interest. *Forrest v. Elwes*, 4 Ves. 497.

Settlement, upon marriage, of stock, the property of the wife, in trust from time to time to receive the dividends, and pay them into the hands of the wife for her sole and separate use, her receipt to be a discharge; after her decease, if the husband should survive, for him for life; and after the decease of the survivor, to transfer the principal among the children according to her appointment by will; in default thereof, equally; if no children, according to her appointment by will. The trustees, with the privity of the wife, sold the stock, and paid the money to the husband, taking his bond of indemnity: he died insolvent. Upon the bill of the widow and children,

the fund, having been replaced by the trustees, was transferred to the accountant-general, upon the trusts of the settlement to trustees, to pay the dividends to the widow, from the death of the husband, with costs. *Whistler v. Newman*, 4 Ves. 129. See, as to the authority of this case, 5 Ves. 17*n.* and 694 *n.* HUSB. & WIFE; SETTLEMENT; TRUSTEES, PERSONAL LIAB.

Bank stock specifically bequeathed to A, in trust to pay a bond debt to himself, and as to the rest, for B for life, remainder over; the trustee being also executor, transferred to persons not entitled under the will, the bank is not chargeable. *Hartog v. Bank of England*, 3 Ves. J. 55. BANK OF ENGLAND.

K and S being trustees of money in the funds, sell it for the benefit of S, who dies insolvent, and K becomes bankrupt. The person interested in the funds may prove against the estate of K the value of the funds at the bankruptcy, though S's estate be first liable. *Exp. Shakeshaft*, 3 Bro. C. C. 197. BANKCY, PROOF IN.

Trustees, who joined with remainder-man to eject *cestui que trust* for life, not excused from making good the whole rent reserved by subsequent accidental deficiencies. Inquiry directed as to the interference of remainder-man. *Kaye v. Powell*, 1 Ves. J. 408.

Trustee, mistaking his power, sold stock without authority; decreed to replace it immediately: if at a less price, to invest the surplus in the same stock to the same uses. *El. Powell v. Herbert*, 1 Ves. J. 297.

Where executor or trustee, entrusted with disposition of some church preferments, made a presentation to A, under a secret condition for his own benefit, the presentation was set aside, and he was decreed to present a more proper person. *Richardson v. Chapman*, 7 Bro. P. C. 317. TRUSTEE.

Where testator had directed that his executors should not be liable for each other's acts, one of them, who was in good credit at the time, having called in a mortgage, and received the money, sends round the assignment to his co-executors, who execute it, and sign a receipt. Held that, as no part of the money should come to their hands, they should not be answerable. *Westley v. Clarke*, 1 Eden, 356. EXORS. LIAB. OF.

Trustees, lending money on personal security, is not of itself such gross neglect as to amount to a breach of trust; and the legatee, and afterwards his assignee, having acquiesced in such loan, a bill to charge the trustees was dismissed. *Harden v. Parsons*, 1 Eden, 145. ACQUIESCENCE; INVESTMENT.

Devise of real estate to trustees, to sell and pay debts and legacies generally: trustees sell and embezzle part of the money: the purchasers not liable to the debts. An estate charged with debts not liable in hands of purchaser, unless debts specified no more than estate devised to be sold. *Rogers v. Skillicorne*, Amb. 188. VENDOR & PURCH.; APPLICATION OF PURCHASE MONEY.

Trustee charged with breach of trust for not putting out money at interest, nor on the best security, according to the trust in a deed. Money lent on a promissory note, is not put out on a security. *Ryder v. Bickerton*, 3 Swan. 80. INVESTMENT; SECURITY.

A bill will lie against directors, committee men, and other officers of a corporation, for relief against a breach of trust, fraud, and mismanagement, for they are agents to those who entrust them to superintend the affairs of the company, and a gross non-attendance makes them guilty of the breaches of trust in others. So a supine negligence, by which a great loss arises, makes them all equally guilty in the second degree, and liable, for they must not neglect to exercise the powers vested in them, to prevent the ill consequences arising from a confederacy. *Charitable*

*Corp. v. Sutton*, 2 Atk. 405. 9 Mod. 349. CORPORATION.

Trustee of lunatic renewing lease for his own benefit, declared guilty of breach of trust, and discharged. *Exp. Phelps*, 9 Mod. 357. LUNATIC; RENEWAL OF LEASE.

If trustee of stock transfer, *cestui que* trust may elect to have it replaced, or to have the money for which the stock sold. *Harrison v. Harrison*, 2 Atk. 121.

Breach of trust can fall only on the personal estate of a trustee. *Vernon v. Vaudry*, 2 Atk. 119. ASSIGNMENT OF ASSETS.

If the persons claiming under the breach of trust have notice of it, then they are subject to the same trust; so if the conveyance be voluntary, or without a valuable consideration; but if for a valuable consideration, and without notice, the purchaser will hold the land discharged, and the trustees must buy and settle other land to the same uses. *Mansell v. Mansell*, 2 P. W. 681. NOTICE.

A, being improPRIATOR of parish, devised part of tithes to certain parishioners as trustees for one thousand years, who re-demised it to him for nine hundred and ninety-nine years, under the yearly rent of 50*l.*, payable to the trustees as a provision for a preacher to be nominated by the trustees. The heir of A afterwards sold the rectory to B, and the representative of the surviving trustee was prevailed on to assign to B the right of nominating a preacher. From the date of the original demise, and for forty years after the latter transaction, the preacher was constantly nominated by the parishioners; but, upon a contest between them and B, it was held that the right of nomination was absolutely in the trustee, and that the assignment of that right was a breach of trust. And the house of lords gave directions for the re-establishment of the trust in trustees to be impartially chosen. *Foley v. Ill. Gen.* 7 Bro. P. C. 249. ASSIGNMENT OF TRUST.

Corporation trustees of charity behaving improperly, and being guilty of gross breaches of trust: they were removed, and other competent persons chosen. *Mayor, &c. of Coventry v. Ill. Gen.* 7 Bro. P. C. 235. REMOVAL OF TRUSTEES.

Remedy for a breach of trust is personal, and money produced thereby, laid out on an estate in Ireland, cannot be specifically followed. The party's assets were, however, marshalled in favour of the claim. *Cor v. Bateman*, 2 Ves. 19. MARSHALLING ASSETS; LIEN.

Trustees in will to support contingent remainders, join with the tenant for life in a conveyance, whereby the contingent remainders are destroyed before they come into *esse*. This is a breach of trust, and whoever claims under such conveyance, having notice of the trust, is liable to make good the estate. *Gorges v. Poe*, 7 Bro. P. C. 221. S. C. Prec. Chan. 308. 1 P. W. 128. NOTICE; TRUSTEES TO SUPPORT, &c.

A trustee purchases lands out of the profits received out of the trust estate, and takes the conveyance in his own name; though possibly, if he be unable to make other satisfaction for the profits so misapplied, those lands may be sequestrated, yet they cannot be decreed to be a trust for the *cestui que* trust. *Kirk v. Webb*, Prec. Chan. 84. See also *Heron v. Heron*, id. 163.

Trustee sells the lands to one who had no notice of the trust, and after a fine and five years non-claim, re-purchases the land. Decreed he should stand seised in trust, as before the sale. *Berry v. Smith*, 1 Vern. 60. 2 Ch. Ca. 124. S. C.

Fine levied by a trustee, and five years past, does not destroy the trust, nor separate it from the land, but transfers them both together. *Id.* 84. FINE & NOTICE.

Both the trustee and the assignee are responsible to

the *cestui que* trust for profits subsequent to an assignment in breach of trust. *Vandehende v. Livingston*, 3 Swan. 625. ACCOUNT.

#### XIV. NOTICE OF.

Fine and nonclaim will not bar a person claiming under a trust; if to a person having notice of the trust, it is merely a conveyance. So if trustee conveys to a person with notice, and takes a re-conveyance, it operates nothing. So if the person to whom he conveyed had no notice, yet on the re-conveyance the trust would attach, though it did not attach on the person to whom he conveyed; nor would have attached if that person had conveyed to another without notice. One taking from a trustee with notice, levies a fine to strengthen his estate: this shall not bar the *cestui que* trust. *Kennedy v. Daly*, 1 Scho. & L. 379. FINE & NONCLAIM.

Testator gave leasehold premises to his daughter for life if his term or terms and interest should therein for so long subsist, for her sole and separate use, notwithstanding her present or future coverture, and after her decease to her children equally, their executors, &c. during all the remainder of the estate, term or terms, and interest therein which should be then to come and unexpired. No trustees being interposed, the husband having possession, was held accountable according to the uses of the will, both as to the original leases, and also as to reversionary leases granted to him, as the person entitled under the will of the former tenant upon favourable terms, and the equity was established against a purchaser from him with notice. *Parker v. Brooke*, 9 Ves. 583. HUSB. & WIFE.

All persons coming into possession of property bound by a trust with notice of the trust, are chargeable in equity as trustees. *Adair v. Shaw*, 1 Scho. & L. 262.

Deed for payment of debts, the trustees convey to A for the purpose of the trust. A mortgages to several persons who have notice of the trust, these mortgages are good. *Hartwick v. Mynd*, 1 Anst. 109. MORTGAGE.

Quere, whether a trustee having prepared a deed of appointment under a power, but not knowing of the execution of it, shall be held to have had such notice so as to affect him in respect of his payment of the money to the legatee of the person who had the power under a subsequent will? *Cothay v. Sydenham*, 2 Bro. C. C. 391.

A and B being trustees of money for the separate use of a feme covert, lend to C, who gives bond to the trustees, and the trust is declared in the condition. The bond is kept by the feme, and B having received money for C, they settle an account, and B gives C a receipt for 100*l.* as received for the use of the feme. B becomes insolvent: whether C is well discharged of this 100*l.* Qu? *Baldwin v. Billingsley*, 2 Vern. 539. BOND, PAYMENT OF.

Payment to the obligee after notice of an assignment of the bond is not good. *Id.* ib.

A purchaser or mortgagee shall not protect himself by taking a conveyance from a trustee after notice of the trust, for by taking such conveyance he becomes the trustee himself. *Sanders v. Dehen*, 2 Vern. 271. VENDOR & PURCH.

Payment of money to a trustee, with notice of the trust, is a mis-payment, though the trustee had judgment and execution against the person that paid the money. *Fritchard v. Langher*, id. 197. PAYMENT, WHAT A GOOD.

An executor, in trust for an infant residuary legatee, renews a lease, part of the testator's personal



estate, in his own name, and, having mortgaged it, assigns the equity of redemption to a trustee, to sell for payment of his own debts. The trustee sells to one who had notice of the infant's title. Purchase set aside. *Whalley v. Whalley*, 1 Vern. 484. VENDOR & PURCH.; NOTICE.

Notice of letters patent, in which there was a trust for creditors, is sufficient notice of the trust. *Douch v. Kent*, id. 319. NOTICE.

#### XV. TO PAY DEBTS.

Where real estates are devised in trust for the payment of debts, in aid of the personal estate, the statute of limitations does not run in equity after the death of the testator. *Hughes v. Wynne*, 1 Turn. & R. 307. STAT. OF LIMIT.

Time does not run against a creditor after the death of the testator, in case of a trust or charge for the payment of debts. *Hargreaves v. Mitchell*, 6 Mad. 326. STAT. OF LIMIT.

Where a trust is created by deed for the payment of debts; if a bill is filed by one of the creditors to enforce the payment of his debt, that purpose can only be effected by the general execution of the trust. The decree ought to direct a bill executed, and an enquiry as to all the debts owing and payable under the trust, and that they should be paid according to their priorities. *Hamilton v. Houghton*, 2 Bl. 169. PR. DECREE.

The mere direction by deed to pay debts, does not infer either contract or trust to pay interest upon debts by simple contract. *Id.* 186. SIMPLE CONTRACT DEBTS; INTEREST, WHEN PAYABLE.

Covenant in settlement to leave by will satisfied by legacy to amount, though followed by general direction for payment of debts. *Wathen v. Smith*, 4 Mad. 236, 325. S. C. SETTLEMENT, SATISFACTION OF; WILL, C. OF.

Where estate devised to infants charged with payment of debts, if personal insufficient, sale of real not decreed till master report personal insufficient, though infants admit it so at hearing. *Birch v. Gloner*, 4 Mad. 376. PR. MASTER'S REPORT; PR. SALE, WHEN DIRECTED: INFANT, WHEN BOUND BY ADMISSIONS.

Devise of freehold estate, in trust to sell and apply the money towards payment of the legacies: the residue of the personal estate after payment of debts, legacies, &c. upon trust to convert all the said residue of his personal estate into ready money to be laid out in freehold property to be settled. The personal estate leaving a residue beyond the charges, the real estate a resulting trust for the heir at law; and charged with the legacies, not primarily, but only as an auxiliary fund to the personal estate. *Maughan v. Mason*, 1 V. & B. 410. WILL, C. OF; CHARGE ON REAL ESTATE; RESULTING TRUST.

Where there is a direction to sell land and pay debts, &c. there is no instance of holding the surplus after that purpose answered, to form part of the personal estate so as to pass by residuary bequest. *Id.* 416. SURPLUS; ADMINISTRATION OF ASSETS.

Distinction between a devise charged with debts, and on trust to pay debts. The former is a beneficial devise, subject to the particular purpose; the latter limited to the particular purpose; and therefore the interest, not exhausted, is a resulting trust for the heir. *King v. Denison*, 1 V. & B. 272. WILL, C. OF; RESULTING TRUST.

Devise in trust for payment of debts does not revive a debt, upon which the statute of limitations had taken effect, by the expiration of the time before the testator's

death. *Burke v. Jones*, 2 V. & B. 275. WILL, C. OF; LIMITATION, STATUTE OF.

Want of surrender supplied, if copyhold estate is devised for debts. *Holmes v. Coghill*, 12 Ves. 216. COPYHOLD, DEFECTIVE SURRENDER OF.

Devise by general words, viz. messuages, lands, tenements, and hereditaments, for payment of debts, will include copyholds if required; and the want of a surrender will be supplied. *Kidney v. Coussmaker*, 12 Ves. 136. WILL, C. OF WHAT PASSES; COPYHOLD.

Where lands are devised in trust for payment of debts, the statute of limitations runs not after death of testator, against debts not barred thereby at his death. *Fergus v. Gore*, 1 Scho. & L. 107. LIMITATION, STATUTE OF.

Charge for payment of debts makes equitable assets. *Bailey v. Ekins*, 7 Ves. 319. ASSETS, EQUITABLE.

Devise to trustees and their heirs to the use of other trustees, for one thousand years, upon trust by sale, lease, mortgage, or otherwise, to raise and pay such sum as the personal estate should fall short of the debts, and after raising and paying thereof, then in strict settlement. A bill being filed by creditors, the personal estate proving deficient, and the trustees of the inheritance having contracted to sell under a power upon their settlement, bill praying the benefit of the accounts against the surviving trustee of the term, though no party to the original cause; that the debts may be paid out of the purchase money; and that on payment, the term may be assigned to the purchasers, it was so decreed, the defendant not objecting. *Fletcher v. Houghton*, 5 Ves. 550.

A charge of debts on a real estate does not entitle simple contract debts to carry interest; secus, where the debtor had done something in nature of a specialty, as creating a trust in his life-time for payment of debts, and annexing a schedule of them. *Stewart v. Noble*, Vern. & Scriv. 528. INTEREST ON DEBTS; ADMON. OF ASSETS.

Devise in trust to pay debts is out of the statute of fraudulent devises. *El. Bath v. El. Bradford*, 2 Ves. 590. FRAUD, STAT. OF.

Trustees to pay debts may fairly raise by sale or mortgage without waiting for a decree. *Id. ib.* POWER OF SALE.

Under a devise that all testator's debts should be first paid and satisfied. Held, that a customary estate surrendered in trust for several persons, and for the use of such as the testator should appoint, was subject to the testator's debts, the first disposition running over all. *Gadolphin v. Bennet*, 2 Ves. 271. WILL, C. OF; COPYHOLD.

Under a trust term by deed to pay debts and legacies: held, that simple contract debts did not carry interest; so likewise as to a will: contra, however, if by any deed in the nature of specialty from whence an intention can be inferred: as if the debts be annexed by way of schedule. *Barrell v. Parker*, 2 Ves. 364.

When debt and legacies are by will directed to be raised by perception of rents and profits, or by leasing and mortgaging of the land, this restrains it merely to a payment out of rents, and the court cannot decree a sale. *Ridout v. El. Plymouth*, 2 Atk. 105. PR. SALE.

In the above case Lord Hardwicke recommended it to the parties to apply for a private act of parliament, to obtain a sale of the testator's valuable estates. *Id.*

One devises a rent charge to be sold, to pay legacies to the amount of 800*l.*, and if the rent charge should sell for 1000*l.* the testator gives a further legacy of 200*l.* The rent charge sells for above 800*l.* and less than 1000*l.*; what exceeds the 800*l.* shall belong to heir as a resulting trust. *Stonehouse v. Evelyn*, 3 P. W. 252. WILL, C. OF; HEIR AT LAW.

One devises all his real estate in trust to pay all his

debts, the bond creditors recover part of their debts out of the personal estate; the simple contract debts shall be equally paid out of the real estate with the bond debts, and the bond creditors shall have nothing there-out, until the simple contract creditors shall have received as much for the same as shall make them equal in payment with the bond creditors. *Hastwood v. Pope*, 3 P. W. 323.

In a devise of lands to pay debts, if the creditors bring a bill to compel a sale, the heir is generally to be made a party; *secus* in case of a trust created by deed to pay debts. *Harris v. Ingledew*, 3 P. W. 92. PL. PARTY; HEIR AT LAW.

Where there is a devise of lands to executors to pay debts and legacies, the debts to be first paid; for this being legal assets, payment must be in a course of administration; *secus*, in case of a bare trust to pay debts and legacies. *Walker v. Meager*, 2 P. W. 550. MOS. 204. ADMON. OF ASSETS; PRIORITY OF PAYMENT.

If an estate is devised in trust to pay debts, the heir must account from the filing of the bill. *Chambers v. Harrest*, MOS. 124. ACCOUNT; HEIR AT LAW.

J being indebted by simple contract which was barred by statute of limitations, made his will and devised lands in trust to pay debts. *Quære*, if debt is revived, and whether to a bill by creditor for trusts of will, a plea of statute is allowable. *Stratford v. Blakecan*, 6 Bro. P. C. 630. STATUTE OF LIMITATIONS.

One dies, indebted by bond; and by will gives a legacy of 500*l.* and devises his lands in fee to J, leaving a personal estate sufficient only to pay the bond; the legatee shall not stand in place of the bond creditor, to charge the land, in regard the land is specially devised; *secus*, if the land had descended to the heir. *Clifton v. Burt*, 1 P. W. 679. PRE. CH. 540. MARSHALLING ASSETS.

One borrows money during his infancy, and applies it to the buying of necessaries, and afterwards coming to age devises lands for the payment of his debts; debt contracted during infancy is within the trust. *Marlow v. Pitfield*, 1 P. W. 558. INFANT, LIABILITY FOR NECESSARIES.

A devised his lands after debts paid (and then says, "my debts are only those contained in the schedule"). A afterwards contracted new debts. The payment of the first debts is all that is required by the will. *Laddington v. Aime*, 3 Lev. 433. WILL, C. OF.

One devises his lands for payment of his debts; bonds and simple contract debts shall be paid equally; but if he only charges his lands with the payment of his debts, so that the lands descended subject to the debts, the bonds shall be preferred before the simple contract debts; but if the heir sells the land before the action brought, then both to be paid equally. *Freemount v. Dedire*, 1 P. W. 430, 431. ADMON. OF ASSETS; WILL, C. OF.

One devises lands to his executors until his debts paid; the remainder over; the executors misapply the profits; they shall hold only until they might have paid the debts by the profits, and after that the land is to be discharged and the executors only liable. *Carter v. Barnadiston*, 1 P. W. 518.

One devises all his real estate to pay debts, having freehold and copyhold, and dies without having surrendered the copyhold to the use of this will; regularly, the copyhold shall not pass without being mentioned, and if mentioned, equity will, on behalf of creditor, supply the want of a surrender; but if the freehold estate be not sufficient to pay the debts, the copyhold being real estate, shall be liable. *Drake v. Robinson*, 1 P. W. 443. ADMON. OF ASSETS; COPYHOLD, DEFECTIVE SURRENDER OF.

Where lands are devised to pay debts, debts barred by statute are revived. *Anon.* 1 Salk. 154. *See quære.* STATUTE OF LIMITATIONS.

Devise of lands to executors for payment of debts; no assets at law till sale; but when sold the money is legal assets. *Hawker v. Buckland*, 2 Vern. 106. ASSETS.

If lands are appointed to pay debts, the heir is entitled to them when the debts are paid, and if to be sold he is entitled to the surplus; but if there be any abuse, his remedy is against the trustee and not against the purchaser. *Culpepper v. Aston*, 2 Ch. Ca. 115. *See quære*, if a purchaser with notice might not be affected? HEIR AT LAW; TRUST RESULTING; SURPLUS.

If lands are devised to trustees for payment of debts, simple contracts and specialties shall be paid in proportion, and though the trustees are creditors and sureties for the testators, they shall not prefer themselves. *Anon.* 2 Ch. Ca. 54. But if lands are devised to an executor, they become legal assets, and shall be paid in due course according to their superiority at law. *Hixton v. Witham*, 1 Ch. Ca. 248. *Girling v. Gee*, 1 Vern. 63. ADMON. OF ASSETS.

Where an equity of redemption or trust estate is devised for payment of debts, all debts shall be paid equally; otherwise if the devise is to the executor, for there, the lands will be legal assets. *Girling v. Lee*, 1 Vern. 63. ADMON. OF ASSETS; EQUITABLE ASSETS.

"My debts and legacies being first deducted, I devise all my estate real and personal to J." This amounts to a devise to sell for payment of debts. *Newman v. Johnson*, 1 Vern. 45. WILL, C. OF.

Where debts are directed by will to be paid out of rents and profits, the court, if it is necessary, will decree a sale. *Berry v. Ashum*, 2 Vern. 26. SALE.

Where a deed of trust is made for payment of debts, it shall extend only to debts contracted at the time of making the deed. *Purefoy v. Purefoy*, 1 Vern. 28. DEBTOR AND CREDITOR.

Where the husband was only a trustee, it was held that the wife was barred of her dower, though contrary to *Nash v. Preston*, (Cro. 191); and such was said to be the constant practice of the court. *Noel v. Jeron*, 2 Freem. 43. DOWER OF WHAT.

If S devises lands to be sold for payment of debts, the heir shall be compelled to join in the sale. *Fowle v. Green*, 1 Ch. Ca. 262. HEIR AT LAW.

A had a power to make leases for twenty-one years in possession; he made one to commence *in futuro*, in trust for payment of debts. This being for payment of debts, was supported in equity. *Pollard v. Greenville*, 1 Ch. Ca. 10. 1 Ch. Rep. 185. LEASE.

#### XVI. USES AND TRUSTS.

It is not of course to let the *cestui que* trust under a will into possession of an estate; it must depend on the testator's intention. *Tidd v. Lister*, 5 Mad. 429. WILL, C. OF; CESTUI QUE TRUST; CONSTRUCTION.

Where any act is to be done, as a conveyance made, the estate is a trust, not a use executed. *Mott v. Buxton*, 7 Ves. 201.

Devise charged with debts to trustees and their heirs, in trust to receive, &c. the rents, &c. and thereout to support and educate the devisor's son, till the age of twenty-one, and then to him: held not a use executed in son before twenty-one. *Bailey v. Ekins*, 7 Ves. 322. WILL, C. OF.

A declaration of uses by the founder of a charity, presumed from an entry in an ancient book, purporting to be such declaration, but without signature or

date, the book being kept by the trustees for entering their proceedings, and containing an order by the trustees dated six years after creation of the trust, that the declaration of the founder be then entered as a direction to the trustees. *Att. Gen. v. Boulbee*, 2 Ves. J. 379. **PRESUMPTION.**

Though a use or trust must arise out of the original feoffment to uses, yet they need not be specifically created at the time of execution of the deed. *Wright v. Id. Cadogan*, 2 Eden, 256.

The statute of frauds has only imposed a form in declaring the use; the controul of the use remains, as it was before the statute, the absolute will and declared intent of the owner. *Id.* 257. **STAT. OF FRAUDS.**

A, being seised in fee *ex parte paternâ*, conveys to trustees in trust for herself, her heirs and assigns, to the intent that she should appoint, &c. and for no other use, intent, or purpose whatsoever. A, dying without appointment, and without heirs, *ex parte paternâ*: Held, *per Henly, C. S.* and *Clarke, M. R.*, 1st, that the maternal heir was not entitled; 2dly, that there being a *terre-tenant*, the crown, claiming by escheat, has not a title by subpoena to compel a conveyance from the trustee, the trust being absolutely determined; no opinion was given on the right of the trustee. *Per Mansfield, C. J.* the heir, *ex parte maternâ*, was not entitled; 2dly, that from the analogy between trusts and legal estates, the crown was entitled by escheat, but that if the conveyance has barred the crown of its right, as between the maternal heir and the trustee, the former was entitled. *Burgess v. Wheate*, 1 Eden, 177. H. Bl. 121. S. C.

No case of a springing use ever introduced in the middle of a limitation, but it always comes in afterwards, and determines the first gift in fee; and whenever it happens to arise, it displaces the first gift, and changes the uses in favour of other persons. *Carwardine v. Carwardine*, 1 Eden, 34.

No instance where equity has considered an estate as not executed, at the same time that law would have considered it as executed. Limitation to trustees to stand seised and receive rents and profits to the use of A, is an estate executed in A. *Id.* 36.

Where the uses of the recovery are declared to be to the recoveror and his heirs, it does not create a new use, but he is in of the ancient use. *Garth v. Cotton*, 3 Atk. 756.

The statute of uses has executed the legal estate, and joined it to the use, the legal estate therefore must want to be executed by a conveyance to make it a trust in equity. *Bagshaw v. Spencer*, 2 Atk. 583.

If a purchaser for a valuable consideration has not the legal estate properly conveyed to him, though the consideration cannot create a use by way of covenant to stand seised, yet the vendor will be considered a trustee for the purchaser. *Pollexfen v. Moor*, 3 Atk. 273.

Natural love and affection is very sufficient to create a use, and will amount to a covenant to stand seised, though no other consideration appear. *Lloyd v. Spillet*, 2 Atk. 149. **CONSIDERATION.**

Uses were introduced during the contests between the houses of York and Lancaster, to avoid forfeitures, and were exactly what trusts are now. *Id.*

Where there is an agreement to suffer a recovery, and uses are declared by it, though it is suffered at a different time, yet if there is no subsequent declaration of uses it shall enure to those so declared. *Stapilton v. Stapilton*, 1 Atk. 7. **RECOVERY.**

The statute (27 Hen. 8. c. 10.) of uses, was made to execute and bring the estate to the use: and after the statute, the *cestui que use* was seised of the estate at law as before he was of the use in equity: but the necessities of mankind, and reasonable occasions in

families, obliged the judges to give way to uses notwithstanding. Contingent uses, springing uses, executory devises, and powers over uses, were foreign to the notions of the common law, and could not be let in upon the common law fees, but were let in by construction (by the judges themselves), upon uses after they became legal estates; yet the judges still adhered to the doctrine, that there could be no such thing as an use upon an use; but when the first use was declared, there it was executed, and must rest for that estate. *Hopkins v. Hopkins*, 1 Atk. 691. Uses in equity and mere trusts stand on different foundations, and will not be governed by the same reasoning. *Id.* 592.

Lands are devised to trustees and their heirs, in trust to pay several legacies and annuities, and then to pay the surplus of the rents and profits to A during her life, for her separate use, or as she should direct; and after her death the trustees were to stand seised to the use of the heirs of her body, with other remainders over. Held that this was a use executed in the trustees, and their heirs, during the life of A, and that she had only a trust in the surplus rents and profits during her life, and that the subsequent limitation to the trustees to the use of the heirs of her body, was a use executed in the persons entitled to take by virtue thereof, and therefore, there being only a trust estate in the ancestor, and a use executed in the heirs of her body, their different interests could not unite so as to create an estate tail by operation of law in the ancestor. *J. d. Say and Sele v. J. y. Jones*, 3 Bro. P. C. 113. S. C. 1 Eq. Ab. 383. Will, C. 3r.

On a marriage settlement, lands were conveyed to trustees and their heirs, to the use of the trustees and their heirs, to the use of the husband for life, remainder to the use of the wife for life, remainder to the first, &c. son of the marriage: these limitations to the husband for life, &c. are trusts only, and not uses; and when the husband and wife levied a fine to a mortgagee to raise money, though the fine would have been a forfeiture of the wife's estate for her life had she had the legal estate, against which equity will not relieve, yet decreed that a trust estate was not forfeited by a fine. *Whitstone v. St. Bury*, 2 P. W. 146. S. C. Prec. Ch. 591. **FINE AND RECOVERY.**

Where a trust is limited to a man and the heirs of his body, with remainder over, the court will not decree the trustees to convey to him an estate in fee, but an estate tail only. *Saunders v. Nevil*, 2 Vern. 428. **LIMIT OF TRUST.**

Lands limited to A in trust for a feme covert, and that A should receive the rents and apply them as the feme whether sole or covert should direct. This is a trust, and not an use, executed by the statute. S. C. 1 Vern. 415.

Although *cestui que use* of term of years be not within statute of uses, rather, therefore, he shall have remedy in equity. Cary, 11.

## TRUSTEES.

See also CHARITY, II. 4.—HUSB. & WIFE.—INFANT, IV.—MUNACY, VIII.—PL. PARTIES, 22.—PR. COSTS, 10. (s).—PR. PAYMENT INTO COURT, 2.—PR. RECEIVER, 2. (d).—STAT. C. OF, II. 27.

- I. APPOINTMENT AND CONSTITUTION OF.
- II. ACCEPTANCE OR RENOUNCMENT OF TRUST.
- III. RELEASE, RENEWAL AND DISCHARGE OF.

## IV. POWERS, DUTIES, AND DISABILITIES OF.

1. Generally.
2. Purchases by, of Trust Estate.
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## V. LIABILITIES.

## VI. THEIR ACCOUNTS, ALLOWANCES, AND COSTS.

## VII. BANKRUPTCY, AND ASSIGNING OF, OR REFUSING TO CONVEY.

## VIII. TRUSTEE AND CUSTODIAN TRUSTS.

## IX. TO PRESERVE CONTINGENT REMAINDERS.

## I. APPOINTMENT AND CONSTITUTION OF.

Exceptions cannot be taken to master's report, approving new trustee; nor will the court interfere with report where there is no complaint that persons approved of are unfit. *Att. Gen. v. Dyson*, 2 S. & S. 528. MASTER'S REPORT; EXCEPTION.

When trustees have a power to appoint new trustees, the court will not, on their application, direct an appointment without a reference. — *v. Roberts*, 1 Jac. & W. 251. PR. REF. TO MASTER.

Trustees of a charity are never appointed by the court without a reference, though the amount of the fund be extremely small. *Att. Gen. v. Fl. Arran*, 1 Jac. & W. 229. REFERENCE; CHARITY.

On construction of will, Skinners' company held to be trustees of certain lands in their corporate character, as governors of the possession, and of the free grammar school of St. A. Judd, in Tonbridge, and that the same were held by them according to the tenor of letters patent of Edward the sixth for the support of the master and scholars of the said school, and for the reputation of the society, and not otherwise, nor to any other uses or intents. *Att. Gen. v. Skinners' Company*, 5 Mad. 173, aff'd, with variation, 1 Jac. 529. WILL, C. OF; CHARITY; CORPORATION.

Court went order a clause to enable trustees to appoint others to be inserted in a conveyance, there being no provision to that effect in trust deed. *Barley v. Mansell*, 4 Mad. 226. TRUST DEED.

The appointment of a trustee by creditors to receive rents, for payment of debts, discharges the estate from any loss arising from the failure of the trustee. *Hutchinson v. Woodroffe*, 2 Ball & B. 49. DEBTOR AND CREDITORS; CONVEYANCE ON ESTATE.

Court controls trustee in the exercise of power to appoint new trustees, though given in very large words. *Widd v. El. Stablesbury*, 7 Ves. 408.

One of three trustees, dismissed under an act of parliament, being gone abroad, and having released, there being no provision for the change of trustees, upon a bill, it was referred to the master to appoint a new trustee. *Bartholomew v. Hamilton*, 5 Ves. 722.

One executor named, by a legacy for his care, clearly a trustee of the residue for the next of kin, the other must be a trustee also. *White v. Evans*, 4 Ves. 20. EXEC. BENEFICIALLY INTERESTED.

Testator directed a new trustee to be appointed, if either should die or become incapable of acting; one absconded, charged with forgery; but was not outlawed: referred to the master to appoint a new trustee. *Milnes v. Price*, 2 Ves. 1, 94.

Where trustees of a charity devise die in the life of the testator, the conflict shall go to his heir at law. *Att. Gen. v. Downing*, Amb. 371. CHARITY.

Parol admission of declaration of devisee, to prove her only a trustee. *Strat v. Winchester*, Dick. 397.

If a purchaser for a valuable consideration, has not the legal estate properly conveyed to him, though the consideration cannot create a use by way of covenant to stand seised, yet the vendor will be considered a trustee for the purchaser. *Pollington v. Moore*, 3 Atk. 273.

Corporation may be trustees. *Att. Gen. v. Landerfield*, 9 Mod. 287. CORPORATION.

Testator devising an estate to persons whom he names trustees for such purposes as they, or the major part of them shall think fit, gives no benefit to them, but is an authority only by appointing a quorum out of them. *Cook v. Duckenfield*, 2 Atk. 668. WILL, C. OF.

No person can be a trustee in law, unless he has a vested interest in the thing given. *Owen v. Owen*, 1 Atk. 496.

Court will not change a mere trustee for a wife, under a marriage settlement, without sending it first to master, to see if a proper person is proposed. *O'Keefe v. Calthorpe*, 1 Atk. 18. PR. REFERENCE TO MASTER.

## II. ACCEPTANCE OR RENOUCEMENT OF.

Where personal property is bequeathed to the executors, as trustees, the probate of the will is an acceptance of the trusts. *Mucklow v. Fuller*, 1 Jac. 198. EXECUTORS.

Trustee for sale, having renounced, is not necessary as party to conveyance, or in receipt for purchase money. *Adams v. Taunton*, 5 Mad. 435. DEEDS, PARTY TO.

As to disclaimer of office of trustee by simple instrument, and disclaimer by conveying to other trustees. *Nicolson v. Wordsworth*, 2 Swan. 369. 370.

One trustee for the sale of an estate having released and conveyed to his co-trustee, refused to join in the receipt of the purchase money; upon the special expression of the deed, the purchaser was not held to the agreement with the remaining trustee; it would have been otherwise if one had merely renounced. *Crews v. Dicken*, 4 Ves. 97. SPEC. PERF.

A trustee in a will, who released and never acted, ought not to be made a party in a suit, to set aside the will on the ground of fraud, and therefore need not answer as to the fraud alleged. *Richardson v. Hulbert*, 1 Anst. 65. PL. PARTIES.

## III. RELEASE, REMOVAL, AND DISCHARGE.

See stat. 1 W. 4. c. 60. Appendix.

Where trustees becomes bankrupt, the chancellor may order conveyance, or assignment to other trustees. 6 G. 4. c. 16. s. 79.

A new trustee may be appointed, under 6 G. 4. c. 16. s. 79, without a reference. *Exp. Inkersole*, 2 G. & J. 230.

Order made under the 79th section of 6 G. 4. c. 16, for a reference to the master, to approve of a new trustee, in the room of the bankrupt trustee, and for the transfer of the trust funds, by the assignees of the bankrupt trustee. *Exp. Saunders*, 2 G. & J. 132.

In bill for removal of trustee, it may be scandalous or impertinent to challenge every act of trustee's misconduct. *Portsmouth v. Fellows*, 5 Mad. 450. PL. IMPERTINENCE; PL. SCANDAL.

Nor to impute to him any corrupt or improper motive in execution of trust. *Id. ib.*

Nor to allege that his conduct is the vindictive consequence of some act on the part of the *cestui que trust*, or of some change in his situation. *Id. ib.*

But it is impertinent, and may be scandalous, to state any circumstances as evidence of general malice or personal hostility. *Id. ib.*

The founder of a charity having named as trustees, the occupiers of certain annual offices, other trustees appointed by the court to hold the funds, the selection of the objects being left to those appointed by the

founder. *Exp. Blackburne*, 1 Jac. & W. 297. CHARITY.

Failure of duty from misunderstanding, not a ground of removal. *Att. Gen. v. Cooper's Comp.*, 19 Ves. 192.

Trustees, under a foreign will, dead, and no personal representation taken out in this country, is a case for relief, by directing a transfer of stock, within the stat. 36 G. 3. c. 90. See 6 G. 4. c. 76. s. 79. and 6 G. 4. c. 74. *Lee v. Bank of England*, 8 Ves. 44. STAT. C. OF; TRANSFER OF STOCK; BANKCY.

On motion, reference directed to inquire whether defendant, a trustee, remains accountable for any acts done by him as trustee, and if not, to settle release. — *v. Osborne*, 6 Ves. 455. PR. REFERENCE TO MASTER.

Decree, discharging from a trust, a woman who had married a foreigner, though the answer denied an intention of the quitting the kingdom, and stated her desire of continuing in the trust. *Lake v. De Lambert*, 4 Ves. 592. FEME COVERT; FOREIGNER.

A trustee, by his answer, declined to act, and on the hearing it was referred to the master to appoint new trustees; the original trustee afterwards agreed to act, and on application to the court, that the trustee might be at liberty to amend his answer in this respect, so as to enable the court, on a rehearing, to vary that part of the decree the court refused to do this; but thought the master was at liberty, on statement of these circumstances, to decline the appointment of new trustees. *Miles v. Neave*, 1 Cox, 159. PR. REFERENCE TO MASTER.

Money in the funds belonging to wards of the court, cannot be transferred into the name of the accountant-general, to the credit of the cause, until the account is taken by a master, and his report made. This does not mean that such a transfer cannot be made, but that it could not operate as an acquittance and discharge of the trustees, until they had passed their accounts. *Beneft v. Rich*, 1 Bro. C. C. 56. and note (1) there. WARD OF COURT; PR. ACCOUNT BEFORE MASTER; TRANSFER OF STOCKS.

Corporation, the trustees of charity, misbehaving themselves, and being guilty of gross breaches of trust, removed, and other competent trustees chosen. *Mayor &c. of Coventry v. Att. Gen.*, 7 Bro. P. C. 235. BREACH OF TRUST.

#### IV. POWERS, DUTIES AND DISABILITIES OF.

1. Generally.
2. Purchases by, of Trust Estate.
3. Investment of Trust Fund.
4. As Witnesses.
5. Discretionary Powers, how controlled, &c.

##### 1. Generally.

Trustee in receipt of the rents and profits of mortgaged estate, under an old conveyance of equity of redemption, on trust to sell and pay off certain debts which had been long since satisfied, is not entitled to redeem the mortgage. *James v. Bion*, and *Owen v. Flack*, 2 S. & S. 600. MORTGAGE REDEMPTION.

Trustee of term to pay debts, purchased the inheritance from tenant for life, and had it conveyed to him by fine and feoffment; remainder-man is not entitled to account of rents, except from his entry to avoid the fine, and if he neglects to claim for five years, he is barred. *Reynolds v. Jones*, 2 S. & S. 206. VENDOR AND PURCH.; TENANT FOR LIFE & REMAN; ACCOUNT.

Where legacy is given for permanent charitable purposes to trustees, not having corporate character,

court will not transfer fund to them, without reference. *Wellbeloved v. Jones*, 1 S. & S. 40. PR. REFERENCE; LEGACY; CHARITY; PR. TRANSFER.

Where trustees for sale are to apply produce for instant, power of giving receipts to purchasers is necessarily incident. *Lavender v. Stanton*, 6 Mad. 46.

Power to trustees to lay out money on securities, includes power to give discharges to borrowers. *Wood v. Harman*, 5 Mad. 368. TRUST.

Power given to trustees to sell lands and divide the profits amongst the *cum que* trusts, some infants, enables trustees alone to give effectual receipts to purchasers. *Sowaisby v. Lacy*, 4 Mad. 142. POWER OF SALE.

Trustee of a settlement not entitled, by an agreement, with the husband, before the marriage, to a lien on the fund settled to the separate use of the wife during the joint lives of the husband and wife, with remainder to the survivor; in opposition to a joint appointment made by them, under a power reserved to them in the settlement. *Morris v. Clarkson*, 1 Jac. & W. 107. LIEN; SETTLEMENT ON MARRIAGE.

In bill to foreclose, trustee for mortgagee is a necessary party. *Wood v. Williams*, 4 Mad. 186. PR. PARTY.

Trustees with power to change stocks, cannot thereby change *cum que* trust's interests. *Lord v. Godfrey*, 4 Mad. 455.

It is the duty of trustees to obtain information of the disposition of the trust fund. *Walker v. Symonds*, 3 Swan. 58.

An absolute alienation by trustees of a charity, may be valid, if beneficial to the charity. *Att. Gen. v. Warren*, 2 Swan. 302. CHARITY.

Purchaser (a trustee, acting on behalf of himself and others, his co-trustees, and of the *cum que* trusts) ordered to pay purchase money into court: the agreement having been entered into in the name of himself alone; upon affidavit, that the plaintiff, (the vendors) had no notice of his acting for others, and of acts of ownership committed since possession given to him under the agreement, in opposition to the answer, alleging notice, and denying any acts of ownership by himself, or by any other person, to his knowledge. *Critchley v. Jerminham*, 2 Mer. 502. VENDOR & PURCH.; PAYMENT OF PURCH. MONEY INTO COURT.

Mere trustee has no right to traverse inquisition. *In re Sadler*, 1 Mad. 531. TRAVERSE OF INQUISITION.

Trustees cannot deal with trust fund for their own benefit; if stock is purchased with trust money, in whatever name it may stand, the profit belongs to fund. *Phayre v. Peere*, 3 Dow, 128. S. C. 1 Bli. N. S. 594.

One trustee cannot sign the certificate for himself and co-trustee. *Exp. Rigby*, 2 Rose, 224. BANKCY, CERTIFICATE, SIGNATURE OF.

Signature of one trustee to a bankrupt's certificate without authority to act for the other, is not sufficient. One executor can do any act; secus, one trustee. S. C. 19 Ves. 463. BANKCY, CERTIFICATE, SIGNATURE OF; EXECUTOR.

Devise in trust to sell in such manner, and at such time as the trustees shall think proper. The period of conveyance as between those entitled for life and in remainder, depends not upon an authority, discretion, nor even a sound discretion in each case, but upon some fixed rule ascertaining a given period, as upon a trust to sell with all convenient speed; controlled in this instance by consent. *Walker v. Shore*, id. 387. WILL, C. OF.

Trustee, dying nineteen months after the testatrix, without having acted, held entitled to a legacy, given as a token of regard and a recompence for his trouble.

No refusal or neglect to act where necessary, appearing. *Brydges v. Wotton*, 1 V. & B. 134. **LEGACY.**

The trustee of a mortgage holds same in trust to the extent of the mortgage for the mortgagee, subject thereto for the mortgagors, and he cannot do any thing to prejudice the mortgagors. The trust of a mortgage, as between mortgagor and mortgagee differs from that of an outstanding term in a third person unconnected with either of the parties seeking the legal estate, the only question there being, which has the better equity to call for the legal estate. *Blennerhassett v. Day*, 2 Hall & B. 133. **MORTGAGE.**

General rule that a trustee shall not be the receiver, with emolument. *Sutton v. Jones*, 15 Ves. 584. **PR. RECEIVER.**

Trustee not to be receiver, unless a special case, and without emolument. *Sykes v. Hastings*, 11 Ves. 363. **RECEIVER.**

Contract by trustees under power of sale, though by subsequent events it cannot be executed under the power, shall be made good in equity by the effect of the interest acquired in the estate, bound by the contract. *Mortlock v. Buller*, 10 Ves. 315. **Affid. 2 Dow Rep. 518. CONTRACT; POWER OF SALE.**

Previously to bill filed, trustee for wife may pay her personal property or the rents of real estate to her husband, but not after. *Murray v. Ellibank*, 10 Ves. 90. **HUSB. & WIFE, SEPARATE ESTATE.**

Commission of bankruptcy cannot be taken out by person who is appointed and acts as trustee under a deed of assignment for the benefit of creditors, although he does not actually execute the deed. *Exp. Whalley, 1 Smith*, 118. **BANKCY., PETITIONING CREDITOR.**

Directions to trustees to correct any defect or incorrect expression in the will, and to form the settlement, from what appears to them to be the testator's real meaning, does not authorize them to change the limitations. *Stanley v. Stanley*, 16 Ves. 491. **WILL, C. OF.**

General rule, that trustee shall not break in of his own authority upon the capital of infant's fortune. *Walker v. Wetherall*, 6 Ves. 473.

Devise of copyhold (duly surrendered) to A and his heirs, in trust for B and his heirs; upon the death of B, without heirs, the heir of the trustee has no equity to compel the lord to admit him, and his bill was dismissed without costs. *Williams v. Td. Lonsdale*, 3 Ves. 752. **COPYHOLD, ADMITTANCE TO.**

The trustee cannot be receiver. *Anon.* 3 Ves. 515. **RECEIVER.**

A executed a deed, by which he conveyed chattels to B, in trust, as to one moiety, for certain scheduled creditors, as to the other for A's own benefit. C, a creditor, not in the schedule, sued A and recovered, and took out execution against the chattels in the hands of B; B sued the sheriff's officer, and recovered at law. Bill for an injunction, on the ground that the deed was void against creditors for the moiety. The court refused the injunction, for there can be no execution against goods in the hands of a trustee. *Childland v. Estwick*, 2 Anst. 381. **EXECUTION; INJUNCTION.**

Where sale before master is directed by decree, a contract by trustee for private sale would be enforced. *Raymond v. Webb*, Loft. 66. **VENDOR & PURCH.; PR. DECREE FOR SALE; SPEC. PET.**

Where executor or trustee entrusted with the disposition of some church preferments, made a presentation to A, under a secret condition beneficial to himself; the presentation was set aside, and he was decreed to present a more proper person. *Richardson v. Chapman*, 7 Bro. P. C. 318. **BREACH OF TRUST.**

A trustee, with notice of his appointment as such, interfering with the subject matter, cannot repudiate

the trust, and say he acted merely as factor or agent. *Conyngnam v. Conyngnam*, 1 Ves. 522.

The court refused to appoint a receiver of a charity estate against a corporation as trustees. *Att. Gen. v. Mayor of Stafford*, Barn. 33. **PR. RECEIVER; CHARITY.**

Where there was a condition in an appointment that the estate should go over, if the appointee (a young lady) married without the consent of the trustees, and where there is no objection to the person or estate of the gentleman who proposes, and the young lady herself is inclined to the match; trustees should consider themselves in the light of a parent, and readily come into a consent. *Daley v. Desbouverie*, 2 Atk. 261. **S. C. West's Rep. of 1d. Hardwicke, 547.**

Trustees saying in a letter, "I shall be obliged to consent," for the happiness of the lady, will be construed a present consent. **S. C. Id.**

Trustee cannot change the nature of the estate by turning money into land, or a lease for years into a freehold, et c. converso. *Witter v. Witter*, 3 P. W. 100.

A, seised in fee of land, demised the premises to trustees, B, C, and D, for 500 years, in trust to pay debts, and for a charity. B, one of the trustees, being in possession, and as a receiver appointed by the court, cuts down 1000l. worth of timber, D, one of the other trustees consenting. B, the trustee for the charity, or as receiver, ought not to take advantage of his having possession, without which he could not cut down the timber; yet the timber must be valued according to what it would be worth at the end of the term of 500 years. *Bays v. Bird*, 2 P. W. 397. **TIMBER.**

A goldsmith, without any directions from the proprietors, subscribed lottery orders into the S. S. Company; he was held indemnified by the act 6 G. 1. c. 4. s. 23. empowering all trustees, guardians, executors, &c. to make such subscriptions, and it would have been the same if the *cestui que trust* had forbid him to subscribe. *Trenchard v. Wauley*, 2 P. W. 165. And in the next term, in *Weaver v. Fowler*, 1d. Macclesfield made the same resolution, 2 P. W. 170. **TRADE.**

## 2. Purchases of Trust Estate by.

The agent of trustee for sale of estate employed therein, cannot purchase same. *Whitecomb v. Minchin*, 5 Mad. 91. **PRIN. & AGENT.**

Application to impeach a sale to a trustee, must be made within a reasonable time. *Chalmer v. Bradley*, 1 Jac. & W. 59. **LACHES.**

Conveyance of an estate to D, by way of security for the investment of a specific sum of stock, and for payment of the dividends in the mean time with a power of sale in case of default. Under this deed, D is a trustee for the party making the conveyance, and as such disabled from purchasing for himself, so long as he continues to be a trustee without the consent of his *cestuique trust*; therefore the estate being put up to sale by auction, at which C as agent for D was the only bidder, and it was knocked down to him; accordingly the sale was decreed not to stand, although no evidence of fraud or under value, and not to be supported by evidence of the plaintiffs having known and approved of the sale taking place, and afterwards attempting to damp it, nor of a previous conversation with her attorney, in which the latter exhorted the purchaser to bid a good price for the estate to keep up the sale. *Douves v. Gracbrook*, 3 Mer. 200.

Purchase of trust property by trustees for their own benefit set aside, after a considerable lapse of time and several assignments. *Att. Gen. v. Id. Dudley, Coop.* 146. **LENGTH OF TIME.**

Bill to set aside a purchase by a trustee for himself and his children; after a lapse of eighteen years, dis-

missed upon the length of time only. *Gregory v. Gregory*, Coop. 201; affd. 1 Jac. 631. **LENGTH OF TIME.**

Trustees for sale purchased through a trustee at an under value, though without fraud and by auction, and the *cestuique* trust being in fact incapable of discharging the trustees: the purchase set aside with costs. *Sanderson v. Walker*, 13 Ves. 601.

Purchase by a trustee from the *cestuique* trust, established under circumstances with confirmation and acquiescence. *Morse v. Royal*, 12 Ves. 355.

Purchase by trustee of trust property set aside, considerable length of time before bill filed having no effect, as it did not distinctly appear that the *cestuique* trust knew the purchase was made on account of the trustee. *Randall v. Errington*, 10 Ves. 423. **LENGTH OF TIME.**

Purchase under trust to pay debts by trustee, as agent for his father, both creditors in partnership, established under circumstances. *Coles v. Trecothick*, 9 Ves. 234. S. C. 1 Smith, 233.

To set aside a purchase by a trustee of the trust property, it is not necessary to show that he has made an advantage. *Exp. Haines*, 8 Ves. 348. S. P. *Exp. Bennet*, 10 Ves. 393.

There is no rule that a trustee to sell cannot be the purchaser; but however fair the transaction, it must be subject to an option in the *cestuique* trust, if he comes in a reasonable time to have a resale, unless the trustee, to prevent that, purchases under an application to the court. *Campbell v. Walker*, 5 Ves. 678.

There is no general rule that a trustee to sell, shall not be himself the purchaser, but he shall not thereby gain profit to himself; one of the several trustees to sell having purchased, and afterwards sold at a profit, was therefore decreed to account for that profit with costs. *Whitchote v. Lawrence*, 3 Ves. 740.

A trustee purchasing a leasehold farm, devised to him for the use of the plaintiff at an appraisement, afterwards renewing the lease in his own name and purchasing part of the testator's stock, declared to be trustee, and to be accountable for the same to the plaintiff. *Killick v. Flexney*, 4 Bro. C. C. 161.

Trustees having engaged trust property in an adventure, cannot sell either to himself or another. *Wilkinson v. Stafford*, 1 Ves. J. 42.

The court views trustees with jealousy, and in case of two estates, one in trust, the other belonging to the trustee, will not permit him to act for his own or infant's benefit, as he pleases. *Id.* 42.

The testator directed his executor to lay out the residue in his estate, in the purchase of lands or upon heritable or personal securities, at such rate of interest as they should think reasonable; the executors lent the fund to one of themselves on a bond, at four per cent, when five per cent might have been made by heritable or government securities, held liable at five per cent. *Forbes v. Ross*, 2 Cox, 113.

Trustee not to derive advantage from a purchase of trust property. *Whelpdale v. Cookson*, 1 Ves. 9.

Trustee buying debts for less than is due, shall not be allowed for the whole. *Anon.* 1 Salk. 155.

### 3. Investment of Trust Fund.

Where trustees may invest in stock or on real security, and they lend on personal security, they shall be answerable for the principal money only, and not for the value of the stock which might have been purchased. *Marsh v. Hunter*, 6 Mad. 295.

Lands vested in trust out of receipts, &c. to make certain payments and lay out surplus upon mortgage or government securities, with a view to accumulation, with bequest of such accumulations. On petition, a real estate contiguous to testator's real estate was

permitted to be purchased under the circumstances, and to be considered as personal estate. *Webb v. Ld. Shaftsbury*, 6 Mad. 100.

Power to lend trust money upon real or personal security, does not enable trustees to accommodate a trader with a loan upon his bond. *Léngston v. Ollivant*, Coop. 33.

One trustee suffering the other to have trust money under a note of hand, held liable. *Keble v. Thompson*, 3 Bro. C. C. 112.

Trustees not answerable for having applied the trust property, even to what turned out a losing adventure, if without fraud or negligence. *Wilkinson v. Stafford*, 1 Ves. J. 41.

Trustee not answerable for having engaged the infant's name in an adventure, if afraid of the consequences, he does not engage the property. *Contrà*, *Morton Eden's Case* in the House of Lords. *Id. ib.*

Trustees taking upon themselves to lend an infant's money on a private security, must in all cases be responsible in case of the failure of the security. *Holmes v. Dring*, 2 Cox, 1.

Trustee incautiously leaving trust fund in banker's hands without security: held, liable to loss, on banker's failure. *Anon.* Loft, 492.

If trustee pay rents to a banker in credit, who fails, the trustee is not liable. *Exp. Belcher*, *Exp. Parson*, Ambl. 219. S. C. 1 Ken. 38.

Laying out trust money in S. S. stock where it subjects the trust to a loss, is not a good security, for the directors may trade away the whole stock whilst they keep within the terms of the charter; S. S. annuities and bank annuities only, are proper and good security; for it is not in the power of the directors to bring any loss upon them. *Trafford v. Boehm*, 3 Atk. 444.

Trustees may lend money on good personal security, until a proper purchase in land can be had, but are not justified in placing it out in a fluctuating or precarious fund. *Emelie v. Emelie*, 7 Bro. P. C. 259. **PERSONAL SECURITY.**

Trustee of an infant having saved 3,000*l.* out of the profits of his estate, lays it out in a purchase of lands lying near the infant's estate, with the consent of his grandmother, declaring the trust for the benefit of the infant, if he, when at age, shall agree to it. Infant dies within age, the trustees shall account to the infant's executors for the 3,000*l.*; but the profits of the land set off against the interest. *Winchelsea v. Norecliffe*, 1 Vern. 435. **ACCOUNT.**

### 4. As a Witness.

Trustee plaintiff cannot, it seems, be examined as a witness. — *v. Fitzgerald*, 9 Mod. 330.

A trustee, who is ordered to account, cannot be a witness. *Smith v. Dk. of Chandos*, Barn. 416.

A bare trustee is a good witness for his *cestui que* trust, but not an executor in trust, as he is liable to be sued by creditors, and to answer costs. *Croft v. Pyke*, 3 P. W. 181. **EXOR.**

### 5. Discretionary Powers.

Construction of an obscure will, whether a trust or discretionary power was given. *Robinson v. Smith*, 6 Mad. 194. **WILL, C. OF.**

Where discretion of trustee is to be exercised on matter of fact, court will substitute a master; but not if upon matter of opinion or judgment. *Walker v. Walker*, 5 Mad. 424. **PR. REFERENCE TO MASTER.**

Semble, that proof of general, though not universal approbation of parish, is sufficient to justify *bona fide* conduct of trustees of parish charity, where they have a discretionary power. *In re Chertsey Market*, 6 Pri. 261.

On demurrer, held, that trustees to whom discretionary power was given of renewing leases, had not an arbitrary power of renewal, but must renew when most for benefit of *cestui que trust*. *Milington v. Mulgrave*, 3 Mad. 491.

Direction in will, that executors shall pay annuity, unless circumstances render it unnecessary, impracticable and inexpedient, means unless in the opinion of executors it shall become so, and court has no controul over such discretion, unless they act *malâ fide*. *French v. Davidson*, id. 396. WILL, C. OF.

Residuary devise and bequest for such of the testator's relations and kindred, in such proportions, &c. as his executors should think proper, recommending and advising his said trustees and executors to give the greatest share to such person and persons who, in their opinion and judgment should appear to them to be his nearest relations, and most deserving; declaring his intention not to controul their discretion, but that every thing relative to that disposition, who were his relations, and the proportions, should be entirely in the discretion of the said trustees and executors, and the heirs, executors, and administrators of the survivor of them: held, a trust, and a power. The ground of the power being personal confidence, it is *primâ facie* limited to the original trustees, not without express words passing to others, to whom by legal transmission, the same character may happen to belong, and cannot be executed by the devisees and executors for that specific purpose only, of the surviving trustee; a trust therefore executed by the court for the next of kin at the death of the testator, according to the statute of distributions. *Cole v. Wade*, 16 Ves. 27.

The real estate, except what was converted in execution of the power taken by the next of kin as real, the will not operating a conversion out and out; the representative therefore, the trust being disappointed, taking the respective estates as they find them, having no equity against each other. The costs apportioned according to the value of the real and personal estates. *Walter v. Maunde*, 19 Ves. 424. WILL, C. OF; TRUST EXECUTED BY COURT.

Where discretionary power is given by will to trustees, to invest fund in real or personal estate, and it is to be collected from the whole will, that it shall be invested in real estate: though never invested, it shall be regarded as real estate. *Cowley v. Hartstonge*, 1 Dow. 361. WILL, C. OF; ADMON. OF ASSETS.

If testator's intention is clearly manifested on face of will to give an unlimited discretion to trustees, the court will not controul it: but a general discretion must be held to refer to the limitations in the will. *Id.* 378. WILL, C. OF.

Discretion of trustees having power to change securities with consent, is not to be controuled by court, unless mischievous and ruinous to that fund. *De Manneville v. Crompton*, 1 V. & B. 351.

Trust deed, whereby trustees were to give the residue of A's estate "among all his friends and relations, where they should see most necessity, and as they should think most just;" though, in other cases the court will not interpose where trustees declining to act have a power to distribute generally, according to their discretion, without any defined object, it was held, that here a rule was laid down, the word "friends" meaning "relations," and the court would judge of the respective families' necessities and occasions by a reference to the master. *Gower v. Mainstaring*, 2 Ves. 87.

#### V. LIABILITIES.

Trustees of a charity grant an improper lease of the charity lands, in which they covenant with the lessee

for his actual enjoyment of the demised premises during the term; the court, in setting aside the lease, will order the indenture of the demise to be cancelled *in toto*, and will not have the personal covenants of the trustees in force for the benefit of the lessee. *Att. Gen. v. Morgan*, 2 Russ. 306. CHARITY LEASE; CANCELLATION OF DEEDS.

The trustees of a charity were made, as individuals, defendants to a suit for the administration of the charity; afterwards the information was amended, and they were made defendants in their corporate capacity; but the suit was not dismissed against them as individuals at the hearing: the record was considered as constituting two different causes, and the one against the trustees as individuals, was dismissed with costs, though in the cause against them in their corporate capacity, a decree was made, remedying abuses which had grown up in the charity, and regulating its future administration. *Att. Gen. v. Mansfield*, 2 Russ. 501. PL. PARTIES.

Where trustees of a charity under an instrument of doubtful construction have acted honestly, though erroneously, they will not be charged in respect of past misapplication of the funds. *Att. Gen. v. Corp. of Evesham*, 2 Russ. 45. CHARITY.

The trustee of a legacy which had been invested in stock, authorises the sale of the stock, and permits B to receive the proceeds; B retains the money in his hands, and during many years, the legatee, who was not aware that the legacy had ever been invested in stock, or that stock, in which it once was vested, had been sold, deals with B, as the only person accountable to her for the money; notwithstanding these dealings on the part of the legatee, the trustees continue to be accountable for the stock. *Adams v. Clifton*, 1 Russ. 297.

Trustees employing trust fund in their business, instead of investing it when amounting to a certain sum as directed by will, an account was directed, and they charged with 5 per cent. on balance in their hands. *Brown v. Sansome*, 1 McClell. & Y. 427. ACCOUNT; INTEREST, WHEN PAYABLE.

A creditor, who makes out a *primâ facie* case of misconduct in trustees, is entitled to a decree that they shall account for whatever they might have received without their wilful default or neglect; though, in a prior suit instituted by another creditor, and conducted without collusion, a common decree for an account has been previously made against them. *Shepherd v. Tongood*, 1 Turn. & R. 379. CREDITORS; ACCOUNT.

Where a person executor and trustee of legacy to be laid out in stock has fully administered estate, and assented to legacy, and retains legacy in his hands, not as assets, but as trustee, he is liable for breach of trust, and ordered to purchase stock at price of time when he was first able to invest it. *Byrchall v. Prudford*, 6 Mad. 235. LEGACY; BREACH OF TRUST.

Where there is no imputation of breach of trust in trustee, suffering deed to get out of his possession, he need not be party to bill for its restitution. *Knye v. Moore*, 1 S. & S. 61. PL. PARTY.

The usual indemnity clause does not exonerate one of two trustees from a loss occasioned by a debt due from the other having been suffered to remain outstanding. *Mucklow v. Fuller*, 1 Jac. 198.

Where it is a term of trust deed that each trustee shall be answerable only for one moiety, court will not extend the liability. *Birt v. Betty*, 6 Mad. 90.

In a bill to compel performance of a covenant to surrender copyhold estate to A in trust for others, A must be a party. *Cope v. Parry*, 2 Jac. & W. 538. PL. PARTY; SPEC. PERF.

Executor and trustee becoming bankrupt, a receiver was appointed, though testator knew the com-



mission had issued. *Langley v. Hawk*, 5 Mad. 46. PA. RECEIVER; EXOR.

Trustee cannot, by any act of his own, denude himself of that character till he has performed his trust. *Chalmers v. Bradley*, 1 Jac. & W. 68.

In suit against trustees of charity, all the trustees must be parties though they do not act. *In re Chertsey Market*, 6 Price, 261. PL. PARTIES.

Trustees not to be compelled to perform an agreement entered into under mistake, to sell for an inadequate consideration. *Bridger v. Reid*, 1 Jac. & W. 74. SPEC. PERF.; MISTAKE.

Power to trustees to advance to A 1000*l.* with consent of B under her hand, signed by two witnesses. Trustees advance the sum without consent. Subsequent acquiescence by such deed not sufficient, and trustees ordered to refund. *Bateman v. Davis*, 3 Mad. 98. POWER, EXECUTION OF.

Co-trustee held liable for acts of other, though he merely joined in receipt for conformity sake, and never meddled in trust beyond that. *Bradwell v. Catchpole*, cited 3 Swan. 78.

Infant fraudulently concealing his age, and obtaining from trustees part of stock which he was entitled to on coming of age; and when of age a few months afterwards, applying for and receiving the residue of such stock: Held, a fraud in infant, and that neither himself nor his assignees could enforce repayment by trustees of stock paid during infancy, and that applying for residue of stock when of age was a recognition of first payment. *Cory v. Gertchken*, 2 Mad. 40. INFANT; FRAUD.

Trustees joining in receipt are not chargeable unless they also receive the money. *Chambers v. Minchin*, 7 Ves. 198.

A loss happening by the default of a trustee appointed by a testator, falls on the legatees, and the estate is discharged from it. *Hutchinson v. Massacreene*, 2 Ball & B. 54. ADMISSION OF ASSETS.

Settlement of a renewable lease in trust out of the rents and profits to pay the fines and charges of renewing, and subject thereto for husband and wife successively for life; remainder to the first son at twenty-one. The trustees not having renewed in the lives of the tenants for life answerable as for a breach of trust, though not deriving any benefit from it. *Id. Montford v. Ld. Cadogan*, 17 Ves. 485. Affirmed 19 Ves. 635. quod vide, and 2 Mer. 3. SETTLEMENT OF RENEWABLE LEASE.

General rule of specific performance that the purchaser shall have what the vendor can give, with an abatement out of the purchase-money, for so much as the quantity falls short of the representation, enforced against trustees for infants, upon the mere mistake of their agent without fraud, &c. but the relief adapted to the justice of the case, viz. the purchase being of wood upon a gross valuation, without regard to the quantity of land; an abatement for a deficiency of quantity from erroneously inserting the hedges and fences not included in the purchase, was directed with reference to land. *Hill v. Buckley*, 17 Ves. 394. SPEC. PERF.; VEND. & PURCH.; COMPENSATION.

Trustees under a misrepresentation that the fund was invested in stock, charged with interest at five per cent. upon the same principle as if they had sold out stock and used the money, viz. an option to the *cestui que* trust to have the actual profit or five per cent. *Bate v. Scales*, 12 Ves. 402. INTEREST, WHEN.

Trustee charged in respect of a misrepresentation to a purchaser having notice, and alleging only that he did not recollect the fact. *Burrows v. Lock*, 10 Ves. 470.

A trustee charged, though he did not receive the money, under the circumstances, having joined in the receipt; the sale unnecessary; and permitting his co-trustees to keep and act with the money contrary to the trust; not charged in the respect of the interest of one of the *cestui que* trust having notice of the breach of trust, and acquiescing. *Brice v. Stokes*, 11 Ves. 319.

T holds shares in a trading company in trust for W, who, by his will, appoints T his residuary legatee. T continues in possession of the shares, and becomes bankrupt. The shares are not within the meaning of the bankrupt act, 11 & 12 G. 3. c. 8. s. 9. inasmuch as T is himself the "true owner and proprietor thereof," subject, however, to the debts and legacies of W. T and his partners, together with W, give securities to C for the proper debt of T. W dies, leaving T and C his executors, and T his residuary legatee, and leaving a sum of money under the controul of C. C applies this money to the payment of the securities given by T and C, and by W; and debits W in account with the amount; and on settling with T as executor of W, C hands him over these securities, and pays him, as residuary legatee, the balance due to the estate of W. C shall be answerable to the creditors and legatees of W on failure of C, as well for the sum paid to C, as that retained by C. *Joy v. Campbell*, 1 Scho. & L. 328.

Trustees and executors charged with loss occasioned by breach of trust by joining in a transfer and sale, and lending the produce to a partnership in which one of them was engaged, the other receiving no benefit. Decree for account against all for the funds. *French v. Hobson*, 9 Ves. 103. TRUST, BREACH OF.

Trustees and their representatives chargeable in equity for a breach of trust, though no benefit derived from it. *Adair v. Shaw*, 1 Scho. & L. 272.

Trustees charged with loss occasioned by mere negligence, and costs follow of course. *Caffrey v. Darby*, 6 Ves. 488. LACHES.

Trustee not charged with a loss by failure of banker to agent in whose hands money was deposited, pending transaction for change of trustee. *Adams v. Claxton*, 6 Ves. 226.

Legacies in trust for the testator's son for his own use and benefit, provided no misfortune in business shall in the mean time have happened to him, so as to deprive him or his family of the benefit of it, the testator declaring his intention, his son's fortune being amply sufficient by this fund to form a certain and permanent provision for him or his family; but in case he fail in business at any time before the age of thirty-two, then in trust for the support of him, his wife and children, as the trustees think proper, so long as he shall labour under the effects of any misfortune in trade: but as soon as he shall be freed and absolutely discharged from the effects of any misfortune or failure in trade, then (but not before) to be paid to him; otherwise, the interest to be continued to be paid for the support of him, his wife and children, for his life; and if, at his death, he shall be under any difficulty from misfortune or failure in business, in trust for his wife and children according to his appointment by will, and if he shall leave no widow or child, according to his disposition. There was a considerable settlement. The son, in the twenty-eighth year of his age, being discharged under a deed of composition, the legacy was decreed to him, the trustees and his children not opposing it; but the court observed, that if he should not be discharged, as in case it should end in a bankruptcy, the trustees would not be indemnified. *De Mierre v. Turner*, 5 Ves. 306. WILL, C. OF.

The indemnity of the trustees under a deed of trust does not give the persons employed by them a right

as creditors against the trust fund. *Woorall v. Harford*, 9 Ves. 4. PRINC. & AGENT.

Settlement, upon marriage, of stock, the property of the wife, in trust from time to time to receive the dividends and pay them into the hands of the wife for her sole and separate use, her receipt to be a discharge; after her decease, if the husband should survive, for him for life; and after the decease of the survivor, to transfer the principal among the children according to her appointment by will; in default thereof equally, if no children, according to her appointment by will. The trustees, with the privy of the wife, sold the stock, and paid the money to the husband, taking his bond of indemnity. He died insolvent. Upon the bill of the widow and children, the fund having been replaced by the trustees, and transferred to the accountant-general, upon the trusts of settlement, the trustees to pay the dividends to the widow from the death of the husband, with costs. *Whistler v. Newman*, 4 Ves. 129. See as to the authority of this case, 5 Ves. 17. n. and 694. n. TRUST, BREACH OF; HUSB. & WIFE; SETTLE.

Where sale by trustee to purchaser with notice of trust, is set aside, neither purchaser nor trustee pays interest on rents. *Macartney v. Blackwood*, 1 Ridg. L. & S. 602. FRAUDULENT SALE; INTEREST.

Trustee, how far charged with interest and costs and profits of a farm carried on by aid of testator's personal estate. *Kellick v. Flerney*, 4 Bro. C. C. 163.

Trustee charged with interest for wilful misconduct, as not paying money into court pursuant to an order: but slight difference in the sums admitted and reported in his hands is not sufficient; farther enquiry whether he made interest, not to be directed unless a strong case. *Sammis v. Rickman*, 2 Ves. J. 36. INTEREST.

Devises in trust to sell for payment of debts, assign to the son of the devisor; the creditors receive the interest from him for eleven years, and agree with him for an increase of interest on their debts: the original trustees continue liable. *Hardwick v. Mydd*, 1 Anst. 110. LENGTH OF TIME; ACQUESCENCE.

Trustees are mere stake-holders, and cannot be affected with more than they actually received without wilful default. *Pybus v. Smith*, 1 Ves. J. 189. *See qu.*

A trustee joining in a receipt and reconveyance of a mortgaged estate, though he does not receive the money, is liable, and the receipt being in evidence, no enquiry can be directed as to the fact. *Scurfield v. Howes*, 3 Bro. C. C. 90.

Account decreed against a trustee, who, having engaged the trust property in an adventure, afterwards renounced it for the trust, and declared it to be on his own account; though no part of the trust money actually laid out. *Wilkinson v. Stafford*, 1 Ves. J. 32. ACCOUNT.

Parties to bill by creditors against trustees for sale. *Routh v. Kinder*, 3 Swan. 144. PL. PARTIES.

A trustee in a will which directed money to be lent at such rate of interest as they should think reasonable, by consent of his co-trustee keeps it at 4 per cent.: ordered to pay five, and the executors to pay the costs of taking the accounts as to that interest. *Forbes v. Ross*, 2 Bro. C. C. 430. FRAUD, FID. SIT.; INTEREST.

If the trustee of a term, and the *cestui que* trust, are before the court, an intermediate trustee of the equitable interest need not be the party to a bill filed to carry the trusts of the term into execution. *Heggl v. Teynham*, 1 Cox, 57. PL. PARTY.

One trustee knowing and concealing his co-trustee's having sold out the trust fund, equally liable with the trustee, who actually sold. *Bourdman v. Mosman*, 1 Bro. C. C. 68.

Trustee investing money at his own discretion, runs risk of depreciation. *Hancom v. Allen*, Dick. 498.

Writ of *ne exeat* against trustee upon an account acknowledged. *Taylor v. Leitch*, id. 380.

Trustee joining in receipt, though only for conformity, is accountable. *Westly v. Clarke*, id. 330.

If two executors join in giving a discharge for money, they are both answerable though one only actually received it. *Exp. Belcher, Exp. Parson*, Ambl. 219. S. C. 1 Ken. 38. EXORS. PERSONAL LIABILITY.

If trustees will bind themselves to be liable for the acts of each other, the court will not relieve them, especially in the case of a composition of debts. *Leigh v. Barry*, 3 Atk. 583.

In the case of trustees, though there are not negative words in a deed that they shall not be liable for the acts of one another, yet the court will not make them so for more than each have received. *Id.* 584.

Equity will endeavour to deliver a trustee from a misapplication of trust-money, where he errs in the management only; but if he goes out of it with the approbation of the *cestui que* trust, it must be first made good out of the person's estate who consented. *Trafford v. Boehm*, 3 Atk. 444.

A bill charges forgery in a lease, and prays relief; the trustees who were parties to the lease, and to whom the fraud and breach of trust is imputed, must be parties. *Jones v. Jones*, 3 Atk. 110. PL. PARTIES.

If a trustee files bill and brings *cestui que* trust before the court for his own private interest, he shall pay whole costs of suit. *Henley v. Philips*, 2 Atk. 48. COSTS.

By settlement before marriage, it was agreed, that 2000*l.* in the hands of a trustee should be laid out in land, and settled on the husband for life; then to the wife for life, for her jointure, and to the children equally; and in default of issue, then to the wife in fee. The husband and wife being necessitous, the trustee paid them 600*l.* on a release and their joint bond of indemnity, and afterwards 400*l.* in the same manner, with a new agreement, that the remaining 1000*l.* should be laid out in an annuity, for the separate use of the wife, during coverture, and in fee, in case of survivorship. The trustee afterwards paid the husband the remaining 1000*l.* and then he died, leaving his wife destitute. Upon a bill by the wife against the trustee's representative, upon this breach of trust, and to be paid what shall be due to her for the 2000*l.* the parties, on the recommendation of Ld. Chancellor, agreed to pay the wife 100*l.* per annum for life, tax free, together with costs, which was ordered accordingly. *Thayer v. Gould*, 1 Atk. 615.

Where there is a falling off of stock without the neglect of trustee, he is not liable to make good the deficiency, but is answerable only as far as the value, especially where it was specific stock. *Jackson v. Jackson*, id. 513. INVESTMENT.

A & B are trustees under a deed, by which neither of them is to answer for the other; A receives a sum of money under the trust, and gives a writing under hand and seal, acknowledging it, and that B had received no part of it; A never placed out the money, and dies; this writing is a specialty and good against the executor, but not against the heir of A, he not being mentioned in it. *Gifford v. Manley*, Forres. 109. SPECIALTY DEBT; HEIR AT LAW.

A, who is a trustee for B of 1000*l.* South Sea stock, at the desire of B borrows 1000*l.* on this stock of the company, and B receives the money; A pays the ten per cent on the late act to be discharged of the loan; though B forbade the payment yet he is liable. *Balsh v. Hyham*, 2 P. W. 453. S. S. STOCK.

A trustee is not answerable for an innocent mistake, and from which he derived no advantage; and a court of equity will grant a perpetual injunction to prevent

any proceedings at law, grounded on such mistake. *Crookshanks v. Turner*, 7 Bro. P. C. 255. MISTAKE.

An executor or trustee insolvent at the time they place out money at interest, shall, if they make any, pay interest as they run no risk; secus, of one who is in good circumstances. *Bloomfield v. Wytherley*, Prec. Chan. 505. S. C. 1 Eq. Ab. 398. but cited and overruled 1 Bro. C. C. 360. EXORS. INTEREST.

A settlement was made by a third person to the use of the husband for ninety-nine years; remainder to trustees during his life, &c.: remainder to the wife for life, remainder to the first, &c. son of the marriage; remainder to the heirs of the body of the husband; remainder to the right heirs of the husband; there was no issue of the marriage, and the trustee joined in cutting off remainders, yet the court refused to punish them at the suit of a remote remainder-man. *Tipping v. Piggot*, Gilb. Eq. Rep. 34.

Two executors join in a receipt, and only one of them actually receives the money; both chargeable to creditors but not to legatees. (But see 2 Bro. C. C. 117.) Two trustees join in a receipt, and one receives the money, only the receiving trustee shall be charged. *Sed quere. Churchill v. Hobson*, 1 P. W. 241. S. C. Salk. 318. EXORS. LIAB.

Trustees not to take advantage of their own laches. *Kentish v. Newman*, 1 P. W. 236.

Although a trustee is not directed to pay money out at interest, yet if he makes interest, he shall account for it. *Lee v. Lee*, 2 Vern. 548.

Two trustees in a mortgage join in an assignment of the term, and in a receipt for the whole, each receiving a moiety only of the mortgage money are to be answerable only for what they respectively receive. *Fellows v. Mitchell*, 1 P. W. 81. 2 Vern. 504. 515.

Where on a bill to call a trustee to account, he by answer submits readily to it, though found in debt, he shall pay the interest for the balance only from the time of the account liquidated, and no costs; secus, if he controverts the account; there, if found in arrear, he shall pay interest and costs. *Parrot v. Treby*, Prec. Chan. 254. ACCOUNT; INTEREST, WHEN PAYABLE.

Executors who all join in a sale shall be all charged though one only receives the money; secus, of trustees. *Aplyn v. Brewer*, Prec. Chan. 173. EXORS. LIABILITY OF.

A trustee in a recognizance releases it without any consideration; decreed to pay the principal and interest not exceeding the penalty. *Jevon v. Bush*, 1 Vern. 342.

Each trustee shall be charged for no more than he actually receives. Otherwise if the trustees join in receipts. *Spalding v. Shalmer*, 1 Vern. 303.

If a trustee for payment of children's portions, pays one his full share, and the trust estate decays, he shall not be allowed it. *Tilsey v. Throckmorton*, 2 Ch. Ca. 132.

Trustee not to be charged with imaginary values, but only as a bailiff. *Palmer v. Jones*, 1 Vern. 144.

Defendant was trustee to plaintiff, an infant, and received for him 40*l.* in gold, of which he was robbed by his own domestic servant, together with 200*l.* of his own: Ld. Ch. allowed the trustee this 40*l.* on his own oath, for he was but to keep it as his own. *Morley v. Morley*, 2 Ch. Ca. 2.

If a trustee joins with a *cestui que* trust in any conveyance to bar the entail, it is no breach of trust, for it is no more than what he may be compelled to do, though the trustee himself might have barred such entail without his joining, and that not only by fine or recovery, but also by feoffment, bargain, or sale, devise or surrender, (if no custom to the contrary in the latter case). See *Goodrich v. Brown*, 1 Ch. Ca. 49. *Washburne v. Downes*, 1 Ch. Ca. 213. *Lord Digby v. Langworth*, 1 Ch. Ca. 68. *North v. Champenon*, 2 Ch. Ca. 64. 78.

## XI. THEIR ACCOUNTS, ALLOWANCES AND COSTS TO.

A testator after devising lands on trust to constitute a grammar school, directed that the trustees should have the management of it, and should appoint a master and usher, and pay to them respectively 50*l.* a year, and 50*l.* a year; the trustees established a school, which, however, from mistake was not conducted as a free grammar school, and the rents of the charity lands having increased, an augmentation was made to the salaries of the master and usher. It held that the trustees were entitled to have the sums paid in receipt of this augmentation allowed them in their accounts, notwithstanding their error in the application of the charity, and the mention of salaries of a specified amount in the will. *Att. Gen. v. Dean, &c. of Christchurch*, 2 Russ. 321. CHARITY.

Trustee is of course entitled to all reasonable expences in conduct of trust, but not for personal trouble and loss of time, unless he makes out a special case therefore, before acceptance of trust. *Brocksopp v. Barnes*, 5 Mad. 90.

Trustee bound to pay interest on money retained a length of time. *Trimleston v. Hamill*, 1 Ball & B. 385. INTEREST.

Settled rule, that in all matters of trust or in the nature of trust, a trustee is not allowed any compensation for his trouble in the business entrusted to him. *In re Ormsby*, 1 Ball & B. 189.

Trustee, or next friend of infant is entitled to fair expences beyond taxed costs, under the head of just allowances. *Fearns v. Young*, 10 Ves. 184. PA. COSTS; PROCHAIN AMI.

Trustee and executor, although taking under will a commission as a satisfaction for trouble, is entitled to allowances under a general trust to set and manage as he should think proper, and out of the rents and profits to pay all rates and taxes, charges of repairs, stewards, bailiffs, and gamekeepers' salaries and expences, and all other charges and expences he should think proper; but he was not allowed to appoint an establishment, gamekeepers, &c. except as the due management required. *Webb v. El. Shaftesbury*, 7 Ves. 480.

100*l.* devised to an infant payable at twenty-one, and if he dies before then, it is devised over and the interest of the 100*l.* is for the child's maintenance. The trustee lays out 20*l.* of the 100*l.* for placing out the child an apprentice, and the child died under twenty-one, this 20*l.* shall be allowed. *Franklin v. Green*, 2 Vern. 137. INFANT MAINTENANCE.

## VII. BANKRUPTCY AND ABSCONDING OF, OR REFUSING TO CONVEY.

See Stat. 1 W. 4. c. 60. Appendix.

Where trustees, &c. of friendly societies, are out of jurisdiction of court, or it be uncertain whether they are alive, or they refuse to convey, &c. court of exchequer may appoint a person to convey, 10 G. 4. c. 56. s. 15. FRIENDLY SOCIETIES; JURISDICTION.

When trustees shall be absent, &c. courts may order stock to be transferred, and dividends paid, *id.* s. 16.

By this statute it would seem the jurisdiction of courts of chancery on this subject is taken away. See the repealed statute. (Compiler.)

Where bill is filed, merely to obtain transfer of stock standing in name of trustee, who is out of jurisdiction of court, order must be made at hearing of cause, and cannot be obtained on petition. *Burr v. Mason*, 2 S. & S. 11. TRANSFER OF STOCK; PETITION.

One of two trustees absconding, the other ordered to transfer fund into his own name, and that of an-

other appointed. *In re Friendly Society*, 1 S. & S. 82. FRIENDLY SOCIETY.

Infant trustee for sale is not within the statute, 7 Anne c. 19. (but see 6 Geo. 4. c. 74.) though the persons entitled to the produce of the sale are adult and join in the petition. *Semble*, *Exp. Chasteney*, 1 Jac. 56. INFANT TRUSTEE; STAT. C. OF.

When a testator directed that in case his son should carry on the testator's trade for the benefit of himself and his mother, his lease and furniture should not be sold, but that the trustees should permit the widow and children to reside therein and have the use of it; and the widow and son carried on the trade and became bankrupt. Held that the furniture, &c. was not in the order and disposition of the bankrupts. *Exp. Martin*, 2 Rose, 331. BANKRUPTCY; REPUTED OWNERSHIP.

When, by agreement, stock is placed in joint names, and one trustee is also a *cestui que trust*, he not having power to transfer his interest, it does not pass on bankruptcy to his assignees. *Exp. Kensington*, 2 V. & B. 79. S. C. Coop. 66. BANKRUPTCY; REPUTED OWNERSHIP; BANKCY. ASSIGNMENT WHAT PASSES.

Under 36 G. 3. c. 90. (repealed and re-enacted by 6 G. 4. c. 74. which see) on proof that one trustee had become bankrupt and absconded, and was abroad and unlikely to return, the remaining trustee was ordered to transfer trust stock into name of himself and a new co-trustee. *Williams v. Bird*, 1 V. & B. 3. TRANSFER OF STOCK. STAT. C. OF.

Where A is surety of B in respondentia bond, and B assigns all his goods on board ship to A, on trust to pay debt due to himself, and next to pay off all debts for which he was surety on bond, and before time mentioned in bond, A became bankrupt, and assignees receive money on account of proceeds of goods; ordered, that after deducting debt due to A, the residue should be divided among the respondentia creditors. *Exp. Carstairs*, 1 Rose, 130. BANKCY. ASSETS.

Order for a transfer of stock within the statute 36 G. 3. c. 91., (repealed and re-enacted by 6 G. 4. c. 16. s. 79, 80); as upon a refusal by a party appearing by counsel, and admitting that she had disobeyed an order to transfer. *Rider v. Kilder*, 13 Ves. 123. BANKCY. ORDER FOR TRANSFER OF STOCK.

A bill for a specific performance of an agreement was made necessary by a trustee refusing to join in the conveyance. The court being of opinion, that the trustee ought to pay all the costs of the suit, the decree was that the plaintiff should pay the costs of all the other defendants, (although he had a decree against them,) and recover over the whole costs from the defendant, the trustee. *Jones v. Lewis*, 1 Cox, 199. PR. COSTS.

Trustee of fund absconding, dividends of fund ordered to be paid to *cestui que vie*. *Wharton v. Massey*, Dick. 429.

Bankrupt, though in possession, yet if empowered to dispose of goods in trust for another, they are not liable to the bankruptcy, either in law or equity. *Copeman v. Callant*, 1 P. W. 314. BANKCY., REPUTED OWNERSHIP.

Factor in possession and empowered to sell goods for another, they are not liable to the factor's bankruptcy, *id. ib.*

Executor in trust becomes a bankrupt, the goods which he has as executor, not liable to the bankruptcy, *id. ib.*

it ought to be filed by some on behalf selves and rests. *Douglass v. Horsfall*, 2 S. & S. 14. PARTIES.

*Semble*, where trustee is in such situation as to preclude advantage over *cestui que trust*, dealing between them will not be set aside. *Naylor v. Winch*, 1 S. & S. 566. FRAUD, FID. SIT.

Generally all persons interested are necessary parties to bill of foreclosure; and where equity of redemption was conveyed to trustees to sell, &c. with power to discharge purchasers by receipt, does not dispense with necessity of making *cestui que trusts* parties. *Culverley v. Philp*, 6 Mad. 229. PL. FORECLOSURE; PL. PARTIES; DEEDS, PARTIES TO.

On motion by trustees to dissolve injunction against them, *cestui que trusts* not parties to suit cannot be heard. *Ball v. Tunnard*, 6 Mad. 275. PL. PARTIES.

It is not of course to let a *cestui que trust* under a will into possession of estate; it must depend on the testator's intention. *Tidd v. Lister*, 5 Mad. 429. WILL, C. OF; TRUST.

Writ of *ne exeat regno* granted against the obligor in a bond given to trustees at the suit of a party beneficially interested in the money secured by it. *Leake v. Leake*, 1 Jac. & W. 605. PR. WRIT NE EXEAT REGNO.

Where trust property is employed in trade without authority, the *cestui que trusts* must elect to take either the profits for the whole period, or interest for the whole period. Circumstances may arise to entitle them to take profits for one and interest for another part of the period; but a notice of dissolution of partnership, published for a particular purpose, and not accompanied by a settlement of accounts, or a transfer of the property, is not sufficient. *Heathcote v. Hulme*, 1 Jac. & W. 122. ELECTION.

*Cestui que trust* using trustee's name as co-defendant, ordered to give later security for costs. *Annesley v. Simeon*, 4 Mad. 390. PR. SECURITY FOR COSTS.

*Cestui que trust* concurring or acquiescing in a breach of trust, not entitled to relief, subject to inquiry into the circumstances which induced concurrence or acquiescence. *Walker v. Symonds*, 3 Swan. 64. BREACH OF TRUST; ACQUIESCENCE.

Right of a *cestui que trust* to proceed separately against one trustee implicated in a joint breach of trust. *Id.* 75. BREACH OF TRUST; PL. PARTIES.

If there are *cestui que trusts* who ought in strictness to be made parties to such a suit, and they are not so brought before court, their interests may be ascertained and protected (by indulgence of court) by a petition to be presented by them for that purpose to obviate further delay and expence. *Drew v. Harman*, 5 Price, 319. PL. PARTIES.

To bill by persons entitled to a certain aliquot portion of a certain ascertained sum in hands of trustee, *co-cestui que trusts* are not necessary parties. *Smith v. Snow*, 3 Mad. 10. *Id.*

Trustees having committed breach of trust by granting longer leases than they had power to do by deed; the fact of *cestui que trusts* receiving rent from the lessees in ignorance of the invalidity of their leases, did not operate as a new agreement. But *cestui que trusts* having neglected to look into their rights, account only directed from filing of bill without costs to plaintiff. *Bowes v. East London Waterworks*, 3 Mad. 373. ACQUIESCENCE; ACCOUNT; BREACH OF TRUST.

Reference of a solicitor's bill of costs to be taxed upon the application of one of two trustees and executors by whom he had been employed in the conduct of the cause, and in other matters relating to the executorship, the executor making the application not having acted, and his co-executor refusing to consent to the application, the bill having been long

### VIII. TRUSTEE AND CESTUI QUE TRUST.

Trustee cannot file bill concerning trust without making *cestui que trusts* parties; if they are numerous

since paid by the acting executor, but unknown to the parties beneficially interested, and no settlement of the executorship accounts having been made, notwithstanding repeated applications, until lately, and the *cestui que trust* (one of them a married woman) having executed a release to the executors: motion on behalf of the solicitor to discharge the order of reference refused, the *cestui que trust* having a right to use the name of his trustee for the purpose of taxation, and the release to the executors, not operating to prevent him from prosecuting against the solicitor, the remedy given by the statute. *Hazard v. Lane*, 3 Mer. 285. PR. TAXATION OF SOLICITOR'S BILL.

The distinction between attorney and trustee to sell as to contracts with client and *cestui que trust* is, that attorney retaining character may contract, subject to onus of making it thoroughly manifest that he has taken no advantage of his confidential situation. But in trustee it is not sufficient to show he has not taken advantage, the general rule being that he must divest himself of that character. *Cane v. Id. Allen*, 2 Dow. 299. SOLICITOR & CLIENT; FRAUD, FID. SIR.

Equity will never permit the trustee to evict his *cestui que trust*. *Shine v. Gough*, 1 Ball & B. 445.

No act of the trustee can vary the right of the *cestui que trust*, but his situation may vary; as when the *cestui que trust* is his heir, and the right to die depends upon which dies first. *Selby v. Alston*, 3 Ves. 341.

Bill by devisee in trust to sell for specific performance of an agreement to purchase; exception to the report in favour of the title that the persons entitled to the purchase-money subject to debts, legacies, and other charges, were not parties to the suit; the Ld. Ch. was of opinion they ought not to be parties to the conveyance, and if they were, their covenant ought to extend only to their own acts and those of the deviser, not to a general warranty without a special contract for it; but as the point must come properly upon objections to the conveyance, the exception was overruled upon the form. *Hakeman v. Ds. Rutland*, 3 Ves. 233. PL. PARTY; EXCEPTIONS TO MASTER'S REPORT.

Bill by one trustee of stock against the other to compel him to replace it or give security according to his engagement when the plaintiff joined in transferring the stock into his name, demurrer because the *cestui que trusts* were not parties, overruled with costs. *Franco v. Franco*, 3 Ves. 75. PL. PARTIES.

A *cestui que trust* claiming compensation for breach of trust against the representatives: the trustee, can only come in as a simple contract creditor. *Kearnan v. Fitzsimon*, 3 Ridgw. P.C. 1. ADMON. OF ASSETS.

A trustee cannot prove a debt alone; the *cestui que trust* must join in the proof. *Exp. Dubois*, 1 Cox, 310. BANKCY. PROOF IN.

Trustee not protected by acquiescence of the *cestui que trust*, not duly informed. *Ryder v. Bickerton*, 3 Swan. 81. ACQUIESCENCE.

Where the real estate is in the hands of trustees, and the trustees convey it over without notice of the trust, if a bill is brought by the *cestui que trust*, the trustees must be made defendants. *Harrison v. Pryse*, Barn. 324. PL. PARTY; VEND. & PURCH.

Bill of redemption against the trustee is not sufficient; the *cestui que trust* must be a party. *Whistler v. Webb*, Bun. 53. PL. PARTY.

Trustees postponing or accelerating the sale of estates devised to them, will make no alteration in favour of the heir to the prejudice of *cestui que trust*. *Hawkins v. Chappel*, 1 Atk. 623. HEIR.

A trustee has as much the benefit of the pleading of this court, as he that has the equitable interest; and *cestui que trust* is intitled to have the privilege main-

tained by the trustee. *Earl Suffolk v. Green*, 1 Atk. 450.

Lease of a coal mine to A reserving a rent; A, the lessee, declares himself a trustee for five persons, to each a fifth; the five partners enter upon work and take the profits of the mine, which afterwards becomes unprofitable, and the lessee insolvent; the *cestui que trusts* not liable, but for the time during which they took the profits. *Clacering v. Westley*, 3 P. W. 402. LESSOR & LESSEE; ACCT.

Where a trustee has an infant's money to lay out for his benefit, and employs it in his trade, the court will give an option for the benefit of the infant either to have interest or the profits of the trade. *Anon.*, 2 Ves. 630. INFANT.

The widow of the *cestui que trust* of a copyhold estate, shall have her free bench as well as if her husband had the legal estate. *Banks v. Sutton*, 2 P. W. 712. overruled, id. 719. n. (g). DOWEN.

Though by death of *cestui que trust* the suit abates as to him, yet if there be a decree against him and his trustees to convey, &c. the trustees are obliged to convey the legal estate, for the death of either party makes no abatement only quoad himself. *Finch v. Lord Winchelsea*, 1 Eq. Ab. 2. PR. ABATEMENT.

One buys an estate in the name of a trustee, who gives a bond in 200l. penalty to assign the estate as the *cestui que trust* or his executor shall direct; *cestui que trust* dies, and his executor brings debt on the bond and recovers judgment, and has the money paid him, after which he brings a bill to have a conveyance of the estate; trustee to convey to the plaintiff, and to account for the profits, but in account is to be allowed the 200l. and interest which he paid. *Moorecroft v. Dowling*, 2 P. W. 314. BOND.

*Cestui que trust* in tail brings a bill against the trustees to the intent they should join in a recovery; this not proper; but it is proper to pray that the trustees may convey the premises to the *cestui que trust* in tail, who may then suffer a recovery, though if the trustees are also trustees for any annuities subsisting, they are not compellable to part with the legal estate out of them, to the *cestui que trust* in tail. *Carteret v. Carteret*, 2 P. W. 133. RECOVERY.

A *cestui que trust* must in all cases be a party, but the trustee need not, especially if *cestui que trust* undertakes for him. *Kirk v. Clark*, Prec. Chan. 275. PL. PARTY.

A devises lands to trustees until debts paid, and then to an infant and his heirs. Defendant enters and levies a fine, and five years pass. Infant when of age brought an ejectment, but was barred, because the trustees should have entered. Equity will relieve, and not suffer an infant to be barred by the laches of the trustees, nor to be barred of a trust estate during his infancy. The infant in this case shall recover the mesne profits. *Allen v. Sayer*, 2 Vern. 368. INFANT.

Common recovery suffered or fines levied by *cestui que trust* of an estate tail, has the same effect in equity as it would have at law, in case the legal estate was in him. *Carpenter v. Carpenter*, 1 Vern. 440. FINE & RECOVERY.

An heriot is not due upon the death of *cestui que trust*, but of him that has the legal estate. *Trin. Coll. Camb. v. Browne*, 1 Vern. 441. HERIOTS.

In a bill against executors who are only executors in trust, it is not necessary to make the *cestui que trust* or residuary legatees parties. *Anon.* 1 Vern. 261. PL. PARTIES.

A co-plaintiff, though but a trustee, cannot be examined as a witness for the other plaintiff. *Phillips v. Dk. Bucks*, 1 Vern. 230. PR. WITNESS, COMPETENCY OF; PARTY PLAINTIFF.

Relief for *cestui que trust* of lease against assignment or sale by trustee. *Rooke v. Staples*, Cary, 76.

## IX. TO PRESERVE CONTINGENT REMAINDERS.

Under a settlement and recovery, lands were limited to the use of A for life, and after his decease to the use of B and his heirs, during the life of A to support contingent remainders; remainders to the use of C for life, to the same B and his heirs during the life of C to support contingent remainders; remainder to the first and other sons of C in tail male; remainder to the use of D for life, and if she should marry, and her husband should survive her, to her husband for his life, and after the determination of those estates to the said B and his heirs, (without saying during the life of D), to support and preserve contingent remainders; remainder to the first &c. sons of D in tail; remainder to the use of E for her life, and if she should marry, and her husband should survive her, to her husband for his life; and after the determination of those estates to the said B and his heirs, (without saying during the life of E), to support contingent remainders; remainder to the first and other sons of E in tail male: held, that under the limitation to B and his heirs, after the limitations of estates for life to D and E, the trustee took the fee, and that E took only an equitable estate. *Colborne v. Tyndall*, 2 Y. & J. 605. SETTL. C. OF.

It is not a sufficient ground for restricting an estate limited in a deed to a trustee and his heirs, to an estate for life, that the estate given to the trustee seems to be a larger than was essential to its purpose, or that the limitation has been unnecessarily repeated. *Id. ib.*

Trustee to preserve contingent remainders, joining in a recovery with the remainder-man in tail, having attained twenty-one: held, no breach of trust, and no objection to a specific performance. *Briscoe v. Perkins*, 1 V. & B. 485. FINE & RECOVERY; TRUST, BREACH OF.

Trustees to preserve contingent remainders, honorary trustees; not to be compelled to join in destroying them. *Id.* 492.

Trustees to preserve contingent remainders, joining in a recovery, held, with reference to the circumstances and occasion, no breach of trust. *Mundy v. Walters*, 16 Ves. 283. BREACH OF TRUST.

Generally trustees joining to destroy the contingent remainders, before the tenant in tail is of age, is a breach of trust. *Id. ib.*

Trustees to preserve, &c. are not to permit the tenant for life or years, by destruction of that estate, to bring forward a remainder to himself or another, for the purpose of cutting timber. *Stansfield v. Habergam*, 10 Ves. 278.

A dormant surrender of a copyhold (that is, a surrender to A, on condition to perform the will of the surrenderor,) will vest an estate in the dormant surrenderor, sufficient to support the contingent remainders of the surrenderor's will, without the interposition of trustees for the purpose. *Gale v. Gale*, 2 Cox, 136. COPYHOLD, SURRENDER OF.

The court will not compel a trustee for preserving contingent remainders, to join in a recovery, unless to continue the estate, or under very particular circumstances. *Barnard v. Large*, 1 Bro. C. C. 534.

A, tenant (of a settled estate) for ninety-nine years, if he should so long live, remainder to trustees to preserve, &c. remainder to his first and other sons, remainder over to A and B; his sons being indebted, assigned this settled estate in trust to their creditors, and agreed to suffer a recovery. The creditors filed a bill against A and B, and against the trustee to preserve, &c. to compel him to join in the recovery. *Per cur.* the court will effectuate the intention of a testator as far as possible, to preserve the limitations he has made where the uses are executory; and as there

is no similar case in which the court has decreed the trustees to join, it ought not to be done here. Bill dismissed. *Woodhouse v. Hoskins*, 3 Atk. 22.

A devised lands in trusts for B for life, remainder in trust for his sons successively, remainder in trust for the future sons of C, remainder over, and the testator provided for the disposition of the rents and profits during the minorities of those who were to take in future. B died in testator's life-time, and it was decreed, the contingent limitations should enure as executory devises, and that the profits from the death of the testator till the birth of a son of B, should go to the heir; and afterwards, a son being born to B, upon the death of that son it was decreed, that the rents and profits should belong to the heir, until some person should become entitled under the limitations of the will. *Hopkins v. Hopkins*, 1 Atk. 581. 1 Ves. 268. Ca. temp. Talb. 44. A corrected copy of this case was stated by Lord Loughborough, in *Habergham v. Vincent*, 4 Bro. C. C. 390.

The resulting trust of a freehold, to support remainders of a trust, may connect with the limitation in tail, though not created together with it. S. C. 1 Atk. 595.

There may be a resulting trust under a trust to appoint contingent remainders for the heir at law, in the same manner as under an executory devise. S. C. 1 Atk. 597.

The court will not compel trustees to join in a sale which will not only destroy contingent remainders, but all the uses in a marriage settlement; for they are guilty of a breach of trust in joining to destroy contingent remainders, whether the settlement be voluntary for a valuable consideration, or by will. *Symance v. Tattam*, 1 Atk. 614.

Trustees for supporting contingent remainders joining to destroy them, guilty of a breach of trust; and no diversity, whether the settlement be voluntary, or for a valuable consideration, or by will only. *Mansell v. Mansell*, 2 P. W. 678. Ca. temp. Tal. 252.

On marriage, lands are settled to A for ninety-nine years, if he so long live, remainder to B and his heirs, during the life of A, to support contingent remainders, remainder to the first, &c. son of A. A has two sons, C and D. A, the father, having mortgaged the premises, he and his son C covenant to suffer a recovery, and to procure B, the trustee, to join. B, the trustee, by answer, submits to the court; the court will not compel the trustee to join, unless D, the second son of the marriage, will consent. *Townsend v. Lawton*, 2 P. W. 379. Sel. Ca. Ch. 71. MARRIAGE SETTLE.

In a marriage settlement, husband made tenant for ninety-nine years, if he so long lived, remainder to trustees during the life of the husband, &c. remainder to the first, &c. son by the marriage in tail male; remainder to the first, &c. son of any other wife; remainder over. A son is born, and of age, the wife dead, and there are no other sons by the second marriage: the trust for preserving contingent remainders descends to an infant; if for the benefit of the family, equity will decree the infant trustee to join in a recovery. *Wilmington v. Foley*, 1 P. W. 536. SETTL. C. OF; INFANT TRUSTEE.

Trustee to preserve contingent remainders in a voluntary settlement, decreed to join in a sale for payment of debts. *Bassett v. Clapham*, 1 P. W. 358.

Trustees in a will to support contingent remainders, joining with tenant for life in destroying them, are guilty of breach of trust, and purchaser, with notice of trust, is liable to make good the estate. *Gorges v. Pye*, 7 Bro. P. C. 221. S. C. Prec. Chan. 308. 1 P. W. 128. NOTICE; BREACH OF TRUST.

Trustees in a marriage settlement, for preserving

contingent remainders, (there being no issue), are decreed to join in a sale, the settlement being only of an equity of redemption, and the wife consenting to the sale. *Platt v. Sprig*, 2 Vern. 303.

Whether a trustee for preserving contingent remainders shall be decreed to join in a sale, to pay debts,

when there is no probability of issue. *Davies v. Weld*, 1 Vern. 181. SALE, JOINING IN.

## TURPIS CONTRACTUS.

See CONSIDERATION, III. 3.

## UNCLAIMED DIVIDENDS.

See BANKCY. XV. 3.—RECONVEYANCE, &c.

## UNDERLEASES.

See LANDLORD & TEN., V.

## UNDERWOOD.

See TIMBER.

## UNDUE INFLUENCE.

See AGREEMENT, VII.

## UNIFORMITY.

See STAT. C. OF, II. 43.

## USES AND TRUSTS.

See TRUSTS, XV.

## USURY.

See also LEASE, I. 2.—STAT. C. OF, II. 44.

Suits on contracts founded on usury to be dismissed. *Beame's Ord.* 10.

A revolted colony of Spain not recognized as an independent state by Great Britain, executed bonds at six per cent. interest as securities for a loan. P, acting in collusion with B, a holder of the bonds in England, by falsely representing that he had purchased some of them, induced the plaintiff to become a purchaser: Held on demurrer that the bonds were not usurious, as it did not appear by the bill that the contract for the loan was made or the amount of it to be paid in this country; that P and B would have been answerable to the plaintiff for losses sustained upon his purchase, but that as the original contract was made with a government not acknowledged by Great Britain, the court could not relieve him. *Thompson v. Powles*, 2 Sim. 195. VEND. & PURCH.; PUBLIC POLICY.

A testator directed that one of his residuary legatees should be answerable for all debts due to him from the father of the legatee. A debt, though usurious, must be deducted from the legatee's share. *Stanton v. Knight*, 1 Sim. 482. WILL, C. OF.

Deed by which A, B and C, partners in trade, in consideration of 4000*l.* paid to them by D, in augmentation of their capital, agree to admit him into

partnership with them for a term: it was agreed that A should receive in lieu of profits a clear sum of 550*l.* per annum, and all the property of the concern was charged with the payment of this sum quarterly, and of the 4000*l.* at the determination of the partnership. A, B and C, were to pay rent, taxes, wages, and the other outgoings out of the trade which was to be carried on by them and in their names only, and D was not to be required to attend to it, D was at liberty to retire on giving twelve months' notice, and on his retiring or at the end of the term the 4000*l.* and the arrears (if any) of the 550*l.* per annum were to be paid to him by A, B, and C, by instalments, to be secured by their bonds, and they were to indemnify him from the debts of the partnership: Held that this deed was not usurious. *Ferreday v. Horden*, 1 Jac. 144. DEED, C. OF; PARTNERSHIP.

Bill to stay proceedings at law and discover usury charging an agreement to take, but not the taking usurious interest, and not offering to pay the amount and which he by bill admitted legally due, is demurrable. *Whitmore v. Francis*, 8 Price, 616. PL. BILL.

Mortgagor gives second mortgage for what is due for principal and interest on first mortgage, and also for interest upon interest due on the first mortgage; *quære*, if second mortgage void as founded on usury? *Sackett v. Russell*, 4 Mad. 58. MORTGAGE; INTEREST, COMPOUND.

Bill praying re-assignment of lease, and stating a clause in assignment of power of redemption on paying a sum larger than the legal interest, added to original sum given, and in default thereof a foreclosure is not demurrable on ground of usury. *Metcalf v. Brown*, 5 Price, 260. PL. BILL.

Fee-farm grants or lease of mortgaged premises from mortgagor to mortgagee at a fixed annual rent, is among that description of transaction at which courts of equity look with great jealousy. *Hickes v. Cooke*, 4 Dow, 24.

C being indebted to G in 1000*l.* agreed to transfer within a given time 100*l.* per annum, long annuities, at the then price, and in meantime pay G the dividends, and that debt of 1000*l.* should constitute part of the purchase-money. The stock was not purchased at the time, and there was a rise in the price of stocks. The agreement held not usurious or within the stock jobbing acts. *Clark v. Giraud*, 1 Mad. 511. STOCK JOBBER ACTS.

If usurious interest is not contracted for, the security is not invalidated by subsequently taking usurious interest. *Exp. Jennings*, 1 Mad. 331.

Charge by bill broker in the country of 10*s.* per cent. commission in respect of bill payable in London not usurious. *Exp. Henson*, 1 Mad. 114.

Bonds though they necessarily carry interest, given for instalments made up of principal and interest, being the consideration of a purchase or assignment of real and personal estate, are not usurious. *Tarleton v. Backhouse*, Coop. 231.

Debt affected with usury cannot be proved. *Exp. Bangley*, 1 Rose, 168. BANKCY. PROOF.

Contract for repayment of a debt with legal inter-

est, or at the option of the creditor, to transfer so much stock as it would have produced on the day it was payable, void as usurious: the principal and interest being secured, with the chance of a rise of the stock: not therefore like a contract to replace stock absolutely which might fall. *Barnard v. Young*, 17 Ves. 44. **CONTRACT.**

A reasonable commission beyond legal interest for extra incidental charges, as upon agency in the remittance of bills, not usurious. *Baynes v. Fry*, 15 Ves. 120. **COMMISSION, CHARGE OF; PRIN. & AGENT.**

A lease for 999 years made by mortgagor to mortgagee, set aside; the policy of the law upon which the statutes of usury are founded, not permitting such a transaction between persons standing in the relation of the mortgagor and mortgagee. And this, semble, although the lease was made at a fair value. *Webb v. Rorke*, 2 Scho. & L. 661. **MORTGOR. & MORTGEE; LEASE.**

A, seized of the reversion in fee of premises, which were let to E for a term of years at 15l. 8s. yearly rent, agrees *bona fide* to sell to B the rent reserved by that lease for the residuum of the term, for a sum the principal and interest of which was to be reimbursed to B in that time, by the perception of the rent, supposing it punctually paid, and at the same time A being induced by the accommodation offered him by B in purchasing the rent, makes a lease for lives renewable for ever to B of the same premises, and at the same rent which E paid, but not to commence or be payable until the expiration of E's lease, at which time the premises would be worth 20l. or 22l. per annum. This not impeachable, as a lease coupled with a loan; for the first transaction being a fair purchase of the rent, and the second, though induced by the first, yet not distinguishable from a lease made upon payment of a fine. *Lukey v. O'Donnell*, 2 Scho. & L. 466. **LEASE; LOAN.**

Rent may be reduced beyond legal interest by way of fine, yet the transaction not impeachable if not attended by fraud. *Id.* 470. **LEASE.**

In order to constitute a loan, it is essential that the money, with interest, is at all events to be secured to the lender. *Id. ib.*

W lends to B 200l. on the bond of B and W, bearing interest at five per cent., and at the same time purchases from B the rent charges for lives of 50l. per annum for 300l. with a covenant that B should be at liberty to re-purchase the rent charge on giving three months notice, and paying 350l. and all arrears of interest; W and B execute their joint and several bonds to W in the penal sum of 700l. conditional for the payment of 350l. and for the regular payment of the rent charge: held, to be a security for the loan of 200l. and 300l. on the ground, that W was at all events secured by a bond for 700l.; but neither the right of repurchase nor the additional sum of 50l. to be paid thereupon, would have been sufficient to turn the transaction into a loan. *Verner v. Winslanley*, 2 Scho. & L. 393. **ANNUITY, WHERE GOOD.**

A contract between mortgagor and mortgagee for a lease to be granted by the former, in consideration of forbearance, is usurious. *Gulbins v. Creed*, 2 Scho. & L. 218. **MORTGAGOR AND MORTGAGEE; LEASE.**

A lease granted at the same time with a loan of money by lessee to lessor, set aside, although the proposal for connecting the loan with the lease moved from the lessor. But an under-lessee *bona fide*, and not concerned in the transaction of the loan, not disturbed. *Molloy v. Irvine*, 1 Scho. & L. 310. **LESSOR & LESSEE; LEASE CONNECTED WITH LOAN.**

Distinction between jurisdictions in equity and in bankruptcy in setting aside securities, affected by usury. In bankruptcy the party is not, as in the

other case, left a creditor for what was actually advanced. *Benfield v. Solomons*, 9 Ves. 84.

A beneficial lease granted at the same time with a loan of money by lessee to lessor, held fraudulent and void, as affording to the lender a profit on the money lent beyond legal interest. *Broune v. Odeu*, 1 Scho. & L. 115. **LESSOR AND LESSEE; LEASE CONNECTED WITH LOAN.**

A beneficial lease obtained under the influence of loans of money, made, or expected to be made by the lessee to the lessor, is a fraudulent evasion of the statutes of usury, and an undue advantage taken of the lessor, and therefore void. *Drew v. Power*, 1 Scho. & L. 182. **LESSOR & LESSEE; LEASE CONNECTED WITH LOAN.**

Under an agreement to take off a discount above five per cent. for prompt payment, though according to the custom of the trade, the creditor cannot, upon failure, charge more than five per cent. *Exp. Aynsworth*, 4 Ves. 678. **INTEREST.**

A custom in Liverpool for the banker to strike a balance every quarter, and send the account to the merchant, and then to make that balance carry interest for the next quarter, is not usury. *Cabot v. Walker* 2 Anst. 495.

Where statute of limitations had run against recovery of penalty for usury, the usurer cannot protect himself from discovery, by demurrer founded on liability of subjecting himself to forfeiture. *Talbot v. Smith*, 1 Ridgw. L. & S. 360. **DISCOVERY; DEMURRER; STAT. OF LIMITATION.**

Agreement by A to purchase houses from B for 431l. 10s.; possession to be given, and 200l. paid immediately, the rest with interest at Michælmass; but if not then paid, A to pay, in lieu of interest upon the same, a clear rent of 42l. per annum, out of which was to be deducted interest for the 200l. paid, not usurious. *Spurrier v. Mynors*, 1 Ves. J. 527. 4 Bro. C. C. 28. Usury is taking more than the law allows upon a loan or for forbearance of a debt. *Id.* 531. To make a contract usurious, intention of forbearance for exorbitant interest must appear. *Id.* 533.

Demurrer to a cross-bill to have an usurious security delivered up, not offering to pay the sum really due, allowed. *Mason v. Gardiner*, 4 Bro. C. C. 436. **PL. BILL; PL. DEMURRER.**

If it be necessary to have the assistance of a court of equity to set aside an usurious contract, it must be on the terms of paying what is fairly due, with legal interest. *Scott v. Nesbitt*, 2 Cox, 163. S. C. 2 Bro. C. C. 641. **MAXIM.**

One agrees to lend 1000l. at 5l. per cent., and for that purpose sells 1000l. S. S. annuities, which being under par, did not produce 1000l.; he advances the money so produced, and takes mortgage for 1000l.: Held a shift within the statute of usury; and the difference between the price at which the stock was sold ordered to be repaid, on a bill brought after a decree for foreclosure, and the whole money allowed in the account taken under that decree. *Moore v. Buttie*, Amb. 371.

The court does not relieve against an usurious contract, so as to make the principal lost, as well as interest. *Pitt v. Cholmondeley*, 2 Ves. 567.

But assignees of a bankrupt are not compellable to pay what is really due on a transaction attended with usury: under the general jurisdiction in bankruptcy, it is otherwise where they apply to a court of equity by a bill to be relieved. *Exp. Ship*, 2 Ves. 489. **BANKCY. PROOF.**

Bottomry not within the statute of usury, because a real risk is run. *El. Chesterfield v. Janssen*, 2 Ves. 143. And see this case more generally as to Usury, S. C. 1 Atk. 350. **BOTTOMRY BOND.**

If there be a loan of money with more than legal interest, and a casualty goes to the interest only, it



is usury; secus, if it goes to the principal and interest. S. C. 1 Atk. 350.

Bottomry bonds may be so constructed as to be an evasion of the statute against usury, as well as any other contract. *Id.* 341. **BOTTOMRY.**

If a bargain was really for an annuity, though bought at ever so low a price, it is no usury; if on the foot of borrowing and lending money, otherwise. *Id.* 340. **ANNUITY.**

Where there is a borrowing of money, a device to have more than the legal rate of interest, is within the statutes of usury. *Id.* **ib.**

S, a man, of intemperate habits, aged 30, in order to pay tradesmen's bills, and other debts, for 5000*l.* in hand, bound himself in the penalty of 20,000*l.* to pay 10,000*l.* upon the death of M, a lady, aged 78, if he survived her. M died, aged 84, and S survived her two years; at M's death a new bond was entered into, with the same penalty for the payment of 10,000*l.* and interest; and S executed a warrant of attorney to empower judgment to be recorded against him in K. B., which was done accordingly; 2000*l.* were paid by S in about five months from the death of M. Before his death, S devised the residue of his personal estate, after paying debts, &c. to his son, a minor. The plaintiffs, his guardians and executors in trust, brought a bill to be relieved against defendant's demands, as an unconscionable bargain and usurious contract. The court relieved plaintiffs against the penalty and judgment, by directing defendant to deliver up the second bond to be cancelled, and to acknowledge satisfaction on the judgment upon being paid by plaintiffs what should be due at law; but would not give him costs, as there was *probabilis causa litigandi*, and defendant's case far from favorable. *Id.* 301. **FRAUD, CATCHING BARGAIN.**

As to averments necessary to support a plea of usury. *Wortley v. Pitt*, 1 Ves. 164. **PL. PLEA, AVERMENT.**

Plea, 2000*l.* lent on condition to pay in a year 200*l.* and the principal, or 250*l.* per annum during borrower's life, not an usurious contract. *Id.* **ib.**

No part of a demand arising upon a usurious contract is provable. *Exp. Thompson*, 1 Atk. 125. See however, 58 C. 3. c. 93. **BANKCY., PROOF IN.**

A sells goods to B in the course of trade, and afterwards takes an usurious bond. B becomes bankrupt: *quare*, whether the bond extinguishes the precedent book debts, or whether A can prove either of them under the commission? *Exp. Dany*, Ridgw. 289. **BANKCY., PROOF UNDER; BOND; DEBT, EXTINGUISHMENT OF.**

On a bill to set aside a usurious contract, defendant may demur to a discovery of what interest he agreed to take, for he cannot set forth that without discovering the very interest he has taken. *Chancery v. Tahourden*, 2 Atk. 393. **PL. DISCOVERY; PL. DEMURRER.**

This court will decree money, overpaid in pursuance of an usurious contract, to be accounted for, notwithstanding the agreement of the oppressed party to allow such payments. *Bosanquet v. Dashwood*, Forbes. 38. **PARTICEPS CRIMINIS; ACCOUNT.**

In the case of money lost at gaming, and paid, possibly this court will refuse relief; the plaintiff in equity being *particeps criminis*, *id.* **ib.**

Bill not suggesting wilful usury, but that defendant had miscomputed interest received by him, and praying discovery as to the fact. Plea thereto overruled. *Anon.* 2 Eq. Ab. 70. S. P. *Bosanquet v. Dashwood*, Forbes, 38. S. C. *id.* 534. **PL. DISCOVERY; PL. DISCOVERY TENDING TO CRIMINATE.**

## VENDOR AND PURCHASER.

See also AGREEMENT.—INTEREST, PECUNIARY, I. 3. —PL. PARTIES, 23.—PR. PAYMENT INTO COURT, 6.—PR. RECEIVER, 2. (J).—PR. SALES JUDICIAL.

### I. GENERALLY, AND PAYMENT OF PURCHASE MONEY.

#### II. ENFORCING CONTRACT. See also subd. IV.

#### III. THE CONSEQUENCES OF DELAY, AND INTEREST ON PURCHASE MONEY; AND INVESTMENT.

#### IV. OF THE TITLE.

#### V. WHERE PURCHASER MAY OR MUST TAKE, WITH COMPENSATION OR INDEMNITY.

#### VI. ALLOWANCE TO PURCHASER AS AN ABATEMENT OF PRICE.

#### VII. DELIVERY OF POSSESSION, AND THE EFFECT THEREOF.

#### VIII. THE CONVEYANCE, AND THE COSTS THEREOF.

#### IX. PURCHASER'S COVENANTS.

#### X. DISCHARGE OF THE CONTRACT, AND REFUNDING PURCHASE MONEY.

#### XI. BONA FIDE PURCHASER, HOW FAVOURED OR BOUND.

#### XII. LIEN CONCERNING.

#### XIII. OF NOTICE, AND ITS EFFECT.

#### XIV. APPLICATION OF PURCHASE MONEY.

### I. GENERALLY, AND PAYMENT OF PURCHASE MONEY.

Vendor of any estates in lands may compel assignees to elect whether they will abide by or decline the

agreement. 6 Geo. 4. c. 16. s. 76. **BANKCY. ELECTION.**

Where conveyance is executed to purchaser, which expresses purchase money to have been paid, estate does not pass by the conveyance in equity till money actually paid, although receipt for same is indorsed on conveyance. *Winter v. Id. Anson*, 1 Sim. 444. **CONVEYANCE; RECEIPT.**

An injunction may be obtained, on motion, to restrain purchaser under decree not party to cause, who has not paid his purchase money, from committing waste on property purchased. *Casamajor v. Strode*, 1 S. & S. 381. **INJUNE.**

The purchaser of a life interest in stock sold before a master, is entitled to a dividend becoming due on the day following the sale. *Anson v. Turgood*, 1 Jac. & W. 637. **DIVIDENDS OF STOCK; INTERMEDIATE PROFITS.**

Order directing timber to be sold before master, and purchase money to be paid by instalments. Purchaser desirous of paying purchase money immediately, on allowance of discount, the same ordered, on defendants consenting. *Sitwell v. Sitwell*, 4 Mad. 183. **PR. SALES JUDICIAL.**

Purchaser before conveyance is the owner in equity for almost every purpose as to profit and loss, but, before payment, may be restrained from cutting timber: as between his representatives, it is real estate. *Rawlins v. Burges*, 2 V. & B. 387.

In sales under a decree, it is irregular to pay the purchase money to the party; it ought to be paid into court. *Bennett v. Harrih*, 2 Scho. & L. 581. **SALES JUDICIAL.**

From the execution of the contract, the estate is in equity the property of the vendee, descendible and devisable as such. *Seton v. Slade*, 7 Ves. 274.

Upon the purchase of an equity of redemption, the agreement of the purchaser with the vendor to pay the mortgage without any communication with the mortgagee, is not sufficient to make it the personal debt of the purchaser. *Butler v. Butler*, 5 Ves. 534. **PRIVITY OF CONTRACT; MORTGAGE.**

Bill for specific performance against vendor, the vendee being in possession, and an account being necessary of the vendor's personal estate, referred to the master to fix a short day for the payment of the purchase money; otherwise the bill to be dismissed, as against those defendants, with costs. *Louthier v. Andover*, 1 Bro. C. C. 396. **PR. REFERENCE TO MASTER; PR. PAYMT. OF MONEY.**

## II. ENFORCING CONTRACT.

*See also post, subtit. IV.*

A being, as a partner, entitled to a share of extensive iron-works, and of the lands and premises on which they were carried on, agreed for valuable consideration to assign to B his interest in the property and business. B interfered and acted as a partner, but afterwards he assigned his share, and gave notice to the other partners what he had withdrawn from the business, and when called on to complete his purchase, resisted the performance of the contract successfully, on the ground that a good title could not be shewn. Held, that B, as between him and his other partners, was to be treated as a partner, and was to contribute to the partnership losses, until the time when he gave notice of his withdrawal from the concern and assigned his share. That his liability ceased upon his assigning his share and giving notice to the other partners of his withdrawal from the concern. That the assignment of his share, though made to an insolvent person, was not for that reason the less effectual in putting an end to his liability. That the assignee not having been acknowledged a partner or permitted to act as such, did not by his acceptance of the assignment, incur any liability as between himself and the co-partners. *Jefferies v. Smith*, 3 Russ. 158. **PARTNERSHIP.**

Where damages in action for breach of contract to sell chattel would be insufficient for purchaser, though sufficient for vendor, specific performance decreed, as remedy must be mutual. *Willy v. Cottle*, 1 S. & S. 174. S. C. 1 T. & R. 78. **SPECIFIC PERFORMANCE; DAMAGES.**

Purchaser of bankrupt's mortgaged estate sold before the commissioners under the general order, upon petition in the bankruptcy, ordered to complete his purchase. *Exp. Gould*, 1 G. & J. 231. **BANKCY.; SALES JUDICIAL.**

Where there is a contract to sell at a valuation by A, B and C, the court will compel vendor to permit the valuation. *Morse v. Merest*, 6 Mad. 26. **CONTRACT; VALUATION.**

An agent employed to sell an estate, secretly buys it himself in the name of a trustee, whom he represents to his employers to be the real purchaser. He cannot call for an execution of the trust until the transaction is confirmed by the vendor. *Woodhouse v. Meredith*, 1 Jac. & W. 204. **PRINC. & AGENT; FRAUD, FID. SER.**

Bill by a vendee for specific performance, insisting that the vendors could not make a good title, dismissed with costs. *Nicolson v. Woodsward*, 2 Swau. 365. **SPEC. PERF.**

Specific performance decreed with costs, in a case where the defendant, objecting to title, had been served with notice of a prior decision in a different cause in favour of the same title against a similar objection.

*Biscoe v. Wilks*, 3 Mer. 456. **SPEC. PERF.; TITLE; COSTS.**

Bill for specific performance of an agreement to purchase, against the original vendee and an assignee of his contract, dismissed, as against the former, the plaintiff being held, by delivery of abstract and offer to execute a conveyance, to have accepted the latter as purchaser. *Qu.* if the bill had been filed against the original purchaser only? *Holday v. Hayn*, 1 Mer. 47. **SPEC. PERF.; ASSIGNMENT.**

M being in embarrassed circumstances, in consideration of loan of 900*l.* makes lease to D, with covenant for perpetual renewal of lands of yearly value of 450*l.* at rent of 150*l.*, subject to private parol agreement, that M might redeem within two years, on payment of 1300*l.* S, knowing the circumstance, with consent of M, purchases from D his interest, to whom S pays the 1300*l.* S afterwards purchases the whole interest of this and other land of M, for additional sum of 3706*l.*, the clear profit rent at which the lands let the year following being 600*l.* a year, and other advantages. Held binding on M. *Meredith v. Saunders*, 2 Dow, 515. **INADEQUACY OF CONSIDERATION.**

Specific performance refused from ambiguity of contract. Purchaser having insisted on one construction of contract, not permitted to compel vendor to convey upon the terms that vendor originally offered. *Clowes v. Higginson*, 1 V. & B. 524. **SPEC. PERF.; AMBIGUITY.**

Specific performance against a purchaser under a power of sale in a mortgage deed, without the mortgagor, though under a covenant to the mortgagee to join in a sale, without costs; the only authority produced not being in print. *Corder v. Morgan*, 18 Ves 344. **SPEC. PERF.; MORTGOR. & MORTGEE.**

An act of bankruptcy and a docket struck, though no commission issued, a sufficient objection to a bill for specific performance of a previous contract for the sale of an estate to the plaintiff, in a case even where part of the money had been paid, and sub-contract for sale of part entered into by the plaintiff; and the defendants had agreed to convey accordingly. *Franklyn v. Ed. Boulton*, 14 Ves. 550. **SPEC. PERF.; BANKCY. ACTOR.**

Vendor, upon objection to the title, sold to another, after notice that she would do so if the title was refused. Under a bill for a specific performance, or an issue or reference to ascertain the loss of the first purchaser, a reference was directed upon the authority of *Denton v. Stuart*. As to the principle; *Qu?* *Greenaway v. Adam*, 12 Ves. 395. **DAMAGES; SPEC. PERF.**

Objections by a purchaser by auction; first, that a way round and across a meadow was not specified; secondly, on account of a bidding for the plaintiff; a specific performance was decreed with costs. *Bowles v. Round*, 5 Ves. 508. **SPEC. PERF.**

Where sale before master is directed to take place by decree, a contract for private sale by trustee will not be enforced. *Raymond v. Webb*, Loft. 66. **PR. DECREE FOR SALE; TRUSTEE; SPEC. PERF.**

Attorney, as agent, on sale of an estate, not disclosing to the buyer an incumbrance, and leading him to suppose the title good, held liable to make satisfaction in default of the vendor. *Anot v. Biscoe*, 1 Ves. 95. **FRAUD; PRIN. & AGENT.**

Where father is possessed of an advowson, which he apparently intended for his son, is prevailed on, when in an infirm state, to enter into articles for sale of it, specific performance refused, though no fraud imputed to purchaser. *Bell v. Howard*, 9 Mod. 302. **FRAUD.**

A specific performance of an agreement by a purchaser of an estate was decreed in equity, where he agreed with the vendor to buy if a good title could be made, and he afterwards brought up the claim of a

stranger in his way. *Masters v. Cook*, Colles, P. C. 433. **SPEC. PERF.**

### III. THE CONSEQUENCES OF DELAY, & INTEREST ON PURCHASE MONEY; & INVESTMENT.

By an agreement entered into with executors for the purchase of a leasehold public house, and the good will and licences connected with it, the household furniture, stock in trade, and other effects upon the premises, were to be taken by the purchaser at a valuation, and possession was to be delivered up to him on the 29th Sept. 1821. The valuation was made, but on the 29th of Sept. the purchaser, alleging that there was a defect in the title to the leasehold, refused to perform his contract: the executors filed a bill for specific performance, but in the mean time remained in possession of the house and carried on the business. Held, that though the executors were entitled to a decree for specific performance, and though the purchaser had done wrong in refusing to perform the contract, he could not be made answerable for the trade which had been carried on in the premises since Sept. 1821. That he could not be compelled to take that portion of the stock in trade, on the premises at the time of the decree, which was not there at the date of the agreement; but had been substituted for such parts of the old stock as had been consumed in the usual course of the business: that the purchaser ought to be charged with rent and taxes, and other outgoings paid by the executors since Sept. 1821, and with interest on the same so paid by them. That the purchaser was not entitled to any occupation, rent, or other allowance, for the use of the house and furniture by the executors, during the period that elapsed after the 29th of Sept. 1821. *Dakin v. Cope*, 2 Russ. 170. **SPEC. PERF.; ACCOUNT; INTERMEDIATE PROFITS.**

By conditions of sale, the purchase money was to carry interest, a deposit of 20l. per cent. was to be paid, and the auction duty was to be borne equally by the purchaser and the vendor; the purchaser paid only the amount of the deposit, and out of it the auctioneer paid the whole of the auction duty: held, that the portion of the deposit applied in discharge of the purchaser's moiety of the auction duty was to be considered as an unpaid part of the purchase money, and that the vendor was entitled to interest on it. *Townshend v. Townshend*, 2 Russ. 303. **INTEREST ON PURCHASE MONEY.**

Purchaser paying purchase money into his banker's, where it remained four years with notice to vendor; held, not liable for interest on difference between his average balance in banker's hands during a few days, when less than the purchase money was therein, and during the three preceding years. *Winter v. Blades*, 2 S. & S. 393. **INTEREST.**

Specific performance of agreement to grant lease, refused, plaintiff having delayed to file his bill for more than two years since notice from defendant that he would not perform contract on account of plaintiff's non-fulfilment of his part thereof. *Heapy v. Hill*, 2 S. & S. 29. **SPEC. PERF.; LACHES.**

Where payments have been made by vendor at different times on account of purchase, all exceeding the interest due at the times of such payments, and the decree in suit by vendor for specific performance, directs accounts to be taken of what is due to plaintiff for principal and interest in respect of purchase, rests are always made therein. *Griffith v. Heaton*, 1 S. & S. 271. **ACCOUNT; RESTS.**

Where conditions of sale provide, that interest shall be paid from a certain day if purchase not then completed, purchaser cannot relieve himself therefrom, though vendor caused delay; otherwise, if no stipula-

tion. *Esdaile v. Stephenson*, 1 S. & S. 122. **INTEREST; LACHES.**

Where no stipulation as to interest and purchaser completes his part, he pays four per cent. interest and takes rents and profits; but where rents and profits do not value at four per cent, he pays no interest, and vendor takes rents and profits. *Id. ib.* **INTEREST; LACHES; RENTS & PROFITS.**

Where vendor has improperly delayed performance of contract and refused to give possession, he is not entitled to benefit of general rule as to interest on purchase money. *Paton v. Rogers*, 6 Mad. 257. **LACHES; INTEREST.**

The time of valuation, is of the essence of the contract; but the defendant cannot take advantage of it, if he has improperly occasioned the delay. *Morse v. Merest*, 6 Mad. 26. **TIME; CONTRACT; LACHES.**

Purchaser charged with five per cent. interest on the purchase money unpaid. *Burnell v. Brown*, 1 Jac. & W. 168. **INTEREST.**

The title appearing on the abstract not being satisfactory, and the purchaser for that reason not having taken possession, the vendor to account for the rents received, or which without his wilful default might have been received. *Wilson v. Clapham*, 1 Jac. & W. 36. **RENTS & PROFITS.**

Completion of contract being delayed for three years by difficulties in title, vendor is accountable for deterioration of the land during that period. *Poster v. Deacon*, 3 Mad. 394. **LACHES.**

On a bill by a purchaser for specific performance on a contract for the sale of an estate, a vendor, who, during fifteen years, had retained possession of the whole estate, and of one-third of the purchase money, was, under the circumstances, charged with interest of one-third of the rents and profits. *Barton v. Todd*, 1 Swan. 255. **INTEREST.**

Vendor being in possession for upwards of fifty years, and purchaser having done acts inconsistent with notion of his being the owner, specific performance of agreement to sell, refused, as amounting to waiver. *El. Rose v. Sterling*, 4 Dow, 442. **SPEC. PERF.; WAIVER.**

Deterioration arising from the agreement between intended purchaser and tenant of vendor being misunderstood by tenant, purchaser held liable to the loss. *Harford v. Purrier*, 1 Mad. 532.

When purchase money is agreed to be paid, and a conveyance made at a given time, and disputes arise as to title, and the purchaser proposes to vendor to lay out the purchase money in exchequer bills till wanted, but vendor returns no answer, and money is so laid out, the purchaser is at the risk, and the vendor is entitled to the money with four per cent. interest. (See 13 Ves. 563, n. 27. 2nd edit.) When the purchase is completed, the purchaser is entitled to the rents and profits till possession given, and vendor to purchase money with interest; and if by neglect of vendor no rents, &c. have been received, he will be liable for what he might have received, while purchaser was out of possession. *Ackland v. Cuming*, 2 Mad. 28.

Party having contracted with person since deceased, for purchase of advowson, but had taken no steps during life of vendor to enforce contract, and for a considerable time after his death (objecting to title on ground of outstanding judgments and a creditor's bill pending): held, not entitled as against devisee to present, if a vacancy occur in meantime, though he insists on having contract completed; and if, in consequence of his insisting on such right, bill to ascertain it become necessary, a decree in favour of plaintiff will carry costs as far as his claim came in question, although it be part of decree, that, subject to next presentation, he be permitted to complete his

contract. *Wyvill v. Bp. Exeter*, 1 Price, 292. PRESENTATION TO BENEFICE; PR. COSTS.

Time is of the essence of the contract; waived by a protracted treaty. *Wood v. Bernal*, 19 Ves. 220. TIME; WAIVER.

Vendor and purchaser having proceeded in treaty beyond the time limited for completion of contract, and the vendor having brought an action and withdrawn, his record, on finding he could not support it, not having got in a judgment amounting to half the purchase money, and the purchaser having brought an action for his deposit, and obtained a verdict; an injunction to restrain his proceeding was refused. *Id. ib.* INJUNC. TO STAY PROCEEDINGS AT LAW.

Purchaser not to pay interest on the deposit, even where he has rendered a suit necessary by refusing to perform the contract on the ground of an objection to the title which could not be supported. *Bridges v. Robinson*, 3 Mer. 694. INTEREST ON P. MONEY.

Vendor, resisting an application by the purchaser for payment into court of the deposit, in the hands of the vendor's agent, charged with a loss by the agent's failure. *Fendon v. Browne*, 14 Ves. 144. INVESTMENT.

Specific performance prayed both by original and cross bill, after considerable delay upon the title; the rents to be received and interest paid, from the time stipulated. *Id. ib.*

Effect of a deposit by vendee with notice to vendor to stop or determine the rate of interest, not as a tender and appropriation, transferring the risk as to the principal: therefore, upon an investment in stock by the vendee, the title not being ready, and the vendor having notice; but returning no answer, the advantage by a rise, as the loss by a fall, is the vendee's. *Roberts v. Mussey*, 13 Ves. 561. INVESTMENT.

To excuse a purchaser from paying interest during the delay in clearing difficulties as to the title, it is not sufficient that the money was appropriated and unproductive; but the vendor must have notice thereof. *Pocell v. Martur*, 8 Ves. 146. INTEREST.

A vendor cannot come at any distance of time for a performance; but a bill filed fourteen months after the correspondence upon the objection to the title ceased, by the defendants returning no answer to the last letter calling for a distinct answer, and threatening a bill, and the auctioneer not having been called on to return the deposit, it was referred to the master. *Marq. Hertford v. Bower*, 5 Ves. 719. SPEC. PERF.; LENGTH OF TIME.

Specific performance refused on account of the laches of the plaintiff, the vendor. *Guest v. Homfray*, 5 Ves. 818. SPEC. PERF.; LACHES.

Contract for sale of houses, which, from defects in title, could not be completed on the day fixed: the treaty was proceeded in on proposal to waive objections on certain terms: the houses being burnt before conveyance, the purchaser is bound, if he accepted title, and circumstances of vendor suffering insurance to expire on the day on which the contract ought originally to have been completed without notice, makes no difference: a reference, was, therefore, directed to master to inquire whether the proposal was accepted or acquiesced in on behalf of the purchaser. *Paine v. Meller*, 6 Ves. 347. CONTRACT; INTERMEDIATE LOSS.

A purchaser of a future interest, after a term, shall not pay interest, or an increased price for a part of the term clapsing before the purchase is completed, unless the delay be his fault. *Crowsock v. Smith*, 3 Anst. 877. INTEREST.

Injunction granted to stay action against the auctioneer for the deposit, although the estate sold, was represented as freehold with leasehold adjoining, and turned out to be almost all leasehold, and although there had been great delay in making out the plaintiff's

title: *Fordyce v. Ford*, 4 Bro. C. C. 494. INJUNCTION TO STAY PROCEEDINGS AT LAW; MISREPRESENTATION.

If the purchaser demand his deposit at the day for completing the contract, and the vendor has not delivered his abstract before that time, and also neglects to deliver it until after an action brought for the deposit, it is evidence of an abandonment of the contract by the vendor, who shall not be entitled afterwards to a specific performance. *Lloyd v. Collett*, 4 Bro. C. C. 469. LACHES; ABANDONMENT OF CONTRACT.

Motion for an injunction to restrain an action against the auctioneer for the deposit, refused where there had been great delay on the part of the vendor, *Id.* INJUNC. TO STAY PROCEEDINGS AT LAW.

Purchaser is entitled to interest on his deposit, and to costs at law and in equity, until the vendor has made his title good; but vendor is entitled to subsequent costs and may enforce the contract, if his title be good when the report is made. The rents belong to the vendor till his title is made good, and afterwards the purchaser must take to the rents and pay interest on his purchase money till the principal is discharged. *Pincke v. Curteis*, 4 Bro. C. C. 329, S. P. 333, in note. INTERMEDIATE PROFITS.

Upon sale of a reversion, part of the terms was that the money be paid by a certain time; not being so by default of the vendee, vendor discharged from his contract. *Newman v. Rogers*, 4 Bro. C. C. 391. SPEC. PERF.; REVERSIONARY INTEREST.

A manor was sold under the decree of the court, as part of the real estate of the testator, and an order was made on the 13th March, that the purchaser should, on or before the 17th May, pay his purchase money into court, and be let into possession of the profits from Lady-day, several deaths and admissions had taken place prior to Lady-day, but the fines due thereon had not been paid or assessed until after that time, no court having been holden; these fines belong to the vendors and not to purchaser. *Garrick v. El. Camden*, 2 Cox, 231. INTERMEDIATE PROFITS.

Money paid in as earnest at a sale of an estate, and ordered to be laid out in the funds, is part-payment of the purchase-money, and the vendor must abide by the rise or fall of the funds. *Poole v. Rhudde*, 3 Bro. C. C. 49. INVESTMENT OF PURCHASE MONEY.

Interest against a purchaser for delaying payment; court will not make purchaser appoint a clerk in court which is only necessary where the party is to appear. *Child v. Id. Abingdon*, 1 Ves. J. 94. INTEREST.

The advantage a purchaser receives from the extinction of lives, has never been considered in equity as a reason for his paying interest on his purchase-money. It is not a general rule that a purchaser of estates, under a private agreement, or a decree for a sale, shall from the time of possession, pay interest. The court, in awarding interest, never regards the purchase, but the time of executing the conveyances; and even then the purchaser shall pay interest only from the time the possession is delivered. Where lives drop in after a man is reported the best bidder, the court will direct the purchaser to make some compensation in respect to the estates being bettered. *Blount v. Blount*, 3 Atk. 636. 638. INTEREST.

If a purchaser by private contract, does not pay the purchase-money at a time fixed, he will be chargeable with interest, as he must bear any loss; so likewise will he be entitled to any profits that may arise from the estate. *Dary v. Barber*, 2 Atk. 490. Vide *White v. Nutt*, 1 P. W. 61. INTEREST.

Where a purchaser has an interest by the dropping in of lives, the court will direct an inquiry what interest should be paid by him on that account. *S. C. Id.*

A reversion expectant on an estate for life, is de-

creed to be sold; B is confirmed the best purchaser, and the order made absolute 1st January, 1724; in January 1726; B is ordered to bring his money into the bank; the life drops; if the life had dropped the next day after the report of B's being the best purchaser made absolute, the purchase must have stood, and as for that time the life was wearing, so from that time the purchaser ought to pay interest. *Erp. Manning*, 2 P. W. 410. SALES JUDICIAL.

A contracts for the purchase of an estate, and is let into possession; the estate being greatly incumbered, A pays off some of the incumbrances; great delay is used on part of vendor in clearing other incumbrances and making a good title. Held not sufficient to discharge purchaser from contract. *Smith v. Dolman*, 6 Bro. P. C. 291. LACHES.

On casualties happening between the articles for a purchase and the sealing of the conveyance, who shall bear the loss. *White v. Nutt*, 1 P. W. 61.

#### IV. OF THE TITLE.

Old judgments existing against a former owner of leaseholds, who parted with the property in 1770, and to enforce which no steps appeared to have been taken, are no objection to the title. *Cannell v. Blacketer*, 2 Sim. 242. JUDGMENT: LENGTH OF TIME.

Contract for the sale of the borough, lordship, and manor of H, with rights, royalties, members, and appurtenances, and all the messuages, lands, tenements, and other hereditaments, and their rights, members, and appurtenances to the said borough, lordship, and manor belonging, as set forth and described in a particular referred to in the contract, the vendors derived their title under a conveyance in 1809, by the general description of the borough, lordship, and manor of H, with all and singular the rights, members, and appurtenances thereunto belonging or appertaining, with a reference to preceding deeds, containing the same description through which the title was traced in the same general manner to 1744; the purchaser objected that the identity of the several lands mentioned in the particular as forming part of the manor was not made out, and it appeared that some of them had been purchased since 1744, and therefore could not pass under the ancient and general description; the vendors thereupon produced abstracts of the title to such lands, and showed by steward's books, that the lands, ever since they had been purchased, had been annexed to, and treated as part of the manor, and contended that they passed under the general words "appertaining or belonging" in the conveyance of 1809; to obviate the difficulty they also obtained a confirmation of that conveyance with a declaration that the lands in question were intended to be passed by it under the general words. Exceptions to the master's report of a good title were over-ruled, principally, as it should seem, on the grounds of the deed of confirmation; the court declaring, that if it were of opinion that a good title could be made, it would hesitate to decree a specific performance, unless that deed were delivered to the purchaser. *Townsend v. Champenown*, 1 Y. & J. 538.

It seems to be no objection to a title, that a person, who sixty years back was the survivor of three trustees appointed by will for sale of an estate, did not execute a conveyance purporting to be made by him and the parties beneficially interested, possession having gone under that conveyance, and the estate in equity being converted into personally. *Id. ib.*

Where a deed, dated sixty years back, contains a recital of the creation of a mortgage term, and a subsequent assignment of it in trust to attend the inheritance, and the term is not subsequently noticed in the

title, it will be presumed to have been surrendered; and it is no objection to the title that the vendor cannot produce the deed creating the term, nor the assignment of it. *Id. ib.*

When an estate is sold free from incumbrances, and upon production of the abstract of title it appears that the estate is subject to a mortgage or other charge or incumbrance, the incumbrance does not afford an objection to the title, but is matter of conveyance only; and such is the rule even if the amount of the incumbrance be greater than the purchase money. *Id. 449.*

The court will not exercise its summary jurisdiction to compel a vendor's solicitor to perform an undertaking given by him at the sale, to do certain acts for clearing the title to the estate. *Part v. Bushell*, 2 Sim. 38. SOLICITOR; JURISDICTION.

A conveyance to a purchaser in 1793, from persons residing in Bermuda, of lands then in their possession, and to which, subject to an outstanding but satisfied mortgage term, they claimed title, under an entail created in 1732, through a descent recited in the deeds; a subsequent assignment of the mortgage term from the mortgagee to the purchaser and an uninterrupted enjoyment under his conveyance will not enable him to make a good title, if unsupported by extrinsic evidence of the pedigree recited in the deeds, or of possession prior to 1793, conformable to that pedigree. *Fort v. Clarke*, 1 Russ. 601.

Specific performance decreed, though vendor's title was founded on destruction of contingent remainders. *Hasker v. Sutton*, 2 S. & S. 513. SPEC. PERF.

It being necessary, in order to make a title perfect, that a recovery should be suffered for the purpose of barring an old estate tail vested in a person who was not a trustee for the vendor, the deed making the tenant to the *precipe*, and the warrant for suffering the recovery were executed before the filing of the bill for specific performance; but the recovery was not completed a few days afterwards: held, that a good title was not shown before the commencement of the suit. *Lewin v. Guest*, 1 Russ. 325.

A person who purchases two lots, is not justified in refusing to perform his contract for the purchase of the second lot, because a good title is not shown to the first lot. *Id. ib.*

If vendor retains title-deeds, and covenants for further assurance only, the purchaser may, under that covenant, compel him to enter into a covenant for production of deeds. *Fain v. Ayers*, 2 S. & S. 533.

Where the title of an estate was derived from a person who entered as heir, under the impression that his ancestor's will was void, a purchaser has a right to production of the will, or evidence of its contents. *Stevens v. Guppy*, 2 S. & S. 439.

Specific performance of agreement to buy fee-simple of lands, and right, &c. refused where part of subject of contract proves only leasehold. and the right is qualified; object being to work commercial speculation, which could only be done by enjoyment of unqualified right, and twelve years had elapsed since agreement entered into. *Wright v. Howard*, 1 S. & S. 190. SPEC. PERF.; TIME.

Purchaser not bound to complete purchase without title deeds, unless he has legal covenant to produce them. *Burley v. Daine*, *id.* 449. TITLE DEEDS.

Where devise of real estate, subject to debts and legacies, had contracted to sell estate in order to raise money to pay debts, and afterwards a bill was filed against her by legatees for administration of testator's estates, and purchaser consented to go before master, upon reference as to title in that suit: held, he was not thereby bound to take equitable title, but might insist on having same title as though bill for specific performance had been filed against him; and that as two commissions of bankrupt had issued

against devisee before contract was entered into, though neither was proceeded in, he was not bound to accept title. *Cann v. Cann*, 1 S. & S. 284. **VEND. & PURCH.**

A testator devised his copyhold estate to his wife for life, with remainder to his two sons, as tenants in common, in fee; the eldest son and customary heir was, by an arrangement between himself, his mother and brother, admitted to the copyhold in fee, and executed by deed a declaration of trust to the uses of his father's will. The brothers became bankrupts, and their assignees sold their reversion to the plaintiff: held, that the plaintiff, though as against the assignees, a purchaser of a legal reversion, was not as against the tenant for life, entitled to compel such a surrender as would give him the legal reversion. *White v. Stock*, 6 Mad. 227.

When a necessary party to a title is neither in law or equity under the controul of the vendor, the master ought to report against the title, unless there is produced to him a legal or equitable obligation on the part of the stranger to join in the conveyance. *Fs-dale v. Stephenson*, 6 Mad. 366.

If vendor can make a good title at hearing, on further directions it is sufficient for specific performance, vendor paying costs. *Paton v. Rogers*, id. 256. **SPEC. PERF.**

An attendant term having become vested in the wife of the owner of the inheritance as administratrix of the trustee, and her husband becoming bankrupt, his assignees agree to sell the estate, and file a bill for specific performance of the agreement, pending which suit the husband dies: held, that the widow was not entitled to dower; that she was to assign the term of the purchaser, and that he was bound to accept the title. *Mole v. Smith*, 1 Jac. 590. **DOWER; TERM ATTENDANT; ASSIG. OF TERM.**

The father, vendor, claimed the estate by purchase from his son; the purchaser is entitled to evidence of the fairness of the transaction. *Boswell v. Mendham*, 6 Mad. 373.

The court was of opinion, that limitations in a marriage settlement to the brothers of the settlor and their issue were voluntary; but thought, under the circumstances, that a purchaser could not be compelled to take the title depending on the validity of those limitations, and dismissed a bill by the creditors of the vendor after his death for specific performance, there having been subsequent dealings with the estate, which might have confirmed the settlement, the agreement for purchase being suspicious, and it being doubtful whether the creditors could file such a bill. *Johnson v. Legard*, 1 Turn. & R. 281. **SETTLEMENT, VOLUNTARY; CONSIDERATION; COLLATERALS.**

On a suit for specific performance by vendor against purchaser of leasehold property under an agreement, general as to title, the master cannot report a good title in vendor, unless he sets forth a good title in his lessor; bill therefore dismissed, but without costs. *Purvis v. Rauer*, 9 Price, 488. **LANDL. & TENANT; SPEC. PERF.**

The rule of compelling a purchaser to take the estate where a title is not made till after the contract, not to be extended. *Lechmere v. Brasier*, 2 Jac. & W. 289.

Title depending on recovery suffered by tenant in tail, the reversion of which had vested in the crown by attainer of reversioner, held not such a title as purchaser is bound to accept. *Blosse v. Clannorris*, 3 Bligh, 62.

No objection to sale in court under a will, that infants interested in will cannot join in conveyance. *Powell v. Powell*, 6 Mad. 53. **INFANT; PR. SALES, JUDICIAL; DEEDS; PARTIES TO CONVEYANCE.**

Where presumption in favour of title is so strong,

that a judge would feel himself bound to give a clear direction to a jury, the purchaser would be concluded thereby, but if the presumption would be left for a jury to determine, he would not be bound to take it. *Emery v. Crocock*, 6 Mad. 57.

Where, in title deed there is a recital of prior deeds which are lost, and presumption is in favour of the title, purchaser cannot object to title, on the ground of the absence of those deeds. *Prosser v. Watts*, 6 Mad. 59.

Purchaser is not bound to take a doubtful title. *Price v. Strange*, 6 Mad. 159.

Purchaser cannot be compelled to take title, founded on matter of fact not admitting of satisfactory proof, or which cannot be well proved. *Smith v. Death*, 5 Mad. 371.

Whether the purchaser can be compelled to take an assignment of a term as a protection against dower; *Qu.?* An attendant term having become vested in the wife of the owner of the inheritance, as the representative of the trustee, whether an assignment of it to a purchaser to prevent dower, can be compelled; *Qu.?* *Mole v. Smith*, 1 Jac. & W. 665. **DOWER.**

On a sale, in lots, of premises, the particulars of which state them to be held under one lease, receiving rent, and that the purchaser of one lot is to be exclusively subject to the rent, the other purchasers cannot object to the title, on the ground of a clause of re-entry on non-payment, contained in the lease. *Walter v. Maunde*, 1 Jac. & W. 181.

Landlord contracting to sell part of the demised estate, with an apportionment of a specific amount, part of the rent reserved for the whole estate, can make a good title to it without the consent of the tenant. *Id. ib.* **LAND. & TENANT.**

Devise of copyhold estates, the legal estate being out-standing, "to my son R, to be entailed upon his male heirs, and failing such, to pass to his next brother, and so on from brother to brother, allowing 2500*l.* to be raised upon the estates, for female children each;" whether a trust executed or executory; and if the latter, whether an estate tail in R; *qu.?* The point too doubtful to compel a purchaser to take the title. *Jerrisse v. Northumberland*, 1 Jac. & W. 559. **WILL, C. OF; TRUST EXECUTORY.**

In compelling a purchaser to take a title, the court formerly acted upon its own opinion; but now it will not compel him to take it if the point is doubtful. *Id.* 569.

A purchaser was held entitled to an investigation of the vendor's title, notwithstanding possession taken; acts of ownership incident to possession, and preparation of a conveyance. *Burroughs v. Oakley*, 3 Swan. 159.

Where condition of sale was for sale of interest, "under such title as vendor lately held the same, an abstract of which may be seen at," &c. Held, that purchaser could not object to title. *Freene v. Wright*, 4 Mad. 364. **SPEC. PERF.**

If exceptions taken to report of good title are overruled, other objections to title cannot be made; but if allowed, and new abstract be delivered, other objections may be brought in. *Brooke v. —*, 4 Mad. 212. **PR. EXCEPTIONS TO MASTER'S REPORT.**

Case sent to law, whether purchaser of lot 2, would, by a conveyance of vendor alone, without the concurrence of the lessee, acquire the same rights and remainders against lessee, in respect of the apportioned rent of 40*l.* therein to be reserved to him, as he would acquire in case no rent were mentioned in such conveyance from vendor, by a jury, for that part of the reversion comprised in lot 2. *Bliss v. Collins*, 4 Mad. 229. **ISSUE AT LAW.**

Purchaser under decree of two-sevenths of estate in one lot, is not obliged to take one-seventh, to which

only title can be made. *Roffey v. Smalleross*, 4 Mad. 227. PR. SALES, JUDICIAL.

Where copyhold is sold under commission, good title is made by bargain and sale from commissioners to the purchaser direct. *Exp. Holland*, 4 Mad. 483. BANKCY.; SALE OF COPYHOLD.

Where the validity of a deed depends upon the bona fides of the transaction, to be collected from extrinsic circumstances, a court of equity will not compel a purchaser to accept a title under the deed, because neither the purchaser nor the court has adequate means of ascertaining those circumstances. *Hartley v. Smith*, Buck. 368.

On the sale of an estate as title free, the question whether title free, is not a question of title. *Binks v. I. d. Rokeby*, 2 Swan. 224.

Vendor having lost title deeds, agrees to give real security for title: held personal security not sufficient, and that he must purchase real estates for that purpose. *Walker v. Barnes*, 3 Mad. 247. SECURITY; SPEC. PERF.

Motion may be made on bill for specific performance for reference as to title and whether title was shewn prior to filing bill. *Anon.* 3 Mad. 495. PR. REFERENCE AS TO TITLE.

On a bill by vendor for specific performance of an agreement to take a lease for twenty-one years, at rack-rent, the master having reported in favour of the title shewn by the abstract, and an objection being taken to the report, the question was, whether, where the agreement is silent, the vendor of a leasehold interest is not bound to produce the title of his lessor; and the exception was allowed. *Eddes v. Hooker*, 2 Mer. 424. LANDLORD & TEN.

Objection on the ground of non-production of lessor's title, overruled in the case of a bishop's lease. *Id.* 430. LANDLORD & TEN.

Where a man contracts to purchase on the faith of the vendor's having a good title, he has a right to have the title sifted to the bottom, before he can be called upon either to accept an indemnity or compensation for a defect, or to abandon the contract. *Knatchbull v. Cruikshank*, 3 Mer. 137.

Equity does not compel a purchaser to take such a title as a willing purchaser might be satisfied with; but the court will inquire whether a title can be had, and if the title is defective as to part, there is no principle of equity more artificial than that which calls on the court to decide, whether the purchaser shall be bound to take with any, and what compensation. *Id.* 140.

Specific performance decreed with costs, in a case where the defendant, objecting to title, had been served with notice of a prior decision in a different cause, in favour of the same title, against a similar objection. *Biscoe v. Wilks*, 3 Mer. 456. SPEC. PERF.; COSTS.

The court of chancery does not warrant the title of an estate, which is purchased under its direction. *Toulmin v. Steere*, 3 Mer. 223. PR. SALES, JUDICIAL.

The right of a good title does not grow out of the agreement between the parties, but is given by law; but a purchaser may waive his right, by going on with the agreement after he has full notice that he is not to expect a good title. This is in such case matter of notice, and not of contract. If the vendor of a leasehold interest means to sell, without producing his lessor's title, he ought to declare it. *Ogilvie v. Foljambe*, 3 Mer. 53.

Mortgage debt and premises were assigned by mortgage to trustees, with power to sue and give acquittances, and all the same powers as mortgagee had. Mortgage estate was sold under a decree, and purchase money paid into court. Held, on exceptions to title, because scheduled creditors were not parties to the bill, but only the trustees, that the trustees could

make a good conveyance, and that the exceptions ought not to have been made to title, but to the conveyance. *Bucks v. Rokeby*, 2 Mad. 227. CONVEYANCE.

Title reported good by deputy remembrancer in creditor's suit, purchaser not compellable to accept it, if only a *prima facie* title. *Eyton v. Dicken*, 4 Price. 303. PR. SALES, JUDICIAL.

A contracts with B to purchase an estate, and after accepting the title, agrees to sell to C, who refuses to complete his purchase, on the ground of his having discovered another will made thirty years ago, not set forth in the abstract, but supposed to affect the title. Upon a bill for specific performance by the original vendor against A, who, by his answer, (which was sent in, and the cause set down for hearing before this discovery was made), admitted the title; *quære*, if he may be allowed to set up the will as an objection to the title, by a supplemental answer! By consent of both parties, a reference was directed to the master, to enquire whether a good title could be made, regard being had to the will only. *Const v. Barr*, 2 Mer. 57.

Vendor not making good title, when bill filed, pays costs up to time title reported good. *Hartford v. Parrier*, 1 Mad. 532. COSTS.

It is no objection to a title that two fee-farm rents, created by letters patent by James I. are not shewn to have been extinguished, if being proved that no claim had been made by the crown of the rents, from the year 1706, and no proof of any previous claim. *Simpson v. Guttridge*, 1 Mad. 609. CROWN; LENGTH OF TIME.

Where adult female, before marriage, agrees to accept, in lieu of dower, a rent-charge, she is bound to see that the grantor has title to lands charged therewith, and therefore a purchaser of other lands belonging to grantor, which might otherwise have been liable, in case of failure of such security, is not entitled to see, from title deeds, that grantor has title to such charged lands. *Id. ib.* TITLE DEEDS, INSPECT. OF; DOWER.

Exceptions to master's report in favour of title of vendor of bishop's lease, on ground of non-production of bishop's title, overruled. *Fane v. Spencer*, 2 Mad. 438. PR. MASTER'S REPORT OF TITLE, EXCEPTIONS TO.

On the report against vendor's title, his bill for specific performance dismissed with costs on motion. *Hallers v. Papan*, 19 Ves. 351. SPEC. PERF.; PR. DISMISSAL OF BILL.

Where title deeds cannot be delivered, assignees must, like any other vendor, give attested copies of them at the expense of the estate; but their covenant for the production of the deeds should be confined to the time of their continuance as assignees. *Exp. Stuart*, 2 Rose, 215. BANKCY. ASSEES. DUTIES OF; TITLE DEEDS.

A bankrupt's estate is sold by auction; the purchaser, after having paid a deposit, gives notice that he means to abandon the purchase, on a supposed defect in the title. The commission is afterwards superseded, on the ground that there was no good petitioning creditor's debt, and another commission issues, and the same assignees are chosen. Held, that as the assignees, at the time when they received notice from the purchaser, had not a good title to the estate, they could not enforce the contract, nor consequently retain the deposit. *Bartlett v. Tustin*, 1 Marsh. 583.

The reversion of an estate having been put up to sale, by auction, describing it as leased with a covenant on the part of the tenant to repair, and the purchaser objecting to the title, because no counterpart of the lease was in the possession of the vendors, it being stated to be in the hands of a party under a partition of the estate, made some time before; the court

thought that such counterpart ought to be deposited for the benefit of all parties, before it could compel the purchaser to take. *Shore v. Collett*, Coop. 234.

Specific performance of agreement to purchase refused, no good title being made to small part of estate, which was essential to enjoyment, and on the ground of defendant having been let into possession and turned out again by plaintiff. *Knatchbull v. Grueber*, 1 Mad. 153. Affid. 3 Mer. 124. SPECIFIC PERFORMANCE.

The defendant having sold and conveyed land to the plaintiff, suggesting that he had a title, and it afterwards appearing that he was not entitled to part, the same being an encroachment from a common, though no eviction had happened or was threatened: a bill lies to set aside the conveyance, and for a return of the purchase money and all expenses. *Edwards v. McLeay*, Coop. 308. MISREPRESENTATION; BILL TO SET ASIDE CONVEYANCE.

Defect of title to a considerable part of the estate, though a good objection by the purchaser to a specific performance, not by the vendor. *Western v. Russell*, 3 V. & B. 187.

Purchaser not to be compelled to take an indemnity against a judgment, accounting to half of the purchase money. *Wood v. Bernal*, 19 Ves. 221.

Purchaser is not to be compelled to take a doubtful title, depending on the decision of certain legal questions. *Sloper v. Fish*, 2 V. & B. 145.

Implied covenant by vendor of a freehold estate for the title, though an assignee under a commission of bankruptcy selling by a general description, not restrained to his actual interest. *Deverell v. Lord Bolton*, 18 Ves. 512. COVEN. IMPLIED.

Purchaser not compelled to take a doubtful title, viz. by executing a power of sale, introduced under a direction by a decree, establishing a will, to the master to approve a proper settlement: the will not authorizing the insertion of such a power; nor could it be sustained under a power by a former settlement; which, if not extinct by the failure of the limitations, and the union of the estate for life with the reversion, could not be duly applied to purposes clearly foreign to its original object; and though purchasers are not put to exercise a very nice and critical judgment with regard to the purposes for which powers are created, it could never be intended to refer to a perfectly new set of limitations, in a new settlement, at a long subsequent period, under a disposition by the will of the owner of the fee, to be exercised, not for any purpose in the least degree connected with the settlement, but avowedly as an expedient to supply the want of a valid power in that settlement, and enable those whom he had made only tenants for life, to dispose of the estate. *Whate v. Hall*, 17 Ves. 80.

Contract for sale of an existing and a reversionary lease not specifically performed without a production of the titles of the lessors. The objection not waived by a premature conditional approbation of the title, by the purchaser's counsel, but the expense incurred in making out the title before this objection was taken, repaid. *Deverell v. Lord Bolton*, 18 Ves. 505. SPEC. PERF.; WAIVER.

Approbation of counsel not a waiver of all reasonable objections to the title. *Id.* 514. WAIVER.

Vendor not making a good title ordered to pay costs, though he was only a trustee to sell. *Edwards v. Harvey*, Coop. 40. COSTS.

Outstanding term to attend the entailment, the trusts being performed, may be an objection to the conveyance not to the title. *Berkeley v. Daugh*, 16 Ves. 380. OUTSTANDING TERM.

Purchaser not compelled to take a doubtful title; no objection to a purchaser that the defect of title appeared on the abstract delivered before he filed his bill. *Stapleton v. Scott*, 16 Ves. 272.

Objection to title by purchaser, under a trust to sell as bound to see to the application of the money in satisfaction of scheduled creditors and others, coming in within a limited time after the date of the deed or disabilities removed; overruled upon the tenor of the deed implying that the receipt of the trustees should be a discharge. *Balfour v. Welland*, 16 Ves. 151.

An act of bankruptcy a sufficient objection to title, without shewing a debt upon which a commission could issue. *Lowes v. Lush*, 14 Ves. 547. VEND., &c.; BANKCY., ACT OF.

Particular describing a lease as subject to notice to quit, not inconsistent with a covenant that the tenant shall hold over for a certain time, "after the end of the term;" that being upon the context distinguished from the "other sooner determination;" and time generally not being of the essence of the contract. *Hall v. Smith*, 14 Ves. 426. PARTICULARS OF SALE.

Assignees in bankruptcy bound, as other persons, to make a good title, unless guarded by express stipulation. Their bill for a specific performance, therefore, the report being against the title, was dismissed. *McDonald v. Hanson*, 12 Ves. 277. Bcy. ASSIGNEES.

Re-conveyance of the legal estate presumed under obscure circumstances after a great lapse of time, though the possession originally not adverse, but under a trust: upon that presumption a specific performance decreed against a purchaser. *Hillary v. Waller*, 12 Ves. 239. LENGTH OF TIME; PRESUMPTION OF RECOGNIZANCE.

Whether without express stipulation a person under a contract with a lessee for years to purchase the term, can insist upon a production of the lessor's title, and whether the lessee can compel such production, *querre*? The lessee's bill for a specific performance dismissed; his interest described as forty years, the residue of a term free from incumbrances, being a few years only of an old term, and a reversionary term from another lessor, and old incumbrances not shewn to be discharged. *White v. Foljumbie*, 11 Ves. 337. PROD. OF TITLE; SPEC. PERF.

Assignees of a bankrupt contracting to sell, bound, as other persons, to make a good title, but in special cases, as if they had contracted supposing they had a good title, the parties would be left to law. *Id.* 343. BANKCY. ASSIGNEES.

Objection by a purchaser upon illegitimacy upon the circumstance that the register of marriage could not be found, an inaccurate statement in a deed, and some particularity of description of a child in a will. Upon the time of the marriage, previous to the marriage act, and other circumstances, the lord chancellor's opinion was against the objection; but it was overruled upon a general release, which though only reciting generally that objections were taken, was held sufficient as binding the party to inquire into the nature of the objections. *Lord Braybrooke v. Inskip*, 8 Ves. 417.

Mere suspicion upon opinions in the abstract, &c. will not support an objection by a purchaser. *McQueen v. Farquhar*, 11 Ves. 467. VEND. & PURCH.

Bill for specific performance of a contract for sale of an estate, upon various objections to the title, dismissed in the first instance without a reference. *Omerod v. Hardman*, 5 Ves. 723.

A purchaser not compelled to take a doubtful title, nor will a case be directed without his consent. The court also hesitated upon giving sanction to a title founded on the destruction of contingent remainders by tenant for life, there being no trustees to support them. *Rouke v. Kidd*, 5 Ves. 647.

Upon a late decision of the court of exchequer, that a presumption from non-payment of tithes, cannot bar even a lay impropiator; the Id. Ch., though holding the contrary opinion, would not compel a purchaser to take such a title, and dismissed the bill against him



for a specific performance. *Rose v. Calland*, 5 Ves. 186.

Purchaser decreed to take a title under an obscure will, amounting to a power to sell, the legal estate not being given, descends to the heir till execution of the power, and then passes to the vendee. *Warneford v. Thompson*, 3 Ves. 513.

Testator devised all his manor, messuages, lands, tenements, tithes and hereditaments, and all his real estate whatsoever, "except what is hereinafter mentioned and devised," to the use of all his children successively, in strict settlement, and gave two of them annuities, which he charged upon a rectory held by him under a lease for lives, which he directed to be renewed if those two children or either should be living at his death, and that their lives or that of the survivor should be inserted in the new lease, and the fine to be paid out of his personal estate: he gave part of his personal estate specifically, and directed the residue to be laid out in land, to be settled to the same uses as his real estate; but afterwards, by a testamentary paper unattested, he disposed of his personal estate otherwise: the heir contracted to sell the lease of the rectory, and upon a case directed to the court of K. B. on his bill for specific performance, the certificate was, that the lease did not pass by the will, but devolved on the heir as special occupant; but the Ld. Chancellor considered that if too doubtful to be forced on a purchaser; an act of parliament was therefore obtained. *Sheffield v. Ld. Mulgrave*, 2 Ves. 525. WILL, C. OF.

By the terms of an auction the title deeds were to be produced by a certain day; they were not then ready; but the purchaser received them afterwards without objection; he cannot afterwards, on disliking the title, object to the delay. *Smith v. Burnam*, 2 Anst. 527. LACHES.

In a suit for payment of creditors, the real estates of testator were ordered to be sold; A being reported the purchaser of one of the estates for 14,480*l.*, entered into possession and accepted the title, and proper conveyances were executed; on application by the creditors to have the purchase money paid out, the purchaser stated, that the tenants of the estate had been served with a writ of right at the suit of a person who claimed the whole estate under an adverse title; but the court thought, that the purchaser having accepted the title, &c. could not prevent the money being paid out of court, and ordered it accordingly. *Thomas v. Powell*, 2 Cox, 394. PR. PAYMENT OUT OF COURT.

Purchaser is not to be compelled to take an equitable estate. *Abel v. Heathcote*, 2 Ves. J. 100. 4 Bro. C. C. 278.

A devised the residue of his property to his wife, in trust to divide it among their children in such manner as they should deserve: one of the seven children sold her share, and covenanted to make it up a full seventh: this is good, and on a specific performance she can make a good conveyance without the mother joining. *Musprat v. Gordon*, 1 Anst. 34. WILL, C. OF.

In an abstract of a vendor's title, a will which formed part of it, was represented as having been proved in the spiritual court, which afterwards appeared not to have been done. The purchaser filed his bill, praying that the defendants might either be decreed to prove the will, or that it might be deposited in the hands of the master for safety. It appeared that two other persons were interested under the will, and they were added as parties, and they not objecting, the will was directed to be deposited with the master; the vendors having by their misrepresentations occasioned the suit, were ordered to pay all the costs. *Harrison v. Coppard*, 2 Cox, 318. WILL, PROOF OF; PR. PRODUCTION DEEDS INTO COURT.

Court will not decree a specific performance of a purchase where there is a doubtful title. *Cooper v. Denne*, 4 Bro. C. C. 80. S. C. 1 Ves. J. 565. SPEC. PERF.

Where a master's report is against the title, a vendor's bill may now be dismissed with costs upon motion. *Bennet Coll. v. Carey*, 3 Bro. C. C. 390. PR. COSTS; PR. DISMISSAL OF BILL.

Determined, on a rehearing, to be sufficient, if a party can make a good title on a bill for specific performance at any time before the final decree. *Id. ib.* SPEC. PERF.

If defence to bill for specific performance of agreement for a purchase depends merely on want of title in vendor, defendant ought to rest on his answer, and not file cross bill to have it delivered up or to prevent an action, for plaintiff cannot succeed at law. *Hilton v. Barrow*, 1 Ves. J. 284. SPEC. PERF.; CROSS BILL.

Mortgage of a lease which recited the surrender of a former lease, which was in consideration of the surrender of a former lease in which plaintiff's title appeared: held to have notice of the title. *Coppin v. Fennyhough*, 2 Bro. C. C. 291. NOTICE.

It is no objection on the part of a purchaser of land sold by a master, that more land is sold than is necessary for the purpose of testator's will. *Lutyech v. Winford*, 2 Bro. C. C. 248. SALES JUDICIAL.

Qu. How far the court will go in compelling a party to complete a purchase where no title can be made to some part of the property? *Poole v. Shergold*, 1 Cox, 273. S. C. 2 Bro. C. C. 118. SPEC. PERF.

It is no objection to the title to an estate, that an extent had issued from the crown against the owner, which remained in the hands of the sheriff unexecuted; it appearing that the lords of the treasury had, in fact, compromised the debt, though a writ of *amoveas manus* had not actually issued. *Id.* 160. EXTENT.

Land was settled on A for life, remainder to his wife for life, remainder to their children, with a power of revocation and appointment to new uses by the husband and wife jointly: proviso, that if A should become bankrupt, &c. then the limitation to him for life should cease, and the lands should go to trustees during his life, for the benefit of his wife and children. A agreed for the sale of this estate, and proposed to make title to the purchaser by executing this power of revocation. The conveyancer on the part of the purchaser, required an indemnity against A's having committed any secret acts of bankruptcy, for that the power of revocation would be extinguished by the forfeiture of the life interest of A. On a bill filed by A, to compel the performance of this contract, the court thought there was no ground for the objection, and that the mistake in opinion of the conveyancer could not save the defendant from costs. *Maling v. Hill*, 1 Cox, 186.

Purchaser of copyhold not obliged to accept of surrender by letter of attorney; a custom that it must be in person is not contrary to law. *Mitchel v. Neale*, 2 Ves. 679.

Purchaser of an equitable title to a rent charge claiming against some purchasers of the land for a valuable consideration without notice, must try his title at law in the name of his vendors. *Whitfield v. Fausset*, 1 Ves. 387. ISSUE AT LAW.

During the existence of a *ca. sa.* on which the debtor is in custody, no other execution ought to issue; but if it does, and the sheriff takes a leasehold estate under a *fi. fa.* he is justified, and sale by him is good subject to enquiry as to fairness, though the court will set it aside on motion, and without an *audita querela*, but where defendant dies under execution, plaintiff (by stat. 21 Jac. 1.) may have a new

execution. *Jeanes v. Wilkins*, 1 Ves. 195. *DEBTON & CRED.*

It was said in this case to be a rule among conveyancers, that where an estate had been long in a family, the vendor's covenant must go as far back as the first purchaser of the estate; but where the vendor claims immediately under the person who first bought the estate, there he need not covenant any further back than from that person: because whoever buys the estate has the benefit of the covenants in the deed to the vendor's purchaser. *Id.* Hardwicke said, he never heard of such a rule; yet where conveyances are to be made by a decree of the court, they should be settled by such rule as learned conveyancers would direct. There are many cases where a person covenants no further than his own acts, as where an estate is decreed to be sold for payment of debts, and no surplus remains, the court will not require the heir to covenant beyond his own acts: so as to a devisee. But where, after such sale, the surplus is considerable, the heir or devisee in many cases has been directed to covenant that neither he (the heir) nor his immediate ancestor, nor the devisee, nor his devisor has done any act to incumber. *Lloyd v. Griffith*, 3 Atk. 267.

If a purchaser for a valuable consideration has not the legal estate properly conveyed to him, though the consideration cannot create a use by way of covenant to stand seised, yet the vendor will be considered a trustee for the purchaser. *Pollefen v. Moor*, *id.* 273. *TRUST.*

A purchaser objected to a title for want of a deed which had been inrolled but could not be found. A copy of it taken in 1632, attested by five witnesses, was produced in court: Held, that this copy would have been sufficient even without an attestation. *See* *serius*, if the original deed has been in a private hand. *Harvey v. Phillips*, 2 Atk. 541. *TITLE DEBTS.*

Lands are devised to A and B, and to the heirs of the survivor in trust to sell: though the inheritance be in abeyance, yet the trustees by a fine may make good title by estoppel. *Ticks v. Edwards*, 3 P. W. 372. *ADVANCE.*

One articles to buy lands, and the title is under a will, not proved in equity against the heir, yet in some cases equity will compel the purchaser to accept the title. *Cotton v. Wilson*, 3 P. W. 190.

Where a person articles to sell an estate, and brings a bill for an execution of the agreement, though at the time of the agreement he cannot make a title to the purchaser, it is sufficient if he is able to do so when the decree or report is made. *Langford v. Pitt*, 2 P. W. 632. *VEND. & PURCH.*

A articles with B for the purchase of an estate of 180*l.* per annum, for which he was to give thirty-five years' purchase upon granting and conveying to him, and pay 50*l.* in part; but discovering that 30*l.* per annum of the lands were copyhold, refused to go on. On bill by B, equity will not decree a specific execution of this agreement, being inequitable, but will order the 50*l.* to be paid back. *Hick v. Phillips*, *Proc. Chan.* 575. *SPEC. PERF.*

A agrees in writing with C for the purchase of an estate, if a good title could be made. B (a stranger) afterwards files a bill claiming part of the lands; C buys in his claim. C is entitled to a specific execution of the agreement. *Master v. Cook*, *Colles' P. C.* 433. *Id.*

In articles there was to be a covenant in the conveyance, that certain lands were free from incumbrances. *Id.* Ch. said, this is not a covenant that the lands are free, and if any incumbrance is discovered between the execution of the articles and sealing the conveyance, whereof the party had no notice, that incumbrance shall be discharged before the

sealing of the conveyance, as the concealment of it would be a fraud; though against all incumbrances discovered afterwards, there is only the party's own covenant to protect a purchaser. *Vane v. I. d. Bernard*, *Gilb. Eq. Rep.* 6. *COVENANT, C. OF.*

A devise obtains a decree to hold and enjoy against the heir, who, it was supposed, had suppressed the will. Pending this suit, a third person gets an assignment of a mortgage made by the testator, and then purchases the equity of redemption of the heir, with notice of the will: the court would not admit the purchaser to dispute the justice of the decree, nor to try at law whether the will was not cancelled by the testator. *Finch v. Newham*, 2 Vern. 216. *DEVISEE; HEIR AT LAW.*

#### V. WHERE PURCHASER MAY OR MUST TAKE WITH COMPENSATION OR INDEMNITY.

One of the terms of an agreement was, that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made by a certain time. The counsel being of that opinion, a bill by the purchaser for a specific performance with a compensation was dismissed with costs; and an application afterwards made by the plaintiff that his deposit might be set off against the defendant's costs, and the surplus (if any) paid to him, was refused with costs. *Williams v. Edwards*, 2 Sim. 78. *SPEC. PERF.; PR. COSTS.*

A conveys lands to trustees, on trust to sell, if the unsatisfied debts of a partnership in which he had been concerned, should at a given time exceed 40,000*l.* the trustees sell and convey to the purchaser by a deed, which recites that the debts of the partnership exceeded the specified amount, and that A had died intestate as to his real estates, and the heir at law of A joins in that deed and enters into a covenant for the title of the trustees, a covenant against all acts done by heir or his father, and a covenant for further assurance; it afterwards appears to be uncertain whether A had not devised his real estate, and the purchaser files a bill to have protection against, or remedy of, the alleged defect in his title, which this discovery created. Held, that the purchaser is not entitled to have an account taken of the debts of the partnership, in order to establish the fact of their having at the specified time exceeded the specified amount; that he is not entitled to have the books and documents connected with the accounts of the partnership delivered to him or deposited for safe custody; and that he is not entitled to a covenant either from the heir or from any other person for the production of those books and papers. *Hallett v. Middleton*, 1 Russ. 243. *COVENANT FOR INDEMNITY; DELIVERY UP OF DEEDS; ACCOUNT; PARTNERSHIP DISCOVERY.*

Quit rents being incidents of tenure, are subjects of compensation. *Estelle v. Stephenson*, 1 S. & S. 122. *QUIT RENTS.*

Lessee subject to covenant cannot compel specific performance of agreement to purchase the premises, though he offers to indemnify purchaser against performance of covenants. *Fildes v. Hooker*, 3 Mad. 193. *SPECIFIC PERFORMANCE.*

The purchaser of an estate, sold as tithe-free, cannot be compelled to take it subject to tithe on terms of compensation; but an estate of a hundred and forty acres being sold under a decree, the particulars stating about thirty-two acres to be tithe free, and no evidence of exemption having been produced on the reference of the title, the master was directed to certify the proper amount of compensation. A purchaser under a decree for sale having accepted, and

(on a report of an objection to the title for which compensation was ordered,) retained possession, must pay interest on the purchase money from the time at which he took, or at which a title was shewn, under which he might have safely taken possession, and is entitled to an allowance for prior, not for subsequent deterioration of the estate. *Binks v. Ld. Rokeby*, 2 Swan. 222.

Estate being sold by auction in lots, under conditions, one of which expressed that they were subject to the perpetual payment of 120*l.* a year to the curate of N, but that the same and the perpetual annual payment of 20*l.* to the hospital of C, were in future to be charged upon, and paid by the purchaser of lot 1 only: the purchasers of the other lots are entitled, not to an absolute exoneration, but to an indemnity from the purchaser of lot 1. Nature of the indemnity which they may require. *Casman-jur v. Strobe*, 2 Swan. 347. See further, 1 Jac. 630. CONDITIONS OF SALE.

If a person possessed of a term contracts to sell the fee, he cannot compel the purchaser to take, but the purchaser can compel him to convey the term, and this court will arrange the equities between the parties. *Wood v. Griffith*, 1 Swan. 54. See also *Mortlock v. Buller*, 10 Ves. 316. SPEC. PERF.

Compensation for the dry rot in house and premises decreed, upon representation of the vendor to the purchaser as to the state of repairs; he relying upon such representations, and stating to the plaintiff that he did not employ a surveyor for that reason. *Grant v. Hunt, Coop.* 173. MISREPRESENTATION.

Specific performance of an agreement for sale of estate decreed, notwithstanding a variance from the description, with compensation, for the deficiency in value; though a minute examination might have discovered the defects, as in the state of the house, &c.; but not for a variance from the description, as lying within a ring fence; the premises consisting of leasehold farm, and three years having expired, pending the suit, interest was given to the vendor, and a rent set up in it respect of his possession. *Dyer v. Hargrave*, 10 Ves. 505. SPEC. PERF.; INTEREST.

Purchaser not bound to take with compensation in a case of great intentional misrepresentation, although so provided by the conditions of sale in case of "any error or mis-statement" in the particulars. *Stewart v. Alliston*, 1 Mer. 26.

Though generally so, it is not universally true that a purchaser may take what he can get, with compensation for what he cannot have. Whether that is ever done without express undertaking on his part to do what court shall order; *Qu.!* *Paton v. Rogers*, 1 V. & B. 351.

Distinction between a purchase and a lease for lives; as time is not essential in a purchase, any delay may be compensated, either by receipt of the rents and profits, or in case a title cannot be made out, by interest on the deposit; but in a lease depending on lives, where time is most essential, delay does not admit of any compensation. *Ormond v. Anderson*, 2 Ball & B. 370. TIME.

General rule of specific performance that the purchaser shall have what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation, enforced against trustees for infants upon the mere mistake of their agent without fraud, &c.; but the relief adapted to the justice of the case, viz. the purchase being of wood upon a gross valuation, without regard to the quantity of land, an abatement for a deficiency of quantity from erroneously inserting the hedges and fences, not included in the purchase, was directed with reference to land. *Hill v. Buckley*, 17 Ves. 394. SPEC. PERF.; TRUSTEES.

Reservation of salt works, mines, &c. in 1704,

with a right of entry though no instance of any claim, and the title had been transferred in 1761, without such reservation upon the usual covenants, held an objection, giving a right to compensation, the purchaser not insisting upon it further. *Seaman v. Fawcett*, 16 Ves. 390.

Specific performance decreed upon the bill of the purchaser with compensation for a defect of a title, if to be ascertained, by reduction of the purchase money; if not, or the plaintiff would so take it with an indemnity, the defendant, the vendor, proposing an option to take it as it was, or relinquish the contract: the defect consisting in the representation by the particular of a church lease for twenty-one years, the lease being actually for lives, and the covenant limited and contingent. *Mulligan v. Cooke*, 16 Ves. 1.

Under a bill to have a contract delivered up on the ground of defective title of defendant, the vendor, and for compensation for the injury to the plaintiff by the failure of the contract, decree was made for delivering up the contract, without prejudice to an action instead of an inquiry before the master. *Gurillim v. Stone*, 14 Ves. 128. DELIVERY UP OF DEEDS.

Warranty on sale against obvious defects is not binding. *Dyke v. Hargrave*, 10 Ves. 507. WARRANTY.

The objection by a purchaser applying only to a small part of the estate, a specific performance decreed with compensation. *McQueen v. Farquhar*, 11 Ves. 467.

Purchaser will not be compelled to take under contract for freehold, a long leasehold, though for a very long term, upon principle of compensation. *Drewe v. Corp.* 9 Ves. 368.

A contract having been made for sale of an estate, it afterwards appeared that there were some outgoings from the estate which were not disclosed at the time of the contract, yet these being matters which are in compensation, the contract shall be carried into execution, with an allowance only to the purchaser for those particulars which diminish the value; the agreement not being completed within the time specified, the purchaser shall be allowed interest for such time as the purchase money shall appear to have been kept dead for the special purpose of completing the contract. *Howland v. Norris*, 1 Cox, 59. SPEC. PERF.; INTEREST.

## VI. ALLOWANCE TO PURCHASERS AS AN ABATEMENT OF PRICE.

The amount of deterioration of an estate pending a suit for specific performance, having been ascertained by an issue, the purchaser was allowed it out of his purchase money which he had paid into court, under an order, with interest from the time when he paid in his money. *Ferguson v. Tadmam*, 1 Sim. 530. INTEREST.

A piece of land, imperfectly watered, was described in the particular as uncommonly rich water meadow. Held, that this was not such a misrepresentation as would avoid the sale. *Scott v. Hanson*, 1 Sim. 13. SPEC. PERF.; FRAUD; MISREPRESENTATION.

Devise to A, charged with a legacy to B; A sells the estate, without having discharged the legacy. On a bill filed by B against A for payment of the legacy, decree against the purchasers, with decree over against A, in case, upon enquiry, it should turn out that no deduction had been made from the purchase money, in respect of the legacy. *Newman v. Kent*, 1 Mer. 240. LEGACY CHARGED ON LAND.

If a purchaser compromises debts charged on purchased premises, (the vendor being bound to relieve the incumbrances), he ought not to charge the vendor more than he actually pays, as that is the amount of

damage he sustains by breach of covenant. *Cane v. Ld. Allen*, 2 Dow, 296. PAYING OFF INCUMBRANCE; ACCOUNT.

Purchaser is not entitled to abatement for deficiency in quantity, the particulars of sale describing lot as containing "more or less." *Winch v. Winchester*, 1 V. & B. 375.

Purchaser not permitted to apply part of his purchase money in discharge of a mortgage on the estate, though some of the parties consented, others being infants, and that there was such an incumbrance not appearing on the report. *Qu.*, could it be done, if all were competent, and consented? — *v. Stretton*, 1 Ves. J. 266. PAYING OFF INCUMBRANCES.

#### VII. DELIVERY OF POSSESSION, AND THE EFFECT THEREOF.

A purchaser of a share in a co-partnership business does not waive objections to the title by taking possession of the property, and acting as a partner, when the contract stipulates that a good title shall be made by a specified future day, and it appears to have been the intention of the parties that the purchaser should immediately, and before the day, have the possession. *Sterens v. Guppy*, 3 Russ. 171. WAIVER.

The vendor of a share in a co-partnership business filed a bill against the purchaser, who had taken possession, charging that he had grossly mismanaged the property, and destroyed its value, and praying that he might be declared to have accepted the title, and might be decreed to perform the contract specifically. The court was of opinion, that the title had not been accepted, and as a good title was not shewn, a specific performance could not be decreed; held, that upon a record so framed, no accounts or enquiries could be directed as to defendant's possession and management of property, with a view to ascertain whether any or what sum ought to be paid, or compensation made by him to the plaintiff. *Id. ib.* PARTNERSHIP; ACCOUNT.

On a bill by a vendor for specific performance, where the purchaser had, in 1814, entered into possession under the agreement, and, pending the suit, continued in possession until 1823, the plaintiff, in consequence of a defect in the title, failing in his attempt to compel the performance of the contract, the court refused to decree, under the prayer for general relief, an account of rents and profits against the purchaser, though he had stated, by his answer, that he was willing to pay a fair rent. *Williams v. Shaw*, 3 Russ. 178. ACCOUNT OF RENTS & PROFITS.

If a purchaser, after the delivery of the abstract, on the face of which part of the estate appears to be subject to a right of sporting, not mentioned in the particulars of sale, enters into possession, he waives the objection. *Burnell v. Brown*, 1 Jac. & W. 163. WAIVER.

On motion by vendor against purchaser in possession for reference to set occupation rent, title not being completed, order was accordingly made, and that interest at 5l. per cent. on deposit should, under circumstances, be deducted from rent. *Smith v. Jackson*, 1 Mad. 618.

Specific performance decreed against purchaser, without reference as to title, upon ground of possession, a correspondence, and no objection to title till two years after delivery of abstract. *Marg. Anspach v. Noel*, 1 Mad. 310. SPEC. PERF.

Though, generally, a purchaser cannot be called upon for purchase money until title made, yet where he is let into possession upon mutual confidence of speedy title, and the difficulty is a mutual surprise, he cannot, without express contract, retain possession,

withholding purchase money. *Gibson v. Clarke*, 1 V. & B. 500.

Specific performance decreed against purchaser, without reference as to title, upon possession, and no objection made to abstract. *Fleetwood v. Green*, 15 Ves. 594. REFERENCE AS TO TITLE; SPEC. PERF.

Purchaser under a decree of the court is not entitled, upon an affidavit that he has had his money lying ready for some time, to be let into possession of estate, and receipt of rents for all such time so passed. *Barker v. Harper*, Coop. 32. SALES JUDICIAL.

A purchaser taking possession without a conveyance, was compelled to pay interest, though the money was to be paid at a particular day, on the execution of the conveyance. *Fludyer v. Cocker*, 12 Ves. 25. INTEREST.

Possession taken generally amounts to a waiver, even of objections to a title. *Id.* 27. WAIVER.

The rule that a purchaser shall have possession as from the quarter day preceding the sale, does not apply to a colliery, which is an article of trade, the profits accruing daily. The proper period is the month or week in which the purchase takes place, according to the usual course of taking the account. *Wren v. Kirtou*, 8 Ves. 502. MINES.

Possession of a house, by delivery of the keys. *Guest v. Humfray*, 5 Ves. 818.

#### VIII. THE CONVEYANCE, AND THE COSTS THEREOF.

A testator devised his copyhold estate to his wife for life, with remainder to his two sons as tenants in common in fee; the eldest son and customary heir was by an arrangement between himself, his mother and brother, admitted to the copyhold in fee, and executed by deed a declaration of trust to the uses of his father's will. The brothers became bankrupts, and their assignees sold their reversion to the plaintiff: Held that the plaintiff, though as against the assignees or purchaser of a legal reversion, was not, as against the tenant for life, entitled to compel such a surrender as would give him the legal reversion. *White v. Stock*, 6 Mad. 327. TITLE.

Upon sale of copyhold in court, vendor coming for aid, is compelled to surrender in person, if conveniently to be done. *Noel v. Weston*, 6 Mad. 50. PR. SALES JUDICIAL; COPYHOLD SURRENDER.

Where copyhold is sold under commission, good title is made by bargain and sale from commissioners direct to purchaser. *Exp. Holland*, 4 Mad. 483. BANKRY. SALE OF COPYHOLD.

Where, pending a demurrer to bill, the vendor is ordered to place proper conveyance into hands of court, purchaser is ordered to place purchase money there also; the purchaser will not be permitted to take out conveyance, though he consents to vendor taking out the money. *Cutler v. Broughton*, 3 Mad. 95.

Words construed so as to have some meaning taken rather than rejected: therefore vendor proposing a price clear of all expences, construed, that the purchaser should bear the expence of making out the title, the law imposing on him the expence of the conveyance. *Stratford v. Bosworth*, 2 Ves. & B. 341. CONTRACT, C. OF.

Construction of a contract, that a reference of the expences was confined to the expence of the conveyance; but the evidence of the attorney was admitted for the defendant to prove the intention of both parties according to verbal instructions, that the plaintiff, the purchaser, should also pay the expences of making out the defendant's title. *Ramsbottom v. Gouden*, 1 V. & B. 165. DEEDS, C. OF; PR. EVID.

Purchaser of small lots entitled to attested copies of the title deeds, accompanying the principal purchase at the expence of the vendor, no stipulation having been made upon the subject. *Boughton v. Jewell*, 15 Ves. 176.

Purchaser who cannot have the original title deeds, the estate being sold in number of lots, is entitled to attested copies at expence of vendor. *Dare v. Tucker*, 6 Ves. 460.

Expence of conveyance falls on the purchaser if no particular stipulation. *Dk. Bolton v. Williams*, 2 Ves. J. 155. 4 Bro. C. C. 297.

Assignees in bankruptcy must surrender copyhold to purchaser. *Drury v. Man*, 1 Atk. 95. See 6 G. 4. c. 16. s. 64. 68. 69. COPYHOLD, SURRENDER OF; BANKRY. CONVEYANCE TO PURCHASER.

Conveyances made under a decree, are to be settled by the like rule as men of judgment among conveyancers would direct. *Lloyd v. Griffith*, 3 Atk. 267. SALE JUDICIAL.

#### IX. PURCHASER'S COVENANTS.

Under a contract for assignment of a term whether from the original lessee or a mesne assignee, the purchaser must covenant for indemnity against payment of rent and performance of the covenants, though he cannot have a covenant for title from the assignor as being an executor, and also by express stipulation. *Staines v. Morris*, 1 V. & B. 8.

Though upon the purchase of an equity of redemption the incumbrance is not, as between the representatives of the purchaser, his personal debt, even by his covenant to pay, which is considered as only for indemnity of the vendor; it is, if, beyond that, he enters into a new contract with the mortgagee, as for different times and modes of payment, &c. *El. Orford v. Ly. Rodney*, 14 Ves. 417. INCUMBRANCES.

#### X. DISCHARGE OF THE CONTRACT AND REFUNDING PURCHASE MONEY.

An estate having been sold, some part of which, material to the enjoyment of the rest, was subject to a defect of title known to the vendors, but not disclosed by the abstract, and unknown to the purchaser, the contract was rescinded, and the vendors were ordered to repay the purchase money, with all costs and expences incident to the purchase and conveyance. *Edwards v. M'Leay*, 2 Swan. 287. FRAUDULENT CONCEALMENT; CONTRACT.

Where vendor in ignorance and mistake agrees to sell that in which he has no interest at the time of sale, equity will rescind the contract and will order bond given for purchase money to be cancelled and interest paid on it to be refunded without costs on either side. *Hitchcock v. Giddings*, 4 Price, 135. MISTAKE; BUYING OF TITLES.

Injunction to stay proceedings in an action brought by a purchaser to recover the amount of his deposit refused; the description in the printed particular of sale being calculated grossly to deceive as to the real nature and value of the estate sold. *Stewart v. Alliston*, 1 Mer. 26. INJUNC. AGAINST PROC. AT LAW; FRAUD.

The defendant having sold and conveyed land to the plaintiff, suggesting that he had a title, and it afterwards appearing that he was not entitled to part, the same being an encroachment from a common, though no eviction had happened or was threatened, a bill lies to set aside the conveyance, and for a re-

turn of the purchase money, and all expences. *Edwards v. M'Leay*, Coop. 308. MISREPRESENTATION; TITLE; BILL TO SET ASIDE CONVEYANCE.

Purchaser entering into possession, knowing of objections to abstract but continuing to negotiate, cannot break off contract, and injunction will lie against his proceeding at law to recover back purchase-money; but otherwise if he had declared off, on delivery of abstract. *Wards v. Jeffery*, 4 Price, 294. SPEC. PERF.

Court will not make absolute order nisi for dissolving injunction (granted to restrain purchaser from proceeding at law to recover part of purchase-money paid by him in advance, the vendor not being able to make title, and there being outstanding incumbrances,) without the masters report as to sufficiency of title, although objections are fully stated in defendant's answer. *Church v. Legent*, 1 Price, 301. PR. MASTER'S REPORT ON TITLE; PR. DISSOLUTION OF INJUNC.

Purchaser discharged on motion upon affidavit of imprisonment for debt and insolvency. *Hodder v. Ruffen*, 1 V. & B. 544. INSOLVENCY.

Purchaser under a particular, giving a false description, not bound at law or in equity, or by any act of his agent without a fresh authority. *Deverell v. J. d. Bolton*, 18 Ves. 509. SPEC. PERF.; PARTICULARS OF SALE.

Purchaser cannot insist on being discharged upon a report of defective title, if capable of being made good within a reasonable time; as to which, the vendor will be put under terms. *Coffin v. Cooper*, 14 Ves. 205.

Purchaser not entitled to a conveyance of part though answering the general description in the advertisement of sale, as it was not in the contemplation of either party at the time of the purchase or conveyance, purchase being referred to a more particular description which did not include that part, and the surrender having been made according to that, and from his own instructions. If one party thought he had purchased *bonâ fide* part of an estate which the other thought he had not sold, it is a ground to set aside the contract. If both understood the whole was to be conveyed, it must; otherwise if neither understood so. *Cutlerley v. Williams*, 1 Ves. J. 210.

Small variation in general description of land not material. *Id.* 212.

Vendor contracting to sell estate in which he has no title, purchaser not bound though real owner offers a title. *Tendering v. London*, 2 Eq. Ab. 680. SPEC. PERF.

It is against natural justice that any one should pay for a bargain which he cannot have: as if I article to buy a house, and the house is burnt down before the day of payment, I am not bound to pay the money. *Stent v. Bailis*, 2 P. W. 220.

Bill for specific performance of articles for the purchase of an estate, dismissed with costs; because the title was not laid before the vendee's counsel within the time limited. *Lewis v. Ld. Lechmers*, 10 Mod. 503. SPEC. PERF.; TIME ESSENTIAL TO CONTRACT.

One transfers stock by virtue of a forged letter of attorney, the transfer to be void, and the right owner not hurt; and the dividends received under this forged letter of attorney, together with the stock, to be taken back from the assignee, and restored to the right owner. *Hildyard v. S. S. Company*, 2 P. W. 76. FRAUD.

A, articles with B, for the purchase of an estate of 180l. per annum, for which he was to give thirty-five years' purchase upon granting or conveying to him, and pay 50l. in part; but on discovery that 300l. per annum of the lands were copyhold, refused to go on. On a bill by B, equity will not decree a specific exe-

cution of this agreement, being inequitable, but will order the 50*l.* to be paid back. *Hick v. Phillips*, Prec. Chan. 575. SPEC. PERF.; TITLE.

Purchaser before a master submitting to forfeit his deposit, not bound to proceed in the purchase. *Savile v. Savile*, 1 P. W. 745; but see note (s), id. 747. SALES JUDICIAL; SPEC. PERF.

A agrees with B, lord of the manor, to purchase a copyhold for two lives, such as A shall name. A pays 200*l.* part of the purchase-money, and was to pay the rest in three months; a court is held; three months pass; B died suddenly, and the manor came to one who was not bound by the contract. The executor of B to refund 200*l.* *Anbry v. Keen*, 1 Vern. 472. AGREEMENT BECOMING IMPOSSIBLE.

If, on parol agreement for a lease, any consideration had been paid, equity would restore the consideration, though it did not execute the agreement in specie. *Deane v. Izard*, 1 Vern. 159.

There is a difference between money laid out in necessary repairs and lasting improvements, and money laid out for fancy and humour; the former shall be allowed, though not the latter. *Id. ib.*

A sold to B, and covenanted against himself and all claiming under him; B secured the purchase-money, and was evicted by a title paramount A's title; B was relieved from the payment of the purchase-money. *Anon.* 2 Ch. Ca. 19.

When eviction entitles a purchaser to relief. *Maynard v. Moseley*, 3 Swan. 651. EVICTION.

Different consequence of eviction before and after payment of purchase-money. *Id.* 655.

#### XI. BONA FIDE PURCHASER, HOW FAVOURED OR BOUND.

In a suit for specific performance by vendor, a writ of *ne exeat regno* ought not to issue against the purchaser, unless the court deems it quite clear that there must be a decree for the specific performance of the contract. *Morris v. McNeil*, 2 Russ. 604. PR. WRIT NE EXEAT REGNO.

Premises held under a demise, containing a proviso, that lessees shall not assign without the license of landlord in writing, are sold under a decree to a purchaser, who pays his purchase-money into court, and is let into possession; the landlord having refused to concur in the assignment, the representatives of the lessee filed a bill against him, alleging that his conduct with respect to the sale had been such as to deprive him in equity of any right to act on the legal construction of the covenant and proviso against assignment, and praying that he might be decreed to give his licence in writing for the transfer of the interest. The purchasers are necessary parties to such a bill. *Maule v. Dr. Beaufort*, 1 Russ. 349. PL. PARTIES.

Trustee of term to pay debts, purchased the inheritance from tenant for life, and had it conveyed to him by fine and feoffment. Remainder-man is not entitled to account of rents, except from his entry to avoid the fine, and if he neglects to claim for five years, he is barred. *Reynolds v. Jones*, 2 S. & S. 206. TRUSTEE; TENANT FOR LIFE AND REMAINDER-MAN; ACCOUNT.

Purchaser of pension granted by Geo. 3., and which necessarily ceased on king's death, not entitled to pension which was granted by Geo. 4. merely in continuance of the former one. *Cly v. St. John*, 2 S. & S. 32. PENSION; DEMISE LE ROY.

Where a receiver is appointed in a suit for specific performance, if the purchaser is compelled to take the title, the receiver is to be considered as his receiver.

*Boehm v. Wood*, 1 Turn. & R. 345. RECEIVER; SPEC. PERF.

Husband is not compelled to make allowance to wife before he enjoys her equitable interest for life, unless he neglects to provide for her; but if before that latter event, husband assigns it for valuable consideration, purchaser is not obliged to provide for wife. *Elliott v. Cordell*, 5 Mad. 156. HUSB. & WIFE.

Receiver appointed on the motion of the vendor, pending a reference of title. *Boehm v. Wood*, 2 Jac. & W. 236. RECEIVER; REF. AS TO TITLE.

The purchaser of a copyhold estate, devised subject to payment of debts, in trust for sale, and sold, during the infancy of the heir, under the usual decree, is not entitled to have a portion of the purchase-money retained in court, as a provision for defraying the expense of the fine, which would become payable on the death of the heir before a conveyance. *Morris v. Charlson*, 3 Swan. 558. INFANT TRUSTEE; FINE.

Where A, the heir of lessee, having a right to perpetual renewal, had entered into an agreement with B respecting the independent lease of lands, held under renewable lease by ancestors of B, which independent lease B had obtained from landlord by fraud and circumvention: Held, that heir of A, and purchasers for valuable consideration claiming under him, were entitled in equity to benefit of agreement between B and A, and that heir of landlord was entitled to benefit of agreement, so far as B took an interest. *Butler v. Mulvihill*, 1 Bligh, 137. AGREEMENT; FRAUD.

A purchaser of property collaterally charged to secure a bond debt, for which he mortgages the purchased estate, and pays the remainder of the purchase money, is not entitled to insist on having the property reconveyed to him free of incumbrance before he pays the sum so secured by mortgage; and if he file a bill to have the estate reconveyed to him, and a declaration of court as to the persons entitled to receive the money, where there are two sets of claimants, he will be considered as merely a mortgagor filing bill to redeem, and must pay all costs, although he has paid the money into court. *Drew v. Harman*, 5 Pri. 319. MORTGAGE; PR. COSTS.

Limitation in marriage settlement to settlor's brother, is not a valuable consideration as against subsequent purchasers. *Johnson v. Legard*, 3 Mad. 283. LIMITATION; CONSIDERATION; COLLATERAL RELATIONS.

But limitation in favour of issue of second marriage, was held good. *Clayton v. El. Wilton*, cited *id.* 302.

A court of equity will not assist a vendor in defeating a prior voluntary settlement made by himself. *Smith v. Garland*, 2 Mer. 123. VOLUNTARY SETTLEMENT.

Purchaser objecting to title on the ground of a voluntary settlement made by the vendor; a bill for specific performance by the vendor was dismissed, and an exception to the master's report, approving the title, allowed. *Id. ib.*

Purchase for valuable consideration (the adequacy of price being disputed), by nephew from uncle, who (unknown to nephew), was insolvent and died soon after the purchase: held not impeachable by creditors of uncle. *Copis v. Middleton*, 2 Mad. 410. FRAUD ON CREDITOR.

Court will not interfere to assist a purchaser for valuable consideration of estate seized under an extent, against the vendor, for which he has paid the principal part of purchase-money, and offers to pay the remainder to the crown, or to give up the estate on satisfaction made to himself. *Rex v. Hollier*, 2 Pri. 394. EXTENT.

Voluntary settlement of personal property, in trust

for such one or more of his children as the settlor shall appoint. Appointment to one child, exclusively, upon a secret understanding that that child shall re-assign a part of the fund to, or in favour of a stranger. This appointment is a fraud upon the settlement: and void, not only to the extent of the sum assigned back, but *in toto*. Bill, by purchaser for valuable consideration, without notice, under this appointment, dismissed as against the person entitled under the settlement, in default of appointment; such person having also the legal estate in the fund, which was the subject of the appointment. *Daubeny v. Cockburn*, 1 Mer. 626. POWER, ILLUSORY EXECUTION OF.

Payment of a valuable consideration by person, not having the legal estate, and not being an object of the power, cannot set up an invalid appointment in favour of such purchaser. *Id.* 638. POWER, ILLUSORY APPOINTMENT.

Secus, where the power is unlimited as to its objects, and the appointment is only impeachable on the ground of its being voluntary. *Id. ib.*

If a purchaser of the legal estate in lands, subject to an equitable rent-charge, refuse to pay the rent-charge, a receiver will be appointed. *Pritchard v. Fleetwood*, 1 Mer. 54. PR. RECEIVER; RENT-CHARGE.

Purchaser, *pendente lite*, &c. in debt, &c. a real action, bound by judgment. *Metcalfe v. Cartwright*, 2 V. & B. 205. JUDGMENT; ASSIGNMENT PENDENTE LITE.

Purchaser of estate, charged with debts *pendente lite*, by creditors, is bound by decree. *Id.* 207. DECREE; ASSIGNMENT PENDENTE LITE.

Receiver appointed after answer of purchaser, under circumstances. *Hall v. Jenkinson*, 2 V. & B. 125. PR. RECEIVER.

Covenant upon marriage, that the heirs, executors, &c. of the husband shall, within six months after his death, pay to the wife, if she should survive him, the fortune he received, with the addition of 50% per cent.; and in case he should receive any other part of her fortune, to which she was entitled in reversion under a will, to pay that in the same manner, and with the same profit. The husband becoming bankrupt, the wife has no claim upon that reversionary fund, against a purchaser under the commission. *Baker v. Serra*, 14 Ves. 313. MARRIAGE SETTLE; HUSB. & WIFE.

A purchaser, under a decree, shall not be affected by error in the decree, *e. g.* in its not having given a day to an infant defendant to shew cause, or in decreeing a sale of lands to satisfy judgment debts, without an account of the personal estate. *Bennett v. Hamill*, 2 Scho. & L. 566. SALLS, JUDICIAL; DECREE, ERROR IN.

A purchaser has a right to presume that the court has taken the steps necessary to investigate the rights of the parties, and that on that investigation it has properly decreed a sale; but he ought to see that all proper parties to be bound are before the court, and that he does not take a title which can be impeached *alunde*. *Id. ib.*

Purchaser cannot protect himself against claim of dower, by a term attendant upon the inheritance, unless he has procured an assignment. *Maudrell v. Maudrell*, 7 Ves. 567. See this case further, 10 Ves. 246. DOWER.

Husband, having power of appointment paramount to right of dower, in default thereof, to himself for life, remainder to his right heirs, if the power could have effect, yet a purchaser, taking by a conveyance, adapted to pass the interest in the estate as a limitation in fee, was held to take in that way, not by way of appointment, and therefore subject to dower. *Id. ib.* DOWER; POWER, EXEC. OF.

Relief against forfeiture of the deposit upon putting

the other party in the same situation, as if the contract had been performed at the time agreed. *Moss v. Matthews*, 3 Ves. 279. FORFEITURE OF DEPOSIT.

Defendant stating by answer, a purchase for valuable consideration without notice, shall not be compelled to answer further. *Jerrard v. Saunders*, 2 Ves. J. 454. PL. ANSWER; VALUABLE CONSIDERATION.

This court will not take the least step against a purchaser for valuable consideration without notice, not even to perpetuate testimony against him. *Id.* 458. VALUABLE CONSIDERATION; PERPETUATING TESTIMONY.

Injunction against purchaser, on behalf of creditor, to restrain payment to heir. *Green v. Lowes*, 3 Bro. C. C. 217. INJUNCTION.

The court will not apply the maxim  *caveat emptor*, to cover a false and positive representation, essentially material to the subject. *Lanndes v. Lane*, 2 Cox, 363. FRAUD; MISREPRESENTATION.

A, by settlement after marriage, not being indebted, conveys to trustees to family uses, reserving a power to sell, but covenanting that the purchase money should be paid to the trustees, to be laid out to the same uses; he sells to B, who has notice of the covenant, but pays his money to A, who dies insolvent: B's representatives shall not be obliged to repay the money, the settlement being voluntarily and fraudulent as against a purchaser. *Freely v. Temple*, 2 Bro. C. C. 148. VOLUNTARY SETTLE.

Purchase for a valuable consideration *bond fide* paid: held a good defence, though the consideration was much less than the real value. *Bullock v. Sadler*, Amb. 764. INADEQUACY OF CONSIDERATION; PL. PLEA OF PURCHASE.

Where marriage articles limited a joint estate to the intended husband and wife, and after the death of the survivor, to the use of the heirs of the body of the husband, begotten on the wife, and the settlement after marriage pursued the words of the articles, husband and wife levy a fine, and first mortgage, and then agree to sell, the articles not being produced, the court would not decree them to be carried into execution by strict settlement against the purchaser, who had notice of them. *Cordwell v. Mackrill*, Amb. 515. S. C. 2 Eden. 344. MARRIAGE ARTICLES.

The court is cautious in following money into land, but will do it if proved that the money was laid out in land, the doubt is on the proof; always done when admitted on the answer of person laying it out. *Lane v. Dighton*, Amb. 413. TRUST.

A purchaser for valuable consideration, without notice, by taking an assignment of a term attendant, may protect himself from mesne incumbrances. *Willoughby v. Willoughby*, Amb. 282. INCUMBRANCES; TERM, ATTENDANT.

A *bond fide* purchaser without notice, if the term is in a trustee, may use it to protect or recover the possession; so if the term is in himself. *Id.* 283.

The term will protect against all intermediate incumbrances. *Id. ib.* TERM, ATTENDANT.

Title of purchaser for valuable consideration is a good ground of defence, but not for relief. *Patterson v. Slaughter*, Amb. 293. PL. PLEA; PL. RELIEF.

Purchasers for valuable consideration, not bound by private act of parliament. *Ponfret v. Ld. Windsor*, 2 Ves. 480. PRIVATE ACT OF PARLIAMENT.

Wife not entitled to dower against a purchaser of the inheritance who has got an assignment of a term, originally made previous to her right of dower. *Scanlon v. Lyford*, Amb. 6. S. C. nom. *Hill v. Adams*, 2 Atk. 200. DOWER.

S devised all his real and personal estate to G, his heirs, &c. charged with his debts; plaintiffs were bond creditors, and received their interest of G, as

executor, regularly for sixteen years, but never asked for the principal, and G during this interval made several sales of the testator's estate: Held that the purchaser shall not be disturbed after a quiet possession of so many years. *Elliot v. Merryman*, 2 Atk. 41. **BARN.** 78. **LENGTH OF TIME.**

Where purchaser has given a full value for estate; mistake of some party to conveyance of their claim thereto under a marriage settlement shall not turn to the prejudice of the purchaser without notice. *Malden v. Menill*, 2 Atk. 8. **FRAUD, IGNORANCE OF RIGHTS.**

If one who confesses a judgment aliens part of his land, and the rest descends, the heir shall not have contribution against the purchaser. *Hurrey v. Woodhouse*, Sel. Ch. Ca. 3. **W. KOL.** 3. **HEIR AT LAW; CONTRIBUTION.**

After twenty years' possession, a purchaser shall not be put to prove the payment of his bond for the purchase money. *Anon.* Mos. 37. **LENGTH OF TIME.**

One possessed of a term devises to A, makes B his executor, and leaves some debts; if the executor sells the term, the purchaser shall hold it against the devisee; secus, if sold at an under-value, or if the purchaser knew there was no debts, or that the debts were, or could be paid without breaking in upon the specific legacy. *Ewer v. Corbet*, 2 P. W. 148. **EXECUTOR; FRAUD.**

A trader seised of land in fee gives judgment to B, and then sells the lands to C, &c.; afterwards becomes a bankrupt; though the judgment creditor cannot come in for more than his proportion with the bankrupt's creditors, whether he may not extend the lands in C, the purchaser's hands, C having purchased before the bankruptcy; and this not prejudicing the creditors. So if A, the trader, gives judgment to B, and articles for a valuable consideration to sell to C, and then becomes a bankrupt, it seems the judgment shall bind the lands in the hands of C, who article to buy them; but whatever money the purchaser was to pay the bankrupt, the same shall be liable to the bankruptcy. *Orlebar v. Fletcher*, 1 P. W. 738. **JUDGMENT, BANKCY.**

One having a bond, receives the money due upon it, and afterwards assigns it, for a valuable consideration as unsatisfied, to another who has no notice of the payment, yet the purchaser can have no avail of this bond. *Turton v. Bosson*, 1 P. W. 497. **S. C.** 2. **Vern.** 764. **Free. Chan.** 522. **10 Md.** 455. **1 Stra.** 240. **BOND; FRAUD.**

A purchases of a man who had committed an act of bankruptcy, but without notice thereof, afterwards a commission is taken out, and there being a term standing out in trustees, the assignee brings a bill against them, and the purchaser to have the term assigned to him. Bill dismissed. *Wilkes v. Bodington*, 2 Vern. 599. **TERM ATTENDANT; BANKCY. ASSIGNMENT.**

A purchaser without notice shall not be hurt in equity, not only where he has got a prior legal title, but where he has a better right to call for the legal estate than another, who has got an incumbrance prior to his title. *Id. ib.*

A makes a lease for three years; and in consideration of the lessee's laying out 100*l.* in improvements, covenants at the end of the term to grant a new lease at the same rent. Purchaser of the inheritance decreed to make good the covenant. *Richardson v. Sydenham*, 2 Vern. 447. **\*COVENANT, WHO BOUND BY; LESSOR AND LESSEE.**

Tenant for life of a copyhold sold his estate, and surrendered it that the lord might admit A the purchaser; the copyholder in reversion entered and recovered at law; A was relieved in equity. *Anon.* 2 Freem. 118. **COPYHOLD, SURRENDER OF.**

Lord of manor (his tenants refusing to renew) makes a lease of the premises to his daughter for ninety-nine years, and afterwards sells the manor to

J S, who has notice of the lease, but has security that the daughter, when at age should surrender; daughter decreed to have the benefit of the lease. *Jennings v. Selleck*, 1 Vern. 467. **ADVANCEMENT; PARENT AND CHILD.**

Devisee shall not examine witnesses in *perpetuum rei memoriam*, to prove a will against a purchaser without notice, till the will has been established by a verdict at law. *Beckinall v. Arnold*, 1 Vern. 354. **PR. BILL TO PERPETUATE; DEVISEE.**

Court will not entertain bill by dowress to set aside an outstanding term as against a purchaser, though he had notice. *Bodmin v. Vendebendy*, 1 Vern. 356. 179. **OUTSTANDING TERMS; DOWER.**

Copyholder in fee takes an enfranchisement of his copyhold in the name of a trustee, and devises the lands to his younger son, who sells to A; the heir at law of the copyhold recovers in ejectment, and A brings his bill and is decreed to hold and enjoy against the heir. *Dancer v. Erett*, 1 Vern. 392. **S. P.** *Parker v. Turner*, *id. ib.* **COPYHOLD.**

A man who purchases without notice of a prior incumbrance, or prior right, shall not have his title impeached in equity, nor shall he be compelled to discover any writings which may weaken his title, neither shall any advantage be taken from him which may defend him at law. *Harding v. Hardres*, Rep. temp. Finch 9. *Hayman v. Gomeidon*, *id.* 34. *Snelling v. Squib*, 2 Ch. Ca. 47. *Wilker v. Bodington*, 2 Vern. 599. *Stephens v. Gaule*, *id.* 701. He must plead himself a purchaser without. *Bodmin v. Vendebendy*, 1 Vern. 179. But he need not set forth the consideration he paid. *Moore v. Mayhew*, 1 Ch. Ca. 34. 2 Freem. 175. **NOTICE; PL. PLEA OF PURCH.**

## XII. LIEN, CONCERNING.

Application by vendor, who had not conveyed, for a sale of the premises in discharge of his lien for the unpaid purchase-money, and to prove for any deficiency granted. *Exp. Gyde*, 1 G. & J. 323. **BANKCY. PROOF IN.**

Where purchase money for estate was, in pursuance of agreement for purchase, secured by bond of purchaser, payable at death of vendor with interest; but conveyance expressed that it had been paid, and it had vendor's receipt indorsed upon it: held, that vendor had no lien upon the estate for the amount of the bond, and estate is in purchaser immediately. *Winter v. Tal. Anson*, 1 S. & S. 434.

Remainder-man having sold property to a purchaser, by whom money is advanced to pay off a heavy and pressing incumbrance, the remainder-man representing himself as having a right to sell with the concurrence of the tenant for life for that purpose; whereupon a draft of conveyance is prepared, to which the tenants for life and remainder-men are made parties, and the purchaser takes possession, gives the purchaser such an equitable title to the purchase, as having cleared the estate from a charge to which the tenant for life was liable, as to establish a lien on the property which equity will protect, by enjoining the tenant for life from proceeding by ejectment to obtain possession, until the cause shall be finally determined on the hearing, whatever case may be made by the answer on merits stated on part of defendant in equity. *Ludlow v. Grayall*, 11 Price, 58.

Covenant between vendor and purchaser, that purchase money should be repaid within two years after resale, discharges the vendor's lien. *Exp. Parkes*, 1 G. & J. 228.

Case in which vendor of estate loses his lien, by a contract between all parties for a second sale, the first vendor being unable to complete his contract.



*Cood v. Pollard*, 9 Price, 544. And same case confirmed, 10 Price, 109. LIEN.

A trustee for the sale of a brewhouse and plant, (the cestuique trusts being infants) contracts to sell them, and lets the purchaser into possession: held, that the purchaser was in possession within the stat. of 21 Jac. 1. c. 19, and therefore the plant, upon his becoming bankrupt, passed to his assignees, without being subject to the lien for the purchase money. *Exp. Dale*, Buck, 365.

Vendor has a lien on estate sold for purchase money, though he has received bills from purchaser in payment of same, and though purchaser becomes bankrupt. *Exp. Peake*, 1 Mad. 346.

Vendor held not to have waived his lien on the estate sold, by taking the promissory note of the vendee, and receiving its amount by discount. *Exp. Learing*, 2 Rose, 79. WAIVER.

Rule in equity in the case of an implied lien is, that the vendor's lien is not gone by accepting a bond or note from the purchaser, nor will a receipt for the purchase money discharge the lien till the money be paid; this rule is strengthened when applied to the case for an express charge. *Saunders v. Leslie*, 2 Ball & B. 614. LIEN, RELEASE OF.

A vendor accepting a mortgage on another estate, is not conclusive evidence against the extinction of his lien on the estate sold. *Id.* 515.

Vendor's lien on the estate for the purchase money, not discharged by taking bills of exchange; which are to be considered, not as a security, but as a mode of payment. *Grant v. Mills*, 2 V. & B. 306. BILL OF EXCHANGE; WAIVER.

Judgment against the purchaser of a leasehold house and furniture for damages and costs, does not destroy lien of the vendor upon the house and furniture; and therefore proof under a commission of bankruptcy against the purchaser for the deficiency allowed. *Exp. Ld. Seaforth*, 19 Ves. 235. 1 Rose, 306. BANKRUPT. PROOF IN.

Vendor's lien for purchase money unpaid, against the vendee; volunteers and purchasers with notice, or having equitable interest only, claiming under him, unless clearly relinquished, of which another security taken and relied on, may be evidence according to the circumstances, the nature of the security, &c.; the proof being upon the purchaser. and failing in part, upon the circumstances, another security being relied on, may prevail as to the residue. *Muckreth v. Symmons*, 15 Ves. 329.

Lien of vendee, having paid prematurely, is analogous to that of vendor. *Id.* 345.

Purchase money unpaid, is *prima facie* a lien on the lands sold; and if a security is taken for that money, it lies on the vendee to shew that the vendor agreed to rest on that security, and to discharge the lands. A note passed by a vendee to a trustee for part of the purchase money, out of the amount of which incumbrances then not ascertained were to be satisfied, and the balance only paid to the vendor, is not such a security as will discharge the lien on the lands. *Hughes v. Kearney*, 1 Scho. & L. 132.

Vendor's equitable lien upon estate for purchase money is lost by taking special security by way of pledge of stock. *Naim v. Prowse*, 6 Ves. 752.

Whether the vendor of an estate who takes bond of the vendee for the purchase money, has a lien on the lands for the purchase money remaining unpaid? *Blackburne v. Gregson*, 1 Cox. 90. S. C. 1 Bro. C. C. 420.

Although the vendor of an estate has fraudulently concealed an incumbrance, yet the purchaser has no lien on the purchase money after it has been paid over. *Cator v. Bollingbrooke*, 1 Bro. C. C. 301. FRAUD. CONCEALMENT.

Purchaser, without notice, of a rent charge transfers

stock in payment; the party entitled for life, grants an annuity out of the dividend, secured by a letter of attorney to receive the dividends, to a person who had no notice of the transaction; the purchaser of the estate is evicted by grantee of the rent charge; he has no lien on the stock. *Id.* *ib.*

If the vendor parts with his estate, and takes a security for the consideration money, there is no reason for a court of equity to assist him against the creditors of the purchaser. *Fawell v. Hellis*, Amb. 726.

A purchases lands of B, and mortgages back those lands for part of the purchase money, and gives a note to B, for 200l. the other part thereof; A devises those lands to be sold for payment of his debts; this 200l. note, though for part of the purchase money, shall not be preferred to other debts, nor be a charge on the land in equity. *Bond v. Kent*, 2 Vern. 281. PRIORITY OF SECURITY.

A sells land to B, who afterwards becomes a bankrupt, part of the purchase money not being paid. A shall not be bound to come in as a creditor under the statute; but the land shall stand charged with the money unpaid, though no agreement for that purpose. *Cipman v. Turner*, 1 Vern. 267, 268. BANKRUPT. PRIORITY.

I S. bought an estate of A, who gave him a bond to suffer a recovery within three years, or to return him his money upon a re-conveyance. A tendered a recovery, but before it was suffered, a third person made a title to the land, whereupon I S. brought his bill for the purchase money, but the court could not relieve him, for having consented to take the bond, he must resort to A's covenant against incumbrances. *Meynard's case*, 2 Freem. 42.

### XIII. OF NOTICE, AND ITS EFFECT.

The possession of a client's deeds by his solicitor is so usual, and so much in the ordinary course of transactions, that where a purchaser purchases an estate, and is informed that the deeds are in the hands of the solicitor of the owner of the estate, there is nothing in that circumstance which renders it necessary for him to inquire under what circumstances the solicitor holds the deeds. And therefore, where a solicitor acquires, by contract, a different interest beyond what his character of solicitor confers, (such as an equitable mortgage), it is incumbent on him immediately to give clear and distinct notice of such interest to all persons in the visible ownership of the estate; and such a case is not within the principle of the cases in which a purchaser of land has been held bound to inquire of the tenant in possession the nature of his interest. *Boson v. Williams*, 3 Y. & J. 150.

Plea of valuable consideration without notice, is no protection against adverse claim, of which purchaser might have had notice by using due diligence. *Jackson v. Rowe*, 2 S. & S. 472. PLEA.

Injunction granted *ex parte* to restrain the negotiation of a bill of exchange by a holder who had given valuable consideration for it, but who had notice that it had been improperly accepted by a partner of the plaintiffs in the partnership name. *Hood v. Aston*, 1 Russ. 412. PR. INJUNC.; BILL OF EXCHANGE.

A testatrix having directed that a lease should be sold, and the money divided among five persons, the administrator alleging that he had become entitled to it by an arrangement with the legatees, assigned it over for valuable consideration: held that, at his death, it remained assets unadministered, and that the purchaser must be directed to convey it to the administratrix *de bonis suis*, though the persons beneficially interested were not at all parties to the suit. *Cubylge v. Boatwright*, 1 Russ. 649. FRAUD.

Party declaring, that unless contract was performed by such a day, he should consider it as a refusal by the other party to perform it, and would act accordingly, does not amount to a notice of abandonment of the contract. *Reynolds v. Nelson*, 6 Mad. 26. NOTICE OF ABANDONMENT OF CONTRACT.

A agrees, verbally, to sell an estate to B: he afterwards agrees, in writing, to sell it to C, and then conveys it to B in pursuance of the first contract, B having notice of the second. Semble, C cannot call on B for a conveyance. *Dawson v. Ellis*, 1 Jac. & W. 524. PRIORITY OF CONTRACT.

A person contracting to purchase leasehold property, is held to contract with notice of the clauses of the lease. *Walter v. Maunde*, 1 Jac. & W. 181.

A person agreeing to purchase the right and interest of another, under a contract for a lease, with full notice of the nature of it, cannot object to the payment of the consideration, either on the ground that such contract is not binding on the other party to it, or for want of title. *Baxter v. Conolly*, 1 Jac. & W. 576.

If purchaser is informed of incumbrances on estate, but is misinformed as to the nature of them, it is sufficient notice to set him on the enquiry as to incumbrances, and he is bound. *Taylor v. Baker*, 5 Price, 306. INCUMBRANCE.

Purchaser having employed the vendor's agent, who had notice of an incumbrance, charged with notice, notwithstanding the purchase was made under the sanction of the court, and an infant was interested in it. *Toulmin v. Steere*, 3 Mer. 210. PRIN. & AGENT; SALE JUDICIAL.

Purchaser of an equity of redemption cannot set up a prior mortgage of his own, or which he has got in against subsequent incumbrances, of which he had notice. *Id. ib.* PRIORITY OF SECURITY.

The possession of a tenant is notice to a purchaser of the whole actual interest he may have in the estate; therefore, of a right to the timber on the estate, although such right accrued by a title posterior to that on which his possession was grounded. *Allen v. Anthony*, 1 Mer. 282. NOTICE.

A trust fund of 15,000*l.*, created under marriage settlement, by which certain lands were limited to husband for life, remainder to first and other sons in tail, with powers to husband of leasing for forty-one years, or three lives, at best rent, was directed, by deed, to be conveyed, &c. to same uses, &c.; and in mean time, trustees, with consent of husband, were empowered to lend money on certain security. Husband purchased leasehold for 891*l.*, to which he took the assignment to himself alone, and obtained purchase money out of trust fund to amount of 11,696*l.*, taking security for 1400*l.* less than 11,696*l.* Husband granted lease at great under-value for his own term to attorney who managed purchase, which purchase proved very beneficial: Held, that first son of marriage was entitled to follow that part of trust fund which had been misapplied, and to have benefit of purchase, and to have lands sold, discharged of lease to attorney, whose equity against him (the son) as personal representative of father, was barred by notice of settlement and breach of trust. *Phayre v. Perce*, 3 Dow, 116. S. C. 1 Bli. N. S. 594. TRUST, BREACH OF.

A purchaser aware of tenant's possession of part of the estate, has constructive, though not actual, notice of the whole of the tenant's interest in the estate. *Powell v. Dillon*, 2 Ball & B. 416.

Constructive notice to a purchaser of a tenant's title, precludes the plea of purchase for valuable consideration without notice. *Id.* 421.

Notice to a purchaser of a lease necessarily implies notice of all the covenants in it, and being specifically informed that the estate was in lease, he is bound to know all the contents of the leases, and cannot take

upon himself a partial knowledge. *Eyre v. Dolphin*, 2 Ball & B. 301.

Where the evidence of notice in the purchaser is very loose, and there only exists a suspicion of it, equity will not act upon it. *Id.* 301.

Grants in reversion obtained by an agent and trustee from his employers and *cestui que trusts* for fraud and misrepresentation, afterwards assigned for valuable consideration to a purchaser having notice of the facts and nature of the title, set aside. A conveyance taken after the grants, the fiduciary relations still existing, and the grantor ignorant of his rights, is a continuation of the fraud, and not a confirmation. *Dunbar v. Tredennick*, *id.* 304. FRAUD, FID. STR.

A purchaser with notice is bound to the same manner as his vendor. Although a purchaser with notice be not a party to the original fraud, yet he is considered as an accessory after the fact. *Id.* 319.

Qu. Whether purchaser for valuable consideration under a decree fraudulently obtained, though ignorant of fraud, can protect himself when fraud appears on face of proceedings? *Gore v. Stackpole*, 1 Dow, 30. FRAUD.

Specific performance decreed against a purchaser at a public auction, where the representation in the particulars of sale (complained of as calculated to mislead) was so vague and indefinite, that it ought to have put the purchaser on making previous inquiry. *Trouer v. Newcome*, 3 Mer. 704.

Equity will not relieve against a contract entered into by a child with a parent for an appointment from him; and a purchaser from the parent with notice of the fraud will be affected with it. *Palmer v. Wheeler*, 2 Ball & B. 18. POWER; PARENT AND CHILD.

Purchaser of a lease though not considered a purchaser for valuable consideration without notice, to the extent of not being bound to know from whom the lessor derived his title, is not to take notice of all the circumstances under which it is derived. Therefore, understood to have notice, that the lessors were trustees for a charity, not that the lease was bad, that depending on circumstances *dehors*. *Att. Gen. v. Backhouse*, 17 Ves. 293.

Objection by purchaser of allotments under an inclosing act, that the award of the commissioners was not made, overruled; the act containing a clause enabling a sale, and declaring the conveyance valid before the award; and supposing the possibility of the commissioners vaying the allotments, the purchaser having full notice of all the circumstances. *Kingsley v. Young*, 17 Ves. 468. AFFL. 18 Ves. 207. INCLOSURE ACT.

Purchaser bound by notice of a judgment though not docketed. *Davis v. El. Strathmore*, 16 Ves. 419.

Purchaser within the registry act bound by notice of a deed not registered. *Id. ib.*

The possession of a tenant is notice to a purchaser of the actual interest he may have either as tenant or farther, as in this instance, by an agreement to purchase the premises. *Daniels v. Davison*, 16 Ves. 249.

Notice to a purchaser, that there is a lease, is notice of its contents. *Wall v. Smith*, 14 Ves. 426.

Effect of an indefinite representation by a vendor; as that a leasehold estate was nearly equal to freehold, being renewable upon a small fine; putting the purchaser upon inquiry; though, connected with certain circumstances, such representation may be fraudulent, and form a ground for rescinding the contract. *Fenton v. Browne*, 14 Ves. 144.

Notice to a purchaser of possession by a tenant, is notice of his interest. *Hiern v. Mill*, 13 Ves. 120.

Notice to a purchaser in one transaction will not affect him in an independent subsequent one; but notice of a deed is notice of the whole of its contents so far as they affect the transaction in which notice

of the deed is acquired. *Hamilton v. Royse*, 2 Scho. & L. 315.

Bill by tenant in tail in possession under marriage settlement for discovery and delivery of title deeds; plea, mortgage by tenant for life alleging himself to be seised in fee and in possession of premises and deeds as apparent owner, allowed. *Wallwyn v. Lee*, 9 Ves. 24. **PL. PLEA.**

Averments necessary to plea of purchase for valuable consideration, without notice that vendor or mortgagor was owner, or pretended owner, and that he was in possession, not that purchaser was. *Id.* 32. **PL. PLEA, AVERMENTS.**

The recital in a deed of a fact which may or may not (according to circumstances) in equity amount to a fraud, will not of necessity affect a purchaser for value, denying notice of the fraud. *Kenney v. Browne*, 3 Ridgw. P. C. 512. **FRAUD.**

Purchaser with notice is bound in all respects as the vendor; therefore, where tenant for life granted leases for lives under a power, and bound himself, upon the dropping of a life, to grant a new lease with the same provision for renewal on the death of any person to be named in any future lease, and afterwards joined in a sale, though the power is exceeded; yet if a life drops in the life of the lessor, the purchaser having notice, must specifically perform, by granting a new lease with the same provisions: general notice to a purchaser that there are leases, is notice of all their contents. *Brydges v. Ds. Chaudes*, 2 Ves. J. 437.

Purchaser being told part of the estate was in possession of a tenant, was bound by the lease. *Taylor v. Stibbert*, *id.* 440.

Vendee says he has bought, vendor is silent: held, conclusive notice to a third person present. *Weymouth v. Boyer*, 1 Ves. J. 425.

Equity will not relieve the assignees of a bankrupt against a purchaser of the bankrupt's lands without notice of the act of bankruptcy. *Chandos v. Brownlow*, 2 Ridgw. P. C. 425. **BANKRUPT ASSIGNMENT.**

Mortgagee of a lease which recited the surrender of a former lease, which was in consideration of the surrender of a former lease in which plaintiff's title appeared: held to have notice of the title. *Coppin v. Fernyough*, 2 Bro. C. C. 291. **TITLE.**

Fraudulent conveyance set aside as against a purchaser with notice notwithstanding a great length of time which had elapsed since the original transaction. *Alden v. Gregory*, 2 Eden, 280. **LENGTH OF TIME. FRAUDULENT CONVEYANCE.**

Where, in the office copy of a will, a whole line of the original had been omitted, but the sense was left in such a manner as to give reason to suppose that the original contained a limitation in tail of real estate; held, that this was sufficient to put a purchaser upon enquiry. *Surman v. Barlow*, 2 Eden, 165.

Covenant in a marriage settlement that the husband shall, within one year, execute, he being then under age, does not shew such an interest in him, as to put a purchaser upon inquiry. Proof of constructive notice by one witness, not sufficient against a positive denial of notice by the answer. *Howarth v. Deane*, 1 Eden, 351.

Where a purchaser cannot make out his title, but through a deed which leads to a fact, he will be affected with notice of that fact. *Mertins v. Jolliffe*, Amb. 311.

One affected with notice conveys to another without notice; the assignee having legal estate shall not be affected with the notice to assignor, and so vice versa. *Id.* 313.

Though a man is bound to take notice of every thing necessary to his title, he need not look into what is not necessary. *Id. ib.*

If trustees to preserve contingent remainders join in sale to one without notice, the purchaser will be safe; contra if he have notice. *Willoughby v. Willoughby*, Amb. 284.

Notice of ancient articles by which the estate is agreed to be settled on the husband for life, remainder subject to a charge by way of jointure for the wife to the heirs male of husband by his wife, shall not affect the title of a purchaser claiming under the husband by reason of the modern method of carrying such articles into execution. *Senhouse v. Earle*, Amb. 285. **S. C.** 2 Ves. 450.

One seised of an estate subject to several equitable incumbrances, sells it to a purchaser and conveys the legal estate to him free from incumbrances, except some of the equitable incumbrances which were later in date to the others, the purchaser having no notice of the other incumbrances only, and they were preferred to the other creditors. *Ingram v. Pelham*, Amb. 153. **TRUST.**

Party having notice through his agent of sufficient to make him inquire as to the title, cannot protect himself by procuring the legal estate. *Maddox v. Maddox*, 1 Ves. 61.

Notice to an agent as well as personal notice will affect the party, and the deposition of the agent will be allowed to be read. *Id. ib.*

If a man will purchase with notice of another's right, giving a consideration will not avail him. *Mead v. Ld. Orrery*, 3 Atk. 238.

The augmentation of vicarage by yearly payments of corn and money out of rectory is a charge on rectory inappropriate into whose hands soever it shall come. Where vicar brings bill for arrears of certain annual payments issuing out of impropriate rectory, he shall recover against the impropiator, though a considerable time has elapsed between the commencement of arrears and impropiator's possession. But purchaser with notice of such claim pending such suit shall only account for arrears after his possession. *Cook v. Smeed*, 2 Bro. P. C. 184. **ACCOUNT; ARREARS.**

On a plea of purchase for valuable consideration without notice of plaintiff's title, it is sufficient to aver that the person who conveyed was seised or pretended to be seised when he executed the purchase deeds; but where a fine and non-claim is the bar, averment of actual seisin is necessary. *Story v. Ld. Windsor*, 2 Atk. 630. **S. C.** 1 Ch. Ca. 34. **PL. PLEA.**

Petitioner denying notice at or before execution of the deeds is not sufficient, he must aver that he had none at or before the payment of the money. *Id.*

If a person purchase an estate which he sees has a defect upon the face of the deed, yet a fine will be a bar, for that defect is the very occasion of levying the fine. Secus, as to a purchase from a trustee to a mortgagee. *Id.*

A purchaser with notice himself from a person who bought without notice, may shelter himself under the first purchase. *Louthier v. Carlton*, 2 Atk. 242. **S. C.** Ca. temp. Talb. 186.

Where by a transaction foreign to the business in hand, a counsel or attorney employed to look over a title has notice, that shall not affect the purchaser. *Id.* **PRIN. & AGENT.**

Purchaser with notice of agreement to settle, held a trustee. *Skirme v. Merrick*, 2 Com. 700. **AGREEMENT.**

Where the real estate is in the hands of trustees, and the trustees convey it over without notice of the trust. If a bill is brought by the *cestui que trust*, the trustees must be made defendants. *Harrison v. Frye*, Barn. 324. **PL. PARTY; TRUSTEE & CESTUI QUE TRUST.**

Though a purchaser knew not of an incumbrance

before he paid his money, yet if he knew it before the deed was executed, it affects him with notice. *Wigg v. Wigg*, 1 Atk. 384.

A purchaser for a valuable consideration, with notice of voluntary settlement from a person who bought without notice, shall shelter himself under the first purchaser, but he cannot defend himself in equity upon articles only. *Brandlyn v. Ord*, 1 Atk. 571. DEEDS, VOLUNTARY.

A devised an estate to B in tail, remainder to C in fee, bill by the heir in tail of B, for the deeds and possession; plea, a purchase without notice from C, for a valuable consideration, over-ruled; for where a man claims under a conveyance in which there is an estate tail prior to the estate he purchased, he is bound to see if that estate is spent. *Kelsal v. Bennet*, 1 Atk. 522.

Where a man purchases an estate, pays part, and gives bond to pay the residue of the money, notice of an equitable incumbrance before payment of the money, though after the bond, is sufficient. *Tourville v. Naish*, 3 P. W. 306.

A bankrupt, whose estate is in mortgage, conveys the equity of redemption to a third person after an act of bankruptcy, but before the commission and assignment; this shall not defeat the assignees: but where a *bonâ fide* purchaser for a valuable consideration, and without notice, has a contest with the assignees, this court will not take any advantage from him; therefore not compel a discovery. A commission issued is notice of the bankruptcy. *Collet v. De Gols, Forbes*, 65. BANKRY. ASSIGN. WHAT PASSES; BANKRY. NOTICE OF.

In a plea of a purchase, it is a sufficient denial of notice to say, that at the time of the purchase he had no notice, without saying, or at any time before. *Jones v. Thomas*, 3 P. W. 243. PL. PLEA.

To affect purchaser by notice to his counsel, it should be in the same transaction. *Fitzgerald v. Fauconberge*, Fitzgib. 207. PRIN. & AGENT.

A defendant in a plea of a purchase for valuable consideration, omits to deny notice; if the plaintiff replies to it, all the defendant has to do is to prove his purchase, and it is not material if the plaintiff proves notice, for it was the plaintiff's own fault that he did not set down the plea to be argued, in which case it would have been over-ruled. *Harris v. Laidlaw*, 3 P. W. 94. PR. PLA.

Mortgagee need not give notice of his mortgage to purchaser of estate. *Osborne v. Lea*, 9 Mod. 97. MORTGAGE.

Purchaser for valuable consideration without notice, shall not be impeached, especially where a settlement has been since made in his favour. *Rochfort v. Nugent*, 5 Bro. P. C. 351. SETTLE.

A defective surrender of copyhold land, for securing a sum of money, which was become void for want of being presented in due time, made good against a subsequent purchaser, with notice. *Jennings v. Moore*, 2 Vern. 609. COPYHOLD, DEFECTIVE SURRENDER.

A purchases a leasehold of an executor, having notice that a debt of the testator's was unpaid, and out of the purchase money has an allowance of a debt of 200*l.* due to him from the testator, and a debt of 500*l.* due to him from the executor, the remainder, being 150*l.*, was paid in money. This sale not good against an unsatisfied creditor. *Crane v. Drake*, 2 Vern. 616. DEBTOR & CRED.

A, having notice of incumbrance, purchases in name of B, and then agrees that B shall be the purchaser, who accordingly pays his money, without notice of incumbrance. Though B did not employ A, or know anything of purchase till after it was made, yet B, afterwards approving of it, made A his agent *ab ini-*

*tio*, and is affected with notice. *Blenkarn v. Jennings*, 2 Bro. P. C. 278. PRIN. & AGENT.

Defective surrender of copyhold for securing a sum of money, which was become void by not being presented to in due time, made good against subsequent purchasers, with notice. *Id.* COPYHOLD, SURRENDER OF.

A voluntarily agrees to give certain houses to his niece and the heirs of her body, after the death of himself and his wife, in case they should have no issue; but no conveyance was executed by A, though he lived above twenty years afterwards. In the meantime, A becomes indebted by mortgage, judgment, &c. and by his will devises all his estate, both real and personal, to his wife. This agreement is not good against a purchaser for valuable consideration, although he had notice by being a subscribing witness to it. *Parrell v. Pleydell*, 1 Bro. P. C. 124. VOLUNTARY AGREEMENT.

One purchases, having notice of a settlement, whereby the vendor was but tenant for life, remainder to his first, &c. son in tail, and afterwards sells to one who had no notice. Tenant for life dies, leaving a son: decreed, the last purchaser shall hold the land, but the first shall account for the purchase money which he received, with interest from the death of the tenant for life. *Ferrars v. Cherry*, 2 Vern. 383.

The settlement was made after marriage, but in pursuance of articles before the marriage; but the articles are not taken notice of in the settlement; however, the purchaser having notice of the settlement, it was incumbent on him to inquire whether it was voluntary, or made in pursuance of an agreement before marriage. *Id. ib.*

A purchaser or mortgagee shall not protect himself by taking a conveyance from a trustee after notice of the trust, for by taking such conveyance, he becomes the trustee himself. *Sanders v. Dehen*, 2 Vern. 271. TRUST.

Court of equity cautions in impeaching a purchaser's title upon presumptive notice. *Hitchcock v. Sedgwick*, 2 Vern. 159. PRESUMPTIVE NOTICE.

An executor in trust for an infant residuary legatee, renews a lease, part of the testator's personal estate, in his own name, and having mortgaged it, assigns the equity of redemption to a trustee to sell, for payment of his own debts. The trustee sells to one who had notice of the infant's title. Purchase set aside. *Whalley v. Whalley*, 1 Vern. 484. TRUST.

A parol agreement for a purchase and possession delivered, decreed to be performed against a subsequent purchaser with notice, who had a conveyance and had paid his money. *Butcher v. Butcher*, 1 Vern. 363. AGREEMENT, PAROL.

A made a conveyance to B with power of revocation by will, and limited other uses. If A dispose to a purchaser by will, a subsequent purchaser is intended to have notice of the will, as well as of the power to revoke: and this is a notice in law: and so in all cases where a purchaser cannot make out a title but by a deed which leads to another fact, notice of which a purchaser shall be presumed cognizant; for it is *crassa negligentia*, that he sought not after it. *Moor v. Bennet*, 2 Ch. Ca. 246. NOTICE.

Purchaser or mortgagee coming in upon a valuable consideration without notice, and purchasing in a precedent incumbrance, it shall protect his estate against any mortgage subsequent to the first, though before the last mortgage; though he purchased in the incumbrance after he had notice of second mortgage. *Marsh v. Lee*, 2 Vent. 339.

Notice to bind a purchaser of lands given to charitable uses, must be certain, and a general notice is not sufficient; therefore where land is intended to be sold by act of parliament, and it is there declared

that the land is chargeable with a charitable use, and afterwards the bill passes not, but is sold for money to one of the members who spoke upon the bill: Held, not sufficient notice within the statute. *East Grinstead Case*, Duke's Charit. Uses, 638. (Bridgman's edit.)

If A, having notice that lands were contracted to be sold to B, purchases those lands and takes a conveyance to his son and heirs, though the son had no notice of B's contract, yet the notice to his father shall affect him, *Abney v. Kendal*, 1 Ch. Ca. 38. So, if one who purchases for another, has notice of a dormant incumbrance, it shall affect the very purchaser. S. C.

#### XIV. APPLICATION OF PURCHASE MONEY.

Mortgagee or purchaser of land charged, from executor, is not generally bound to see to the disposition of the trust fund; but where in the transaction there is intrinsic evidence of breach of trust, and that the mortgagee or purchaser must have been aware of it, such land will still remain charged and liable. *Watkins v. Cheek*, 2 S. & S. 199

Where legacies were charged on the real estate of a trader, and his devisee and executor sold part of the real estates before the debts were paid: Held, that purchasers, notwithstanding the 47 Geo. 3. st. 2. c. 74. were liable to see to application of purchase money. *Horn v. Horn*, 2 S. & S. 448. STATUTES, CONSTRUCTION OF; TRADE.

Purchaser under decree bound to see directions of decree observed. *Colclough v. Sterum*, 3 Bl. 181. FR. DECREE.

Conveyance to a *bona fide* purchaser, under a decree against a feme covert for a sale of part of her separate estate, cannot, after an acquiescence of twenty-two years, be set aside, notwithstanding the purchase money may have been misapplied. An order, disposing of the real estate of a feme covert made on her consent, and acquiesced in during her life, will not be set aside on a doubtful case made many years afterwards by her representatives. *Burke v. Crosbie*, 1 Ball. & B. 489. FEME COVERT; LENGTH OF TIME.

Generally, a purchaser from an executor, not bound by his misapplication of the money, nor in many cases even of pledge, if free from fraud, or direct evidence on the face of the transaction of an intended misapplication. *McLeod v. Drummond*, 17 Ves. 154.

Objection to title by a purchaser, under a trust to sell, as bound to see to the application of the money in satisfaction of scheduled creditors and others, coming in within a limited time after the date of the deed or disabilities removed, overruled, upon the tenor of the deed implying that the receipt of the trustees should be a discharge. *Balfour v. Welland*, 16 Ves. 151. TITLE.

The doctrine as to binding a purchaser to see to the application of the money by trustees, has been extended further than any sound equitable principle will warrant. *Id.* 156.

A purchaser under a decree, not affected by irregularities and defects in the decree, by which the application of the money may not have been properly secured. *Curtis v. Price*, 12 Ves. 89. DECREE.

Whether the rule, that where there is a general charge of debts not scheduled, a purchaser is not to see to the application, holds where the purchase is not from the original trustees, but from others to whom they conveyed: *quære*? An objection upon the distinction was overruled upon circumstances. *Braybroke v. Inskip*, 8 Ves. 417.

Charge or direction by deed, for payment of debts generally, followed by specific dispositions; the pur-

chaser is not bound to see to application of purchase money. *Jenkins v. Hiles*, 6 Ves. 654. note.

Where the purchase money is to be laid out again by the trustees generally, the purchaser need not look to the application. *Doran v. Wiltshire*, 3 Swan. 699.

Where the first trust is for payment of debts, the purchaser is not bound to look to the application of purchase money. *Williamson v. Curtis*, 3 Bro. C. C. 96.

A purchaser of leasehold premises from an executor, need not (in general) see to the application of the purchase money, nor need there be any recital in such an assignment of the purpose for which it is sold; but if, on the face of the assignment, it appears to have been made in satisfaction of the private debt of the executor, such a sale is fraudulent against the persons interested in the premises under the will, and a court of equity will relieve against it. But such a claim will be barred by a great length of time having run against the parties seeking relief. *Bonney v. Ridgard*, 1 Cox, 145. LENGTH OF TIME.

Where land is directed by will to be sold generally, and the money to form part of the personal estate, the purchaser is not bound to see to the application of the money. *Smith v. Guyon*, 1 Bro. C. C. 186.

Where an estate is charged with debts generally, in case of a sale before suit, the purchaser is not bound to see to the application of the purchase money; but if he buys after bill filed, he is. *Walker v. Smallwood*, Ambl. 677.

Devise of real estate to trustee to sell and pay debts and legacies generally; trustees sell and embezzle part of the money; the purchasers not liable to the debts. An estate charged with debts not liable in hands of purchaser, unless debts specified; no more than estate devised to be sold. *Rogers v. Skillicorne*, Ambl. 188. TRUST.

Where a term is devised away by will, a purchaser of and from the executor is not bound to see whether it was necessary to sell the term for payment of the debts. *Langley v. El. Oxford*, Ambl. 797.

Purchaser or mortgagee under a decree, for sale or mortgage, and payment of creditors, answerable for the application of the money, if not paid into court. So also, if the debts are specified in a schedule, &c. by the will. *Lloyd v. Baldwin*, 1 Ves. 173.

If lands are devised for payment of debts in a schedule, purchaser is bound to see to application of purchase money; but if trust be general to pay debts, though he has notice of them, he is not so bound. *Abbott v. Gibbs*, 1 Eq. Ab. 358.

Where lands are vested in trustees by act of parliament, to be mortgaged for a particular purpose, it is incumbent on the mortgagee to see the money applied accordingly. *Catterel v. Hampson*, 2 Vern. 6.

Where lands are to be sold for payment of particular debts, the purchaser must take care to see his purchase money rightly applied; but if more is sold than is sufficient to pay the debts, that shall not turn to the prejudice of the purchaser. *Spalding v. Shalmer*, 1 Vern. 301.

Where a deed of trust is for payment of debts in general, a purchaser is not affected with any misapplication of the money: otherwise, where it is for payment of debts particularly specified. *Dunck v. Kent*, 1 Vern. 260.

Where lands are appointed for payment of debts, though there results a trust to the heir, the purchaser is not concerned whether the personal estate was sufficient to pay the same, or whether too much was sold, or the creditors paid; for he having paid his money, shall hold against the heir and creditors, and they must seek their remedy against the trustee empowered to sell. *Culpepper v. Aston*, 2 Ch. Ca. 115.

Heir of purchaser in possession of the land, charged with payment of purchase money unpaid. *Cary, 25.*

### VERDICT, AND JUDGMENT AT LAW.

A party against whom a verdict has been obtained at law, must pay money recovered into court, before he can entitle himself to an injunction to stay execution, though he has since obtained a rule requiring plaintiff to shew cause against a new trial. *Austin v. Thomson, 11 Price, 1.* **Pr. PAYMENT INTO COURT; Pr. INJUNCTION.**

After a verdict at law, a bill, with proper charges, may be sustained for the discovery of documents necessary to a fair decision. *Field v. Beaumont, 1 Swan. 209.* **PL. DISCOVERY, BILL OF.**

Whether after a verdict at law, in an action of trespass, the court will grant an injunction against future trespasses, in favour of parties, who refused at the trial to produce documents necessary to a fair decision; *quære?* *Id. 210.* **INJUNCTION AGST. TRESPASS; Pr. PRODUCTION OF DEEDS, &c.**

Bill by one claiming to be son and heir of a deceased tenant in tail, alleging that the father had suffered a recovery, and declared the uses to himself and a trustee in fee, and that plaintiff had brought a writ of right, but defendant had the title deeds, and intended to set up the legal estate in the trustee. Defendant pleaded judgment in the writ of right, and averred that the title in the trustee had not been given in evidence. Plea allowed. *Sidney v. Perry, Mitf. Pl. 207.*

Mistake in verdict relieved against. *Graves v. Stritho, Dick. 469.*

Plea of a foreign sentence in a commissary court of France (which is a court of a political nature), relating to some matters for which the bill was brought. Ordered to stand for an answer, with leave to except. *Gage v. Bulkeley, 3 Atk. 215.* Vide *S. C.* on hearing 2 Ves. 556. nom. *Gage v. Stafford.* A sentence of a foreign court may be a proper defence by way of plea, but the court pronouncing the sentence must at least have full jurisdiction to determine the rights of the parties. *Mitf. Pl. 208.* And see *Bluet v. Pumpfield, 1 Ch. Ca. 237.* where a bill to be relieved against actions for breaking an inhibition of the king of Denmark, was dismissed, on the ground that sentence had been given in the court there. So, where after a decision in a court of competent jurisdiction in *Demerara*, a bill was filed in chancery alleging fraud, but those allegations being denied, the court refused to interfere. *White v. Hall, 12 Ves. 321.* And in *Barrow v. Jaminet, Mos. 1.* Sel. Ca. Ch. 69. 1 Dick. 48, a sentence by a court of competent jurisdiction at Leghorn was considered as conclusive.

The cases in which equity will relieve against verdicts, are where plaintiff knew the fact of his own knowledge to be otherwise than what the jury found, and defendant was ignorant of it at the trial. Where a defendant submits to try it at law first, when he might by bill of discovery have come at the fact from plaintiff's answer on oath, before such trial was had, the court will not always relieve against a verdict. Allowing the damages to be excessive, defendant at law ought to have applied to the court where the cause was tried, and moved for a new trial on that account. *Williams v. Lee, 3 Atk. 224.*

To a bill to be relieved against bonds, defendant put in an answer, and also pleaded a nonsuit in an action of trover brought for the bonds. Plea allowed, but plaintiff permitted to proceed on the answer. *Wilcar v. Sturt, 1 Vern. 77.*

Bill to be relieved against a bond, and judgment thereon, suggesting that same was irregularly obtained. Defendant pleaded the judgment, and demurred, for that the validity of the judgment was examinable

only in the court where it was pronounced. Plea and demurrer allowed. *Huddleston v. Ashugg, Finch, 204.*

To a bill to establish a modus, defendant pleaded a verdict and judgment in an action of debt under the statute, for not setting out tithes. Plea allowed. *Bluck v. Elliot, Finch, 13.* That a verdict and judgment in law may be pleaded in bar to a bill seeking relief, see *Pitt v. Broadway, id. 70,* where to a bill for discovery of title, and perpetuating testimony of witnesses, defendant pleaded two verdicts and judgment in ejectment, obtained by his father. So *Hellam v. Grave, id. 265.*

So in *Cornell v. Ward, id. 239,* defendant pleaded (amongst other things) a verdict and judgment, and affirmation thereof on a writ of error. So in *Temple v. Bultinglass, id. 275;* where to a bill to supply a defective execution of a power to make leases, defendant pleaded a special verdict and judgment, under which the leases made under the power were declared void.

Bill to be relieved against an action. Defendant pleaded a verdict and judgment. Plaintiff, on petition, got an order that the bill should be taken as filed before the trial, and the plea set aside, with leave for defendant to plead, answer, or demur *de novo.* Defendant pleaded the same matter again, and that he had no notice of the bill, nor was served with process until after the verdict, yet ordered to answer. *Anon. 3 Ch. Rep. 25.*

After verdict in an action, a bill was filed, suggesting matter in defendant's knowledge, which plaintiff could not prove at the trial. Plea of verdict allowed. *Seael v. Freeston, 1 Ch. Ca. 65.* And that a verdict may be pleaded to a bill to set the verdict aside, vide etiam *Lee v. Bowles, 2 Ch. Ca. 95.* *Shuten v. Gilbard, id. 250.* *Armsted v. Parker, Finch, 171.*

### VESTED INTERESTS.

See INTERESTS IN PROPERTY, I.

### VEXATION.

Reference directed to ascertain if separate answers all to same effect, by defendant's having same interests, was vexatious. *Fanshau v. Moore, 2 S. & S. 509.* **SEPARATE ANSWERS.**

Plaintiff filing bill, and after answer amending bill, so as to make case quite reverse, ordered that he pay costs of original bill, and parts of answer set forth by reason of that bill, and costs of the motions as a vexatious proceeding. *Mavour v. Fry, 2 S. & S. 113.* **AMENDMENT; COSTS.**

Bill for specific performance of agreement to take lease, and action for rent of occupation, not allowed at same time. On motion, court will order rent to be paid. *Carrick v. Young, 4 Mad. 437.* **Pr. STAYING PROCEEDINGS AT LAW.**

Mortgagee on bill to redeem, insisted heir at law was living. Master twice reported him dead, and exceptions were twice taken thereto, and issue at law was directed, by which he was also found to be dead. Mortgagee not to pay costs of issue, as it was not vexatious, so long as court thought necessary to direct issue. *Wilson v. Metcalf, 3 Mad. 45.* **MORTGAGEE & MORTGEE; COSTS; ISSUE AT LAW.**

Proceedings stayed until costs of former suit by same party suing in *forma pauperis*, in cases only of great vexation. *Wild v. Hobson, 2 V. & B. 112.* **STAYING PROCES; COSTS; PAUPER.**

Jurisdiction by injunction upon a ground of vexation by repeated actions for breach of covenant. *Waters v. Taylor, 2 V. & B. 302.* **JURISDIC; INJUNC.**

Though a bankrupt would be restrained from repeated attempts to supersede the commission, amounting to vexation, he was not prevented from bringing a second action; but pending that action, and on inquiry directed relative to an estate, by the sale of which he proposed to pay his debts, the commission was ordered to proceed in the usual course. *Ex parte Bryant*, 1 V. & B. 506. S. C. 2 Rose, 1. **BANKCY. SUPERSEDING COMMISSION.**

A bill for the specific performance of an agreement after an action at law had failed, not vexatious; and so *vice versa*. *M'Namara v. Arthur*, 2 Ball & B. 353.

Where litigation is vexatious, full costs should be given; *aliter* where a fair question has been raised for the opinion of court. *O'Donel v. Brown*, 1 Ball & B. 264. **PR. COSTS.**

Bill of heir at law against devisee, where vexatious, dismissed with costs. *Seal v. Brounton*, 3 Bro. C. C. 214. **HEIR AT LAW; COSTS.**

Where the defendant disclaims, the party is not to reply; if he does, and serves the defendant with a subpoena to rejoin, the defendant may have costs against him for the vexation; otherwise where the disclaimer is to part and answer to another part of the bill. *Williams v. Longfellow*, 3 Atk. 582. **PR. COSTS.**

Plaintiff's father died intestate, the mother administered; forty years after the father's death, the son, who had accepted a legacy under the mother's will equal to two thirds of what his father left, brings a bill against the mother's executor to account for the father's personal estate, come to her hands. Bill dismissed with costs to deter others from such frivolous suits. *Huet v. Fletcher*, 1 Atk. 467.

After two trials at law by direction of the court of chancery, and both verdicts the same way; equity will grant a perpetual injunction, and decree upon the right found by the verdict. *Leighton v. Leighton*, 4 Bro. P. C. 378. **PERPETUAL INJUNC.**

After five several trials at bar, and the verdicts all the same way, the court of chancery will grant a perpetual injunction to restrain all further proceedings at law by the litigant parties, or any claiming under them, upon the same title. *El. of Bath v. Sherwin*, 4 Bro. P. C. 373. **PERPETUAL INJUNC.**

## WAGER.

See GAMBLING.

## WAIVER.

See also PL. BILL, 2. (c).—PR. ANSWER, 17. (h).—PR. COSTS, 2. (a); 5.—PR. PLEA, 5.—SECURITY, III.

Where an order had been obtained, that service of a subpoena on the attorney of the defendant, who resides abroad, and had brought an action at law against the plaintiffs, should be good service; but such order was obtained, and the subpoena issued and served two days before the filing of the bill; the court refused to discharge the order for irregularity, holding that the irregularity, if any, had been waived by a subsequent appearance of the defendant. *Royal Exchange Assurance Comp. v. Short*, 1 Y. & J. 570. **PR. ORDER FOR SUBSTITUTED SERVICE.**

## VICARAGE.

See TITHES, II.

## VICE CHANCELLOR.

See also JURISDICTION, II.

Appointment of V. C. 53 Geo. 3. c. 24. **JURISDICTION.**

It is understood that V. C. has no jurisdiction to supersede commission of bankruptcy. 2 Rose, 162. **JURISDIC.; BANKCY. COMMISSION, SUPERSEDING.**

Vice Ch. has no jurisdiction under 53 Geo. 3. c. 24. to alter or vary, or discharge order made by Master of Rolls. *Whitehouse v. Hickman*, 1 S. & S. 104. **ORDER; JURISDIC.; MASTER OF ROLLS.**

*Qu.*, whether the V. C. has power to hear by consent a motion to discharge or alter an order made by by Ld. Ch.? The V. C., if authorized to discharge, is not to alter order made by Ld. Ch. *Saunders v. King*, 2 J. & W. 429. **JURISDIC.**

The V. C. can certify the propriety of awarding a writ of *procedendo*, in cases where a commission has been superseded upon his certificate. *Exp. Cramp*, Buck, 3. **BANKCY., WRIT OF PROCEDENDO.**

The Ld. Ch. can direct the V. C. to hear a petition for a writ of *procedendo*, to issue where a commission has been superseded on the V. C.'s order, confirmed by the Ld. Ch. *Exp. Hurd*, id. 45. **BANKCY. JURISDIC.**

## VISITORS.

See CHARITY, I. 1.

## VOLUNTARY AGREEMENTS AND DEEDS.

See AGREEMENT, XI. 4.—DEEDS, III.

The irregularity of a sequestration is waived, if the party against whom it is issued gives the sequestrators directions how to deal with his property. *Const v. Burr*, 2 Russ. 161. **PR. SEQUESTRATION.**

An answer, however evasive, will not be ordered to be taken off the file after the plaintiff has excepted to it. *Glassington v. Thwaites*, 2 Russ. 458. **PR. ANSWER, EVASIVE; PR. TAKING PLEADINGS OFF FILE.**

A party cannot refer for impertinence an affidavit filed in support of a motion, if, after that affidavit was filed, he has filed any affidavit in opposition to the motion. *Keeling v. Hoskins*, 2 Russ. 319. **PR. REF. FOR IMPERTINENCE.**

An order referring a defendant's examination for impertinence, cannot be obtained as of course, if the plaintiff has proceeded on examination. *Johnstone v. Urs*, 2 S. & S. 578. **ORDER OF REFERENCE OF IMPERTINENCE OF EXAMINATION.**

Treaty and negotiations for a variation of the terms of a contract will not amount to a waiver, unless the circumstances shew that it was the intention of the parties that there should be an absolute abandon-

ment and dissolution of the contract. *Robinson v. Page*, 3 Russ. 114.

A purchaser of a share in a co-partnership business, does not waive objections to the title by taking possession of the property and acting as a partner, when the contract stipulates that a good title shall be made by a specified future day, and it appears to have been the intention of the parties, that the purchaser should immediately, and before the day, have the possession. *Sterens v. Guppy*, 3 Russ. 171. VEND. & PURCH.

Exceptions to answer, containing in substance, but not verbatim, the interrogatories not answered, overruled. But if defendant has submitted to answer, and his further answer is referred back, he is too late to object to exception. *Hodgson v. Butterfield*, 2 S. & S. 236. EXCEPTIONS TO ANSWER.

If person named defendant, but who has never been served with subpoena, or appeared to bill, appears by counsel, and consents to be bound by decree, the defect is cured. *Capel v. Butler*, 2 S. & S. 457. PL. PARTIES.

Where from construction of will, executor, who was residuary legatee, had power to release debtor of testator, and he waived the debt by writings, but did not formally release; executor of executor might, it seems, withhold annuity given in consideration of whole debt being paid. *Hemming v. Gurrey*, 2 S. & S. 311. WILL, C. O.

Where motion would have the effect of raising exceptions to answer, the court will not qualify their order by making it without prejudice to exceptions being taken. *Phillips v. Stephenson*, 11 Price, 733. PR. MOTION; EXCEPTIONS TO ANSWER.

Admission by the bankrupt of the receipt of the copy of a petition to stay his certificate, not a waiver of personal service. *Exp. Furnival*, 1 G. & J. 254. BANKCY., SERVICE OF PETITION TO STAY CERTIFICATE.

The principle of waiver applies to irregularity only, and not to erroneous acts. *Levi v. Ward*, 1 S. & S. 334.

If a bill and cross bill be filed, the plaintiff in the original bill has a right to the first answer, and may move to stay proceedings in the cross cause till the original bill is answered, though the plaintiff in the cross bill may be in a situation to enforce an answer first. The right of the plaintiff in the original bill to make the motion, was held not to have been waived, by his having taken out the common orders for time to answer the cross bill. *Harris v. Harris*, 1 Turn. & R. 165. PR. ORDER FOR TIME TO ANSWER; PR. CROSS BILL; PR. ANSWER.

Contempt, for want of answer, may after answer is filed, be discharged by waiver on the part of plaintiff. *Hoskins v. Lloyd*, 1 S. & S. 393. CONTEMPT; PR. ANSWER.

Filing affidavits in answer is a waiver of the objection to the affidavits in support of the petition, that they were filed before the petition was presented. *Exp. Gilpin*, 1 G. & J. 183. BANKCY. AFFIDAVITS IN SUPPORT OF PETITION.

Defendant being in contempt for want of answer, puts in one and obtains order for discharge, upon payment or tender of costs of contempt. Costs tendered but not accepted. Answer excepted to and referred, and after warrants to proceed before master, defendant submits to exceptions; plaintiff did not proceed immediately on former contempt, but waited for answer to exceptions: Held, defendant entitled to order for time to answer exceptions. *Cor v. Champneys*, 6 Mad. 262. CONTEMPT; PR. EXCEPTIONS; PR. TIME TO ANSWER EXCEPTIONS.

Injunction to restrain the breach of a covenant, that buildings shall be erected upon a general plan, refused; the covenantee having acquiesced in a partial deviation from the plan, and not having made imme-

diately application to the court. *Roper v. Williams*, 1 Turn. & R. 118. INJUNC.; LACHES; COVENANT; BREACH OF.

A landlord who relaxes in favour of some of his tenants, a covenant entered into for the benefit of all, is not entitled to an injunction to restrain the other tenants from infringing that covenant. *Id. ib.*

Irregularity of subpoena to hear judgment waived, by appearing on a motion to advance the cause, and not then taking the objection. *Carvick v. Young*, 1 Jac. 524. PR. SUBPENA TO HEAR JUDGMENT.

If in an ecclesiastical court, a party is cited as resident within the jurisdiction, and appears and pleads without objection, he cannot afterwards put that fact in issue. And in such case an intervenor is not at liberty to raise an objection to the jurisdiction on that ground. *Chichester v. Donegal*, 6 Mad. 375. JURISDICTION OF ECCLESIASTICAL COURT; PL. PLEA TO JURISDICTION.

Court refused (with costs), to order interrogatories to be suppressed, however impertinent, if witnesses have answered them; they should demur; answering them waives the impertinence. *Jefferies v. Whittuck*, 9 Pri. 486. PR. IMPERTINENCE; PR. INTERROGATORIES TO WITNESS.

Exceptions not signed by counsel taken off the file, though the defendant had taken an office copy of them, and the plaintiff had obtained an order of reference. *Yates v. Hardy*, 1 Jac. 223. PR. EXCEPTIONS TO ANSWER; PR. SIGNATURE OF COUNSEL.

If in creditor's suit, plaintiff does not call for contribution, according to decree, before creditors are admitted to prove, he waives all claims to contribution. *Shortley v. Selby*, 5 Mad. 447. CRED. & DEBTOR; CONTRIBUTION.

If a purchaser after the delivery of the contract, on the face of which, part of the estate appears to be subject to a right of sporting, not mentioned in the particulars of sale, enters into possession, he waives that objection. *Burnell v. Brown*, 1 Jac. & W. 168. VENDOR & PURCH.

Objection to appointment of arbitrator waived by attending him. *Harcourt v. Ramsbottom*, 1 Jac. & W. 511. ARBITRATION.

Affidavits in support of petition, filed after petition day, cannot be read (a); but if party knowing of irregularity answers them, the objection is waived (b); but secus, if he did not know of it (c). The petition however is generally permitted to stand over till next petition day, that respondent might answer the affidavit, the petitioners paying costs of the day (a). (a) *Exp. Peel*, Buck, 394.—(b) *Exp. Bury*, id. 393.—(c) *Exp. Smith*, 395. BANKCY. PETITION, AFFIDAVITS IN SUPPORT, WHEN FILED.

Where bill prays relief against all defendants but one, against whom it only prays discovery, he cannot after answer obtain order for his costs; such order discharged. *Att. Gen. v. Burch*, 4 Mad. 178. PR. COSTS; PL. DISCOVERY.

Plaintiff moving as of course to amend bill after exceptions to answer, waives them; he must move specially for leave without prejudice. *De la Torre v. Bernales*, 4 Mad. 396. PR. EXCEPTIONS; PR. AMENDMENT.

Proof under a commission is equivalent to payment; therefore when solicitors had obtained an order to have their bill taxed, and to prove for the amount, it was held that they had relinquished their lien upon the papers in their hands belonging to the bankrupt. *Exp. Hornby*, Buck, 351. BANKCY. LIEN; BANKCY. PROOF IN.

A party against whom a commission of bankruptcy has been maliciously obtained, and to whom, after superseding the commission, the Ld. Chancellor had assigned the petitioning creditor's bond, having afterwards brought an action on the case against the peti-



tioning creditor, and a rule of court having been made by consent, referring the matters in dispute, except the bond assigned, to the award of an arbitrator, and an award having been made with an exception of the bond, an action cannot be maintained on the bond. An action on the case is a waiver of a right of action on the bond, and to restrain that right; the agreement of the parties must be unequivocal. *Holmes v. Wainwright*, 2 Swan. 20. ACTION; BANKCY. ASSIGN. OF PET. CRED.'S BOND.

By the order directing a party to be examined as a witness on the trial of an issue, no objection is waived except that which arises from his being a party in the cause. *Rogerson v. Whittington*, 1 Swan. 39. PR. EXAMINATION OF PARTY TO CAUSE.

Objections for want of parties removed by acts of defendants. *Blackburn v. Jepson*, 3 Swan. 139. PL. PARTIES.

A testator having directed his trustees and executors, after sale of his estates, to stand possessed of the money arising from the sales upon trust, in the first place, to invest 400*l.* in trust for his wife for life in bar of dower, and after her death for W C; and upon farther trust, out of the residue of the money, to invest 400*l.* in trust for J R for life, and after his death for his children; and upon farther trust to pay other sums to persons named; and having bequeathed the residue of his estate to W C, and the only acting executor having made no investment on the trusts of the will, but having paid interest on the two sums of 400*l.* to the respective legatees, and applied the assets to his own use, and afterwards become bankrupt; it was held, that by that dealing the two legatees had waived whatever priority the will might have given to them, and the dividends payable on the whole sum proved under the commission against the executor in respect of the testator's estate were divided among the pecuniary legatees and the residuary legatee, in the proportion of the amount of their legacies, and of the residue, as it was computed at the death of the testator, with interest on each. *Exp. Chadwin*, 3 Swan. 380. BANKCY.; EXOR.; PRIORITY OF SECURITY.

\*Presumption that objections to competence have been waived, where it is not clear that at the time of the examination the objection was unknown. *Vaughan v. Worral*, 2 Swan. 400. PR. EVID.; WITNESS, COMPETENCY OF.

Time may be made the essence of contract, but may be waived by conduct. *Hudson v. Bartram*, 3 Mad. 440. TIME; CONTRACT.

Subpoena served on defendant at house in London, but he resided in the country. Attachment issued, and he appeared: Held, appearance waived irregularly, and that it made it a town cause. Order obtained for six weeks' time to answer, was, therefore, discharged with costs as being irregular. *Bound v. Wells*, 3 Mad. 434. PR. APPEARANCE; PR. PROCESS, IRREGULARITY OF; PR. TOWN CAUSE; PR. TIME TO ANSWER.

Though a bankrupt applies to the court to have a petition to stay his certificate advanced, yet that is not a waiver of his right to be personally served before the petition day. *Exp. Groomer*, 1 Buck. 39. BANKCY. PETITION TO STAY CERTIFICATE, SERVICE OF.

Vendor being in possession for upwards of fifty years, and purchaser having done acts inconsistent with notion of his being the owner, specific performance of agreement to sell, refused as amounting to waiver. *El. Rose v. Sterling*, 4 Dow. 442. SPEC. PERF.; VEND. & PURCH.

No rule of convenience fixing any period within which a creditor of a banking-house not making his demand on the surviving partners, is held to have waived his equity against the estate of the deceased partner. *Devaynes v. Noble*, 1 Mer. 569.

When defendant is in custody for contempt in not

putting in answer, and he puts one in which plaintiff accepts, plaintiff cannot, under process of contempt, recover costs; and, semble, he loses them. *Const v. Elers*, 1 Mad. 530. COSTS; CONTEMPT.

Waiver of irregularity by examining before the master without a previous state of facts. *Willan v. Willan*, 19 Ves. 590. S.C. Coop. 291. See 2 Dow. P. Rep. 274. PR. STATE OF FACTS; PR. EXAMINATION.

Petition for a re-hearing ordered to be taken off the file, on the ground of its making a different case from that on which the decree was pronounced. *Qu.* Whether, by consenting to an order consequential on a decree, the party so consenting, precludes himself from the right of appeal? *Wood v. Griffith*, 1 Mer. 35. PL. PETITION OF RE-HEARING.

In equity, objection to the competence of a witness, is not waived by cross-examination. *Moorhouse v. De Passion*, 19 Ves. 433. S.C. Coop. 300. WITNESS, COMPETENCY OF; PR. CROSS-EXAMINATION.

The right to process, under an undertaking for a serjeant at arms, &c. immediately on exceptions to the report of an insufficient answer disallowed, is waived by plaintiff's taking out a subpoena for a better answer, and excepting to the report entitling defendant to eight days after the exceptions are disposed of. *Algar v. Regent's Canal Company*, 19 Ves. 379. S.C. Coop. 221. PR. PROCESS; SERJEANT AT ARMS; PR. EXCEPTIONS TO REPORT; PR. ANSWER, INSUFFICIENCY OF.

Vendor held not to have waived his lien on the estate sold, by taking the promissory note of the vendee, and receiving its amount by discount. *Exp. Joaring*, 2 Rose, 79. LIEN; VENDOR & PURCH.

Specialty security not waived by a promissory note, taken for the balance of the account of interest. *Curtis v. Rush*, 2 V. & B. 416. SECURITY.

Plea of matter of record, with averments of matter in pais, must be filed upon oath, therefore plea of the statute 32 Hen. 8. c. 9. against selling pretended titles, with the necessary averments of want of possession, &c. not being on oath, ordered to be taken off the file, though set down by the plaintiff for argument; this irregularity not admitting waiver. *Wall v. Stubbs*, 2 V. & B. 354. CHAMPERTY.

By accepting answer, immediate right of costs under process of contempt are waived. *Smith v. Blofield*, 2 V. & B. 100. CONTEMPT; COSTS.

Where in a plea of purchase for valuable consideration the purchaser omitted to deny notice, and the plaintiff replied to it instead of setting it down for argument, if the defendant prove what he has pleaded, the bill as against him must be dismissed with costs. *Fyfe v. Dolphin*, 2 Ball & B. 302. PL. PLEA OF PURCHASE.

So of an answer to that effect, unless fraud proved. *Id.* 303.

Vendor's lien on the estate for the purchase money not discharged by taking bills of exchange which are to be considered, not as a security, but as a mode of payment. *Grant v. Mills*, 2 V. & B. 306. LIEN; BILL OF EXCHANGE; VENDOR AND PURCH.

After answer reported insufficient, plaintiff may proceed with old process if he has not accepted costs. *Coulson v. Graham*, 1 V. & B. 331. ANSWER, INSUFFICIENCY OF; PR. PROCESS; PR. COSTS.

Covenant not to assign without licence once dispensed with, the condition is gone, both in law and equity, but the principle questionable, and not to be extended, for instance, to a mere act where the licence is to be in writing. *Macher v. Foundling Hosp.*, 1 V. & B. 191. LANDLORD & TEN.; COVENANT, BREACH OF.

Defendant in contempt putting in answer to which exceptions were allowed, plaintiff not accepting costs

may go on with old process. But if in custody, old process is discharged pending reference, by a tender of costs. *Boehm v. De Tastet*, 1 V. & B. 324. **PR. ANSWER, INSUFFICIENCY OF; PR. PROCESS; PR. COSTS.**

Time, as of the essence of the contract, waived by a protracted treaty. *Wood v. Bernal*, 19 Ves. 220. **VEND. & PURCH.: TIME.**

Contract for sale of an existing and reversionary lease not specifically performed without a production of the title of the lessors. The objection not waived by a premature conditional approbation of the title by the purchaser's counsel; but the expence incurred in making out the title before this objection was taken, repaid. *Deverell v. Id. Bolton*, 18 Ves. 505. **SPEC. PERF.; TITLE.**

To permit a tenant to remain in possession and expend his money in building with the knowledge of the landlord after an eviction for non-payment of rent, is a waiver of the forfeiture under the ejectment statutes. Acceptance of rent with notice of forfeiture is a waiver thereof at law. *Hume v. Kent*, 1 Ball & B. 554, 561. **LANDLORD & TEN.**

Though a parol waiver of a written contract amounting to a complete abandonment, and clearly proved, would bar a specific performance, or even parol variations so acted upon that the original agreement could no longer be enforced without injury to one party; variations verbally agreed upon are not sufficient to prevent the execution of a written agreement, the situation of the parties in all other respects remaining the same. In this case the variations were all for the advantage of the defendant by gratuitous covenants of the plaintiff. *Price v. Dyer*, 17 Ves. 356. **SPEC. PERF.**

Where a party rests satisfied with an agreement and for some time treats it as fair, it is most material to ascertain the time he first impeaches it; for although he may be entitled to relief if applied for in due time, by his delay he may lose it. *Murray v. O'Dea*, 1 Ball & B. 118. **FRAUDULENT AGREEMENT.**

Though generally a party cannot be heard until he has declared his contempt, a step taken by the other party waives the contempt for all purposes except the right to costs in the cause, not to be obtained by process of contempt for the purpose of enabling the defendant to dismiss the bill for want of prosecution. *Anon.* 15 Ves. 174. **PR. BILL, DISMISSAL OF; PR. CONTEMPT, WAIVER OF; PR. ANSWER.**

Proviso in a lease for re-entry upon assignment by the lessee, his executors, administrators, or assignees without licence, ceases by assignment with licence, though to a particular individual. *Brummell v. Macpherson*, 14 Ves. 173. **COVENANT AGAINST ASSIGNMENT.**

Possession taken generally amounts to a waiver even of objections to title. *Fludger v. Cocker*, 12 Ves. 27. **VEND. & PURCH.**

To prevent decree *pro confesso*, defendant should have not only the answer on file, but also a receipt for costs. The answer being actually filed without payment or tender of costs, the defendant was remanded to give an opportunity of moving to take it off the file for irregularity, but plaintiff having taken an office copy of answer that course failed. *Sidgier v. Tyle*, 11 Ves. 202. **PR. DECREE PRO CONFESSO; PR. COSTS; PR. ANSWER.**

Wife may waive equity for settlement out of her own property, even after the order, at any time before its completion. *Murray v. Elidun*, 10 Ves. 88. **HUSB. & WIFE; SETTLEMENT.**

Approbation of counsel not a waiver of all reasonable objections to the title. *Deverell v. Id. Bolton*, 8 Ves. 514. **VEND. & PURCH.; TITLE.**

Reference of answer for impertinence is waived by subsequent waiver for insufficiency. *Pellett v. —*,

6 Ves. 456. **PR. REF. FOR IMPERTINENCE; PR. REF. FOR INSUFFICIENCY.**

Where, by the terms of an auction, the sale is to be completed by a certain day; yet, if neither party takes any step to quicken the other, till it becomes impossible to execute the agreement by the day fixed, the time is waived, and equity will interfere to prevent the purchaser taking advantage of it at law. *Jones v. Price*, 3 Anst. 924. **VEND. & PURCH.; TIME.**

In a bill for the single value of tithes, it is not necessary expressly to waive the treble value. *Wools v. Walley*, 1 Anst. 100. **TITHES; PL. BILL.**

A mortgagee takes a bond from the assignee of the devisee, for the arrears of interest then due, and gives a receipt; the bond is unpaid; the interest is still secured by the mortgage. *Hardwick v. Mynd*, 1 Anst. 111. **MORTGAGE & MORTGEE; BOND.**

A conditional consent to proceed at law, waives an injunction. *Grant v. Priddell*, 1 Anst. 62. **INJUNCTION.**

A waiver of irregularity in process by appearance, does not relate back, so as to bring the defendant into contempt for not appearing in time. *Robinson v. Nash*, 1 Anst. 76. **PR. APPEARANCE; PR. CONTEMPT.**

Where there is an old endowment of a vicarage, but the modern usage varies from it, there is ground to presume, that the variance has arisen from the act of persons competent to make it. The endowment is not therefore conclusive evidence in favour of the vicar, but his right is properly triable at law. *Carr v. Henton*, 7 Bro. P. C. 100. **TITHES.**

It is no answer on exceptions, that the defendant is a mere witness, and ought not to have been made a party; for, having submitted to answer, he must answer fully. *Cookson v. Ellison*, 2 Bro. C. C. 252. **PL. PARTY; WITNESS; EXCEPTIONS TO ANSWER.**

Plaintiff having referred a plea for impertinence, afterwards set the plea down for argument; this is a waiver of the reference for impertinence, notwithstanding the defendant had attended the master upon it. *Dixon v. Olmius*, 1 Cox, 412. **PR. PLEA; IMPERTINENCE.**

An admission of assets, by the executor's answer, is waived by the plaintiff's going on to an account of assets, and procuring a receiver to be appointed. *Wall v. Bushby*, 1 Bro. C. C. 484. **ADMISSION OF ASSETS.**

Filing a cross bill prevents any objection to the jurisdiction. *Burgess v. Wheate*, 1 Eden. 190. **JURISDICTION.**

Agreement in writing may be revoked or waived by parol. *Inge v. Lippingwell*, Dick. 469.

Order to dismiss for want of prosecution, if plaintiff desires time, and promises to pay costs, though dismissal be irregular, yet objection is thereby waived. *Hall v. Chapman*, Dick. 349.

B purchases copyhold of lord for lives; lord makes lease of freehold of soil to A, reserving rent, and afterwards levies fine of manor to B, who accepts rent from A; *qu.* is B's copyhold gone? *Compton v. Brent*, 1 Dyer, 30. pl. 207. *Id.* Cary, 6.

No appearance or answer will give a jurisdiction to a limited court. *Green v. Rutherford*, 1 Ves. 471. *Peun v. Baltimore*, 1 Ves. 446. **JURISDICTION.**

Where the injunction was issued irregularly, held defendant had not waived objection to the irregularity by asking for time to answer. *Travers v. Stafford*, Ambler. 105. S. C. 2 Ves. 19. **PR. INJUNCTION; PR. TIME TO ANSWER; WAIVER.**

Where bond creditors acquiescing in sale of lands, charged by will of debtor with their debts, and for sixteen years receive interest regularly, they shall not disturb purchaser. *Elliot v. Merriam*, 2 Atk. 41. S. C. Barn. 78. **SPECIALTY CREDS.; BOND CREDS.;**

**ACQUIESCENCE; LENGTH OF TIME; CHARGE ON LANDS.**

If the defendant puts in his answer, and then moves to dissolve the injunction, this waives an irregularity in obtaining it. *Davile v. Peacock*, Barn. 27. **PR. INJUNCTION, IRREGULARITY IN OBTAINING.**

An irregularity in process may be cured by the defendant's appearance. *Floyde v. Nangle*, 3 Atk. 569. **PR. APPEARANCE.**

But not if the appearance is entered just before the long vacation, for the purpose merely of avoiding an attachment. *Anon.* 3 Atk. 557. **PR. APPEARANCE.**

After a bond debt is turned into a judgment, the creditor cannot in the life time of the ancestor bring any action on the bond, nor against the heir, for it is entirely extinct; but he still obtains a great advantage, as the judgment binds the land, and gives him the preference to all other creditors. *Stillman v. Ashdown*, 2 Atk. 609. **JUDGMENT, CRED.**

A judgment creditor is not bound to wait till he is paid out of the rents, for the court will accelerate the payment by directing a sale. **S. C.**

Where on plea of former decree plaintiff sets down cause, he waives his right of reference to master as to such decree. *Morgan v. Morgan*, 1 Atk. 53. **PR. PLEA OF FORMER DECREE, REFERENCE TO MASTER.**

A written agreement can only be waived by written waiver, it seems; but strong proof of parol waiver would at least be required. *Buckhouse v. Crosby*, 2 Eq. Ab. 33.

One, by articles previous to his marriage, covenants, in consideration of 3500*l.* portion, and of his intended wife's conveying her lands to him and his heirs when she came of age, to settle certain lands of his own in jointure. Neither the wife nor her trustees executed the articles. After marriage, the husband settles his lands, mentioned in the articles, and recites the settlement to be in performance of the articles, and in consideration of the marriage, and for a provision for the wife, (to bar her of dower), and their issue; but never requires her to convey her lands to him. The wife is a party to, and executes this settlement. After the husband's death, she enters on the settled lands. This settlement is a waiver by the husband, of the proposed conveyance by the wife, and she shall hold as well her own estate, as also the lands settled. *Lucy v. Moore*, 4 Bro. P. C. 343. **MARRIAGE ARTICLES; INFANT.**

After the defendant has answered the bill, he cannot refer it for scandal. *Abergaremy v. Abergaremy*, 2 P. W. 311, *sed quare*. **PR. REF. FOR SCANDAL.**

The lord of a manor entered into an agreement with his copyhold tenants, for inclosing part of a common, and to effectuate this agreement, the tenants consented to the inclosure, and released their right of common in the ground to be inclosed; and the lord, on the other hand, released each particular tenant from all quit-rent and other services. The inclosure, by various accidents, was prevented from taking effect, and therefore, the tenants continued to enjoy their right of common, pay their quit-rents, and do suit and service at the lord's courts, as before: held, that this agreement was mutually waived. *Lanesborough v. Ockshott*, 1 Bro. P. C. 151. **AGREEMENT.**

Bringing debt upon a judgment, is no waiver of lien created by that judgment. *Erby v. Erby*, 1 Salk. 80. **LIEN.**

Prohibition lies not to an inferior court after the defendant has pleaded there, for by pleading the defendant submits to the jurisdiction. But at the suit of the king prohibition lies, though the defendant has pleaded; but if a prohibition has been granted, the court will grant a supersedeas if there is an affidavit that the cause arose within the jurisdiction. *Anon.*

1 Vern. 301. **JURISDIC.; PROHIBITION TO INFERIOR COURT; CROWN.**

**WALES.**

See also **COURTS, IV.**

Jurisdiction of Wales allowed, suit under 10*l.* *Eastcourt v. Tanner*, Cary, 74; but not for cause concerning title to lands. *Morgan v. Bithell*, id. 84. *Keyes v. Hill*, id. 89.

Jurisdiction of Wales over misdemeanors committed in chancery, overruled. *Griffith v. Penrine*, id. 90.

Jurisdiction over matter of lease for years admitted. *Moore v. Marshall*, id. 92.

Promise made within Wales, not sufficient to give jurisdiction. *Hutton v. Prince*, id. 99.

**WARD.**

See **GUARDIAN AND WARD.**

**WARDS OF COURT.**

See **INFANT, I. 2.**

**WASTE.**

See also **PR. INJUNCTION, 23.**

Tenant for life, unimpeachable of waste, except in the park, demesne lands and woods adjoining the capital messuage, there being no woods of that description, cannot cut timber in any of the woods that are either an ornament or shelter to the messuage. *Newdigate v. Newdigate*, 1 Sim. 131. **TENANT FOR LIFE.**

If tenant for life has rendered accounts to remainder-man, of timber cut by him, during more than six years before filing of bill against him, for account of such timber and value thereof, stat. of limitations cannot be pleaded to bill. *Hony v. Hony*, 1 S. & S. 568. **PL. PLEA; ACCOUNT; STAT. OF LIMIT.**

Where equitable waste of one kind only has been done or threatened, the injunction is not to be extended to equitable waste of other kinds, *semble*. Usual injunction in cases of equitable waste, not extended to trees which protect the premises from the effect of the sea. *Coffin v. Coffin*, 1 Jac. 70. **PR. INJUNC. TO STAY WASTE.**

Account against the representative of tenant for life, without impeachment of waste, of dilapidations permitted by him, in and about the mansion-house, refused. *Lansdowne v. Lansdowne*, 1 Jac. & W. 522. **ACCOUNT; TENANT FOR LIFE; EXECUTOR.**

See the case of *Attorney General v. Dk. Marlborough*, 3 Mad. 498.

Tenant in tail restrained by stat. from barring issue and those in remainder, is not, for that reason, within the principle of equitable waste. *Id. ib.*

Bill for account of equitable waste by tenant for life, and for relief, will lie against his personal representative. *Lansdowne v. Lansdowne*, 1 Mad. 116. **EXORS. & ADMORS.; ACCOUNT.**

Reversioner of leasehold renewed the lease in his own name, and covenanted to repair, with privity of tenant for life: held, he was to be considered as having entered into the covenant on behalf of the tenant for life, and that latter's estate was liable, for dilapi-

dations occasioned by his neglect to repair. *Marsh v. Wells*, 2 S. & S. 87. TENANT FOR LIFE, & REMAN. MAN.

Analogy between bill of interpleader and to restrain waste. *Martinius v. Holmuth*, cited in *Stevenson v. Anderson*, 2 V. & B. 212. note (j), 2d edit. INTERPLEADER.

Residue bequeathed in trust to be laid out in real estates, to be settled to the same uses as estates devised to the trustees for life successively, without impeachment of waste, with various limitations, in strict settlement, all the estates for life being without impeachment of waste, and the ultimate remainder in fee; the trustees laid out part of the fund in an estate, with a considerable quantity of timber upon it, taking that to be a sound exercise of discretion, the first tenant for life cannot cut the whole. *Purges v. Lamb*, 16 Ves. 174. WILL, C. OF; TEN. FOR LIFE.

Equitable waste has not been extended beyond trees planted, or growing for ornament, as in avenues or vistas, to timber merely ornamental, viz. an extensive wood. *Id. ib.*

Cutting timber where necessary for the growth of underwood, not waste. *Id.* 179.

Land devised to be sold, the money to be laid out in other estates to be settled; the rents and profits, until sale, to go to the persons entitled to the estates to be purchased. Tenant for life, without impeachment of waste, cannot cut timber on the estate to be sold. *Id.* 180. LANDS DEVISED TO BE SOLD; INTERMEDIATE PROFITS, WHO ENTITLED; TEN. FOR LIFE.

Right of tenant for life, without impeachment of waste, to cut timber generally, in a husband-like manner, independent of the effect upon the beauty of the place, except equitable waste. *Id.* 185. TENANT FOR LIFE.

Whether timber is intended for ornament, &c. by deviser of tenant for life, is to be proved from his conduct concerning it. *Lushington v. Boldere*, 6 Mad. 149. TIMBER.

Ornamental timber, though decayed and injurious to other tree, is not to be cut, unless essential to objects of such deviser. *Id. ib.*

Injunction against cutting ornamental timber, upon the principle of equitable waste, extended to trees planted for the purpose of excluding object from view. *Day v. Wheldale*, 16 Ves. 375. INJUNC. AGST. WASTE.

Settlement on marriage of lands of the husband, to the use of husband for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the wife for life, for her jointure, and in bar of dower; remainder to the first and other sons of the marriage in tail male; remainder to the daughters in the same manner; remainder to the heirs of the body of the husband and wife. The husband being dead, without issue, as to the right of the widow to cut timber, and which would be a consequence to the property in it, when severed, as tenant in tail, after possibility of issue extinct, either in possession, by the effect of merger, if the estates can unite, or if not, in remainder, *quære?* A case directed. *Williams v. Williams*, 15 Ves. 419. TIMBER; SETTLEMENT, C. OF.

Tenant in tail, after possibility of issue extinct, being punishable for waste by the law, has, equally with tenant for life, without impeachment of waste by settlement, an interest and property in the timber. *Id.* 427. TEN. IN TAIL AFTER POSSIBILITY, &c.

Tenant in tail, after possibility of issue extinct, having been once tenant in tail in possession with the other donee, and therefore punishable for waste, may not only commit waste, but also convert to her own use the property wasted; therefore, not to be re-

strained in equity, except for malicious waste. *Id.* 430.

Lord of a manor is entitled to injunction and account in respect of waste by a copyholder. *Richards v. Noble*, 3 Mer. 673. COPYHOLD.

Heir who is entitled, by way of resulting trust, until the determination of an event upon which the future contingent estates were to arise, was restrained from cutting timber. *Stansfield v. Habersham*, 10 Ves. 273. INJUNC. AGST. WASTE; HEIR AT LAW.

Tenant restrained from cutting turf for sale, (his lease giving a right of estovers only), notwithstanding an uninterrupted practice for eighty years. *Id. Courtown v. Ward*, 1 Scho. & L. 8. LANDLORD & TEN.; ESTOVERS.

Power of tenant for life under general words "without impeachment for waste," not enlarged by implication from more extensive powers given to trustees for special purposes, after her death. *Downshire v. Ty. Sandys*, 6 Ves. 107. DRESS, C. OF; TEN. FOR LIFE.

In case of lands exchanged under enclosing acts tenants for life, impeachable for waste, cannot cut timber for enclosures by mortgage, under the powers in the act. Estovers from one estate not applicable to the exigencies of another. *Lee v. Alston*, 1 Bro. C. C. 194. S. C. 1 Ves. J. 78. 3 Bro. C. C. 37. TEN. FOR LIFE; INCLOSURE ACT.

The statute of lunatics does not introduce any new right in the crown; the words "waste and destruction" in it, are to be construed in the ordinary, not the technical, sense. Where timber makes part of the general rental of an estate, in case of lunacy, it would be a breach of duty not to manage it in the usual manner. *Orenden v. Id. Compton*, 2 Ves. J. 71. LUNACY.

Tenant for life, with liberty to cut timber at seasonable times, is not to cut trees planted for ornament or shelter to the mansion-house, or sapling trees not fit to be cut or felled for timber. *Chamberlyne v. Drummer*, 3 Bro. C. C. 549. TEN. FOR LIFE.

Order made to prevent removal of timber wrongfully cut. *Anon.* 1 Ves. J. 93. INJUNC.

Motion for a receiver, in a strong case of waste, granted before answer. *Vann v. Barnett*, 2 Bro. C. C. 158. RECEIVER.

Injunction against waste by mere trespass refused. *Mogg v. Mogg*, Dick. 670.

Injunction for waste refused; plaintiff's right doubtful. *Field v. Jackson*, id. 599.

Injunction to stay cutting down sapplings, wavers, and fruit trees. *Kaye v. Banks*, id. 431.

Injunction to stay waste only granted on interlocutory application. *Kettle v. Corbin*, id. 314.

Defendant denying he had committed waste since filing of bill, no inducement to refuse injunction. *Att. Gen. v. Burrows*, id. 128.

Injunction against tenant not impeachable, &c. for cutting down ornamental trees, &c. *Packington v. Packington*, id. 101.

Injunction against tenant in possession, not party, to stay waste. *Att. Gen. v. Dk. Ancaster*, id. 68.

B was tenant for life, with remainder to his first and other sons in tail, remainder to O for life, remainder to her first and other sons in tail, with other contingent remainders, with remainder to B in fee. O had a child who died almost immediately before any other contingent remainder-man came in esse: B cut down timber, his own remainder in fee being next existent estate of the inheritance; but afterwards O had another child; B shall not take advantage of his own wrong by taking the timber so cut, nor is the second child of O entitled until it shall be seen whether B shall have a child; but the produce shall be paid into court by B, with interest at 4 per cent., and accumulate for the benefit of such person as shall

appear at the death of B to have title to it. *Williams v. Bolton*, 1 Cox, 72. TENANT FOR LIFE; ACCOUNT.

Devise of lands to be sold, and other lands to be purchased in another county; A to be tenant for life (sans waste) of the lands to be purchased, and the rents and profits of the lands to be sold to the same use: A cannot cut down timber on the lands to be sold, since he thereby would have the benefit of double waste. *Plymouth v. Archer*, 1 Bro. C. C. 159. WILL, C. OF; TENANT FOR LIFE; TIMBER.

T D provided by a codicil to his will that his wife, whom he had made tenant for life, might cut timber for her own use and benefit at seasonable times: *quere*, what timber the tenant for life shall be restrained from cutting. *Chamberlayne v. Dummer*, 1 Bro. C. C. 166. S. C. 2 Dick. 600. *O'Brien v. O'Brien*, Amb. 107, WILL, C. OF; TENANT FOR LIFE; TIMBER.

Copyhold tenant subject to waste unless by act of God, and tenant for years where burnt by fire, though no covenant to repair or rebuild. *Hook v. Worth*, 1 Ves. 462. LANDLORD AND TENANT.

Jointress having given leave to the next remainder for life, without impeachment, &c. to cut timber; the remainder-man in tail having acceded and encouraged his doing so, the latter was restrained by perpetual injunction from bringing action of waste against the jointress. *Aston v. Aston*, 1 Ves. 396. TENANT FOR LIFE; INJUNCTION AGAINST PROCEEDINGS AT LAW.

In a bill to stay waste, a plaintiff is not entitled to a discovery unless he waives the double penalty. *Boteler v. Allington*, 3 Atk. 457. PL. BILL; WAIVER OF PENALTIES.

A rector may cut down timber for the repairs of the parsonage house or chancel; but not for any common purpose. *Struchy v. Francis*, 2 Atk. 217. RECTOR.

He is entitled to botes for repairing barns and out-houses belonging to the parsonage. S. C. *ib.*

A devised all his lands, &c. to his wife, and if it should happen that she should have no son or daughter by him begotten upon her body, and for want of such issue, then the said premises to return to his brother B, if he should be then living, and to his heirs for ever, paying to his brother 150*l.* within a year after the wife's death: decreed, to be an estate tail in the wife, and not an estate for life only; that by "no son nor daughter" must be understood "no issue," and that she ought not to be restrained from committing waste. *Wyld v. Lewis*, 1 Atk. 432. WILL, C. OF, WHAT ESTATE; ESTATE TAIL.

A devise of the rents and profits of an estate to the husband for life, without impeachment of waste, shall not only be considered as annual profits, but will empower him to cut timber. *Partridge v. Pawlet*, *id.* 467. WILL, C. OF, WHAT INTEREST.

Tenant for life of coal mines may open new pits or shafts for the working the old vein of coals. *Claverling v. Claverling*, 2 P. W. 388. Sel. Ca. in Cha. 79. Mos. 219. TENANT FOR LIFE.

One seised of lands wherein there are coal mines not opened, settles the lands on A in tail, remainder to B for life; A opens the mines, works them, and dies without issue: B may continue working in all mines lawfully opened. *Id. ib.*

Where no custom is alleged of a tenant's power to cut down timber, it must be taken according to the common law, by which he has no power over it. *Edwards v. Heather*, Sel. Cha. Ca. 3. LANDLORD & TENANT; CUSTOM.

One seised in fee, conveys the lands and all trees and mines to trustees in fee to the use of A for life, remainder over; A cannot open the mines or cut

down the trees. *Whitfield v. Berit*, 2 P. W. 242. TENANT FOR LIFE.

A, on marriage of his son, settles a messuage on himself for life sans waste, remainder to his son; the father, though his estate for life be sans waste, cannot pull down the house nor commit any voluntary waste therein; if he does, the court will grant an injunction to stay waste, and compel the father to put the messuage in as good repair as before the waste committed. *Fane v. I. d. Barnard*, 2 Vern. 738. S. C. Prec. Chan. 454. Gilb. Eq. Rep. 127. 1 Salk. 161. SETTLE; TENANT FOR LIFE.

The under-tenant of a jointress commits waste *sparsim*; but had improved the yearly value, and offers to take a lease at the improved rent, and to pay for the timber cut. *Qu.* Whether the court will relieve as to the waste? *Lige v. Smith*, 2 Vern. 263. LANDLORD AND TENANT.

One settles land upon his daughter in tail, and takes a bond from her not to commit waste; bond not binding in equity. *Jervis v. Bruton*, 2 Vern. 251. BOND; TENANT IN TAIL.

Husband, though parted from his wife, charged in equity with his wife's wasting of goods which were devoted to her for her life only. *Paget v. Read*, 1 Vern. 143. HUSB. & WIFE; DEVASTATION; TENANT FOR LIFE.

See the cases of waste in felling timber. *Skelton v. Skelton*, 2 Swan. 170. *Abrahall v. Bubb*, *id.* 172.

Writs of prohibition and assistance, to prevent a prebendary from committing waste on his prebend. *Acland v. Atwell*, 3 Swan. 499. INJUNCTION; PREBEND.

Waste by a bishop the subject of prohibition. *Bp. Winchester v. Walgar*, *id.* 493. BISHOP; INJUNCTION.

Injunction to restrain the lessee for years of the temporalties of a bishop under a lease confirmed by the dean and chapter, and without impeachment of waste, from felling timber. *Id. ib.* ECCLESIASTICAL LEASE; INJUNCTION.

Lessee's damages in waste moderated by death of lessor. *Cary*, 2.

Forfeiture of copyhold for waste during minority. *Littin's Case*, *id.* 6.

Reversioner in fee has remedy in chancery for waste against him in possession. *Cary*, 19.

Waste forbidden in chancery though no action at law will lie. *Id.* 26.

Lessee of copyholder punishable for waste, though copyholder is not. *Dalton v. Gill*, *Cary*, 63.

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## WEAK MIND.

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## WELSH MORTGAGE.

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## WILLS.

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## XVI. CODICIL. See also VIII. 3.

## I. JURISDICTION AND GENERALLY.

Demurrer allowed to a bill, praying that a pretended will might be delivered up to be cancelled, and an injunction and a receiver till letters of administration should be granted, the pendency of a suit in the ecclesiastical court not being distinctly alleged, and the court of chancery not having jurisdiction to try the validity of the will. *Jones v. Frost*, 1 Jac. 466. JURISDIC.

How parties beneficially interested, where one executor and trustee has disclaimed, and the other is dead, are to obtain an appointment of new trustees for the purpose of executing the trusts of will. *Wood v. Stone*, 8 Price, 613.

Bill, by heir, suggesting a secret void trust for charity in residuary devise, but without evidence of a trust expressed, or of an engagement expressed or tacit, preventing it, dismissed with costs, unless the heir would take an issue to which he is entitled. *Paine v. Hall*, 18 Ves. 475. HEIR AT LAW; ISSUE AT LAW; FRAUD.

The course upon a bill by an heir impeaching a will, is to direct him to bring an ejectment, removing obstacles from terms, &c. *Pemberton v. Pemberton*, 13 Ves. 297. HEIR AT L.

A court of equity has no jurisdiction to declare what is or is not a man's last will. *Id. ib.* JURISDIC.

Will is never set aside without issue *devisavit vel non*. S. C. 11 Ves. 63. ISSUE, DEVISAVIT VEL NON.

Devisees filing a bill to establish a will, and to carry trusts into execution, have no right to call upon persons who claim paramount to the will, to litigate such claims with them. *Devonshier v. Newnham*, 2 Scho. & L. 199. INTERPLEADER; DEVISEES.

Devise of real estates the annual value of near 5000*l.* and other estates directed to be purchased with the residue of the personal estate amounting to above 600,000*l.* to trustees and their heirs, &c. upon trust during the lives of the testator's sons A, B. and C, and of his grandson D, and of such other sons as A now has or may have, and of such issue as D may have, and of such issue as any other sons of A may have, and of such sons as B and C may have, and of such issue as such sons may have, as shall be living at his decease, or born in due time afterwards; and during the life of the survivor, to receive the rents and profits, and from time to time to invest the same, and the produce of timber, &c. in other purchases of real estates, and after the death of the survivor of the said several persons, that the said estates shall be divided into three lots, and that one lot shall be conveyed to the eldest male lineal descendant then living of A, in tail male, remainder to the second, &c.; and of all and every other male lineal descendant or descendants then living, who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is limited of A, successively in tail male, remainder in equal moieties to the eldest and every other male lineal descendant or descendants then living of B and C, as tenants in common, in tail male in the same manner with cross remainders, or if but one such male lineal descendant, to him in tail male, remainder to the trustees, &c. The other two lots were directed to be conveyed to the male descendants of B and C, respectively in the same manner, and with similar limitations to the male descendants of their brothers, and to the trustees in fee, and it was directed that the trustees should stand seised upon the failure of male lineal descendants of A, B, and C, as aforesaid, upon trust to sell, and pay the produce to his majesty, his heirs and successors, to the use of the sinking fund; the accumulation, till the purchases or sales can take place, to go to the same purpose, with a direction that all the persons becoming entitled, shall use the surname of the testator only. The trusts of the will were established. *Thellusson v. Woodford*, 4 Ves. 227, *affd.* 11 Ves. 112. PERPETUITY.

A will admitted in answer under which defendant claims, and where nothing turns on it, may be read from the bill, although the answer refers to the will for certainty. *Owen v. Jones*, 2 Anst. 505. PR. EVIDENCE.

Question of intention to be determined by the court, but not proper for the master. *Pitt v. Ld. Camelford*, 1 Ves. J. 83.

Paper writing proved as a testamentary schedule, and held to have effect from the date to pass what was in the hands of M. at the time of the date; not what was at the death of testator. The general rule as to testaments, is that the time of the testament, and not the testator's death is regarded. *Downing v. Townsend*, Amb. 280.

The court cannot set aside a will for fraud, for the due execution of it is triable only at law. *Anon.* 3 Atk. 17. Vide *Bennet v. Vade*, 2 Atk. 324. JURISDIC.

After probate of will, court of equity may enquire into fairness of residuary bequest of personal estate. *Marriot v. Marriot*, 1 Stra. 666. JURISDIC.

In case of a trust estate devised to be sold, or devised to J. S. if the will be disputed, after two trials, in favour of the will, equity will grant a perpetual injunction. *Leighton v. Leighton*, 1 P. W. 671. PERPETUAL INJUNC.

A bill will not lie to perpetuate the testimony of witnesses to a lunatic's will in his life time, made before his lunacy. *Sackville v. Ayleworth*, 1 Vern. 105. PL. BILL TO PERPETUATE; LUNATIC.

## II. WHO MAY MAKE.

See the statutes 32 H. 8. c. 1. Chitt. Stat. 1117. and notes. 34 and 35 H. 8. c. 5. id. 1120. and notes. 29 Car. 2. c. 3. ss. 5. 6. 12. 19. 20. 1, 2, 3, 4. id. 1125. and notes. 3 W. and M. c. 14. id. 1127. and notes.

• Will of a resident in a receptacle for lunatics, established, upon the then state of his mind, compared with antecedent declarations. Distinctions, if not then competent. *Boote v. Blundell*, 19 Ves. 508.

Boy of age of fourteen is competent to make will of personal estate. *Exp. Holgate*, 11 Ves. 11.

Power of disposition by will is incident to trusts for separate uses of feme covert, and husband and trustee, having taken a transfer. *J. h. v. Conetti*, 9 Ves. 369. HUSB. & WIFE, SEPARATE ESTATE.

Will by a wife of her separate property and its produce, whether derived from her husband or a third person is good. *Fettiplace v. Georges*, 1 Ves. J. 46. FEME COVERT.

A woman being about to marry, enters into an agreement with the future husband (without seal or stamp) by which her property is settled upon the survivor for life, with power to the wife to dispose by will made after the marriage: she then immediately makes a will, by which, she bequeaths her property to the intended husband, absolutely, and afterwards (on the same day) she marries. The articles resting in agreement, give the husband an equitable estate for life, but the will is revoked, (not being protected by the power) by the subsequent marriage. *Holson v. Lloyd*, 2 Bro. C. C. 534. FEME COVERT; POWER.

Although a man have a mind of sufficient soundness and discretion to regulate his affairs in general, yet if such a dominion or influence be obtained over him as to prevent his exercising such discretion in the making his will, he cannot be considered as having such a disposing mind, as will give effect to his will. *Quare*, what evidence will be sufficient to establish such a case. *Mountain v. Bennett*, 1 Cox, 353.

Money to be laid out in land, an infant cannot dispose of it by will as money, but it will on the infant's death descend to his heir, who may take it either way. *Carr v. Ellison*, 2 Bro. C. C. 56. S. C. 2 Dick. 796. *Quod vide*. MONEY TO BE LAID OUT IN LAND; INFANT.

Papists are not prohibited from devising lands to protestant trustees, to be sold *bona fide* for payment of debts, &c. *Cusack v. Gilbert*, 5 Bro. P. C. 465. PAPIST.

Husband before marriage gives bond to enable his intended wife, to dispose by deed or will of her freehold estate; she devises during coverture. Heir at law is bound, and shall convey to the devisee. *Rippon v. Dowding*, Ambli. 565. HUSB. & WIFE.

Feme covert cannot at law make will of copyhold lands surrendered by her before marriage, to the use of her will, nor can she declare the uses of the surrender. *George v. Jew*, Ambli. 627. FEME COVERT; COPYHOLD.

Will by feme covert, good and proveable in the ecclesiastical court, if made with assent of her hus-

band. *Dk. of Marlborough v. Ld. Godolphin*, 2 Ves. 70. HUSB. & WIFE.

Wife having specific effects to her separate use, disposes of her separate property by will. After her death her husband sells part of these effects and dies, his representative is accountable to the wife administratrix with the will annexed. *Peacock v. Monk*, 2 Ves. 190. HUSB. & WIFE; SEPARATE ESTATE.

A feme covert may make a will by virtue of a power. *Ross v. Ewer*, 3 Atk. 160.

Power in feme covert to dispose by writing, purporting to be a will, does not give it authority of one in ecclesiastical court, and husband must be examined to his consent before it can be proved. *Henley v. Philips*, 2 Atk. 48. FEME COVERT.

A city orphan cannot by will before twenty-one, dispose of his orphanage part, so as to prevent survivorship. *Anon. Prec. Chan.* 537. CUSTOM OF LONDON.

An infant male may make a will of his personal estate at fourteen, a female at twelve. *Hyde v. Hyde*, Prec. Chan. 316.

A female may make a will at twelve, a male at fifteen if proved to be a person of discretion. *Bishop v. Stary*, 2 Vern. 469. INFANT.

A feme covert who has pin money, or a separate maintenance settled on her, may by writing in nature of will dispose of what she saves out of it; and such disposition shall bind the husband. *Herbert v. Herbert*, Prec. Chan. 41. FEME COVERT.

A wife (whose husband is by act of parliament banished for his life,) may make a will, and in every thing act as a feme sole, and as if the husband was dead. *Countess of Portland v. Prodders*, 2 Vern. 104. FEME COVERT.

A tenant in tail of an equity of redemption may devise it for the payment of debts. *Turner v. Grinn*, 1 Vern. 41. TENANT IN TAIL OF EQUITY OF REDEMPTION.

## III. WHAT MAY BE DISPOSED OF BY WILL.

See statutes 32 H. 8. c. 1. Chitt. Stat. 1117 and notes: 34 & 35 H. 8. c. 5, id. 1120 and notes; 29 Car. 2. c. 3. ss. 5, 6, 12, 19, 20, 21, 2, 3, 4, id. 1125 and notes; and 3 W. & M. c. 14. id. 1127 and notes, and see particularly Chitt. Stat. 1120, n. (d) as to devise of possibilities in real and personal things.

A possibility is devisable. Any equitable interest is devisable. *Perry v. Phelps* 1 Ves. J. 254. POSSIBILITIES, &c.

Testator cannot by any words devise lands, either under the statute or at common law, which he had not at the time of making the will. *Id. ib.*

An equitable lien is an equitable obligation to do according to conscience; and a devise of it good in equity. *Perry v. Phelps*, id. 255. POSSIBILITIES, &c.

Contingent and executory estates, and possibilities accompanied with an interest, are devisable. *Moor v. Hawkins*, 2 Eden, 341. CONTINGENT INTEREST.

Bequest of a contingent interest in personality void, where the preceding gift never vested, owing to a lapse. *Miller v. Fauré*, 1 Ves. 85. POSSIBILITIES, &c.

A devise a term for years to B for life, remainder, to C; C in the life of B devises his remainder; this is good and amounts to C's declaring by his will, that his executor shall stand possessed of the term in trust for the devisee. *Wins v. Jekyl*, 1 P. W. 572. REMAINDER EXPECTANT.

A child entitled to an orphanage share of his father's personal estate, dying under twenty-one and unmarried cannot devise it by his will, for by the custom it survives

to the other children, but he may devise his share under the statute of distributions. *Wilcocks v. Wilcocks*, 2 Vern. 559. CUSTOM OF LONDON.

A right to set aside a release may be devised. *Drew v. Merry*, 1 Eq. Ab. 175.

#### IV. THE VALIDITY AND CONSTITUTION.

See also the four following subdivisions.

A testator bequeaths to A and B in trust for certain purposes which the will states to have been fully explained to them; on the same day a paper writing is signed by A and B, in which they declare that the bequest is upon trust for six persons, whose names are stated, and after their signature some lines are added in the hand-writing of the testator, by which a seventh person (an unborn child) is admitted to a share of the legacy; upon a bill filed by one of the six persons named in the body of the paper writing, the court recognized the paper writing as a valid declaration of trust, though it had not been proved as a testamentary paper. *Smith v. Attersole*, 1 Russ. 266.

A court of equity has no jurisdiction to determine on the validity of a will, either of real or personal estate. *Jones v. Jones*, 3 Mer. 161. JURISDICTION.

Unattested paper clearly referred to in a devise of real estate, considered part of the will if made previously; not if subsequent. *Wilkinson v. Adam*, 1 V. & B. 445.

Legacies by an unattested paper included under a charge of legacies on a real estate, by a will duly attested; but the produce of the sale of a real estate cannot be directly disposed of by an unattested paper. *Id.* 446.

Where a testatrix made her will, disposing of real and personal property, and signed and sealed it; and a clause of attestation in the common form was subjoined, but to which there was no subscription of witnesses; and where the will was found at her death, wrapped in an envelope, on which was written, "I signed and sealed my will to have it ready to be witnessed the first opportunity I could get proper persons." Held that the instrument appearing to be incomplete (something more having been intended) was not a good will as to the personal property. But parol evidence admitted as to the circumstances of the papers, and as to the testatrix's intention. *Walker v. Walker*, 1 Mer. 503. P. N. EVID.; PAROL.

If it appears upon a will of personal estate, that something more is intended to be done, and the party is not arrested, by sickness or death, the usual declaration at the beginning, that it is his will, is not sufficient. *Coles v. Trecothick*, 9 Ves. 249.

If testator by paper subsequent to will, says he has bequeathed that which he has not bequeathed, that paper may be proved as testamentary, and property will pass. *Druce v. Denison*, 6 Ves. 397.

All codicils are part of the will; therefore, a codicil merely for particular purpose as to change an executor, and confirming the will, in all other respects, does not revive a part of the will revoked by a former codicil. *Crosbie v. Macdowel*, 4 Ves. 610. CODICIL.

Two inconsistent wills; a codicil referring to the first by date, as the last will cancels the intermediate will, and evidence of mistake cannot be admitted. *Id.* 616.

Where a testator refers expressly to a paper already written, and describes it sufficiently, it is as if incorporated in the will. *Habergham v. Vincent*, 2 Ves. J. 228. 4 Bro. C. C. 353.

Instrument in any form, whether a deed poll, or indenture, if the obvious purpose is not to take place

till after the death of the person making it, shall operate as a will. *Id.* *ib.*

Testator gives a residue to A for life, remainder to B for life, then to be divided among his (testator's) relations. This is a mere intestacy, and goes to the relations at the death of testator. *Masters v. Hooper*, 4 Bro. C. C. 207.

Testator may provide, that in case of a devolution to executors, they shall not alien, but it must be very special. *Sheers v. Hind*, 1 Ves. J. 295.

Wife having a power to dispose, by will signed and sealed by her, of 300*l.* in the hands of trustees, having made a will, agreeable to the power, afterwards makes a testamentary paper, by which she gives it to her husband, but so much as shall be remaining at his death, &c. to her brother and sisters. This paper is not sealed, found annexed to the will by a wafer, and is on a stamp. His Honour held the annexation by the wafer immaterial, and that the stamp was equivalent to a seal. 2ndly, that it vested absolutely in her husband, and it was decreed to be paid to him, the property not being sufficiently certain to raise a trust. *Sprunge v. Barnard*, 2 Bro. C. C. 585.

A paper writing signed by the executors and others, purporting to be an acknowledgement of what they understood to be the will of the testator, when he was unable to speak, although proved in the spiritual court as a testamentary paper, yet will not operate as a codicil in this court, and the bill claiming legacies under such an instrument, will be dismissed. *Gawler v. Standerwick*, 2 Cox, 16.

A will and codicil are to be taken together as one act. *Reeves v. Newenham*, 2 Ridgw. P. C. 43.

Proviso in a will, that in case the devisee should come into possession of the family estate, the trustees should stand seised of the devised estate to the use of the next person in remainder, valid. And the eldest son of the tenant in possession, is the next person in remainder. *Nicolls v. Sheffield*, 2 Bro. C. C. 215.

C, by his will, devised all his freehold and copyhold estates to his two daughters, A and M, and all other daughters that he might thereafter have, as tenants in common in fee; he had afterwards another daughter, L; he then gave directions for another will, by which he gave all his real estates to his two eldest daughters, and a sum of 15,000*l.* to his daughter L. The attorney took the minutes of this second will in writing, but before it was prepared, the testator died: these minutes were proved in the spiritual court as a testamentary paper. Held, 1st, this paper being proved in the spiritual court is sufficient to pass the copyhold estate; 2d, but is so totally void as to the freehold, that it will not put L to her election, and she therefore will take her share of the freeholds under the first will, as well as the 15,000*l.* under the second; 3rd, the testator gave the 15,000*l.* to his daughter L, to be paid to her at twenty-one or marriage, without interest for the same in the mean time, but if she died before twenty-one or marriage, then the 15,000*l.* was not to be raised, but was to sink into the residue of his personal estate. And he directed that, out of the interest of the 15,000*l.*, certain sums of money should be applied for the maintenance of L. The interest of this legacy beyond the maintenance is vested in L, and must be appropriated to accumulate for her benefit. *Carey v. Askew*, 2 Bro. C. C. 58. 1 Cox, 241. and see 8 Ves. 492. 498. 499. COPYHOLD; WILL, C. *ov.*

An unfinished testamentary paper is of no effect as a will, the party having lived eight days afterwards. *Griffin v. Griffin*, 4 Ves. 197 note.

A will disposing of real and personal property, with a clause of attestation, but no witnesses, established as to the real property. *Habergham v. Browning*, 4 Ves. 200.

Repugnant words in a will may be rejected or



transposed. In this case, the court rejected a repugnancy by interlineation. Bequest of the use and enjoyment of every thing else at my house," means such things as are proper to go with the house as heir looms, viz., fixtures and ornaments, not watches, &c. &c. Estate for life in lands by implication, rebutted by the party having a bequest for life in a particular part of them, and by the testator desiring she should not be turned out. *Boon v. Cornforth*, 2 Ves. 277.

Will of personal estate examinable in ecclesiastical court; but this court will avoid, if possible, the sending it there after the will has been found forged by a jury, which bound the real estate, and will go as far as they can to decree the parties trustees. *Barnesly v. Daniel*, 1 Ves. 287.

M, by will, in 1734, before the mortmain act, devised particular lands and his personal estates, to be laid out in land to charitable uses. By codicil, in 1736, after the act, M declared, that if by the mortmain act his estates could not pass to those uses, he then devised them to B. By a second codicil, in 1737, testator reciting that he was advised his devise of the land to the charity was void, bequeathed his personal estate to the charity, and the real to B. Testator died in February, 1738. On a case stated to B. R. the judges certified that the estate were well devised to B by the second codicil, and that M. decreed the same to him accordingly. *Att. Gen. v. Lloyd*, 3 Atk. 551. 1 Ves. 39.

A codicil is, in its nature, a part of the will; an extension of the intention of the testator. *Dk. St. Albans v. Beaucherk*, 2 Atk. 639.

Testator devised to a charity his copyhold lands, which he had previously surrendered to his will. His will consisted of eleven sheets, two of which he signed in *extremis*, and then died. There were no witnesses, yet held a good appointment under 43 Eliz. *Att. Gen. v. Sautell*, 2 Atk. 497. COPYHOLDS, DEVISE OF.

If a man leave several papers behind him, executed at different times, as to personal property, they shall all be taken as one will, and so construed that all may answer the testator's intention. *Stone v. Evans*, 2 Atk. 87.

Trust estate in copyhold, unsurrendered, will pass by will unattested. *Tufnell v. Page*, 2 Atk. 37. S. C. Barn. 9. COPYHOLD; TRUST.

A will, written on nine sheets, was sealed by the testator, who signed the draft of a new will, and then tore off eight of the seals from the first will; yet the first will was held a good will to pass the real estate, the statute not requiring all the sheets to be sealed; and the second good to pass the personal estate as a *casus omissus* out of the statute. *Hyde v. Hyde*, 3 Ch. Rep. 155.

A, being tenant in tail of the trust of a copyhold estate, with remainder over, and trustees refusing to surrender the legal estate to him, he brought his bill for that purpose, and, pending that suit, went to the lord's court and offered to surrender, but was refused, not having the legal estate; and thereupon he made his will, and gave the estate to his wife and children. Decreed, the estate to go according to the will, the court conceiving the will sufficient to bar the entail of a trust. *Outway v. Hudson*, 2 Vern. 583. BARRING ENTAIL; COPYHOLD.

A, by will duly executed, devises a copyhold estate to his wife, and on the day of his death orders his nephew to obliterate some devises, but nothing as to the copyhold, and then caused a memorandum to be written that he approved of the will as obliterated, but does not republish it, and orders his nephew to carry it to one to write it fair, and, before it is done, he becomes delirious. Held to be a good will, and that the copyhold passed. *Burkitt v. Burkitt*, 2 Vern. 498.

How the spiritual courts proceed where there are executors in a will, and the executrix submits to have

the will proved as though no such executors had been therein. *Parker v. Ash*, 1 Vern. 256.

Wills in Latin or Dutch, must be so framed as to pass an estate according to the rule of our law. *Bovey v. Smith*, 1 Vern. 85. Ch. Ca. 124. S. C.

#### V. EXECUTION.

Lands held in the East Indies by tenure of the nature of fee-simple, do not pass by an unattested will, but decreed to the person who would be heir at law in England. *Gardiner v. Fell*, 1 Jac. & W. 22. EAST INDIES.

In proving execution of devise, actual signature by devisor in presence of three witnesses, is not required, if he declares it to be his will before those who did not see him sign, and separate attestations sufficient. *Westbeech v. Kennedy*, 1 V. & B. 362.

A declaration by the testator, in attestation part of his will, that lands should go to a certain person, not a sufficient devise of them under the statute of frauds, not being signed by the testator or by any person by his direction. *Blemerhassett v. Day*, 2 Ball. & B. 104. STAT. OF FRAUDS.

Execution of a devise under the statute of frauds, requiring signature by the devisor in the presence of three witnesses, and their attestation of his act by their subscription. *Wright v. Wakeford*, 17 Ves. 459.

Attestation of a devise, by a mark good within the statute of frauds. *Id. ib.*

Sealing not necessary to the execution of a devise under the statute of frauds, nor sufficient without signing. *Id. ib.*

"I, A B do make this my will," equivalent to signature, and if acknowledged before three witnesses, a good execution within the statute of frauds. *Morison v. Turnour*, 18 Ves. 183.

Appointment of guardians by an unattested will, made good by a codicil with three witnesses, on the same paper referring to the will as annexed, making some alterations as to legacies, and confirming it in all other respects as in the case of a devise of land. *De Biche v. Id. Fingal*, 16 Ves. 167. GUARDIAN; TESTAMENTARY.

Devise failing, being the effect of a paramount title, established as to other premises, against the express intention that they should go together. *Southey v. Id. Somerville*, 13 Ves. 486.

Real estate in Bermuda passes by a will not duly executed to pass real estate. *Shedden v. Goodrich*, 8 Ves. 481. STAT. OF FRAUDS.

Produce of real estates converted by will, held to pass only where the will is attested by three witnesses. *Id. ib.* CONVERSION OF PROPERTY.

Acknowledgement by devisor of his handwriting to one of the witnesses who did not see him execute, good. *Addy v. Girt*, 8 Ves. 505.

Will, not duly executed according to statute, has no operation even to raise an election against person taking personal estate. *Eap. El. Ilchester*, 7 Ves. 372. *Shedden v. Goodrich*, 8 Ves. 481. *Gardiner v. Fell*, 1 Jac. & W. 22. ELECTION.

Where real estate is charged with legacies generally by will duly attested, legacies may be revoked or charged by an unattested instrument. *Buckeridge v. Ingram*, 2 Ves. J. 665. WILL, REVOCATION OF.

Land devised by will not duly executed, the heir, having a legacy upon express condition not to disappoint the will, must elect. *Whistler v. Webster*, 2 Ves. J. 371. HEIR AT LAW; ELECTION.

A rent is a tenement; and therefore cannot pass by will without three witnesses, if out of freehold; the word "tenement" being in the statute of frauds.

*Habergham v. Vincent*, 2 Ves. J. 231. 4 Bro. C. C. 353. STAT. OF FRAUDS.

One of three witnesses to will not to be found, but on sufficient evidence, will declared well proved. *Binfield v. Lambert*, Dick. 337.

But in *Bird v. Butler*, will not declared well executed, but trusts to be performed and carried into execution. *Id. ib.* note, and see *id.* 349.

Will, subscribed by three witnesses, before whom testator declared it to be his will, but did not sign it; such declaration is equivalent to signing it before them, and such will is good within the fifth section of the statute of frauds, and is also a good will of revocation within the sixth. *Ellis v. Smith*, 1 Ves. J. 11. WILL, ATTESTATION OF; FRAUDS, STAT. OF.

Devise of all lands and tenements in or near F, by a will attested by two witnesses only, where the testator had freehold, will not pass leasehold; contra, if he had only had leasehold. *Chapman v. Hart*, 1 Ves. 271. WILL, C. OF, WHAT PASSES.

Testatrix executed her will in the presence of two witnesses; she afterwards said, in the presence of a third, "this is my will," but did not put her seal, nor say her name was of her hand-writing; Lord Hardwicke inclined this will was void, because not exactly conformable to the statute 29 Car. 2. *Gryle v. Gryle*, 2 Atk. 177. STAT. OF FRAUDS.

Sealing her will without signing in the presence of a third witness, would have been sufficient to make it a good will. *Id.*

Where a sum of money is given originally out of land, a will with that charge must be equally executed with the same solemnity, because it is considered as part of the land. *Brudenell v. Boughton*, 2 Atk. 272. WILL; LEGACIES CHARGED ON LAND.

The rule is the same as to revocations of a devise of lands, and a revocation of a sum of money charged on lands; they must be revoked in the same manner. *Id.* WILL, REVOCATION.

When a first will charges real estate with legacies, and a second gives general pecuniary ones, though not executed in form; yet, the latter legacies will be equally a charge upon the land. *Id.*

A trust is limited to A, his heirs and assigns, or to such as he or they may appoint; A devises these lands by a will attested but by two witnesses; the will void, and shall not operate as an appointment. *Wagstaff v. Wagstaff*, 2 P. W. 258. POWER, EXECUTION OF.

A, possessed of a term of five hundred years in B acre, afterwards purchases the fee simple in C's name, and devises B acre to J in fee; but the will is not attested by three witnesses: the term shall not pass, because attendant on and part of the inheritance. *Whitchurch v. Whitchurch*, 2 P. W. 236. Gilb. Eq. Rep. 168. 1 Stra. 619. S. C. 9 Mod. 124. TERM ATTENDANT.

Coppyhold surrendered to the use of a will, shall pass by a will attested by one or two witnesses only. *Wagstaff v. Wagstaff*, 2 P. W. 258. COPYHOLD.

Though where a copyhold is surrendered to the use of a will, there need not be three witnesses to such will, because the copyhold passes by surrender and not by the will; yet, a trust of equity of redemption of a copyhold cannot pass by a will, unless attested by three witnesses. *Id.* 261. COPYHOLD.

A former will of land is cancelled, the testator supposing a latter will by him made of the same land to the same effect, was good. If that proves not to be duly executed, equity will set up the former will. *Onions v. Turner*, 2 Vern. 743. S. C. Pro. Ch. 459. Gilb. Eq. Rep. 130. 1 P. W. 243.

In December, A made his will; and in January following, designing to make an alteration, he ordered a devise to be interlined. The will was read in this state to the testator, who approved it, and put his seal on the wax in the presence of the same three witnesses

who attested his will at first, but he did not subscribe his name *de novo*: held, a good signing, for the testator's subscribing is only with a view that the witnesses may know the will again. *Townsend v. Pearce*, Vin. Ab. tit. Devise, (R. 4.) 142, pl. 3.

A child of a residuary legatee, is no witness to prove a will relating to the personal estate by the civil law: by which law only such will is determinable. *Thraites v. Smith*, 1 P. W. 10. PR. WITNESS, COMPETENCY OF.

## VI. ATTESTATION.

See also PR. EVIDENCE, 27. (e).

Where power was to be executed by will, signed and published in the presence of, and attested by three witnesses: held, that a will concluding with this declaration, "this is my last will and testament," and expressed to be signed by the testatrix in the presence of the three attesting witnesses, was not a good appointment, because the publication was not attested. *Stanhope v. Ker*, 2 S. & S. 37. POWER, EXECUTION OF.

Proof of the handwriting of an attesting witness to a will, received under particular circumstances, in order to found a decree establishing the will. *James v. Parnell*, 1 Turn. & R. 417. EVIDENCE; PROOF OF HANDWRITING.

Implication is, that witnesses to a will saw the testator execute, if so situated, that they might have seen him; not where they were in an adjoining room, and could not. *Morrison v. Arnold*, 19 Ves. 671.

Will held well attested, though one of subscribing witnesses was executor in trust under will. *Phipps v. Pitcher*, 1 Mad. 144.

Devise and bequest of all the testator's real and personal estate in Grenada, to pay all such annuities, legacies, or bequest, as he should give or bequeath to be paid out of, or charged upon his real or personal estate in Grenada, by his will, or any codicil whether witnessed or not. A charge by an unattested codicil is void, this being not a charge by the will of legacies, but a reservation by a will executed according to the statute, of a power to charge by an unattested paper. As to the objection that the real estate was not charged as a subsidiary fund to the general personal estate, *q.?* *Rose v. Cunningham*, 12 Ves. 29. FRAUDS, STAT. OF.

Attestation of a devise by a mark, good, within the statute of frauds. *Harrison v. Harrison*, 8 Ves. 185.

Attestation of a devise by a mark, good, within the statute of frauds. *Addy v. Gritt*, *id.* 504. STAT. OF FRAUDS.

Legacies out of real estate given by unattested paper, cannot stand unless that paper is clearly referred to by will duly executed so as to be incorporated with it; the circumstance of its being inclosed in same cover with will, not sufficient. *Smart v. Prujean*, 6 Ves. 560.

A younger brother beyond sea having contracted to buy a real estate of his elder brother, makes his will, charging his estate with great legacies; but the will is attested only by two witnesses; afterwards the testator dies without issue, leaving his elder brother executor and heir; the heir may retain out of the assets the whole purchase money, though entitled again to the land as heir. *Coppin v. Coppin*, 2 P. W. 291. ALIEN, OF ASSETS.

Will attested by the witnesses, where the testatrix could see them through the windows of her carriage and of the attorney's office, well attested. *Casson v. Dale*, 1 Bro. C. C. 99.

J W surrendered to the use of his will to be pub-

lished in the presence of three or more credible witnesses, he made his will, and devised the copyholds, but the will not being attested by any witness: held, the copyholds did not pass. *Goodwin v. Kilsha*, Ambl. 684. COPYHOLD, SURRENDER OF.

Will subscribed by three witnesses, before whom testator declared it to be his will, but did not sign it; such declaration is equivalent to signing before them, and such will is good within the 5th section of the statute of frauds, and is also a good will of revocation within the 6th. *Ellis v. Smith*, 1 Ves. J. 11. FRAUD, STAT. OF; WILL, EXECUTION OF.

Witness may attest separately; in that case, if testator acknowledged before each, or signs before one, and acknowledges before the rest, it is good; but otherwise if he signs it before each only, because three different executions, and no one good within the statute. *Id.* 16.

Testator acknowledging signature to will before witnesses, good, as to land. *Grayson v. Wilkinson*, Dick. 158.

Not necessary, under the statute of frauds, that a testator should sign in the presence of the witnesses; his acknowledgment of his hand-writing is sufficient, although done to the several witnesses at different times. *Grayson v. Atkinson*, 2 Ves. 154.

Attestation of marksmen good under the statute of frauds. *Id.* ib.

If testator, by will properly attested, charge real estate with legacies he shall after give by codicil; a legacy by codicil not attested, is good. *Inchiquin v. French*, Ambl. 41. S. C. Ridg. 230, and 1 Cox, 1.

Where the testator owns his land before the witnesses who subscribe the will in the testator's presence, the will is good, though all the witnesses did not see the testator sign the will. *Stonehouse v. Evelyn*, 3 P. W. 254.

A trust or equity of redemption of a copyhold cannot pass by a will, unless attested by three witnesses. *Wagstaffe v. Wagstaffe*, 2 P. W. 258. *Appleyard v. Wood*, Sel. Ch. Ca. 42. COPYHOLD; TRUST; EQUITY OF REDEMPTION.

A witness proving a will of land, swears that he subscribed it in the same room, and at the testator's request: held good, though not said in the testator's presence. *Longford v. Eyre*, 1 P. W. 740.

A witness to prove a will of land, ought to prove that the will was executed in his presence, and also in the presence of the two other witnesses, and that they subscribed in the presence of the testator. *Id.* ib.

One of the three witnesses to the will is a devisee of part of the land, whether not a good witness, if he aliens the land, without covenant or warranty. *Baugh v. Holloway*, 1 P. W. 557.

The witnesses to a will subscribe their names at a window in a passage, where they could see but part of the bed on which the testator lay, and he could not, as he lay there, see them attest his will; this will was set aside, as not being duly executed. *Clark v. Ward*, 4 Bro. P. C. 71.

A will of land written by the testator, and published in the presence of three several witnesses, at three several times, and attested by all at the said respective times in the presence of the testator, sufficient within the stat. of frauds; but whether the man's seeing the writing to be in the presence of the witnesses be sufficient, *qu.*? *Cook v. Parsons*, Prec. Chan. 184. S. C. 2 Vern. 429.

## VII. PUBLICATION, RE-PUBLICATION, AND REVIVAL OF.

Testator by will, charges all his estates with payment of debts, and makes his son residuary devisee; afterwards purchases copyholds which are duly surrendered to the use of his will, and by codicil devises

those copyholds to his son in fee: the codicil held a republication of the will, so as to subject those copyholds to the payment of debts. *Rowley v. Fyton*, 2 Mer. 128. WILL, C. OF; CHARON ON LANDS.

Testator by his will devises all his freehold and copyhold manors, &c. and real estate whatever, upon certain trusts; and gives to the same trustees a sum of 35,000*l.* to lay out in the purchase of lands, to be settled upon the same trusts. He afterwards contracts for the purchase of several estates; and, by a codicil, specifying some of the estates which he had so contracted to purchase, devises them to the same trustees, upon the trusts of his will; and directs that the purchase monies shall be taken as part of the 35,000*l.* confirming his will in all other respects. The codicil amounts to a republication of the will, so as to pass not only the estates therein specified, but all the estates contracted to be purchased between the dates of the will and codicil. *Hulme v. Heggate*, 1 Mer. 285. WILL, C. OF, WHAT PASSES; AFTER-PURCHASES.

Estate contracted for after general devise, will pass by republication, and must be paid out of personal estate. *Broome v. Monck*, 10 Ves. 605. CONTRACT; WILL, C. OF, WHAT PASSES.

Testator devised all his real estate to his sister for life, remainder to her children as she should appoint; for want of appointment, to all her children and their heirs, as tenants in common. His sister having two daughters, by a codicil, declared to be a codicil to his will, not then at hand, he gave one of them an annuity; and directing his annuities to be paid out of his 3 per cent. stock, he charged them on his real estate, in case of a deficiency, and directing the residue of his personal estate to be invested in freehold lands and hereditaments, he recommended to his sister to settle and convey, or join with her husband in settling and conveying all his estates and property which she might derive from him after his decease, to the use of her two daughters for life, in such parts, shares, and proportions as she should approve, with remainder to their respective issue and cross remainders, and the usual powers and clauses in strict settlement. The testator's sister died in his life, and her two daughters were his co-heiresses. Some real estates were purchased between the executions of the will and codicil; as to the real estate the will is not revoked, but is republished by the codicil; and the two nieces are entitled to all the real estates, and to those directed to be purchased, as tenants in common in fee. *Meggison v. Moore*, 2 Ves. J. 630. WILL, C. OF; WILL, REVOC. OF; CODICIL.

Since the statute of frauds, annexation of a codicil to a will, not admissible evidence of republication, because parol. *Barnes v. Crowe*, 1 Ves. J. 495. 3 Bro. C. C. 2. Vide cont. 3 Atk. 798. FRAUD, STAT. OF.

Renewal of a prebendal lease is an ademption of a bequest of it; but a codicil to the will, though to pass after-purchased property is a republication of the will, and the lease shall pass by republication. *Coppin v. Fernyghough*, 2 Bro. C. C. 291. LEGACY, ADEMPMENT OF; LEASE, RENEWAL OF.

Like as with statutes, the revoking a will which has revoked a former one, revives the first. *Harwood v. Goodright*, Loft. 576.

Codicil does not operate as a republication of a will, unless it is annexed to it or the contents, shew the intention. *Att. Gen. v. Downing*, Ambl. 573. CODICIL.

The execution of a second will is a revocation of the first, and cancelling the second afterwards, does not set up the first again. *Exp. Hellier*, 3 Atk. 798. Vide cont. 1 Ves. J. 495.

Every codicil properly attested, is a republication of the will. *Gibson v. Rogers*, Ambl. 97. S. C. 1 Ves. 485. 4 Ves. 288. Sed. *qu.* CODICIL.

Republication of will by codicil, does not require any precise form, nor need it be annexed to, or indorsed on the will. *Potter v. Potter*, 1 Ves. 442. *Sed quæ?* see ante.

By the addition of a codicil, every thing is set up in the will not altered by the codicil; and though the codicil has no date, yet if it appear by evidence to have been executed subsequent to an act which might amount to a revocation, it will operate as a republication. *Carte v. Carte*, Ridg. 210. Ambl. 28. 3 Atk. 174.

S. R. directed his executors to place out 1000*l.* at interest, and to apply the interest for the maintenance, &c. of his grandson, empowering them to pay part of the principal as an apprentice fee, and the residue to be transferred to him at twenty-one. Testator put his grandson apprentice, and paid 126*l.* with him; a year after testator made a codicil to his will, and gave him a legacy of 1000*l.* The question whether paying the apprentice fee was an adeption *pro tanto*: held, that as the 1000*l.* was not given for that purpose alone, the codicil was a confirmation of the legacy, and a republication of the will. *Roome v. Roome*, 3 Atk. 181. LEGACY, SATISFACTION.

To make a republication there must be *animus republiandi*, and therefore when testator was looking for a paper, and person assisting him, took up his will by mistake; testator said, that is my will, not meaning to republish; it was held not a republication. *Abney v. Miller*, 2 Atk. 599.

Where testator, after making his will, surrendered college lease, and took a new lease, held a revocation, and that a republication of the will would not alter the case, the very thing itself being entirely annihilated. S. C. *Id.*

A codicil, attested by three witnesses, and ratifying a will, amounts to a republication of that will, and both ought to be considered together as one will. *Acherley v. Vernon*, 3 Bro. P. C. 91. S. C. 1 Com. 381. CODICIL.

Making a codicil, and annexing it to the will, is no republication of the will. *Hutton v. Simpson*, 2 Vern. 722. Pre. Ch. 439. Gilb. Eq. Rep. 115, 120. *Sed quære*, vid. ante.

A codicil which concerns only personal legacies, will not amount to republication of the will, so as to pass lands purchased after the making of the will. *Strode v. Russel*, 2 Vern. 625. S. C. 3 Ch. Rep. 169. WILL, C. OF, WHAT PASSES AFTER-PURCHASES.

One devises a lease to his daughter, and afterwards renews the lease, and afterwards adds a codicil to his will; whether the renewal of the lease is a revocation, and whether the adding a codicil to his will is a republication, *quære?* *Afford v. Earle*, 2 Vern. 299. Nels. Ch. Rep. 162. S. C.

Testator saying his will was in a box in his study, amounted to a republication. *Id. ib.* *Sed quære*, 2 Atk. 549.

A held a church lease, of which nine months has remained unexpired; he made his will in sickness, and devised all his interest in such lands to B; A. recovering, renewed his lease, and republished his will; resolved, the renewed lease passed by the republication. *Anon.* 2 Freem. 116. *Sed quære*, see 2 Atk. 509. WILL, C. OF, WHAT PASSES.

### VIII. REVOCATION OF.

1. By Cancellation.
2. By Marriage and Birth of Issue.
3. By Alteration or Alienation, by subsequent Act or Deed, Will, Codicil, or other Instrument.

#### 1. By Cancellation.

Cancellation of a codicil effectual notwithstanding an interlineation to the same effect left standing in

the will. *Utterson v. Utterson*, 3 V. & B. 122. S. C. Coop. 60.

Testator gives a moiety of the residue to such living in-hospital as his executor should appoint. He afterwards strikes out the executor's name, and dies without appointing any other executor. This is not a revocation of the legacy, but the court will appoint. *White v. White*, 1 Bro. C. C. 12. CHANCERY.

Where there are duplicates of a will and the testator cancels one of them only, and the other part is left entire, yet it is an effectual cancelling of the will. *Onions v. Tyrer*, 2 Vern. 742. S. C. Prec. Chan. 459. Gilb. Eq. Rep. 130. 1 P. W. 343.

#### 2. By Marriage and Birth of Issue.

Marriage alone not a revocation of a will, as with the birth of a child it is. Exception where the will provides for children. *Wilkinson v. Adam*, 1 V. & B. 465.

Widower having son and devising away real estate; subsequent second marriage and birth of child; held no revocation of devise. *Sheath v. Gork*, 1 V. & B. 390. REAL ESTATE.

But where no heir a revocation may be implied. *Id.* 397. REAL ESTATE.

Marriage and birth of child is an implied revocation of a will of personal property. *Id.* 397. PERSONAL ESTATE.

Second marriage and birth of children, the wife and children provided for by settlement, and there being children by former marriage, does not revoke the will made prior. *Exp. El. Hechester*, 7 Ves. 348.

Whether a will was revoked by marriage and the birth of a child under particular circumstances; *Quære?* *Faxter v. Dyer*, 5 Ves. 603.

A subsequent marriage and the birth of a child revokes a will, *quære*, as to the propriety of admitting evidence against the presumption. *Gibbons v. Gaunt*, 4 Ves. 848. PR. EVID.

Mutual wills by two unmarried sisters under twenty-one, the marriage of one does not revoke the will of the other. *Hinckley v. Simmons*, 4 Ves. 160. MUTUAL WILLS.

Marriage with a legatee no revocation. *Ewbank v. Helliwell*, 2 Bro. C. C. 220. MARRIAGE; LEGATEE.

Marriage and the birth of a child held a revocation of a will of land. *Sprague v. Stone*, Ambl. 721.

One devises real estates to certain uses; afterwards by deed he conveys it to the same uses until he marries, and then to new uses; after the deed and before marriage, he, by codicil attested by three witnesses and directed to be annexed to his will, imposes a forfeiture upon persons disturbing his wife, and after the codicil marries: the settlement revokes the will, but the codicil sets it up again and the new uses springing on the marriage do not revoke the codicil. The subsequent marriage is no revocation of the will. *Jackson v. Harlock*, Ambl. 489. S. C. Eden, 263.

Marriage and birth of a child revoke a will of personal estate. *Id.* 494.

Marriage simply is not a revocation. *Id.* 495.

Subsequent marriage and having children, construed a revocation of a will. *Cook v. Oakley*, 1 P. W. 304.

#### 3. By Alteration or Alienation, by subsequent Act or Deed, Will, Codicil, or other Instrument.

Testator by his will, gave an annuity payable out of his freehold, copyhold, and personal estate, and by

a codicil not duly attested revoked the annuity: held that this was a subsisting charge upon the freeholds. *Mortimer v. West*, 2 Sim. 274. CHARGE ON LAND.

Testator devised his estates at S. and H. to trustees, in trust, if there should be only one son of D, who should attain twenty-one, for that son, and in case there should be two or more such sons, in trust for the second of them, and gave all the residue of his estates to trustees in trust to sell. He afterwards erased, and by codicil declared that he intended to erase the direction to sell only; he then gave all his estates to the son of D who should first attain twenty-one, and change his name to E. D, at death of testator, had a son who was still an infant, and afterwards had another son. Held the codicil revoked the devise of the S. and H. estates, and also the devise of the residues of his estates to the trustees, and that D's eldest son took under this codicil an immediate vested interest, both in the estates of which the testator was seized at the date of his will, and those he afterwards purchased, and consequently was entitled to the rents during his infancy. *Duffield v. Elwes*, 2 S. & S. 544. CODICIL, WILL; C. OF VESTED INTEREST.

By deed of 4th Nov. 1800, (being the settlement made on the marriage of A and B,) the testator and wife, B, in exercise of a general power of appointment vested in her by a previous deed of 11th of May 1799, appointed certain freehold houses to the use of trustees during the joint lives of herself and her husband, for her separate use, with the remainder, in the event of her dying in the life-time of her husband (which happened,) as she should appoint by will attested by three witnesses, with limitations over. Shortly after her marriage, B by will duly attested by three witnesses, devised the houses to her husband in fee: afterwards in 1811, she and her husband executed a deed attested by two witnesses, by which, after reciting the indenture of the 4th May 1799, but not mentioning the marriage settlement, B, in exercise of the power given her by the deed of 1799, and of all other powers, &c. appointed the messuages to the use of her husband for life, remainder to the use of herself for life, remainder to the use of the children of the marriage as she should appoint, and in default of appointment to all the children equally in tail, remainder to her husband in fee. Held that the deed of 1811, did not operate as a revocation of the previous will. *Eilbeck v. Wood*, 1 Russ. 564.

An envelope containing a will and codicil properly executed, and also a subsequent will. If of real estate) not so executed, and bearing an indorsement relative to the first will and codicil erased, and by fresh indorsement, specifying to contain the will of last date, as "the last will," &c.; held that first will and codicil were not revoked thereby. *Gruntley v. Garthwaite*, 2 Russ. 90.

After will, testator mortgaged estate in fee with proviso in case of repayment to reconvey to testator, or to such person, or for such estate, and to such lawful trusts, &c. as testator by deed, &c. should appoint, &c.: such conveyance operates as a revocation of the will *pro tanto* only. *Brain v. Brain*, 6 Mad. 221. MORTGAGE.

A bequest of money connected with a devise void by the statute of mortmain fails, though the devise is revoked by a subsequent conveyance or surrender. *Semble. Att. Gen. v. Hinman*, 2 Jac. & W. 270. MORTMAIN.

If A, being entitled to estate under a contract to purchase, devise it to B, and afterwards takes a conveyance of the estate to himself and C, though only in trust for himself, as to C and for the purpose of barring dower, it is a revocation of the devise; but secus, if he had taken a conveyance simply to himself alone. *Ward v. Moore*, 4 Mad. 368.

Partition after devise, is no revocation. S. C. id. 372.

A codicil not to be presumed a revocation, unless it distinctly appears. *Griffiths v. Grieve*, 1 Jac. & W. 31.

A covenant to surrender copyhold previously devised, is a revocation of the will in equity, if the surrender would have been a revocation at law. *Fawser v. Jeffery*, 2 Swan. 268. See this case, 16 Ves. 519. COPYHOLD, SURRENDER OF.

Though a conveyance for particular purpose will necessarily operate as a revocation no further than the particular purpose, yet if the conveyance goes beyond what the particular purpose requires, it will be a revocation. *Id.* 272, 3. CONVEYANCE.

So a conveyance of the whole estate though for a partial purpose. *Id. ib.* 274. CONVEYANCE.

Imperfect conveyance, may, as evidence of intent, operate as a revocation. *Id. ib.* See this case, 16 Ves. 519. CONVEYANCE.

A, the cestuique trust, devised to B, and then directed her trustees to make new conveyances to other trustees to her and her heirs, and died without new publication; held a revocation. *Id.* 276.

A, being in possession of mines and iron works, under leases of unequal duration, by will bequeathed 25,000*l.* to B "as a capital for him to become partner with my executors of one-fourth share in trade of all those works so long as the lease endures," with a devise to H and his wife of residue of his estates, real and personal. By codicil testator gave to W three-eighths of concern at iron-works: "the partnership will stand at my death W three-eighths, H three-eighths, B two-eighths." After R's death, W, H, & B carried on works for two years, selling iron manufactured not only from the produce of the mines, but from other sources. Held, that codicil revoked residuary clause in favour of H's wife as to the trade, and that concern was a partnership in trade. *Crawshaw v. Maule*, 1 Swan. 495. PARTNERSHIP; WILL, C. OR.

Testator gives 4000*l.* to trustees upon trust for his two daughters at twenty-one, and directed that the legacy duty due in respect thereof shall be paid by his executors out of the residue. By codicil reciting this bequest, and that he is desirous of increasing the same to 5000*l.* he revoked the gift of 4000*l.* and gives 5000*l.* upon the same trust, &c. By a second codicil reciting the former, and that he is desirous of further increasing to 6000*l.*, he revokes the gift of 5000*l.* and gives in lieu thereof 6000*l.* upon the same trusts. This is not a revocation but substitution in each instance, and the 6000*l.* is therefore exempt from the legacy duty. *Cooper v. Day*, 3 Mer. 154. WILL, C. OR; LEGACY DUTY; LEGACY SUBSTITUTION.

Testator bequeaths as follows: "As to all that my leasehold house in L, and all my household goods and furniture there and at S, and as to all my plate, linen, china, pictures, live and dead stock, and all the residue of my goods, chattels, and personal estate, &c. I give and bequeath the same to A." By a codicil, he revokes the bequest "of the residue" to A, and gives "the residue of his said personal estate" to B; the gift of the general residue only, and not of the articles enumerated, is revoked by this codicil. *Clark v. Butler*, 1 Mer. 304.

A will, devising estates for life without impeachment of waste, not revoked by codicil directing the trustees to let until tenant for life married, such leases under restrictions, one of which was that the lessees should not be unimpeachable of waste. *Lushington v. Boldero*, Coop. 216.

Devise of the equitable fee, under a contract to purchase, revoked by the conveyance of a trustee and his heirs to such uses as the deviser should appoint by deed, with two witnesses or will; with remainder

to him for life; to the trustees for the life of the devisor, to bar dower, and to the devisor in fee. *Rawlins v. Burgis*, 2 V. & B. 382.

Distinction between intention and alteration of estate, as the ground of revocation of a will. *Id. ib.*

Revocation by feoffment to such uses as the devisor shall appoint, with remainder to himself in fee. *Id. ib.*

Distinction where partition was the sole object. *Id. ib.*

Revocation by contract to sell a devised estate. *Id. ib.*

Where a testator interlined his will to except the plaintiff, who was named a legatee under it with others, and also made a codicil expressly excluding him, but afterwards obliterated the codicil without doing the same with the interlineation of the will, the court admitted the plaintiff to an equal interest with the other parties taking under the will, considering the inference as certain that the testator so intended. *Uterson v. Uterson*, Coop. 60. S. C. 3 Ves. & B. 122. WILL, C. OF, WHO TAKE.

Revocation of a devise by a contract for sale, though rescinded after the devisor's death. *Bennett v. El. Tankerville*, 19 Ves. 171.

A binding and valid contract for the sale of lands devised, is in equity as much a revocation as a conveyance would be at law. *Id.* 178.

Devise of real estates to be sold, and the produce applied in the same manner as the residue of the personal estate. Codicil not executed so as to pass real estates, revoking the bequest of the residue, does not affect the will as to the real. *Gallini v. Noble*, 3 Mer. 691.

Mortgage in fee after a devise, is a revocation *pro tanto* only. *Tucker v. Thurstan*, 17 Ves. 134. MORTGAGE.

Devise of real estate not revoked by bankruptcy; distinction in that respect between bankruptcy and deviseisin. *Charman v. Charman*, 14 Ves. 580. BANKRUPTCY.

Settlement of personal estate upon a second marriage, upon trust to pay such persons, &c. as the settlor shall by deed or will appoint, and in default thereof to his issue. Construction upon the whole that it was to operate unless a subsequent instrument should be executed: a prior will therefore revoked. *Leigh v. Norbury*, 13 Ves. 340. SETTLEMENT.

Distinction as to the effect of a partition upon a devise; if the conveyance goes no further, the devise is not revoked, as it is if he takes the divided estate with a power of appointment. *Mannudrell v. Mannudrell*, 10 Ves. 256. PARTITION.

Revocation of a devise by an exchange, though the land, after the death of the devisor, was restored to his heir, under an arrangement in consequence of a defect discovered in the title of the other party to the exchange. *Att. Gen. v. Vigor*, 8 Ves. 256.

The ground upon which a partition does not revoke a devise. If the object is to do any thing beyond mere partition, it is a revocation. *Id.* 281. PARTITION.

Deviseisin and remitter by entry no revocation of will. *Id.* 282.

No instance of a revocation of a will at law being held not a revocation in equity, where the partial, particular, purpose was not for charges or incumbrances, or to pay debts. *Harmond v. Oglunder*, 8 Ves. 126.

Codicil reciting a specific and limited purpose, revokes the whole devise, declaring the trusts again, with the proposed alteration, and confirms the will in every particular not thereby altered or revoked; the omission of one trust, though probably against the intention, cannot be supplied. *Holder v. Howell*, 8 Ves. 97.

Testamentary appointment of guardian is not revoked by a subsequent testamentary appointment not executed according to the statute, and not directly importing revocation. *Exp. El. Ilchester*, 7 Ves. 348. GUARDIAN, TESTAMENTARY.

An act inconsistent with will, though, by some accident independent of will it fails of effect, is a revocation. *Id.* 370.

An express revocation, if only subservient to another purpose for which it is incompetent, shall not revoke. *Id.* 379.

Will may be revoked by an instrument not attested as would be required to give it effect; any disposition that would, by the instrument, have completely put an end to that will, shall have that effect; the instrument becomes ineffectual by accident or circumstances dehors the will. *Id.* 374.

Where the act is valid for the whole purpose, but by disability of person to take, or some matter dehors or subsequent to the will, it is ineffectual, it is a revocation. *Id.* 373.

Disposition so made by will as to have legal effect, and afterwards another, by which the former would be revoked; but the other substituted, and it is evident that testator did not intend revocation for any other purpose than to give it effect, if the second instrument cannot have effect of disposition, it shall not be a revocation. Cited *Id.* 372.

The effect of revocation in equity, produced by an agreement for partition, in such a manner as to deprive the testatrix in equity of any interest in the estate devised; and the devisee disappointed, has no right to compensation from heir. *Knollys v. Alcock*, 7 Ves. 558.

Mere partition, whether by compulsion or agreement, is not a revocation of a will; but the slightest addition as a power of appointment, prior to the limitation of the uses, is sufficient. *Id.* 564. PARTITION.

Devise of fee farm rents revoked in equity as well as at law, by subsequent conveyance to trustees, operating an alteration of estate beyond mere purpose of securing a mortgage; but on account of laches of plaintiffs, the heirs at law, court would not give relief, further than by retaining bill, with liberty to bring action, &c. to give an opportunity of taking opinion of court of law, whether there is a revocation at law, or whether court of law will presume a republication from long possession; leaving it open whether plaintiffs are entitled to any account, and for how far back. *Harmond v. Oglunder*, 6 Ves. 199. PR. RETAINING BILL: LACHES.

Wherever the whole legal estate is conveyed, whether for a partial or general purpose, with the single exception of the case of partition, a court of law has nothing to do with the purpose, but is to see whether the interest remains the same in the devisor as at the date of the will; if not, whether the purpose is partial or general, by way of charge or not, it is a revocation at law. *Id.* 218.

Devise is not revoked in equity by a mortgage in fee, or a conveyance in fee, for payment of debts; though after debts are paid, the devisor takes a conveyance to him and his heirs. *Id.* 221. but see the case on appeal, 8 Ves. 106. contra.

Construction of several testamentary papers, that some revoked others, probate having been granted of all. *Beauchamp v. El. Hardwicke*, 5 Ves. 280.

Testator by codicil revoked the legacy of 50*l.* bequeathed to his sister. The only legacy given to her was 100*l.* given by the will: as to the effect of the codicil, *qu?* *Id.* *Carrington v. Payne*, 5 Ves. 405.

Agreement for a partition established against a conveyance, and against a devise, it operating as a revocation, by depriving the testatrix of all interest in the estate devised. *Knollys v. Alcock*, 5 Ves. 648. AGREEMENT.

\* Devise revoked by a contract for sale. *Id. ib.*

\* A devise not revoked by a mortgage in fee to the devisee. *Buxter v. Dyer*, 5 Ves. 656. MORTGAGE.

Revocation of a will by a conveyance never completed. *Cape v. Holford*, 3 Ves. 653.

Lease for years or life is a revocation of a will *pro tanto* only. *Id.* 654.

Testator makes a foffment after will to the use of himself in fee, or suffers a recovery; it is a revocation. *Id.* 664.

By a mortgage in fee of a devised estate, or a conveyance in fee for payment of debts, the will is revoked *pro tanto* only. *El. Temple v. Ds. Chandos*, 3 Ves. 685.

Articles to sell a devised estate are a revocation in equity, but not at law. *Williams v. Owens*, 2 Ves. J. 601. AGREEMENT TO SELL ESTATE.

A devised all his estates to widow for life, remainder to nephew, he paying 2000*l.* to appointee of widow, and made her executrix and residuary legatee. The estates were held under church leases, which testator renewed after will; *quare*, if a revocation? The widow by will, in "pursuance of power," appointed plaintiffs, and devised estates "so given by her said husband's will, and all her interest, &c. therein" to trustees for nephew, on his paying the said 2000*l.* "according to the true intent, &c." of husband's will, but not before or otherwise. Supposing the renewal of leases a revocation, the widow shall be presumed to have designedly given effect to real intent of husband. *Penrice v. Gamons*, 3 Anst. 821. RENEWAL OF LEASES; DEVISE, C. OF; POWER, EXECUTION OF.

Where real estate is charged with legacies generally, by will, duly attested, legacies may be revoked or charged by an unattested instrument. *Buckeridge v. Ingram*, 2 Ves. J. 665. WILL, EXECUTION OF.

By marriage articles, the husband covenanted to convey to the use of himself for life, remainder in trust to secure an annuity to his wife for life, in bar of dower; remainder to trustees for years to raise portions; remainder to the sons and daughters successively in tail; remainder to his own right heirs. Afterwards he devised, upon condition that he should have no issue; and after the will he, in pursuance of the articles, conveyed to trustees and their heirs to the uses and trusts of the articles: the will is not revoked. *Williams v. Owens*, 2 Ves. J. 594.

The rules as to revocation applied to legal estates, are, in equity, applied to equitable estates. *Id. ib.*

Mortgage in fee is a total revocation at law, but, in equity only *pro tanto*. *Id. ib.*

Recovery by tenant in tail, with reversion in fee, is a revocation at law: so in equity, if an equitable estate. *Id.* 698. RECOVERY.

Where a devised estate is differently modified, there is a revocation; otherwise where the testator remains with the same estate and interest, and subject to the same means of disposition, though changed as to the legal or equitable quality. *Id.* 599. *Id.*

Fine for the mere purpose of a partition, is no revocation, even at law. *Id.* 600. FINE & RECOVERY; PARTITION.

Testator devised all his real estate to his sister for life, remainder to her children as she should appoint; for want of appointment, to all her children and their heirs as tenants in common. His sister having two daughters, by a codicil, declared to be a codicil to his will, not then at hand, he gave one of them an annuity, and directing his annuities to be paid out of his three per cent. stock, he charged them on his real estate in case of a deficiency, and directing the residue of his personal estate to be invested in freehold lands and hereditaments, he recommended to his sister to settle and convey, or join with her husband in settling and conveying all his estates and

property which she might derive from him after his decease to the use of her two daughters for life, in such parts, shares and proportions as she would approve, with remainder to their respective issue, and cross-remainders, and the usual powers and clauses in strict settlement. The testator's sister died in his life, and her two daughters were his co-heiresses. Some real estates were purchased between the executions of the will and codicil. As to the real estate, the will is not revoked, but is republished by the codicil, and the two nieces are entitled to all the real estates, and to those directed to be purchased, as tenants in common in fee. *Meggison v. Moore*, 2 Ves. J. 630. WILL, C. OF; CODICIL; WILL, REPUBLICATION OF.

Articles to settle estates of husband subject to certain uses and trusts on first and other sons in tail male; remainder to husband in fee. The husband confirming the articles, devised the same estates, in case he should die without issue male, or on failure of issue male in life of wife; and by a subsequent settlement in performance of articles conveyed to trustees (after certain uses and trusts) to the use of his first and other sons in tail male; remainder to himself in fee. The whole fee being conveyed, and some of the purposes being inconsistent with the will and the articles, the will is revoked as to the settled estate. *Ds. Chandos v. Brydges*, 7 Bro. P. C. 505. S. C. 2 Ves. J. 417. 430.

If lands devised are conveyed for a principal purpose, as a mortgage or payment of debts, it is a revocation *pro tanto* only. *Brydges v. Chandos*, 2 Ves. J. 417.

Partition is no revocation of a devise; otherwise if the object extends farther, even merely to a power of appointment. *At.* 429. PARTITION.

A deed obtained by fraud is not a revocation of a prior will. *Hawes v. Wyatt*, 3 Bro. C. C. 156. Vide S. C. on the hearing at the Rolls, 2 Cox, 263. FRAUD IN OBTAINING DEED.

In cases of contract for land before, but executed after making a will of land, the subsequent execution is not a revocation, the legal interest coming in *esse* afterwards, would not pass by the will at law, but in equity is bound by the prior devise of the equitable interest. *Perry v. Phelps*, 1 Ves. J. 255.

Stock was, in contemplation of a marriage, vested in trustees for the separate use of the wife for life, and with full power for her to dispose of it by will. She made her will during coverture. She survived the husband, and afterwards took a transfer of the stock into her own name. This does not operate as a revocation of the will, or an ademption of the bequest of the stock. *Dingwell v. Askew*. 1 Cox, 427. LEGACY, ADEMPMENT OF.

Feme covert, under a power, makes a will; afterwards becoming discover, she takes a conveyance from the trustees to her own use. This is a revocation of the will. *Lawrence v. Wallis*, 2 Bro. C. C. 319.

F, by will, orders his estate to be sold, and the produce to be divided. He afterwards sells the estate; this is a revocation of the will. *Arnold v. Arnold*, 1 Bro. C. C. 401. S. C. 2 Dick. 645.

Mortgage to devisee, after making of will, is no revocation. *Peach v. Phillips*, Dick. 538.

Renewal of lease for life, revocation of will as to those leases, but not as to lease for years. *Digby v. Lingard*, Dick. 500.

A devisees use of furniture, &c. at B, to his wife for life, on consideration of her residing there. He afterwards suffers a recovery of estate, and dying without republishing will, the estate descends to heir at law: held that wife was entitled to use of furniture, &c.; discharged of condition of residence. *Darley v. Langworthy*, 3 Bro. P. C. 369. S. C. Amb. 653.

A recovery suffered of lands devised by will previously made, is a revocation of such will as to the lands. *Id. ib.*

Marriage and birth of child: held, revocation of will made prior to both. *Christopher v. Christopher*, Dick. 445.

Marriage of feme sole before stat. of frauds, held, revocation of will. 4th Co. (no cases since then). *Id. ib.* 449.

Bequest of a leasehold without any words to pass the right of renewal, is revoked by taking new leases after the will. *Attorney General v. Downing*, Amb. 571.

One devises his freehold estates to certain uses, and bequeaths a leasehold messuage to trustees, to convey it to the uses of the freehold, so that they shall not be separated. He afterwards suffers a recovery of the freehold estates, which operating as a revocation of the freehold, the bequest of the leasehold is also revoked; reversed in the house of lords as to this last point. *Darley v. Darley*, Amb. 653. S. C. 1 Dick. 397. 3 Wils. 6. But see *Southey v. Somerville*, 13 Ves. 492, where L. Eldon said he should be disposed to agree with the opinion of L. Camden, rather than the judgment of the house of lords. And see *Ld. Carrington v. Payne*, 5 Ves. 404. *Louder v. Stone*, 4 Ves. 649. *Ware v. Pechill*, 11 Ves. 280. RECOVERY.

Joint-tenant devises his moiety, and afterwards the jointure was severed; nothing passed by the will. *Swift v. Roberts*, Amb. 617. JOINT-TENANCY, SEVERANCE.

Partition is not revocation. *Id.* 618. PARTITION.

Testator having bequeathed his personal estate to his wife, with a contingent disposition to any child she might be enceinte with, by an instrument executed in the East Indies; during his last illness, empowers A and B, to invest any gold dust, &c. which he had in bottomry, &c. as they should think most advantageous, and deliver the same over to his wife, or her assigns, she running all risk: held, that this instrument, though it had been proved in the ecclesiastical court, was merely an act *inter vivos*, and not a revocation of the will. *Pigott v. Janson*, 1 Eden, 469.

One partner by will gives one ninth of one twelfth of the profits reserved to him, to his partners. He afterwards, on the expiration of the partnership, renews it with the same partners, giving them a greater interest than they had under the former articles: held, they were entitled to one ninth of the testator's interest in the partnership at his death, and that the renewal of the articles was not an ademption nor revocation of the devise. *Backwell v. Child*, Amb. 260. WILL, C. OF; LEGACY, ADEMP. OF.

A fcoffment in fee, executed after a will, is a revocation, even if there was no livery. *Spruon v. Handcastle*, 3 Atk. 803.

A covenant to levy a fine to H for 1000 years by way of mortgage; remainder as A should appoint; fine levied. A devises to H; afterwards for 1000, covenants that the fine should enure to H in fee: held, a revocation of the will. *Hicks v. Moss*, Amb. 215. S. C. 3 Ken. 217.

At law, an imperfect conveyance is a revocation; it depends on intention. *Id. ib.*

"Intent," does not mean intent to revoke, but to make a different disposition. *Id. ib.*

Residue to two executors in nature of joint tenancy; will revoked by codicil as to one; other takes whole. *Humphrey v. Taylor*, Dick. 161.

After a devise of tithes together with a real estate, a surrender of the lease under which they were held, on acceptance of a new lease, held to amount to a tention, on, so that a republication was necessary. *97. v. Anderson*, 2 Ves. 418.

Where a man has an equitable interest in fee in an estate, and devises it, and makes a subsequent conveyance of the legal estate to "the same uses," it is no revocation. *Parsons v. Freeman*, 3 Atk. 749.

If will be made, and afterwards another will without cancelling the former, and either will is proved to be confirmed after the other will, the whole estate comprised in the will so last confirmed, will go according to the limitations in that will. *Phipps v. Anglessey*, 7 Bro. P. C. 445.

If there are two inconsistent wills of the same date, neither of which can be proved to be last executed, they are both void by the common law for uncertainty, and will let in the heir at law, unless such wills are explained by some subsequent act of the testator, so as to reconcile such inconsistency. *Id. ib.*

If two wills appear, and the limitations in both are consistent, and they have both been confirmed by various codicils, the wills and codicils may be taken together as one testamentary disposition, and such construction made as that the limitations in both wills shall take place, to the disherison of the heir at law. *Id. ib.*

Where a common recovery is to a particular purpose, it shall operate as a revocation only to answer that purpose. *Parsons v. Freeman*, 3 Atk. 741. FINE & RECOVERY.

Grant by a husband to his wife in his lifetime will not revoke his will, giving every thing from her. *Beard v. Brand*, 3 Atk. 72.

B, after making his will, surrendered the college leases he had devised thereby, and accepted two new leases, for which he paid a larger fine: but the last lease was not sealed by the college till after the testator's death: held, that the first lease was a revocation; but the latter, which was not sealed, was not. *Abney v. Miller*, 2 Atk. 593. 2 Ves. 418.

If testator, after devising an estate for lives, surrender it and take a new lease, it is a revocation. S. C. *Id.* 527.

So where a fcoffment was made to the same uses with those of a preceding will, it was held a revocation, and the rule of revocation of wills is the same in equity as at law. *Id.*

Purchasing the reversion in fee, after a devise of the life estate, was a revocation *pro tanto*, and descends upon the heir. *Culton v. Hancock*, 2 Atk. 425. S. C. Ridgw. 301.

Testatrix gave her real and personal estate to plaintiffs for life; remainder to J A in tail; remainder to R A in fee, with a few pecuniary legacies, and charged her real estate with the payment, if her personal estate should not be sufficient, and by her will declared she gave all the rest and residue of her personal estate to L C's three daughters: held that the testatrix's charging real estate with the legacies if the personal is not sufficient, shews her intention in one event to revoke the devise of personal, and there being an alteration of her intention before she finishes her will, the construction is, she has altered her will throughout, and plaintiffs are not entitled to any part of the personal estate, but residue belongs to three daughters of L C. *Ulrick v. Lichfield*, 2 Atk. 372.

Where the same thing is given in a will to two different persons, *Ld. Coke* said, "the latter words shall revoke the former;" but in *Plowden*, in the case of *Paramore v. Yardley* it was held, they shall take as joint-tenants; but *Ld. Hardwicke* said he rather inclined to *Ld. Coke's* opinion. *Id.*

So where a man gives a horse to A in the first part of his will, and in the latter part, he gave the same horse to B, it was held a revocation, and *Swinburne*, pt. 7, c. 1, is mistaken in point of law, in saying they should take a joint-tenants. *Id.*

The rule is the same as to revocations of a devise of lands, and a revocation of a sum of money charged



on lands; they must be revoked in the same manner. *Brydenell v. Boughton*, 2 Atk. 272. WILL, EXECUTION; LEGACIES CHARGED ON LAND.

There are virtual as well as express revocations, as by extinguishing or destroying the thing devised which are out of the statute and remain as they did before. *Id.*

Suppose a will is made according to form, and afterwards the lands sold and conveyed to others, though the form of revocation the statute prescribes is not pursued, yet it is a virtual revocation. *Id.*

A feoffment to the use of a testator and his heirs is a revocation. If a man charge his lands with a debt, and afterwards pays that debt, it is extinct, though there is no formal revocation. Lands charged with a portion by a will, and the same given by testator in his lifetime, is a virtual revocation, though no actual one. *Id.*

In all cases where a man gives a personal legacy charged on a real estate, and the will is revoked, the legacies are gone, for when the land is meant only as a collateral security, if the thing secured be taken away, the security itself cannot subsist. *Id.*

Testator devises to A all his dividends on his S. S. annuities, and afterwards by codicil gives to C an annuity for life, payable out of his S. S. annuities: held not to be a revocation *in toto*, but the devises may stand consistently together. *Stone v. Evans*, 2 Atk. 86.

A demise of lease for years to the same person, to whom the fee is devised, and which commences in the life of the devisor, is no revocation of the fee. *Villiers v. Villiers*, 2 Atk. 72.

A mortgage in fee after a devise of the estate, is in law a total revocation; in equity *pro tanto* only. *Cusborne v. Scarfe*, 1 Atk. 606. MORTGAGE.

Will sufficient to pass personal estate will not revoke a will prior of real estate, made according to statute of frauds. *Limbery v. Muson*, 2 Com. 451. REAL ESTATE.

Tenant in tail male, remainder to himself in fee, devises his lands to J. and then suffers a recovery to the use of himself in fee, and dies without issue male; this is a revocation of the will. *Marwood v. Turner*, 3 P. W. 163.

One seised of a lease for lives devises it, and afterwards renews; the renewal is a revocation of the will. *Id.* 166. LEASE, RENEWAL OF.

The same circumstances ought to be proved to have happened on part of testator to shew notice of revocation of will in equity as in law, unless they are prevented by party interested. *Piggott v. Penrice*, 1 Com. 250. EVID.; FRAUDS, ACTS PREVENTED BY.

One devises land, and afterwards articles for a valuable consideration to sell or settle the premises; this in equity is a revocation of the will. *Cotter v. Leger*, 2 P. W. 624. MOS. 277.

A and B were tenants in common of lands in fee: A devised his moiety in fee, after which A and B made partition by deed and fine, declaring the uses as to one moiety in severalty to B in fee: Held, that the will of B was not revoked by the deed and fine levied in pursuance thereof. *Luther v. Kidby or Kirby*, 8 Vin. Ab. 148. pl. 30. 3 P. W. 169. (n.) See *Swift v. Roberts*, 3 Burr. 1490.

A devise of lands to trustees, who are afterwards charged by a codicil, is not revoked by the codicil; but the new trustees shall stand seised upon the trusts of the will, although the word heirs is made use of in the codicil. *Acherley v. Vernon*, 3 Bro. P. C. 85. S. C. 9 Mod. 68. 1 P. W. 783. Com. 381. 2 Eq. Ab. 209. CODICIL.

One, by deed and fine, mortgages: this a revocation of a will only *pro tanto*. *Rider v. Hager*, 2 P. W. 334. MORTGAGE.

Lands devised to one in fee, and afterwards mort-

gaged to the same person, is a revocation *in toto*; but if mortgaged to a stranger, a revocation *quoad* the mortgage only. *Harkness v. Bayley*, Prec. Chan. 514.

A settled lands, with power of revocation by writing in the presence of three witnesses, and in her last illness, by letter, desired a deed of revocation to be prepared, but died before it was done, having by will given the lands to charitable uses. Held, a good appointment, though no revocation. *Pigot v. Penrice*, Gilb. Eq. Rep. 137.

A devised lands to his executor for payment of his scheduled debts, remainder over; afterwards, he mortgaged part of the lands, and paid most of the scheduled debts. This mortgage was held no revocation, but the decree was afterwards reversed, without prejudice to the heir at law. *Baruch v. Carter*, 8 Vin. Ab. 147, pl. 25. MORTGAGE.

One devises his land, by will, attested by three witnesses, and afterwards makes another will of his land, which revokes all former wills, but this will is not duly executed. The last will being no will, and void, will not amount to a revocation of the former. *Onions v. Tyrer*, 2 Vern. 742. S. C. Prec. Cha. 459. Gilb. Eq. Rep. 130. 1 P. W. 343.

A devises lands, in trust to permit his daughter S to receive the rents until her marriage, or death; and in case she marry with the consent of trustees, then to convey the premises to her and her heirs; but if she died before marriage, or married without such consent, then to convey to other persons. S afterwards marries, with the consent of her father, who settles part of the lands on her and her husband, and dies. This settlement is no revocation of the will as to the devise of the other lands to S. *Clarke v. Berkeley*, 2 Vern. 720.

J H, having settled his real estate in trust for himself for life, and afterwards to such uses as he might by deed or will appoint, and, in default of appointment, to sole use of the heirs of his body, by his will noticing the settlement, after giving several legacies, devised all the rest of his real and personal estate to J P (who was not his heir) and the heirs of his body, &c. By lease and release, subsequent to the will, J H conveyed the real estate to a trustee for himself for life, and afterwards for such uses as he should by deed or will appoint, with power to raise, &c., for debts, &c., and, for default of appointment, for J H, his heirs and assigns. J H died, without altering will, or making any other appointment. Held, that the latter conveyance was a revocation of will. *Husband v. Husband*, 7 Bro. P. C. 433.

Devise of lands to A, and afterwards the devisor devised the same lands to B, a pupist; both devises are void; for though the last is void as a will, yet it is good as a revocation. *Roper v. Constable*, 8 Vin. Ab. 141. note to pl. 2. 2 Eq. Ab. 771, pl. 8.

Lease and release of estate, subsequent to will, is a revocation thereof. *Pollen v. Husband*, 1 Eq. Ab. 412.

A devised lands, and afterwards mortgaged them for years, and then levied a fine *sur connaissance de droit come ceo*, &c. and not a fine *sur concessit*: this will be a revocation; but if there had been a fine *sur concessit*, it had revoked only *pro tanto*. *Anon.* 8 Vin. Ab. 136, pl. 10.

A devises lands to his son J for ninety-nine years, determinable upon three lives, and charges the same with an annuity of 10*l.* to his daughter M. The testator afterwards devised these lands to S for ninety-nine years, determinable on three other lives, reserving a yearly rent of 50*l.* Held, that the demise was a revocation of the devise, but not of the annuity, there being rent enough reserved to satisfy it. *Parker v. Lamb*, 3 Bro. P. C. 12. S. C. 2 Vern. 495.

A devises lands to trustees to pay his debts, and

then to pay his wife 200*l.* per annum for her life. Testator lived several years, and his debts increased from 2500*l.* to 10,000*l.*, for 8000*l.* whereof his said trustees were bound. A, the testator, by deed and fine, conveys his lauds to his said trustees to sell, to pay debts, and the surplus to him and his heirs, and his wife joins in the fine and conveyance. Whether this is a revocation of the wife's 200*l.* per annum, or whether she shall have the 200*l.* a year out of the surplus of the money after the debts paid? Decreed for the wife. *Vernon v. Jones*, 2 Vern. 241. S. C. Pre. Ch. 32. 2 Freem. 117.

One devises a lease to his daughter, and afterwards renews the lease, and afterwards adds a codicil to his will. Whether the renewal of the lease is a revocation? and whether the adding a codicil to his will is a republication? *Alford v. Earle*, 2 Vern. 209. Nels. Ch. Rep. 162. S. C.

A devises lands, and then makes a mortgage thereof in fee. This is a revocation in law, but otherwise in equity. *Hall v. Deuch*, 1 Vern. 329. MORTGAGE.

A man devises land in fee, and then makes a lease for years of the same land. The lease, if not made to the devisee, is a revocation at law, *pro tanto* only. *Perkins v. Walker*, 1 Vern. 97.

#### IX. NUNCUPATIVE WILL.

See the stat. 29 Car. 2. c. 3. ss. 19, 20, 1, 2, 3. Chit. Stat. 1127. 4 Ann. c. 16. s. 14. id. 20, 1129.

Suits concerning nuncupative wills to be dismissed. Beame's Ord. 9.

One seised in fee of land limits a term to trustees for 100 years upon such trust as he by deed or will should appoint, and for want of such appointment to attend the inheritance, and afterwards by a nuncupative will gives all to J S, and being a bastard dies without issue; this will not pass the trust of the term. *Thruston v. Att. Gen.*, 1 Vern. 340. WILL, C. OF, WHAT PASSES.

A died beyond the sea and made a nuncupative will; B took administration here and brought his bill for a discovery of the supposed intestate's personal estate; the defendant pleaded the will and that he was executor, and that A left no assets but what were beyond seas. Plea allowed. *Jauncy v. Sealey*, 1 Vern. 397. FOREIGN COURT; PERSONAL ESTATE; PL. PLEA; ADMON.

#### X. PROBATE AND PROOF OF.

See also EXORS. IV. 1.—PR. EVID. 25, 26.

By 55 G. 3. c. 184. s. 37. 100*l.* penalty attaches on meddling with testator's property without taking out probate within six months after his death. And see further as to probate, id. ss. 38 to 51. Chit. Stat. 956, 7, 8.

An executor filed a bill before probate; plea that he had not proved the will, allowed. *Simons v. Milman*, 2 Sim. 241. PL. PLEA; EXOR.

The probate act-book of the prerogative court containing an entry of a will being proved, and of probate being granted to the executors therein named, admitted as evidence of those persons being the executors without accounting for the non-production of the probate. *Cox v. Allingham*, 1 Jac. 514. EVID. EXORS.

Probate of a will not evidence that copyholds pass by it. *Jervoise v. De. Northumberland*, 1 Jac. & W. 570. EVID.; COPYHOLD.

Probate is not evidence of will of real estate. *Gibson v. Whitehead*, 4 Mad. 244. PR. EVID.; REAL ESTATE.

Probate of the will of a married woman which is now necessary, though formerly otherwise limited to

her power, by the assent of her husband with respect to any beneficial interest: not, as to her right, as executrix of another person to make an executor, and continue the representation. *Stevens v. Bugwell*, 15 Ves. 139. FEME COVERT.

A paper proved as a will, reciting the marriage articles of the testator's daughter with A, confirming those articles, and directing that all the testator's property and effects shall be vested in A, preferable to any executor or administrator upon and after the testator's decease for all and every the purposes of his said agreement expressed or intended. The probate obtained by A as executor, held conclusive, and he was held not a trustee for the next of kin upon parol evidence of declarations, subsequent to the will. *Walton v. Walton*, 14 Ves. 318. EXOR. BENEf. INTERESTED; WILL, C. OF.

To get money out of the court, however small the amount, a prerogative probate is necessary. *Thomas v. Davies*, 12 Ves. 417. PR. PAYMENT OUT OF COURT; EXOR.

A codicil expressed to be in event of testator's death before he joins his wife, was executed after their separation in West Indies, upon an intended voyage to England. The voyage being prevented by accident, he joined her and they lived together there and in England, having returned together; and the testator having afterwards gone to Corsica, and thence to Lisbon, died there. The codicil held to be contingent, and did not take effect under circumstances. Probate is not conclusive not being refused except in plain case. *Sinclair v. Arne*, 6 Ves. 607. WILL, C. OF; PR. EVID.

B, a married woman, made a will merely executing a power given her by the marriage settlement, but she appointed C executrix generally. The ecclesiastical court granted probate of this will in the general form. B was the sole executrix of her late husband A. The general probate of the will of B will transmit to C the representation of A without an administration *de bonis non*. *Burr v. Carter*, 2 Cox, 429. EXOR.

In an abstract of a vendor's title, a will which formed part of it was represented as having been proved in the spiritual court; which afterwards appeared not to have been done. The purchaser filed his bill praying that the defendants might either be decreed to prove the will, or that it might be deposited in the hands of the master for safe custody. It appeared that two other persons were intended under the will, and they were added as parties, and they not objecting, the will was directed to be deposited with the master for safe custody. The vendors having by their misrepresentations occasioned the suit, were ordered to pay all the costs. *Harrison v. Coppard*, 2 Cox, 319. VENDOR & PURCH.; TITLE; PR. PRODUCTION DEEDS INTO COURT.

Prerogative probate necessary for the accountant-general to pay money out of court. *Docker v. Horner*, 3 Bro. C. C. 240. Vide S. C. 2 Dick. 746. PR. PAYMENT OUT OF COURT.

Probate of a will is conclusive evidence of the sanity of the testator to dispose of his personal estate, but it is by no means conclusive evidence of his capacity to dispose of his real estate. *Hume v. Burton*, 1 Ridgw. P. C. 277. EVID.

Heir at law, not sole plaintiff, bringing bill to establish will, court declared it well proved and established it. *Penny v. Penny*, Dick. 520.

Admission of will by feme covert, heiress at law, living separately from husband, sufficient to establish it. *Codrington v. El. Shelburne*, id. 475.

Will, though proved *per testes*, not declared well proved in absence of heir, but decreed to be established. *Stokes v. Taylor*, id. 349.

One of three witnesses to will, not to be found; but

on sufficient evidence will declared well executed. *Binfield v. Lambert*, Dick. 337.

But in *Bird v. Butler*, will not declared well executed, but trusts to be performed and carried into execution. *Id. ib. note*. See *id.* 349.

Probate of testator's will, evidence of his death. *French v. French*, Dick. 268.

Where probate and will differ, application to amend must be made to spiritual court. *Marsh v. Hunt*, 2 Atk. 50.

Will not declared well proved in absence of heir, but real estate to be sold in pursuance of trust. *Cator v. Butler*, Dick. 438. Vide also *French v. Baron*, *id.* 138; and S. C. 2 Atk. 120. S. P.

Bill to establish will, and execution of trust by sale of estate. Heir at law not to be found, court cannot pronounce will proved, heir not being before court; but real estate to be sold. *French v. Baron*, Dick. 138.

Probate obtained by fraud, relieved against here, and the deed importing a consent thereto set aside here, not in ecclesiastical court; and the defendant decreed to consent to a revocation of the probate. *Barnesley v. Porel*, 1 Ves. 287. FRAUD; JURISDICTION.

There is no occasion to prove a will in the spiritual court, to entitle a legatee to remove his property out of the real estate. *Tucker v. Phypys*, 3 Atk. 361.

Where a feme covert has a power to dispose of her estate by will, the writing she leaves ought first to be propounded as a will in the spiritual court; and if no executor is appointed, they will grant administration to the husband, with the will annexed. *Ross v. Ewer*, 3 Atk. 160. HUSB. & WIFE.

On a bill to establish a will against an heir, though he made default, the court ordered the proofs to be read, and said, that otherwise, the will could not be well proved. *Well v. Litcott*, 3 Atk. 25. Vide *French v. Baron*, 2 Atk. 120. HEIR AT LAW.

An executor before probate may so far act as to get in and receive his testator's estate, or release debts, or even bring actions for them. *Willis v. Kirk*, 2 Atk. 285. EXOR. POWEN.

When will is to be established, the testator must be proved to be of sound and disposing mind. *Wallis v. Hodgson*, 2 Atk. 56.

If the validity of a will have been already determined, and it has been acted upon, equity will restrain proceedings in the prerogative court to controvert it. *Sheffield v. Da. of Bucks*, 1 Atk. 628. INJUNC.

Where parties are dissatisfied with a probate, chancery will suspend its determination, till after a trial upon the validity of it in the proper court; for equity cannot determine upon the validity of a probate adversely; but if it comes incidentally before the court, and that incident is admitted, the court may determine it, and hold the parties bound by their admission; for an admission by a party concerned in matters of fact, is stronger than if it had been determined by a jury, and facts are as properly concluded by admission as by a trial. There is no difference between parties admitting things proper to be determined by the court, in which the admission is made, and the admission of things cognizable in another court, for they are equally bound. *Id.* 630. ADMISSION OF FACTS.

Where an executor before probate files a bill, and afterwards proves the will, such subsequent probate makes the bill a good one. *Humphreys v. Humphreys*, 3 P. W. 351. EXOR.

Where there are two wills, the first devising the real estate to charitable uses, and the personal estate to particular legatee; and the second will bequeathing the personality to other legatees, and the real estate to such uses as testator should declare, and probate is granted of first will; such probate is conclusive against

the claimants under the second will, until reversed by commission of review. *Annesley v. Palmer*, 9 Mod. 8.

Bill of revivor must show that plaintiff has proved testator's will. *Humphreys v. Ingleton*, Dick. 38.

Where original will is lost, and from exemplification thereof, under seal of prerogative court, there is reason to suspect its validity as to disposition of real estate; such exemplification cannot be admitted as evidence, but party must be left to his remedy at law. *Arthur v. Arthur*, 3 Bro. P. C. 568. PR. EVID.

Heir at law by his answer admitted the will, but died before the cause was brought to hearing, and left an infant heir; and by a bill of revivor, the infant was made a defendant and the suit revived; it was held, that the will must be proved *per testes* against such infant heir. *Sleeman v. Sleeman*, Dick. 787. INFANT.

A will is made in French, and the probate in English, and varies from the original probate, being in a different language, is not conclusive. *L'Fit v. L' Batt*, 1 P. W. 526.

So also the probate of a will cannot be read in case of a real estate, if the defendant admits merely that he believes there is in such a will; *secus*, if the admission is full. *Muggins v. Pratt*, Bun. 6. PR. EVIDENCE IN ONE COURT, READ IN ANOTHER.

## XI. SUBSTITUTION.

See also LEGACY, VII.

On construction of two wills, second held to be in substitution of first. *Hemming v. Currey*, 2 S. & S. 311.

There being several codicils to a will, some of which have repetitions of others, the court declared them to be only substitution. *Campbell v. El. Radnor*, 1 Bro. C. C. 271.

Where a testamentary instrument incomplete as a will, appears on the face of it, to be intended as a substitution for a former complete will, the legacies given by the latter only shall take effect, notwithstanding both instruments are proved in the spiritual court; but where a former will makes a charge of legacies generally on land, and a subsequent will, giving legacies, is not attested so as to affect the land, yet the general charge of the former shall include the legacies given by the latter, otherwise where the charge is made of particular legacies. *Jackson v. Jackson*, 2 Cox, 35.

## XII. MUTUAL WILLS.

An agreement between two sons to divide equally whatever property they may receive from their father in his lifetime, or become entitled to under his will, or by descent or otherwise from him, is not contrary to public policy, but will be enforced in equity. *Wethered v. Wethered*, 2 Sim. 183. PUBLIC POLICY; AGREEMENT.

Mutual wills by two unmarried sisters under twenty-one, the marriage of one does not revoke the will of the other. *Hinckley v. Simmons*, 4 Ves. 160. WILL, REVOCATION OF.

Mutual will can only be revoked by both jointly or by one separately, by giving notice of such revocation, and not at all after death of one party. *Dufour v. Pereira*, Dick. 419.

## XIII. OBTAINED BY FRAUD.

Where the latter part of a will in favour of a party was clearly executed under undue influence, held inoperative as to the party suggesting it, but valid as to others. *Id. Trimbleston v. D'Alton*, 1 Dow, N. S. 85. 1 Bli. N. S. 427.

A court of equity will not entertain bill by heir at law for setting aside and declaring void an impeached

will, alleged to have been procured to be made under circumstances of fraud charged, unless some obvious definite impediment, which court can see and reach, to proceeding at law by ejectment, be shown by bill to obstruct heir in that (the regular) course, and that although defendants have possessed themselves of all the papers and muniments of the deceased, and threaten to set up outstanding terms. *Jones v. Jones*, 7 Price, 663. HEIR AT LAW.

Injunction granted to restrain executor claiming under a will, and also by gift from testatrix in lifetime, from selling, upon affidavit of undue influence. *Edmunds v. Bird*, 1 V. & B. 542. INJUNC.; EXECUTOR.

Relief granted on fraud, in not performing a promise, relying on which, the testator forbore to bequeath. *Chamberlain v. Agar*, 2 V. & B. 262.

Circumstance that one residuary devisee was the attorney who drew the will, not decisive evidence of fraud. *Puine v. Hall*, 18 Ves. 475. EVIDENCE.

Discovery compelled where devise was obtained, or prevented by undertaking of devisee or heir, to do certain acts in favour of individuals, and relief upon the ground of fraud. *Stickland v. Aldridge*, 9 Ves. 519. PL. DISCOVERY.

Executor promised his testator to pay plaintiff 100*l.* legacy, and said he need not put it in his will; after the testator's death, he said he would not pay it. Decree for payment out of assets. *Beech v. Kennigate*, Ambl. 67. S. C. 1 Ves. 23. 1 Wils. 227.

A fraud in procuring a will, cannot be determined in equity, but must be decided by a trial at law. *Webb v. Claverdon*, 2 Atk. 424. Vide *Bennet v. Vade*, 2 Atk. 324.

Bill to set aside a will as obtained by fraud, will lie in equity. *Welby v. Thorough*, Prec. Chan. 123. But not of real estate. *Bramby v. Kerridge*, 1 Eq. Ab. 133. JURISDICTION.

A will of land may be good at law as well executed, and yet ill in equity, as if obtained by fraud. *Goss v. Tracy*, 1 P. W. 288. 2 Vern. 699.

A will as well as a deed may be set aside in chancery for fraud or circumvention. *Welby v. Thorough*, Prec. Chan. 123. JURISDICTION.

A copyholder by his will intending to give the greatest part of his estate to his godson, and the other part to his wife, the wife persuades him to nominate her to the whole, and that she would give the godson the part designed for him; decreed against the wife notwithstanding the statute of frauds and perjuries. *Devenish v. Baines*, Prec. Chan. 4. FRAUD, STAT. OF.

Fraud in obtaining a will relating only to a personal estate, is not examinable in Chancery after the will is proved in the spiritual court, so long as that probate is in force. *Warwick v. Gerard*, 2 Vern. 8. S. P. *Nelson v. Oldfield*, id. 76. JURISDICTION.

A, having made his will and his wife executrix, the son prevails with the mother to get his father to make a new will, and that he might be made an executor, and promises to be a trustee for his mother: Trust decreed. *Thynn v. Thynn*, 1 Vern. 296. TRUST.

#### XIV. MISTAKE AND UNCERTAINTY IN.

To avoid a will for uncertainty, it is not enough that the dispositions in it are so absurd and irrational that it is difficult to believe they could have been intended by the testator; but it must be incapable of any clear meaning. *Mason v. Robinson*, 2 S. & S. 295.

Will in favour of charity, containing many blanks as to some of the objects to take, and sums, &c.; under circumstances a scheme directed for application of the remaining funds provided for charity by will. *Peischel v. Paris*, 2 S. & S. 384. CHARITY SCHEME.

One name may be substituted for another in the construction of a will, where it is manifest not only that the name used was not intended, but that a certain other name was necessarily intended. *Deut v. Pepps*, 6 Mad. 350.

Evidence admitted to prove mistake in name of legatee in will; but one legatee in will who might otherwise have had a claim to that legacy being an infant, inquiry was directed as to the party entitled. *Still v. Hoste*, 6 Mad. 192. INFANT; EVIDENCE.

Gift of the residue of a fund after the application of an undefined amount to a void charity, is void for uncertainty. *Att. Gen. v. Hinman*, 2 Jac. & W. 277. RESIDUE; CHARITY.

If testator gives stock standing in his name, and has no such stock, the legacy fails; the court sends it to the master to inquire what the testator intended, as well where there is a misdescription of fund, as of legatee. *Frans v. Tripp*, 6 Mad. 91. INQUIRY BEFORE MASTER; LEGACY, SPECIFIC.

Evidence not admissible that deviser did not mean what he had expressed, but admissible to show that a particular expression was not his will. *Porell v. Mouchett*, and *Litchfield v. Mouchett*, 6 Mad. 216. EVIDENCE.

Where testator gives stock standing in his name, and has not stock so standing, but it is in the name of a trustee, parol evidence is admissible of the mistake. *Henson v. Reid*, 5 Mad. 451. PAROL EVIDENCE.

Testator possessed of 5000*l.* three per cent. consols, bequeathed 2000*l.* thereof to trustees, in trust, as to 1000*l.* to A, and as to 2000*l.* to B. Held, that testator meant to give trustees 3000*l.* in trust, bequest to them being mentioned only once, and a *id* legacy of 2000*l.* to B being mentioned twice. *Alfred v. Green*, 5 Mad. 92.

Testamentary papers in this form: "I leave and bequeath to all my grandchildren, and share and share alike;" and "further, I appoint F H and F E my trustees for all my grandchildren and nieces;" are void for uncertainty, and pass no interest in the real estate. *Mohun v. Mohun*, 1 Swan. 201.

Bequest in trust for such "benevolent purposes as the trustees in their integrity and discretion may unanimously agree on," not to be supported as a charitable legacy, the word "benevolent" not being to be restricted to the sense of "charitable," so as to authorise the court to say that the application of the property must be confined to such objects as are, strictly speaking, objects of charity; therefore void for uncertainty, and distributable amongst the next of kin. *James v. Allen*, 3 Mer. 17. WILL, C. OF; CHARITY.

The meaning of an ambiguous will to be collected from the words and the context, not from the punctuation. *Sanford v. Railles*, 1 Mer. 651.

Testator having a right to order a thing to be done, expressing in his will that it is to be done, must be understood to speak imperatively, and not merely by way of recital. *Id. ib.*

Bequest of personal property in trust for A (a married woman) for her separate use; with a power of disposing by will (except to particular persons); "And in case she dies without a will, I give all that may remain at her decease to B," followed by a gift of "all the rest and residue" to A, who is appointed executrix: A takes the absolute interest in the property, not a power of disposing merely; and the gift to B of "all that may remain at her decease," is void for uncertainty. *Bull v. Kingston*, 1 Mer. 314. WILL, C. OF, WHAT INTEREST.

Legacy to "R C, my nephew, the son of Joseph C," other clauses describing "my nephew R C," generally, and one legacy to my nephew, R C, the son of John C." The testator had only two brothers, John C, & T C, each having a son named R C: parol

evidence admitted to resolve this latent ambiguity; shewing intimacy with the son of John C, and very slight knowledge of the other, and the legacy was decreed to the former. *Careless v. Careless*, 19 Ves. 601. S. C. 1 Mer. 384. **PR. EVIDENCE PAROL.**

Where it was impossible to ascertain the mistake in a devise, the name belonging to one, the description to another, it was held void for uncertainty. *Id.* 604.

Devise in trust for a son of the testator's nephew, A, at the age of twenty-four; if he have no son, to A, son of the testator's great nephew, B; but if neither have a son, then to a son of the testator's great niece's daughter, taking his name; whoever should take, not to be put in possession of any of the testator's effects until twenty-four, nor the executors to give up their trust till a proper entail be made to the male heir by him; is an executory trust in tail for an only son of A *in ventre* at the testator's death, and not void for uncertainty, nor too remote. *Blackburn v. Stubbs*, 2 V. & B. 367. **WILL. C. O.; LIMIT. TOO REMOTE; TRUST, EXECUTORY.**

General disposition by will not restrained by a defective specification. *Chalmers v. Storil*, id. 222.

Devise of my estates at S, which were devised to me or purchased from A, the fact proving otherwise, construed not as an intended restriction, but as a misdescription. *Welby v. Welby*, id. 191.

Evidence of mistake not admissible to affect the construction of a will. *Shergold v. Boone*, 13 Ves. 376. **EVIDENCE.**

Bequest to the children of R H, late of N, and now of L, the sum of 100*l.* a piece; R H had left N at the age of fourteen or sixteen, and died in L several years before the will; his only surviving child entitled to the legacy against the claim of the children of G H, formerly of N, residing in L at the testator's death, upon the suggestion of mistake. *Holmes v. Cusance*, 12 Ves. 279.

Bequest in trust for such objects of benevolence and liberality as trustee in his own discretion should most approve, cannot be supported as a charitable legacy, and is, therefore, a trust for the next of kin. *Morice v. Bp. Durham*, 9 Ves. 393. **Affid. 10 Ves. 522. CHARITY; RESULTING TRUST.**

Bequest to A or B void for uncertainty; if discretionary in C, it is good. *Longmore v. Broom*, 7 Ves. 128.

The christian name of legatee was mistaken in will; legacy was established on evidence. *See* after great delay in filing bill. *Smith v. Coneu*, Ves. 42. **LACRES.**

Legacy of 2400*l.* in the 5 per cent. consolidated bank annuities: decreed, that 2400*l.* 5 per cent. annuities, viz. navy bills, should be purchased, evidence of the intention and mistake as to the fund being rejected. *Chambers v. Minchin*, 4 Ves. 675.

Legacy to — P. the son of — P.; upon the evidence, the plaintiff, the only claimant, was declared entitled. *Price v. Page*, 4 Ves. 679.

A will cannot be varied upon the ground of mistake, unless the alleged mistake is clearly inconsistent with the intention upon the whole will. *Mellish v. Mellish*, 4 Ves. 45. *Phillips v. Chamberlaine*, id. 51.

Testator gave 100*l.* in trust to pay the interest to A, till her daughter, B, should attain twenty-four, and then he gave the said 100*l.* and the interest then due, to her said mother, A: held, a mistake, and decreed the legacy to be paid to the daughter at the age of twenty-four. *Clarke v. Norris*, 3 Ves. 362.

Legacy "to Mrs. G." Evidence admitted to prove who was intended. *Abbot v. Massie*, 3 Ves. 148. **PR. EVID., PAROL.**

A wrong description of a legatee will not defeat a legacy given to him by name. *Standen v. Standen*, 2 Ves. 589.

When the testator expresses his intention incorrectly, the court will effect it by supplying proper words. *Dodson v. Hay*, 3 Bro. C. C. 404.

Gift by will of pictures to Lady —; absolutely void, and shall not go to the master or be supplied by evidence. *Hunt v. Hort*, id. 311. **EVIDENCE, PAROL.**

Testator's mistake not rectified, because nothing to shew what would have been the intention, if no mistake. *Smith v. Maitland*, 1 Ves. J. 362.

Testator directs his executors to invest personal estate in the purchase of real estates, which when purchased, he devises to A, to him and the male heirs of his body for ever; and if A should die without issue male, then he devised the same to the heir male of the body of B: after tail to A, the court will insert a limitation to trustees to preserve contingent remainders. *Harrison v. Naylor*, 2 Cox, 248. S. C. 3 Bro. C. C. 108. **TRUST, EXECUTORY, AFTER ESTATE TAIL.**

The testator gave the residue "amongst his seven children A, B, C, D, E, and F," naming only six. The seven children shall all share equally. *Humphreys v. Humphreys*, 2 Cox, 185.

Legacy to "James, son of Thomas A." There was no person of that description; but there was a "Thomas, son of James A." The court will not receive evidence to show that this was a mistake in the description. *Andrews v. Dobson*, 1 Cox, 425. **EVIDENCE.**

A court of equity will not supply words in a will, unless there be palpably error *scribentis*. *Molesworth v. Molesworth*, id. 75.

Devise of residue to charitable and pious uses generally; it is not void, but the crown may appoint. So also, if the charitable object be uncertain. *Att. Gen. v. Herriek*, Amb. 712. **CHARITY.**

Bequest for the benefit of poor dissenting ministers living in any country; it was in proof that there are three distinct societies of dissenters, and that collections are made for the poor ministers of each: held, the bequest not void for uncertainty, but should go to the poor ministers of each society. *Waller v. Childs*, id. 524. **Id.**

Mistake in a will and codicil, as to the amount of a fund out of which younger children were to be provided for, rectified on the evident intent of the testator. *Brackenbury v. Brackenbury*, 2 Eden, 275. S. C. Amb. 474.

Legacy to the poor inhabitants of L, held good, and to go to the poor not receiving alms. *Att. Gen. v. Clarke*, Amb. 422. **CHARITY.**

Devise to the descendants of S now living in or about S, or hereafter living any where else: held good. *Crossley v. Clare*, id. 347.

Mistake in the description of legatees; yet legacy held good, and took place according to intention. *Bradwin v. Harpur*, id. 374.

Legacy to son and daughter of W; W had four sons: held, none of the sons could take, but the daughter took the whole. *Dorset v. Sweet*, id. 175.

Legacy to John and B, sons of S; S had two sons, James and B, but none of the name of John: held, James should take. *Id. ib.*

Husband devises to his wife 700*l.* E. I. stock, having none; but there was 700*l.* Bank stock, to the surplus of which the wife was entitled as an executrix, after payment of her testator's debts, and which the husband afterwards transferred in his own name. The 700*l.* Bank stock shall go to the wife, being an erroneous description. *Doer v. Geary*, 1 Ves. 255.

Mistake in the computation of a legacy rectified according to the intention, though contrary to the words. *Milner v. Milner*, id. 106.

Where there is no devise named, this is an absolute omission, and cannot be supplied by parol evi-

dence. *Castledon v. Turner*, 3 Atk. 258. PR. EVID. PAROL.

Where testator gave to Bread-street ward, 200l. according to Mr. —'s will, parol evidence was not allowed to explain testator's intention where there is a blank only. *Baylis v. Att. Gen.* 2 Atk. 239. PAROL EVIDENCE.

When a person is mentioned by a nick-name, or where there have been two, who have had the same christian and surname, parol evidence has been admitted to ascertain whom the testator meant. *Ib.*

R devised 5000l. S. S. annuities to A, and 5000l. S. S. annuities to P. The testator had only 5000l. in this stock : declared that these should be considered as legacies of quantity and number, and other 5000l. were ordered to be purchased out of the testator's personal estate. *Purse v. Smaplin*, 1 Atk. 414.

One bequeaths to her grandchild A, some of her best linen ; this void for the uncertainty, yet the court recommended it to the executor to give some of the best linen to the legatee A. Bequest of such of the best linen as the executor should think fit, or as the legatee should choose, had been held good. *Peck v. Halsey*, 2 P. W. 389.

Legatee's both christian and surnames mistaken, yet the legacy is good. *Bennumt v. Fell*, id. 141.

One devises all his freehold houses in A, and hath none but leasehold houses there ; the leasehold shall pass ; secus, in a grant. *Dog v. Trig*, 1 P. W. 286. WILL, C. OF, WHAT PASSES.

A, seised of Blackacre in tail, and Whiteacre in fee, by mistake devises the entailed acre, and leaves the fee-simple acre to descend : the devisee upon his bill had a decree to enjoy. *Thomas v. Gyles*, 2 Vern. 233. PR. BILL. OF PEACE.

## XV. CONSTRUCTION.

See also PR. EVIDENCE, 25, 26.

1. General Principles.
2. Generally, from particular Form and Words of Will.
3. What Estate is given.
  - (a) Generally.
  - (b) For Simple.
  - (c) Estate Tail.
  - (d) For Life.
  - (e) Joint Tenancy.
  - (f) Tenancy in Common.
4. What passes by.
  - (a) Real and Copyhold.
  - (b) Personal.
  - (c) Property acquired after the Will.
5. What Quantity, and Quality of Interest.
6. Who take, and are capable of taking. See also GRAND CHILDREN ; POSTHUMOUS CHILDREN.
7. Words precatory.

### 1. General Principles.

Bequest in terms importing an intention not to make an immediate disposition, may upon the construction of the whole will, amount to a present bequest. *Lynn v. Beaver*, 1 Turn. & R. 67.

The literal and technical force of words in a will, to be counteracted by rational implication. *Vauchamp v. Bell*, 6 Mad. 343.

On construction of a will, the enjoyment of bequests given in terms indicating a future period, accelerated by implication. *Parroti v. Worsfold*, 1 Jac. & W. 594.

In construction of residuary clause, question is not what the testator had in contemplation when it was made, but what the words he used according to their

ordinary signification will embrace ; unless qualified by other expressions in the will. *Bland v. Lamb*, 5 Mad. 412.

The sense of the words "die without issue," or "for want of issue," not to be departed from without satisfactory evidence, that they were not intended in that sense. *Down v. Penny*, 12 Ves. 548.

In construing a will, the state of testator's family at time of will is to be attended to. *Odell v. Crone*, 1 Ball & B. 449. and affid. in Dom. Proc. S. C. 3 Dow, 68. S. C. 1 Bli. N. S. 594.

In construing will, the intention of testator, and not the technical import of words is to be regarded. *Id. ib.*

Rules for construction of wills ; the intention if possible to be collected from the words, not from circumstances dehors ; upon general principles and established rules, not by conjecture ; and without inquiring whether the personal estate sufficient for the debts. The personal estate first liable to the debts ; unless the intention is clearly to exempt it, and throw them wholly on the real, for which express words are not necessary. *Boote v. Blundell*, 19 Ves. 521.

Inconvenient consequences, not in the contemplation of the testator, at the time of making his will, not sufficient to authorize a variation or interpolation in the terms of a bequest : where those terms are in themselves clear and intelligible. *Smith v. Streetfield*, 1 Mer. 358.

Words in a will must be taken in their legal sense, unless by the context or by express words they clearly appear to be intended otherwise. *Synge v. Hales*, 2 Ball & B. 506.

The construction of a legal devise must be the same in a court of law or equity. *Id.* 507.

Where a testator expresses himself in ambiguous terms, respecting the disposition of his property ; the legal operation of the words he uses must be adopted. *Stubbs v. Roth*, 2 Ball & B. 553.

General rules of construction of will. *Noel v. Weston*, 2 V. & B. 271.

Construction of will passing fee without words of limitation. As to effect of description of lands as in the occupation, &c. of particular tenant to restrain the legal effect of the word "estate" in a devise to pass the fee. *Qu. ? Churton v. Taylor*, 3 V. & B. 160.

Semble, that the general word "things" in a will, following particulars enumerated, are confined to things ejusdem generis. *Stuart v. Marq. Bute*, 1 Dow, 73.

Will is to be construed without regard to the instructions. *Murray v. Jones*, and *Fawcett v. Jones*, 2 V. & B. 318. INSTRUCTIONS.

Will, if extrinsic evidence could be admitted, not to be construed by matters posterior to its execution. *Welby v. Welby*, 2 V. & B. 192.

Construction for creditors favoured not doing violence to or straining the words. *Noel v. Weston*, 2 V. & B. 269. DEBTOR & CRED.

Words in will "rents and profits" extended beyond their natural meaning, viz. "annual profits" to mortgage or sale, when necessary to effect the object, such as raising a gross sum ; for fines on renewal, as well as portions ; and are not controlled by apparent intention to preserve estates entire. *Allan v. Buckhouse*, id. 65. Affid. 1 Jac. 631. RENTS & PROFITS.

Rule of construction that the words used by a testator shall be interpreted according to their legal effect and operation, unless it clearly appear that he intended to use them in a different sense. *Winslow v. Figlie*, 2 Ball & B. 204.

To have recourse to the declarations of a testator as operating on his will, is considered dangerous, and if he has made different declarations at different times, little reliance can be placed on them. *Dwyer v. Ly-saght*, 2 Ball & B. 162.

Will not to be construed by something dehors ; as

by the state of the property where no latent ambiguity. *Page v. Leapingwell*, 18 Ves. 466.

Different construction of the word "surplus" from that which it commonly bears, inferred from the expression of the will. *Id. ib.*

A will cannot be construed by adverting to a single clause; every thing bearing on the subject must be taken together. *Crome v. Odell*, 1 Ball & B. 466. 480. Affd. 3 Dow, P. R. 61.

Particular intent clashing with the general intent in a will must give way. *Id. ib.*

The state of testator's property cannot be resorted to as a criterion to explain the will. *Kellett v. Kellett*, 1 Ball & B. 542. Affd. 3 Dow, P. C. 248.

The word "effects" in a will equivalent to "property" or "worldly substance." *Campbell v. Prescott*, 15 Ves. 607.

Express bequest or power not controuled by the reason assigned; which, though it may aid the construction of doubtful, cannot warrant the rejection of clear words. *Cole v. Wade*, 16 Ves. 46.

If the meaning of a will is ascertained, reasoning from supposed cases will not induce the court to make a different construction; but can only lead to a conclusion that the testator did not see all the consequences; but the absurdities, improbabilities, and inconsistencies, which may arise out of cases falling within one construction or another, are attended to, with a view of ascertaining the meaning. *Leigh v. Leigh*, 15 Ves. 103.

It is not universally true, that the expression of a purpose, for which even a devise of land is made, limits the devise to the purpose expressed; where, for instance, there is a devise of land for payment of debts, it does not necessarily follow that there is a trust for the heir after the debts paid. Each case depends upon the circumstances. Where the purpose expressed is in favour of the party to whom the bequest is made, the presumption for limiting the bequest is rather stronger. *Walton v. Walton*, 14 Ves. 322.

In trying the meaning of phrases in a will all circumstances may be looked at in which the court might have been called to determine the meaning of the same phrases applied to a different state of circumstances. *El. Radnor v. Shafte*, 11 Ves. 457.

Plain words of gift or necessary implication are required to disinherit heir at law. *Berry v. Usher*, 11 Ves. 92. HEIR AT LAW.

Words *primâ facie* equivalent to pass future interests in personal estate, to have that effect, unless controuled by the context. *James v. Dean*, 11 Ves. 389. Affd. 15 Ves. 236.

The construction of will is not to be altered upon inference from testator's knowledge of circumstances of family. *Radeliffe v. Buckley*, 10 Ves. 195.

Rule of construction is not to make any intendment contrary to plain and usual sense of words, unless from other parts of will plainly appearing not intended to have that extensive operation. *Exp. El. Ilchester*, 7 Ves. 368.

Parol evidence not admissible to shew the intention of the testator against the construction upon the face of the will. *Cambridge v. Rous*, 8 Ves. 22. EVID. PAROL.

Court will not take into consideration the amount of the property, nor the number of objects, for the purpose of construing will, except in case of a specific disposition. *Sibley v. Perry*, 7 Ves. 522.

The expression "without being married," in a will, construed according to the common acceptance, "without ever having been married." The word "children," legally construed, is confined to legitimate children. "And" construed "or," to give effect to all the words. *Bell v. Phyn*, 7 Ves. 458.

Every devise of land must be of necessity specific, whether in particular or general terms; otherwise as to

personal property. *Hays v. El. Dartmouth*, 7 Ves. 147.

The word "when," in will, alone and unqualified, is conditional, but it may be controuled by expressions, &c. *Hanson v. Graham*, 6 Ves. 239.

Every word in construction of will, is to have effect, if not inconsistent with general intention, which is to controul. If two parts are inconsistent, the latter prevails. If a meaning can be collected, but it is wholly doubtful in what manner it is to take effect, it is void for uncertainty. *Constantine v. Constantine*, 6 Ves. 100.

General words controuled, in order to make the whole will consistent. Survivorship by words creating a joint tenancy, the intention of severance not being sufficiently clear. *Whitmore v. Trelawny*, 6 Ves. 129 a.

Implication in a will cannot prevail, unless necessary. *Upton v. Ferrers*, 5 Ves. 801.

The rule of construction of wills is, that if the general intention can be collected, or any one particular object, expressions militating with that may be rejected, if plainly appearing to have been inserted by mistake; not otherwise, and if two parts of the will are totally irreconcilable, the latter overrules the former. *Sims v. Doughty*, 5 Ves. 243.

Every word of a will must have a meaning imputed to it, if capable of it without a violation of the general intent, or any other provision in the will. *Reeves v. Brymer*, 4 Ves. 698.

The intention of a testator, if clear and consistent with rules of law, is to govern without regard to the grammatical construction, or whether it deserves favour or not. *Thellusson v. Woodford*, 4 Ves. 311; affd. 11 Ves. 112.

In some cases, as for creditors, an intention will be inferred from the purpose, beyond what it expressed. *Id. ib.*

A will is not to be affected on account of the unmeritorious object; only one general rule of construction for courts of law and equity applicable to all wills; however the court may condemn the object, the intention is to be collected from the whole will; every word is to have effect according to the natural common import; words of art to be construed according to the technical sense, unless upon the whole will, plainly not so intended, the court are bound to carry the will into effect, if consistent with the rules of law, and if they can see a general intention consistent with the rules of law; but the particular mode is not; though that shall fail, the general intention shall take effect. *Id.* 329.

"Heir male," in a will may be words of purchase. *Id.* 326.

The intention of the testator is not to be set aside, because it cannot take effect to the full extent, but it is to work as far as it can. *Id. ib.*

Where the whole property is devised with a particular interest given out of it, it operates by way of exception out of the above absolute property. *Booth v. Booth*, 4 Ves. 408.

Where an absolute property is given by will, and a particular interest is given in the mean time, it is not a condition precedent, but a description of the time when possession is to be taken. *Id.* 409.

A *relict* shall be rejected, if repugnant, not if it can be reconciled and made restrictive. *Wilson v. Mount*, 3 Ves. 194.

Will not to be construed by subsequent circumstances. *Moggridge v. Thackwell*, 1 Ves. J. 475. S. C. 3 Bro. C. C. 517. Affd. 13 Ves. 416.

The words, "and also" may so far disunite two clauses of a sentence, as to give a different construction to the same words. *May v. Wood*, 3 Bro. C. C. 472.

In construing wills, the leading rule is, that the intent of the testator should be observed, and no part

of a will to which a meaning or operation can be given, shall be rejected. *Reeves v. Newnham*, 2 Ridgw. P. C. 36.

Where a testamentary instrument incomplete as a will, appears on the face of it, to be intended as a substitution for a former complete will, the legacies given by the latter only shall take effect, notwithstanding both instruments are proved in the spiritual court; but where a former will makes a charge of legacies generally on land, and a subsequent will, giving legacies, is not attested so as to affect the land, yet the general charge of the former shall include the legacies given by the latter, otherwise where the charge is made of particular legacies. *Jackson v. Jackson*, 2 Cox, 35.

A will restrained in point of extent to a partial disposition by a particular enumeration, and a reference to other instruments, notwithstanding the general words "personal estate," specific disposition by will subsequent to annuities and legacies held auxiliary only, the general personal estate to be applied in the first instance. *Holford v. Wood*, 4 Ves. 76.

A survived share, shall not survive again without express words. *Exp. West*, 1 Bro. C. C. 575. S. C. 1 P. W. 275, 276, 5th edit.

Where plain words give an estate tail, they should not be controuled, but by a very plain indication. *Sayer v. Masterman*, Ambl. 345.

Under a devise to trustees during life of A, of all testator's estates and farms, held word "estate," referred only to the thing and the interest in it. *Id. ib.*

The most liberal construction of wills for creditors. *El. Godolphin v. Penneck*, 2 Ves. 272.

The construction of the execution of a will is the same in equity, as at law. *Ellis v. Smith*, 1 Ves. J. 16.

Order of words in wills not considered; if the intent better answered, it is otherwise. *East v. Cook*, 2 Ves. 32.

Wills in general construed from the making, unless circumstances, or the tenor of it shew, it should be from death of testator, but the intermediate time not regarded. *Loma v. Holmden*, 1 Ves. 295.

Word "estate" when used generally, includes not only the lands or thing, but also the estate or interest so, if "in; or at" such a place is added: but if it is further added on the occupations of particular tenants, Qu.? *Goodwyn v. Goodwyn*, 1 Ves. 228.

Where the words of a will are so inconsistent that they cannot be reconciled, the court must reject those that are the least consistent with the testator's intent; and the same words in the same will, though in a different clause, ought to have the same sense; and therefore where the testator intended survivorship among his children in the personal, he must mean it in the real estate also. *Haus v. Haus*, 3 Atk. 524. 1 Ves. 13. 1 Wils. C. B. 165.

Though real and personal estates are joined in the same devise, yet the same words may be taken in a different sense with regard to the different estates, to support the intention of the party, *ut res magis valeat quam pereat*. *Sheffield v. Id. Orvery*, 3 Atk. 288. Vide *Forth v. Chapman*, 2 P. W. 633.

The court ought not to consider the circumstances of the testator to determine his intention as to personal estate: whether as to real, *Quare?* *Inchiquin v. French*, Ambl. 40. S. C. Ridgw. 230. and 1 Cox, 1.

The court may expound the words in a will, but cannot strike them out. *Southcot v. Watson*, 3 Atk. 233.

"And," must be construed "or," where it is necessary to put a reasonable construction on the will. As where the interest with the principal of the residue of a testator's estate was directed to be settled on his daughter "or" the heirs of her body, as the executors

shall think fit: the word "or" shall be construed "and," for the executors are not empowered to give it from the daughter to the grandchildren. *Read v. Snell*, 2 Atk. 643.

The testator's intent in a will must be consistent with the rules of law, and in many cases the intent has been restrained, as where attempting a perpetuity, or to prevent a tenant in tail from alienating. *Bugshaw v. Spencer*, 2 Atk. 575.

Words that are doubtful and afford implication only, are not to be attended to, where testator has expressed himself in legal words. *Id.*

The words "without impeachment of waste," do not give a power inconsistent with an estate tail, or at least will not defeat it. *Id.* 576.

Departing from strict words of a will has produced such uncertainty that it is to be wished they had been left to legal construction. *Id.*

Where testator's intent appears plain, the court will help an unapt expression by making the words, "heirs of the body," words of purchase. S. C. *Id.*

In construing words to make them agree with the intent of the party, a court of equity is more liberal than a court of law. *Id.* 580.

On the construction of Seijeant Maynard's will, heirs of the body were held to be in the sense of the first and every other son. *Id.* 582.

It is established that in a will the word "issue" is as strong as the word "heirs." *Id.* ISSUE.

Notwithstanding all the parties are volunteers under a will, it is not necessary the words must be taken as they are, but in many cases may be varied. *Id.*

Where the court are obliged to depart from the words of a will, it should rather be to support than to frustrate the intention of the testator. *Id.* 584.

In what case the disjunctive "or" shall be taken to mean the conjunctive "and." *Walsh v. Patterson*, 9 Mod. 441.

In construing one legacy to be a satisfaction for another, regard must be always had to the particular circumstances, limitations and funds, out of which the two several legacies are to arise. *Heather v. Rider*, 1 Atk. 426. LEGACIES ACCUMULATIVE.

Mistakes in wills shall not be supposed, if any construction that is agreeable to reason can be made out. *Purse v. Snaylin*, 1 Atk. 415.

In our law, particular legatees are always preferred to the residuary legatees. Secus, in the Roman law. *Id.* 418.

The court leans against double portions, yet regard must be had to circumstances; as where there is an eldest son, or more children, and the demand would be to their prejudice. Otherwise in the case of an only child. *Belliss v. Lithuatt*, 1 Atk. 427. PORTIONS DOUBLE.

A devise an estate for life to his wife; and in the latter part creates a trust term, to take place from the day of his death, for payment of debts in such manner as the wife should direct. Declared that the term, though subsequent, shall take place of the wife's estate for life, and that the last words do not give the wife the power of exempting her life estate, but only the power of raising it by the most convenient method, by mortgage or otherwise. *Ridout v. Dowding*, 1 Atk. 419.

A court never construes a devise void, unless it is so absolutely dark that they cannot find out the testator's meaning. *Minshull v. Minshull*, 1 Atk. 412.

Subsequent words of limitation affect not the legal operation of the preceding words of limitation, unless the word "heir" is used in the singular number, or an express estate for life limited to the first taker. *Id.* 413. 1 Co. 66. b.

The words "begotten and to be begotten" are the same



as well on construction of wills as settlements. *Cook v. Cook*, 2 Vern. 545.

In case of doubtful words of a will, an heir is to be favoured, not where the will is plain. *Falkland v. Hertis*, 2 Vern. 340. S. C. 12 Mod. 182. 2 Freeman. 220. 3 Ch. Ca. 129. S. C. Sel. Cas. Ch. 129. Qu. ? S. C.

## 2. Generally, from particular Form and Words of Will.

As to when Executors take beneficially, see EXORS. VII.—ELECTION.

When Parol and other Evidence admitted to explain, see PR. EVID. 4; 26.

When Personal is exempted, see ESTATE IX. 1.

A testatrix, by her will, gave to T 50s. a month during his life, in lieu of his giving up all other notes and claims; and by a codicil, she gave him 3l. a month during his life, and concluded by directing that all other things should be paid and done as directed by her will: held T was entitled to both the monthly payments. *Lord v. Sutcliffe*, 2 Sim. 27. LEGACY; ACCUMULATION.

Devise to A and her heirs, but if she died leaving issue, then to such issue and their heirs; A died, leaving issue: held, that her husband was not entitled to be tenant by the curtesy. *Barker v. Barker*, 2 Sim. 249. TENANT BY CURTESY.

A testator bequeathed to his daughter 50,000l., of which 20,000l. was to be paid to her absolutely, and as to the remaining 30,000l. she was to receive the interest to her separate use during her life, and after her death the principal was to be paid to such person or persons as she might by her will appoint, and after giving various other legacies, and bequeathing to the same daughter a share of the residue of his personal estate, he directed that all the specific and pecuniary legacies therein before bequeathed should be paid to the respective legatees, free of the legacy duty; the daughter having died in his life-time, he afterwards, by a codicil, "instead of the legacies given to her by will, which are now lapsed, bequeathed to her husband 20,000l. : held, that the husband was not entitled to have the 20,000l. paid to him free of legacy duty. *Chatteris v. Young*, 2 Russ. 183. LEGACY DUTY.

Where, looking to the whole contents of the two instruments, the testator's intent might be inferred that an annuity given by the codicil was intended to be only a substitute for the two others; the court on error held, that the bequests were not cumulative. *Hemming v. Gurrey*, 1 Dow. N. S. 35, & 1 Bli. N. S. 479. LEGACY, SUBSTITUTION OF.

There is no distinction between a residuary and a specific devise of real estate; every devise of land being in effect specific, in as much as a residuary devise will only pass such real estate as the testator had at the time of making his will, and will not pass as real estate subsequently acquired. *Spong v. Spong*, 1 Y. & J. 300.

When pecuniary legacies are charged upon real and personal estates, and there is a deficiency of personal assets, the real estates as well those specifically devised, as those devised under a general residuary devise, must make good the deficiency. *Id. ib.* CHARGE ON REAL ESTATES.

A testator gave stock to trustees to be divided after the death of two persons, who had life interest in it, among A, B, C, D, & E, in equal shares, and he directed that if any of them should die without issue before their respective shares should become payable, the share of him, her, or them, so dying without

issue, should go to, and be equally divided among the survivor and survivors of them; A died, leaving issue, who were living at the time fixed for the distribution of the fund, then B died, leaving a son, who died without issue, before the period of distribution; shortly afterwards, and also before the period of distribution, C died without issue: held, that B's personal representative was not entitled to any portion of the fund; that the one-third of B's share, which on the failure of her issue, survived to C, did not, on C's death, survive to the other legatees, but was transmitted to her personal representatives: that the words "survivor and survivors," were to be construed in their natural sense, and not as equivalent to "other and others," so that no part of the shares of B & C went over to A's personal representative. *Crowder v. Stone*, 3 Russ. 217. INTEREST VESTED; SURVIVORSHIP.

A trust created by will to purchase land, to be added and closely entailed to testator's family estate, in the possession of T B; testator declaring that his object was to have a head to the family, and that if T B should die without male issue, or dispose of the family estate, the residue of his fortune should go to A, or his nearest relative in the male line; how to be executed. *Woolmore v. Burrows*, 1 Sim. 512. TRUST, EXECUTORY.

Testatrix gave her real and personal estate to trustees to sell, and directed that the proceeds of her real estate should be taken as part of her personal estate, that out of the monies to arise by such sale, and out of all other her personal estate, her legacies should be paid, and gave the residue to A for life, with remainder over: held that the real estate was absolutely converted into personalty, and that some of the legacies which had lapsed, belonged to the residuary legatee and not to the heir. The legacies not having been paid within the year after the testatrix's death, A is not entitled to that year's income, but it forms part of the capital of the residue. *Amphlett v. Parke*, 1 Sim. 275. CONVERSION OF REAL ESTATE; INTERMEDIATE PROFITS.

A testator directed that one of his residuary legatees should be answerable for all debts due to him from the father of the legatee. A debt, though usurious, must be deducted from the legatee's share. *Stanton v. Knight*, 1 Sim. 482. USURY.

The tenant for life of a residue, which is directed to be laid out in certain securities, is entitled to the income accrued in the first year after the testator's decease, on such parts of the testator's estate as are invested at his death in the proper securities, and on such parts as are afterwards so invested within the same year, but the income before such investment forms part of the capital of the residue. *La Terriere v. Bulmer*, 1 Sim. 18. TENANT FOR LIFE OF RESIDUE, FROM WHEN ENTITLED.

Testator directed his executors to purchase, out of his residuary estate, a certain sum of stock, and to pay the dividends to his wife for her life, and after her death to divide the capital between such of his three daughters as should be then living; provided that if any one of them should be then dead, or should afterwards die before her share should become payable or divisible, leaving a child or children, that share should go to such child or children. The testator's wife died in his life-time; one of the daughters died three months after the testator: held, nevertheless, that she had a vested interest in one of the shares. *Collins v. Macpherson*, 2 Sim. 87. INTEREST VESTED.

Devise and bequest of real and personal estate in trust to pay the rents, dividends and interest, from time to time, as the same should become due, and be received unto and for the only use and behoof of the testator's daughter, for and during the term of her natural life, and to pay the same into her own hands,

independent of her present or future husband, and not in any manner subject to the debts, control or engagements of such present or future husband, and her receipt to be sufficient discharge to the trustees, as if she were sole and unmarried: held that the wife had a power of alienation over her life-interest. *Glyn v. Baster*, 1 Y. & J. 329. FEME COVERT; ALIENATION.

A, having a power to appoint by will, certain funds, in such manner as he should think fit, he by his will, so executed and attested as required by the power, gives and bequeaths to his relations sums of money, amounting in the whole, to precisely the sum of which he had the power to dispose, but without any reference or allusion in his will to the power, or any words indicative of his intention to execute it: held, that the will was a good execution of the power. *Qu.* if the testator, in deciding whether a will is a good execution of a power, can look at the state of the testator's property at the time of making his will, as a guide to his intention? *Lounds v. Lounds*, 1 Y. & J. 445. POWER, EXECUTION OF.

A testatrix having, under her marriage settlement, a power in default of issue, to appoint by her will, a sum of 2200*l.*; she, by her will, after reciting the power, proceeded thus: "and I give and bequeath several legacies," some to persons absolutely, and others to persons for life, and after their decease to their children or other persons by substitution, amounting, in the whole, to the precise sum of 2200*l.*; and as to all such real estates as she had power to dispose of, under her marriage settlement or the will of her husband; she expressed her desire that the same should descend to and vest in her daughter, by the preferable title of descent; and subject as aforesaid, she bequeathed the residue of her personal estate to her said daughter: held, that the legacies were not general legacies, payable out of her general personal estate, but were intended to be given by the testatrix under a mistaken notion, that the execution of the power was not restricted to the event of her dying without issue. *Walker v. Taitton*, 1 Y. & J. 557.

Legacies given by a codicil, held to be additions to, and not substitutions for legacies given by the will to the same legatees. *Mackenzie v. Mackenzie*, 2 Russ. 262. LEGACIES ACCUMULATIVE.

A testator by will bequeathed 4000*l.* in trust, after the death of his daughter C, who was then unmarried, for her children, to be paid if the children were under twenty-one, and unmarried at her death, to such of them as were sons at their ages of twenty-one, or sooner if the trustees should think fit; and to such of them as were daughters at their ages of twenty-one years or days of marriage, but if after C's decease the children should all die under twenty-one, and unmarried, then in trust for C's next of kin in consanguinity. C married and died, leaving R, her only son, an infant. After her death the testator by a codicil bequeathed to his grandson R, 6000*l.* payable when he should attain the age of twenty-one years, and directed his executor to spend any sum not exceeding 250*l.* a year in the maintenance and education of R: held that the legacy of 6000*l.* was not a substitution for the legacy of 4000*l.* and that R was entitled to both legacies. *Wray v. Field*, 2 Russ. 267. LEGACIES ACCUMULATIVE.

A testator bequeaths all his right, title, and interest, in two policies of insurance, which he had effected on the life of his wife, together with all benefit and advantage thereof, to his executors, upon trust after the death of his wife to receive the amount of the proceeds, and thereout to pay or provide for certain legacies of his wife having died he received the money and invested it in securities, of which he continued to be possessed at his death: held that the legacies failed.

*Barker v. Rayner*, 2 Russ. 122. LEGACY, ADVERTISEMENT OF.

A testator gave a number of legacies, adding, "I guarantee my estate at C, for the payment of the above legacies;" and he in the subsequent part of his will gave many other legacies. The first class of legacies are not specific, and failing the estate at C, are to be borne by the general personal estate. *Willor v. Rhoades*, 2 Russ. 452. LEGACIES, SPECIFIC.

A testatrix gave the interest of the residue to her brother during his life, and after his death she gave the residue to her executors in trust for four persons by name, and the survivors and survivor of them to be paid to them respectively when they should attain twenty-one, with interest in the mean time; of those four persons two died during the life of the brother: held that they did not take vested interests in any part of the residue, but that the whole of it belonged to the two survivors. During the lifetime of the testatrix's brother, one of the two survivors assigned all other the estate and effects, of or to which she was then possessed or entitled, to trustees upon trust for her creditors; this assignment did not pass her contingent interest in the testatrix's residuary estate. *Pope v. Whitcombe*, 3 Russ. 124. INTEREST VESTED; WILL, C. OF WHAT PARTS.

A testator devised his estate at S and H, to trustees in trust if there should be only one son of D, who should attain twenty-one, for that son; and in case there should be two or more such sons, in trust for the second of them, and gave all the residue of his estates to trustees in trust to sell. He afterwards erased and by codicil declared that he intended to erase the direction to sell only. He then gave all his estates to the son of D, who should first attain twenty-one, and change his name to E. D, at death of testator had a son who was still an infant, and afterwards had another son: held that codicil revoked the devise of the S and E, estates, and also the devise of the residue of the estate to the trustees, and that D's eldest son took under this codicil an immediate vested interest, both in the estates of which the testator was seised at the date of his will and those he afterwards purchased, and consequently was entitled to the receipts during his infancy. *Duffield v. Elwes*, 2 S. & S. 544. CODICIL; VESTED INTERESTS; WILL, REVOCATION OF.

Will directed settlement to be made of real estate on A, and his first and others sons in tail, with power of jointuring, leasing, sale, and exchange, and all other clauses, powers, and provisos, usually inserted in settlements of same kind: held these last words did not give power to charge with portions. *Higginson v. Barney*, 2 S. & S. 516. POWER; PORTIONS.

Legacy to A, as soon as she attains twenty-one, with interest: held to be contingent, and no interest payable till legatee attains twenty-one, and is then to be computed from end of a year after testator's death. *Knight v. Knight*, 2 S. & S. 490. INT. VESTED.

Bequest of money to trustees on trust to invest in public funds, and pay dividends to A until marriage, and then to transfer stock to her husband; in case she should die unmarried, then as she should appoint by will, and in default of appointment, to her executors and administrators. *Simble*; she is not entitled to have fund transferred while unmarried. *Wilson v. Mount*, 2 S. & S. 493. TRANSFER.

Residuary devise of real and personal estate to all the issue, child or children of M F, as should be alive at the time of the decease of the survivor of two successive tenants for life, equally amongst them if more than one, to be divided, share and share alike, when and as they should respectively attain the age of twenty-four years, and to their respective heirs, executors, administrators, and assigns for ever, as tenants in common: held that children living at death of

tenant for life took absolute vested interests in personal as well as in real estate. *Farmer v. Francis*, 2 S. & S. 505. **INTEREST, VESTED.**

Testatrix directed her legacies to be paid by executor, to whom she afterwards gave all her real estates, and the residue of her personal, after payment of her debts and funeral expences: held that legacies were not charged on real estates. *Parker v. Fearnley*, 2 S. & S. 592. **CHARGE ON REAL ESTATE.**

A testator having bequeathed various legacies, and among others, an annuity of 5*l.* to his daughter during her life, directs his son (whom he afterwards makes his executor,) to take care of and provide for her, and "subject as aforesaid," he gave to that son the residue of his real and personal estate: the daughter is entitled to a provision out of the residue in addition to her annuity, and a reference will be directed to the master to fix the amount of such provision. *Broad v. Bevan*, 1 Russ. 511, (note.)

A testator, after bequeathing a sum of long annuities to his wife for life, gave the capital after her death to A, if she shall be living at her decease, and if not to A's son. A outlives the wife, but both he and the wife die in the testator's life time: held that the legacy lapsed, and that the gift to his son did not take effect. *Williams v. Jones*, 1 Russ. 517. **LEGACY, LAPSED.**

A testator by his will directs that with the money arising from the personal estate bequeathed to his trustees (which is to be first so applied,) and from the sale or mortgage of certain real estates devised to the same trustees for a term of years, the annuities and legacies thereafter given, are to be paid; and he afterwards gives, among other things, an annuity, secured by powers of distress and entry on the real estates: by a codicil he bequeaths his personalty, and the residue of his real estates for a term of years to other trustees, upon the trusts in his will and codicil mentioned; and he then gives to A M, an annuity which he charges on the residue of his real estate, and secures by a power of distress: held, that the personalty is the primary fund for the payment of A M's annuity, and that the real estate is charged only as an auxiliary fund. *Fitzgerald v. Field*, 1 Russ. 428. **ADMON. OF ASSETS; CHARGE ON ESTATE.**

A testator bequeathed a sum of stock to trustees upon trust to pay the interest to his son during life, with a direction, if he married a woman with a fortune of a specified amount, to settle the fund upon her and the issue of such marriage; but in case of the son's decease, leaving no issue of his body, the stock was given over to various persons; and the testator also disposed of the residue of his estate. The son married a woman who had not the fortune required by the will, and died leaving issue of that marriage: held, that the son's life interest in the stock was not extended by implication, to a quasi estate tail; that the issue of his marriage took no interest in the stock; that the gifts over failed; and that after the son's death, the stock belonged to the residuary legatee. *Andree v. Ward*, 1 Russ. 260.

A testator having directed his executors to lay out, in what government security they pleased, as much money as would produce a certain annual interest, and having given that annual interest to his wife during her life in case she did not marry again, the executors invested in the 5 per cents. a sum which yielded dividends exactly equal to the specified income, those dividends being afterwards diminished by the conversion of the 5 per cents. into 4 per cents.: the widow was held entitled to have the deficiency made good, either by the sale from time to time of portions of the appropriated stock, or out of any other part of the residue which could be made available. *Mey v. Bennett*, 1 Russ. 370. **INVESTMENT.**

A testator, resident in India, bequeaths to an in-

fant a sum of money to be invested in the Company's securities, of which the interest is to be applied to her maintenance, and the principal to be settled upon herself for life, with remainder to her children. He is lost on his voyage to England, leaving all his property in India. Executors resident in that country prove his will at Calcutta, invest the legacy in the Company's securities, and for several years remit the interest to their correspondents in London for the benefit of the legatee, who had come to England; a part of that interest is brought into court, in a suit established by her for the appointment of a guardian, and for the allowance of maintenance, and an order is made for the payment of her guardian out of the fund so created, of 200*l.* a year as maintenance: held, that there was a specific appropriation in India of the legacy, and that the payment of 200*l.* a year was not liable to the legacy duty. *Hay v. Fairlie*, 1 Russ. 117. **LEGACY DUTY.**

A testator having, by a post-nuptial settlement, made certain provisions for his wife, which were expressed to be in bar of dower, bequeaths to her specific legacies, and a sum of money, adding, that what he has so given her, together with the provision made for her by the settlement, shall be in lieu of any dower which she might claim; the assets having proved insufficient for the payment of the legacies in full, held, that the wife is entitled to priority over the other legatees, and that the legacies given to her, ought not to abate proportionally with the other legacies. *Heath v. Dendy*, 1 Russ. 543. **PRIORITY OF PAYMENT; ABATEMENT OF LEGACIES.**

G, having by deed given his niece a life interest in some real property, by his will devises to her other real property in fee, and then directs the debts due to him from her husband, to be released on condition that within two months from his, the testator's decease, the husband shall release all claim in or to the property which the testator had given or should give to the wife: held, that the release which the husband is to execute, is to be in favour of his wife, and not for the benefit of the estate; that the husband does not forfeit the benefit intended for him by not executing, within the time limited by the will, such an instrument as the testator required of him. *Hollinrake v. Lister*, id. 500. **CONDITION, PERF. OF.**

A testatrix devises to A for life, remainder to A's first and other sons in tail male, remainder to A's daughters as tenants in common in tail, with cross remainders between them in tail, remainder to trustees for a term of years upon trusts to raise and pay such legacies as she had thereafter given, or should give by any codicil; and in a subsequent part of the will she bequeaths various legacies from and immediately after the decease and failure of issue of A: held, that "failure of issue" in the gift of the legacies must be considered "failure of such issue" as were included in the limitation of the estate; and that therefore the bequests were not too remote. *Morse v. Ld. Ormonde*, 1 Russ. 382. **LIMIT, TOO REMOTE.**

A will began as follows:—"In the first place I will, that all my debts and funeral charges be paid and discharged by my executors hereinafter named; and I give and bequeath unto my eldest son Richard William, my estate at Shap, on condition that he make up the deficiency in the payment of the two legacies, which I have left to my younger son and daughter;" held, that the testator's debts were not charged on the estate at Shap. *Willan v. Lancaster*, 3 Russ. 108. **CHARGE ON REAL ESTATE.**

Testator gave his real and personal estate, to persons whom he afterwards appointed his executors, in trust, in the first place, to sell an advowson, and apply the proceeds in discharge of his debts and legacies, and if they should be insufficient, then to raise the deficiency by sale or mortgage of his real estates, and

directed his executors to retain their expenses, but did not expressly declare any trust of his personal estate: held, that the personal estate was primarily applicable to the payment of the testator's debts. *Rhodes v. Rudge*, 1 Sim. 79. **ADMON. OF ASSETS.**

Residuary bequest to two grand-daughters of testator "in trust, till they come of age or marry, the interest to be received in the meantime, and paid to them; but if one of them die before marriage, or twenty-one, then to survivor and her children; but if both should die, leaving no issue, then I give them power to leave it by will as they should think proper. One legatee married, and other attained twenty-one: held, that both acquired vested interest. *Thackeray v. Hampton*, 2 S. & S. 214. **VESTED INTEREST.**

Condition in will in restraint of particular marriage, is dispensed with by consent of testator to it in his lifetime. *Smith v. Coudery*, 2 S. & S. 358. **LEGACY, CONDITIONAL.**

Where, from construction of will, executor who was residuary legatee, had power to release debtor of testator, and he waived the debt by writing, but did not formally release his executor, executor might, it seems, withhold annuity given in consideration of whole debt being paid. *Hemming & Gurrey*, 2 S. & S. 311. **PAROL WAIVER.**

Testator directed his personal and real property to be sold and divided amongst sisters: a power to executors to sell real property was held to be implied. *Tylden v. Hyde*, 2 S. & S. 238. **TRUSTEES; POWER IMPLIED.**

Where residue directed to be laid out in land, and in meanwhile interest thereon to be accumulated, tenant for life held entitled to the interest from the end of the year after the testator's death, till residue laid out. *Kelvington v. Gray*, 2 S. & S. 396. **INTEREST, FROM WHEN; ADMINISTRATION.**

Bequest to executors of residue of testator's estate in trust to sell and invest produce, and to apply so much of the interest and dividends as might be necessary for the maintenance, &c. of testator's five infant children during their minorities, to accumulate the surplus for their benefit; and upon their severally attaining twenty-one, to pay them 2500*l.* each; and if there should be any surplus after such payments, to pay and divide it amongst the five children, or such of them as should be living when the youngest attained twenty-one; and in case any of them died under twenty-one, having issue, his share should go to children, with benefit of survivorship, among the five children, in case of one dying without issue: held, that one dying after twenty-one, and before youngest had attained twenty-one, (though with issue,) took no vested interest in the surplus. *Hawes v. Herring*, 1 M'Clel. & Y. 295. **INTEREST, VESTED.**

A testator bequeathed a fund, which was to be produced by the conversion into money of the residue of his real and personal estate, to trustees upon trust to pay the interest of one moiety to his daughter for her separate use during her life, and after her death to pay 100*l.* a year to her husband during his life, and to apply the remainder of the dividends to the maintenance and education of all and every her children, until they attained twenty-one respectively; and when they attained their respective ages of twenty-one, upon trust to pay the principal to them in equal shares; the mother survived the testator, and left two children, who died under twenty-one: the moiety of the residue vested in these children. *Jones Blackthorn*, 1 Russ. 220. **INTEREST, VESTED.**

Testator bequeathed personal property to his trustees and executors upon trust, to pay dividends to his daughter during her life, to her separate use, and after her decease to pay the principal unto all and every her children who should live to attain twenty-three years of age, share and share alike, with

benefit of survivorship in case any of them died under that age, with limitations over, in case there should be no such child or children, or being such, all of them should die under twenty-three years without lawful issue. The daughter had a child who died under age, in the daughter's lifetime. The bequests to the children, and the subsequent limitations were too remote. *Bull v. Pritchard*, 1 Russ. 213. **LIMIT. TOO REMOTE.**

A native of Scotland domiciled in England, having personal property only, executed during a visit to Scotland and deposited there a will prepared in the Scotch form, and died in England: held, that the will was to be construed according to the English law. *Austruther v. Chalmers*, 2 Sim. 1. **DOMICIL.**

Testatrix devised all her messuages, &c. and real estate to trustees, to sell and pay funeral, &c. expences and legacies, except her charitable legacies, which she directed to be paid out of her personal estate, legally applicable for that purpose, and not out of any part of her said messuages, &c.; and she also directed her trustees to keep separate accounts of the proceeds of her messuages, and of her personal estate legally applicable as aforesaid, and that if proceeds of messuages should be insufficient to pay the legacies, trustees to apply to her personal estate: Held, first, that though personal estate more than sufficient to pay charity, no part could be applied for other legacies, till real estate exhausted: second, that testatrix's leasehold passed to trustees under devise of all her messuages, &c.: third, that heir and next of kin, and not residuary legatee, were entitled to surplus proceeds of freeholds and leaseholds: and fourth, that freeholds having been properly sold in heir's lifetime, the surplus was part of his personal estate. *Dixon v. Dawson*; *Sturges v. Farside*, 2 S. & S. 327. **ASSETS, ADMON. OF.**

Legacy given charged on real estate, to vest immediately on testator's death, but payable at twenty-one, vests, though legatee dies before twenty-one. *Hutkins v. Cheek*, 2 S. & S. 199. **VESTED INTEREST.**

Father, under marriage settlement, with power to appoint shares in which his younger children were to take a sum to be raised for their portion, having exercised that power by will, afterwards advances one daughter, took release from her of her portion, and by codicil revoked his appointment by will as to her: Held, her portion was to go to the other children. *Noel v. Id. Walsingham*, 2 S. & S. 99. **PARENT & CHILD; PORTION; ADVANCEMENT.**

Legacies given to the same persons, though by different instruments, and in some instances of different amount: Held, to be substitutional. *Gillespie v. Alexander*, 2 S. & S. 145. **LEGACY; SUBSTITUTION.**

Devise of moiety to A for life, and of other moiety to B; and after A's death, fee to be conveyed of both to B: if B dies before A, A is not entitled to B's moiety by implication. *Aspinall v. Pettin*, 1 S. & S. 544. **ESTATE BY IMPLICATION.**

A legacy given out of the personal estate of the testator, in trust to pay the interest to a legatee for her life, and after her death, to pay the principal absolutely in certain shares to and amongst several legatees, and in case of the death of such legatees, (naming them) or any or either of them, before such their respective legacies should or might become payable, then the legacy or part of him, her or them so dying, to go to his, her or their executors, or administrators, as part of his, her or their personal estate; on the death of one of the legatees, in the life time of the testator, held that the mention of the executors and administrators in the clause of the will, did not amount to a substitution so as to vest any interest in them, and prevent the lapse. *Bone v. Cook*, 13 Pri. 332. **LAPSED LEGACY.**

A legacy bequeathed out of personal estate also, after the death of a legatee, of the interest and divi-

dends thereof for life, in precisely the same words, except that there was this further provision introduced after the bequest to the several legatees: And in case of the death of any of the said legatees before their legacies should become payable, then the said testatrix willed and directed that the legacy of each of them so dying, should go to and be paid amongst his her or their children share and share alike; and in case of such decease of any of the said legatees, without leaving a child or children, the legacy of him or her so dying, should go to his or her executors or administrators, as part of his or her personal estate: Held, also to be lapsed as to the share of a legatee dying unmarried in the lifetime of the testatrix, and of the tenant for life, and consequently that the executors and administrators of the legatee so dying were not entitled to it. Such a legacy, so lapsing, lets in the next of kin of the testator. *Bone v. Cook*, 13 Price, 332.

#### LAPSED LEGACY.

Under a bequest of the interest, dividends, proceeds and profits of a sum in stock to S for life, and of the stock after death of S to A, but if A should die before twenty-one, to S, a bonus on the stock given under stat. 56 G. 3. c. 96. was held to belong to A as the legatee of the stock. *Hooper v. Rossiter*, 13 Price, 774. S. C. 1 McClell. 527. TENANT FOR LIFE; STOCK, BONUS ON.

Devise of real estates to testator's daughter for life, with remainder to his two sons in fee, and in case daughter should leave any child or children living at her death, then be directed that the two sons or their heirs should pay to such child or children 200*l.* equally between them, as they should severally attain twenty-one, and interest for the same, until the legacy should become due, for maintenance, &c. The daughter left one child which lived several years, but died an infant: Held, that interest was due from mother's death to child's death. *Harris v. Finch*, 1 McClell. 141. INTEREST, VESTED.

Where deviser directs that after payment of 800*l.* to charity to be raised by sale of real estate, residue thereof should go to residuary devisee J R; legacy to charity being void, 800*l.* goes to heir and not residuary devisee; costs to be borne between those two parties equally. *Jones v. Mitchell*, 1 S. & S. 290. LAND DEVISED FOR SALE; TRUST RESULTING; HEIR AT LAW.

Marriage in lifetime of father with his consent or subsequent approbation, is equivalent to marriage after his death with consent of trustees. *Wheeler v. Warner*, 1 S. & S. 305. CONDITION; LEGACY.

Where an annuity is given by will, with direction that it shall be paid monthly, the first payment is to be made at the end of a month after the testator's death. *Houghton v. Franklin*, 1 S. & S. 390. ANNUITY.

Devise of freehold, in trust to pay rents as same should become due and payable, into the hands of testator's wife, and not otherwise, for her life, for her separate use, and her receipts alone, for what should be actually paid into her own proper hands, should be good discharges to trustees. Held, wife had no power to alienate her life estate. *Acton v. White*, 1 S. & S. 429. HUSB. & WIFE, SEPARATE ESTATE; ALIENATION.

Where husband having, by articles, power to appoint wife's real estate, and by other articles, to appoint his own real estates, by will, reciting power over his own estates, in exercise of that power, and all other powers, appointed his own real estates, and all other real estates over which he had power in trust, &c. making no mention, in any part of will, of wife's estates, or of his power over them, and expressing that all persons taking under his will, should be bound by doctrine of election. Held, wife's estate was included

in appointment by will. *Trollope v. Linton*, 1 S. & S. 477. POWER.

Where real estates are devised in strict settlement, subject to trust for raising portions to younger children, during minority of tenant for life, out of rents and profits, or by sale or mortgage. Held, certain funds that had arisen from rents during such minority, were applicable to payment of the portions, and that deficiency only could be raised by sale or mortgage. *Warter v. Hutchinson*, 1 S. & S. 276. PORTION.

Testator having devised lands to A for life, remainder to his children in strict settlement, directs the residue of his personal estate, subject to the payment of debts and legacies, with all convenient speed, to be laid out in the purchase of lands, to be settled forthwith to the same uses, with a proviso, that the trust monies, until they should be laid out, might be invested upon government or real securities, the dividends and interests of which were to go and be paid as the rents of the lands to be purchased would go and be payable; a large portion of the testator's personal estate not required for the payment of debts and legacies, being invested in the funds, and upon securities carrying interest, the tenant for life was entitled to the interest of that portion from the death of the testator. *Ingerstein v. Martin*, 1 Turn. & R. 232. See also *S. P. Hewitt v. Morris*, id. 241. TENANT FOR LIFE; INTERMEDIATE PROFITS.

Testator, after bequeathing to A and B legacies of stock unequal in amount, and giving several legacies to public charities, requests the said A and B to be his executors, and gives to them as such one hundred guineas each. He then orders his books, jewels, plate, and household furniture, to be sold, and after desiring mourning to be provided for his servants, and five guineas each to be given to several persons named in the will, and to his two executors, for a ring, as a token of remembrance, concludes his will in the following manner: "In case there is any money remaining, I should wish it to be given in private charity." Held, that private charity was an object too indefinite to give the crown jurisdiction, or to enable the court to execute the trust. *Ommalley v. Butcher*, 1 Turn. & R. 260. CHARITY; JURISDICTION.

A testator having first directed all his debts to be paid, bequeaths all his copyhold estates, and all his property whatsoever, to his wife, during her life, and after her decease to his surviving children, and appoints A and B his executors; the debts are charged on the copyhold estate. *Ronalds v. Feltham*, 1 Turn. & R. 418. COPYHOLD; CHARGE ON LAND.

Bequest to A for life, and to her child, &c. at twenty-one, is a vested interest at twenty-one; and not divested if child attain twenty-one, and die in life of A, by subsequent expression in will, that in case A should die, not leaving child, or leaving child, such child should die before twenty-one, gift over. *Maitland v. Chalie*, 6 Mad. 243. VESTED INTEREST.

Two classes of legacies payable in two opponent events: Held, on construction, one class only payable. *Swayne v. Smith*, 1 S. & S. 56. LEGACIES, CONTINGENT.

Where a testator gives to legatees, who shall be living at the time of actual distribution, the court will fix a year as the proper period. *Brooke v. Lewis*, 6 Mad. 358. DISTRIBUTION, AT WHAT TIME.

Having purchased certain lands and hereditaments, they were, by his direction, by indenture of bargain and sale, conveyed by the vendor to trustees, for charitable uses. The indenture was enrolled in the court of chancery within six calendar months, but F died within twelve calendar months after its execution: Held that the conveyance was void under the stat. of 9 Geo. 2. c. 36.; held also, that certain pecuniary bequests in F's will, depending on the validity of the

said indenture, had failed. *Price v. Hathaway*, 6 Mad. 304. **MORTMAIN.**

Devise to trustees, in trust to constitute and support a grammar school at P, to appoint a master and usher, and pay them certain salaries; and the trustees to direct the management of the school. Held, that the school was to be a free grammar-school, for teaching the learned languages; that the proper objects were the children of the resident inhabitants of P; that they must be the children of protestants, and must be educated according to the principles of the church of England. The master might take boarders and day scholars, the number of free scholars was to be limited, and in fixing the number, the trust was guided by the amount of salary originally intended; that the free scholars were to be nominated by the trustees; that the trustees were to visit the school at their discretion, and to be allowed their reasonable expenses. The augmentation of the salaries of the master and usher, made by the trustees, upon an increase of the income of the charity, not allowed to them, the school, through error, not having been devoted to the proper objects. *Att. Gen. v. Dean &c. of Christchurch*, 1 Jac. 474. **CHARITY.**

A will directing a settlement of estates, and that there should be inserted all proper powers for making leases, and otherwise, according to circumstances, to and for the tenants for life, to be exercised by them when qualified, and when not, by the trustees, does not authorise the insertion of a power of sale and exchange. *Horns v. Barton*, 1 Jac. 437. **SETTLR.; POWERS, USUAL.**

Bequest by codicil, that dividends only of legacies which had been bequeathed by will, should be paid to legatees, and that legacies should not be paid to them, leaving the principal not further disposed of, is equivalent to a gift of the corpus, and is a gift of the substance of the principal. *Richards v. Richards*, 9 Price, 219. **LEGACY, SPECIFIC.**

When real estate is devised for payment of debts, and articles of personality exempted, if the executors, to preserve the latter from the creditors, delay selling them, and in consequence a loss happens, it may be thrown on the real estate, *semble*. *Clarke v. El. Ormonde*, 1 Jac. 115. **EXORS., DUTIES OF; ADMON. OF ASSETS; CHARGE ON REAL ESTATE.**

Bequest out of real estate to erect a monument in a church to the testator's memory, is not within the statute of mortmain. Bequest to erect a monument to the testator's memory, within a year after his death, in the church of A, with a legacy to the rector of A, on condition of his consenting to the erection of the monument, and a direction that, if he refused, the testator was to be buried elsewhere. Held, that the purpose failed, by the rector's refusing, for many years, to allow the monument to be erected, though a succeeding rector was willing to consent. *Mellick v. The Asylum*, 1 Jac. 180. **MORTMAIN.**

Bequest; and provided that, if done should, by any means or ways whatever, sell, dispose of, or incur the right, his interest should cease. Held, his banishment was a forfeiture. *Cooper v. Wyatt*, 5 Mad. 482. **TESTAMENTARY; BANACY.**

Legacy to feme covert "to and for her own use and benefit," does not give her a separate estate. *Roberts v. Spicer*, 5 Mad. 491. **HUSB. & WIFE, SEP. ESTATE.**

Bequest to testator's daughter and her children, and in default of such issue, and in case of her death, to A and B; the limitation over takes effect on her dying without children. *Gawler v. Cadby*, 1 Jac. 346. **INTEREST, WHEN IT VESTS.**

Where testator himself refers to "the rules of law," the limitations ought to go as far as those rules will permit. *Gover v. Grosvenor*, 5 Mad. 343.

Devise to college, for founding additional fellowships and scholarships, under regulations, by which

certain stipends were to be paid to the new members out of the rents, and the testatrix hoped that a surplusage would remain for the benefit of the college, which was to be thrown into the common stock of the college, and improved as a fund for the repairs of the college in general, discharging debts, building, buying books, or other such public uses within the college; the rents having increased considerably: Held, that the surplus not required for repairing, building, &c. belonged to the old foundation. *Att. Gen. v. Catherine Hall, Cambridge*, 1 Jac. 381. **CHARITY.**

Devise of an estate for charitable purposes, with a direction that the rents should not be raised: Held, that this discretion was void, and that there was no resulting trust for the heir at law as to the increased rents. *Id. ib.* **CHARITY; RESULTING TRUST; HEIR AT LAW.**

Where testator, in each of two testamentary instruments, gives a legacy *simpliciter* to the same person, court will presume both to be meant for him. *Hurst v. Beach*, 5 Mad. 358. **LEGACY ACCUMULATIVE.**

And it is indifferent whether the second legacy is of same amount, or greater or less than first. *Id. ib.*

But where same motive is attached to each, and the amounts are similar, it is presumed to be but one legacy, but the double coincidence must occur. *Id. ib.*

Gift of personal property to trustees, to be settled on marriages of testator's daughters for their separate use, and on their deaths upon trust for their children, with limitation over in case of either of daughters dying without having been married, or without leaving any children, her surviving. The shares of the children of each daughter are vested, subject to be divested, by all dying before their mother; and there being one alive at her death, the representatives of the two who died before her were held entitled to their shares. *Broomhead v. Hunt*, 2 J. & W. 459. **VESTED INTEREST.**

A legacy of so much of a specific fund, and in case of failure of that fund, the deficiency out of another fund: Held a specific legacy, and not a general or pecuniary one, and that therefore legatee was entitled from testator's death. *Fontaine v. Tyler*, 9 Price, 94. **LEGACY, TIME OF PAYMENT; LEGACY SPECIFIC.**

Where testator directs his executors as soon as they should think proper after his decease, to sell so much stock as would produce legacy of 12,000*l.*, legacy is not payable till end of the year after his death. *Benson v. Maude*, 6 Mad. 15. **LEGACY, TIME OF PAYMENT; ADMON. OF ASSETS.**

Testator gives legacy of 20,000*l.* to daughter by will, free of duty, and by codicil, reciting death of daughter, and consequent lapse of her legacy, and instead thereof, gives to daughter's husband sum of 20,000*l.*: Held, he does not take free of duty. *Chatteris v. Young*, 6 Mad. 31. **LEGACY DUTY.**

The words, "I will and direct that my just debts, &c. be paid and satisfied," in the introductory part of will, amount to a charge of debts on real estates. *Clifford v. Lewis*, 6 Mad. 33. **CHARGE ON REAL ESTATES.**

Interest in property given to wife, on condition "that she should neither directly nor indirectly keep, or have any concern or interest in a public or licensed victualling-house, or any other kind of business." Condition not broken by her keeping and having the care of a public-house belonging to others, as their servant and at regular wages, without participating in profits or losses. *Jones v. Bromley*, 6 Mad. 157. **CONDITION.**

Construction of an obscure will, whether a trust was created or merely a discretionary power? *Robinson v. Smith*, 6 Mad. 194. **TRUST.**

A, being possessed of freehold and copyhold estate, the latter of which could not be devised but by conveyance to a trustee, and declaring uses by will, de-

vised to his younger son all his messuages, lands, and tenements at A., and also, all that his messuage and tenement at S. in the occupation and tenure of J., as farmer thereof, &c. Held, that the copyhold land did not pass by the devise, the testator not having observed the formalities necessary for the passing thereof, and that the court would not supply a surrender, or put the heir to election, though the devise was to a younger child. *Hodgson v. Merest*, 9 Price, 556. COPYHOLD, DEFECTIVE SURRENDER OF; HEIR AT LAW; ELECTION; YOUNGER CHILDREN.

Direction for the sale in a given event, of an estate devised by the will, without expressing by whom it was to be sold, does not give a power of sale to the executors by implication. *Patton v. Randall*, 1 Jac. & W. 189. POWER OF SALE, C. OF; EXOR.

A power of sale not expressly given to any one, is not to be implied to the executors because the devisees of the estate are minors. *Id. ib.*

Testator bequeathed interest of 400*l.* to daughter; testator afterwards advanced 100*l.* to daughter's husband, and latter gave receipt for it expressive of its being part of daughter's portion, and testator enclosed receipt, together with his will, in an envelope, and husband, since wife's death, received interest on the 300*l.* only. Held, advance of 100*l.* was not an ademption *pro tanto* of the 400*l.* legacy. *Bell v. Coleman*, 5 Mad. 22. LEGACY; ADEMPITION.

On construction of will, *Skinner's Company* held to be trustees of certain lands in their corporate character as governors of the possession, &c. of the free grammar-school of Sir A. Judd in Tonbridge, and that the same are held by them according to letters patent of Edw. 6. for the support of the master and under master of the said school, and for the reparation of the lands, &c. and not otherwise, nor to any other uses or interests. *Att. Gen. v. Skinner's Comp.* 5 Mad. 173. Affd. with variation, 1 Jac. 629. CHARITY CORPORATION; TRUSTEE.

It is not of course to let a *cestui que trust* under a will into possession of the estate; it must depend on testator's intention. *Tidd v. Lister*, 5 Mad. 429. TRUST; CESTUI QUE TRUST.

Gift, upon trust, to wife for life, and then to use of son for life; and after death of survivor upon trust for such person as should, from time to time, be Lord V. &c. Held, not an executory trust, but a direct gift to each Lord V. successively, and that all living at death of testator, who might become a Lord V. took a vested interest. *Deerhurst v. St. Albans*, 5 Mad. 232. INTEREST, VESTED.

By will testator nominated wife his executrix, "thereby bequeathing to her all the property of whatever description or sort that I may die possessed," &c. Held, she is entitled, though not as executrix, to all his property that such a will could pass. *Noel v. Hay*, 5 Mad. 38. EXOR.

Testatrix, by her will, limited certain estates to her daughter O for life; remainder to her first and other sons successively in tail male; remainder to her daughters as tenants in common in tail general; and if an only surviving daughter, to her in tail general; and in default of all such issue of O, to trustees for 1000 years, upon trust to raise certain legacies as she should bequeath by any codicil; and she afterwards, by codicil, bequeathed certain legacies after the decease and failure of issue of her daughter O. O died without issue: Held, legacies were payable when the term was to take effect. *Morse v. Marq. Ormond*, 5 Mad. 99. Affd. 2 S. & S. 479. LEGACIES, WHEN PAYABLE.

Where, by will, estate is directed to be sold (but no time therefore is stated), and interest of produce is bequeathed to plaintiff, and estates continued unsold, plaintiff, on construction of will, is entitled to rents and profits of first year after testator's death. *Fitz-*

*gerald v. Jervoise*, 5 Mad. 25. RENTS & PROFITS; ADMON. OF ASSETS.

Bequest of 1000*l.* long annuities "now standing in my name, or in trust for me." At the date of the will the testatrix had no long annuities, but had 1000*l.* three per cent. reduced annuities: Held, that that sum passed by bequest. *Pentecost v. Ley*, 2 Jac. & W. 207. LEGACY, ADEMPITION OF.

Devise of a house, after the death of A, for the use of the master that might be appointed to a school for the instruction of poor persons in W, and a bequest of money upon trust to apply the interest in procuring a master and mistress for instructing poor children, and in keeping the school-house in repair, and to apply the residue of the interest to the poor: Held, that the bequest to the school was void as being connected with the devise of the house; and the amount intended for that purpose being uncertain, the gift of the residue was also void. *Att. Gen. v. Hinman*, 2 Jac. & W. 270. MORTUARY.

Where the fund is applicable at discretion to several purposes, some of which are void and the others not, it will be confined to the latter. *Id.* 277.

Gift of residue to be equally divided between the testator's wife, sons and daughters; subject nevertheless as to the shares of the daughters, which were to be placed in the funds in the names of trustees; the interest to be paid to them for their lives for their separate use, and after their deaths the testator gave the shares, to the interest of which his daughters should have been entitled for life, to their children equally, with benefit of survivorship. Two of the daughters having survived the testator, died without children: Held, that their representatives were entitled to their shares. *Whitell v. Dudin*, 2 Jac. & W. 279. INTEREST, VESTED.

Bequest of personal property held a general residuary disposition, although accompanied with expressions favouring a more limited construction, and pointing only to a surplus beyond the property specifically mentioned. *Bland v. Lamb*, 2 J. & W. 399. RESIDUE.

Devise of copyhold estates, the legal estates being outstanding, "to my son R W G, to be entailed upon his male heirs, and failing such, to pass to his next brother, and so on from brother to brother, allowing 2500*l.* to be raised upon the estates for female children each." Whether a trust executed or executory, and if the latter, whether an estate tail in R W G; *qu?* The point too doubtful to compel a purchaser to take the title. *Jerraise v. Dk. Northumberland*, 1 Jac. & W. 559. TRUST; VEND. & PURCH.; TITLE.

The circumstance of the testator not having had the legal estate, can make no difference in the construction of a devise. *Id.* 573.

Legal representatives means executors and administrators, unless contrary intention is manifest. *Price v. Strange*, 6 Mad. 159. LEGAL REPRESENTATIVES; WILL.

Death, without leaving issue, signifies, as to real estate, a general failure of issue. *Franklin v. Lay*, 6 Mad. 258.

Testator, after devising lands to uses in strict settlement, gives the residue of his personality to be invested in lands, to be settled to the same uses. The tenant for life is not entitled to the interest of the residue till one year from the testator's death. The general rule, fixing the end of the first year as the period at which the enjoyment of the tenant for life is to commence, is not to be departed from, unless it appears that the testator's intention is incompatible with it. *Taylor v. Hibbert*, 1 Jac. & W. 308. TEN. FOR LIFE; INTEREST.

Under a devise of all the residue of the testator's estate and effects whatsoever and wheresoever, of what

nature or kind soever, to trustees, upon trusts applicable only to personal property, held, that the real estate passed, with a resulting trust for the heir. *Dunmage v. White*, 1 Jac. & W. 583. **RESULTING TRUST; HEIR.**

Testator, reciting that he has 1500*l.* five per cents., gives it to A, and then gives to B all other his stocks that he might be possessed of at his death. The latter bequest is not specific, but is liable to debts in preference to the former. *Parrott v. Worfield*, 1 Jac. & W. 594. **LEGACY SPECIFIC.**

Legacy "of all my stock that I may be possessed of at my decease," not specific. *Semble*. *Id.* 601. **LEGACY SPECIFIC.**

The word "my" alone, is not enough to make a legacy specific, unless a particular fund is referred to. *Id.* 602.

A will, directing a settlement of estates, and that there should be inserted all proper powers for making leases, and otherwise, according to circumstances, for the tenants for life, to be exercised by them when qualified, and when not, by the trustees, does not authorise the insertion of a power of sale and exchange to the trustees, to be exercised with the consent of the tenant for life. Whether the will authorises the introduction of a power of sale and exchange of any description, *quære?* *Brewster v. Angell*, 1 Jac. & W. 625. **POWER.**

Where a real estate is charged with payment of debts, &c., in exoneration of the personal estate, in order to favour the residuary legatee, and such residuary legatee dies in life of testator, so that bequest lapses; held, on construction of the whole will, that the real estate becomes exonerated, and the personal liable. *Noel v. Henley*, 7 Price, 241. **LAPSE; CHARGE ON REAL ESTATE.**

Real estate being devised in trust to sell at such times or time after testator's death as should seem most advisable, either together or in separate parcels, by auction or private contract, the trustees to stand possessed of the produce of such sale, and the rents and profits accruing in the mean time, upon the trusts of the devise; held, that trustees have not an unqualified discretion as to sale, or to entitle them to retain the accumulation of the mesne rents and profits to answer the exigencies of the will, but that *cestui que* trusts were entitled to receive their respective proportions of the accruing rents, &c., from the end of the year after the death of testator. *Id.* 242. **LEGACIES, WHEN PAYABLE.**

Testatrix having made several specific bequests of stock, gives the residue of her funded property, after payment of her debts and legacies, to A: she gave the residue of her real and personal estates to others, and directed one particular legacy to be paid out of the stock. Held, that the residue of the stock was the primary fund for the payment of the debts and legacies. *Choat v. Yeats*, 1 Jac. & W. 102. **ADMON. OF ASSETS.**

Bequest to wife of real and personal estate for life, and, after her decease, a gift of various legacies, and a devise of all the rest, residue, and remainder of real and personal estate, to testator's nephews. Held, legacies are a charge on real estate. *Bench v. Biles*, 4 Mad. 187. **CHARGE ON REAL ESTATE.**

Charge on specific bequest of debts and legacies. *Brown v. Groombridge*, 4 Mad. 495. **LEGACY SPECIFIC.**

Expressions in will after payment of debts direct "in the next place," certain legacies, and that trustees should afterwards raise other legacies: held, not to give first legatee any priority in payment; but in case of deficiency all should abate in proportion. *Boston v. Booth*, 4 Mad. 161. **LEGACIES, ORDER OF PAYMENT; ABATEMENT OF LEGACIES.**

\* Unless clear contrary intent appear in will, pre-

sumption is, that testator intends all legacies to be equally paid. *Id.* 168. **LEGACY, ORDER OF PAYMENT.**

Words, "In the first place I give to A, then to B, then to C," not evidence of such intent." *Id.* *ib.*

Nor words, "to A, payable at one month, to B, at six months, to C, at twelve." *Id.* *ib.*

Nor, "In the first place I direct, &c. to A, then to B, then to C;" nor, "I direct that my executors shall, in the first place, &c. to A, in the next place to B, then to C." *Id.* 169.

Covenant in settlement to leave by will, satisfied by legacy to amount; though followed by general direction for payment of debts. *Wathen v. Smith*, 4 Mad. 236. 325. **SETTLED, SATISFACTION OF; TRUST TO PAY DEBTS.**

Where will directs dividends to be paid to tenant for life at Lady-day and Michaelmas day, the money was ordered to be invested in the 3 per cents. reduced; the dividends on that stock being payable at that period. *Caldecott v. Caldecott*, 4 Mad. 189. **INVESTMENT.**

Unconditional legacy given by a third instrument which is nearly similar to the first: held to be merely a substitution for a conditional legacy given by the first. *Att. Gen. v. Harley*, 4 Mad. 263. **LEGACY, SUBSTITUTION OF.**

Words of will after giving legacy were, "And in case of legatee's death," legacy to children: held, that words referred to legatee's death before testator, and that legatee surviving testator, took absolutely. *Slade v. Milner*, 4 Mad. 144. **INTEREST VESTED.**

Who is to execute power of sale of real estate, is implied to be in him through whose hands the fund is to pass. *Bentham v. Wiltshire*, 4 Mad. 44. **POWER OF SALE.**

Testamentary expences does not include costs of suit occasioned by will. *Broome v. Groombridge*, 4 Mad. 495. **TESTAMENTARY EXPENCES, WHAT.**

Where literal force of expressions differs in a will, rule is to seek the intent of testator in a consistent and rational purpose, rather than in a purpose irrational and inconsistent. *Jenkins v. Herries*, 4 Mad. 67.

Bequest to trustees for some covert to her sole and separate use and benefit; and also bequest to her of residue for her own use and benefit: held, residue not separate estate of wife. *Wills v. Sayers*, 4 Mad. 409. **HUSB. & WIFE, SEP. ESTATE.**

Under a will directing the transfer of stock among all the children of the testatrix's daughter, except an eldest son; a second son having become the eldest living by the death of his elder brother, who survived the testatrix, is not entitled to a share, although an estate limited to his elder brother did not descend to him. *Matthews v. Paul*, 3 Swan. 328. **YOUNGER CHILDREN.**

Bequest to A for life, and then to be equally divided between her three children, or such as shall be living at A's death: children take vested interests transmissible to their representatives. *Sturges v. Pearson*, 4 Mad. 411. see 6 Mad. 250. **VESTED INTEREST.**

Bequest of a legacy to A for life, and then to be paid at twenty-five, or between twenty-one and twenty-five, if the executors should think proper; and maintenance in the mean time, with a limitation over, in case A should not receive or dispose of it by will or otherwise, in his life-time: the limitation over held void. *Ross v. Ross*, 1 Jac. & W. 154. **LIMITATION OF PERSONALS.**

Bequest to a natural child *en ventre sa mere*, held good, if there is not affixed to gift, by construction of the will, a condition precedent, that it must be ascertained to be the child of the testator. *Evans v. Massey*, 8 Price, 22. **BASTARD, IN VENTRE SA MERE.**

Words of survivorship are to be referred to the pe-



riod of division and enjoyment, unless the contrary intent be specially shown. *Cripps v. Woodcott*, 4 Mad. 11. SURVIVORSHIP.

Legacies to infants payable at twenty-one, with benefit of survivorship in the event of death under that age, and a power to the executors to apply any part of the legacies towards the maintenance of the legatees, bear interest from the death of the testatrix, the infants being her cousins and destitute of other provisions. *Pett v. Fellows*, 1 Swan. 561. INTEREST ON LEGACIES; INFANT.

The rule as to interest on legacies given to infants by persons standing *in loco parentis*, does not extend to an adult, though she had during the life of testator received a voluntary annuity from him. *Raven v. Waite*, 1 Swan. 553. INTEREST ON LEGACIES; PARENT & CHILD.

A testator having directed legacies to be paid at the expiration of six months after his decease without deduction, the legatees are entitled to the full amount, and the legacy duty must be paid by the executors. *Bucksdale v. Gilliat*, 1 Swan. 562. LEGACY DUTY.

A testator having bequeathed annuities issuing out of a leasehold estate to some annuitants for life, to some during the continuance of the fund, and to others indefinitely, with a general provision for an increase or diminution of the annuities, in proportion to the increased or diminished income of the estate; and a particular provision that, on the death of some of the annuitants for life, their portions should be paid to the survivors; the annuities given indefinitely are payable during the continuance of the fund; and the amount of annuities ceasing by the death of annuitants for life not named in the particular provision, belongs not to the survivors, but forms part of the residue. *Hack v. Tuck*, 3 Swan. 270. RESIDUE.

The will (attested by three witnesses) of a person having a power to dispose of a fund consisting partly of household furniture, linen, and plate, containing a gift of "all my estates and effects, of whatever denomination," and of "my household furniture, with linen and plate," is not an execution of the power. *Jones v. Currey*, 1 Swan. 66. POWER, EXECUTION OF.

A testator having by his will directed his executors to transfer 500*l.* part of his residuary estate to H N, and made a specific disposition of the other parts, and having afterwards drawn a pen through the name of H N, and by a codicil declared that he razed her name out of his will with his own hand; the 500*l.* belongs as undisposed of to his next of kin. The costs of ascertaining the right to that sum paid thereout in exemption of the general residue. *Skrymsher v. Northcote*, 1 Swan. 566. LEGACY, ADEMPITION; RESIDUE.

R being in possession of mines and iron works under leases of unequal duration, by will bequeathed "25,000*l.* to B, as a capital for him to become partner with my executors of one fourth share in trade of all those works so long as the lease endures," with a devise to H and his wife of residue of his estates real and personal. By codicil testator gave to W three-eighths of concern at iron works, "so the partnership will stand at my death W three-eighths, H three-eighths, B two-eighths." After R's death, W, H & B carried on works for two years, selling iron manufactured not only from the produce of the mines but from other sources. Held, that codicil revoked residuary claim in favour of H's wife as to the trade, and that the concern was a partnership in trade. *Crawshaw v. Maule*, 1 Swan. 495. PARTNERSHIP; WILL, REVOCATION OF.

A testator having by his will, devised his freehold and copyhold estates in trust for his son in strict settlement, with remainder to his nephew; and having given by his first codicil a special power of sale over a part of his estates, to be exercised at the request of

his son, in favour of his nephew; and by his second codicil a general power of sale over "all or any part of his estates," to be exercised at the discretion of his trustees; the conveyance by the trustees must contain both the particular and the general power of sale. *Green v. Wigglesworth*, 1 Swan. 234. POWER OF SALE; CONVEYANCE.

For the purpose of collecting the intention, every part of the will must be considered. *Gittins v. Steele*, 1 Swan. 28.

Under a bequest of stock in trust to pay the dividends to M H H the niece of the testator, "for and towards the maintenance, education, and bringing up, of all and every the child and children of the said M H H until he, she, or they shall attain twenty-one," then to transfer the principal equally among the children, with a bequest over of principal in default of such issue to the nephews and nieces of the testator living at the death of M H H: The dividends are payable to M H H although she has no child. *Hammond v. Neame*, 1 Swan. 35.

Question on construction of intricate will as to forfeiture by children, through non-compliance on part of father, with condition of assumption of name of devisor. *Hawkins v. Luscombe*, 2 Swan. 375. FORFEITURE; PARENT & CHILD; CONDITION, BREACH OF.

Legacies charged on a reversion directed to be raised by sale or mortgage, and declared to carry interest from the death of the testator, it not appearing from the will that the estate charged was a reversion. *Darries v. Davies*, Dan. 84. LEGACIES, HOW RAISED.

Testator directing by will, his trade to be carried on with the capital then employed therein; and executors fail in the business; held, the capital only and not the general assets of testator were liable to creditors. *Exp. Richardson*, 3 Mad. 138. BUCK, 202. S. C. BANKCY, ASSIGNMENT.

Legacy to A of 600*l.* to be paid at end of one year after testator's death, or to her respective heir; held lapsed by death of A in lifetime of testator. *Tidwell v. Ariel*, 3 Mad. 403. LEGACY LAPSED.

Testator exempts personal estate from payment of mortgages on real estate, which he devises to C. subject to the incumbrances: Held, that descended estates are liable to mortgages. *Barnwell v. Id. Cawdor*, 3 Mad. 453. CHARGE ON REAL ESTATES.

Directions in will that executors shall pay annuity, "unless circumstances render it unnecessary, impracticable and inexpedient," means unless in the opinion of executors it shall become so, and court has no controul over such discretion, unless they act *malà fide*. *French v. Davidson*, 3 Mad. 396. TRUSTEES, DISCRETIONARY POWER.

Bequest to A for life, and afterwards to B, but if he should be then dead, to C & D in equal shares, or the whole to the survivor of them. B died in lifetime of tenant for life, as did also C & D: Held that gift to C & D was a vested interest as tenants in common, subject to be divested if one only had been living at death of tenant for life. *Brown v. Id. Kenyon*, 3 Mad. 410. VESTED INTEREST.

Semble, the same rule will apply to annuities out of residue, unless the contrary is directed by will. *Storer v. Prestage*, 3 Mad. 167. ANNUITIES, WHEN TO COMMENCE; ADMON. OF ASSETS.

Tenant for life of residue under will has no claim to interest till from one year after testator's death. *Stott v. Hollingsworth*, id. 161. INTEREST, FROM WHEN; ADMON. OF ASSETS; TEN. FOR LIFE.

Gift to two executors and survivor of 1000*l.* stock, in trust for A & B, to pay them the dividends thereof from time to time, and from and after the decease of the executors the 1000*l.* to A & B, their executors, &c. equally: Held, that they took absolute equitable interests in the stock as tenants in common during life

of executors, and on their death absolute legal interests. *Gardiner v. Butt*, 3 Mad. 425. INTEREST, VESTED.

Legacy of 3000*l.* to testator's wife A for life, and after her death, one-third to each of his daughters M and H, with proviso, that if either daughter should die unmarried or without issue, the surviving daughter to take both shares, and if both die unmarried or without issue, then to his son of his children. And he gave two-thirds of the residue equally among his daughters, subject to such contingencies in favour of their issue, and with like benefit of survivorship as were before declared as to the 3000*l.* stock. A died in life of testator: Held on her death, that M and H took vested interests in shares of 3000*l.* stock, and of residue. *Laffer v. Edwards*, 3 Mad. 310. VESTED INTEREST.

Construction of will as to vesting of interest, accumulation and maintenance. *Marshall v. Holloway*, 2 Swan. 432. VESTED INTEREST; ACCUMULATION; MAINTENANCE.

Construction of charitable bequests with reference to a local act of parliament, concerning charitable bequests to the parish, &c. *Att. Gen. v. Freeman*, 5 Pri. 425. CHARITY; STAT. C. OF.

Power to appoint sum of money to children in such shares as appointor should think proper, with direction as to time they should take such appointed shares. Two children die before appointor: Held not to have vested interests. *McGhie v. McGhie*, 2 Mad. 368. VESTED INTEREST.

When a legacy is to vest or be paid at a particular age, and there is a clause of forfeiture on marriage without consent, the court will construe it as having relation to a marriage under the specified age. But where no age is specified, *quære*, if the court can limit the condition to a marriage without consent under twenty-one? clearly not, where the party so marrying was above twenty-one at the date of the will. *Lloyd v. Bruntton*, 3 Mer. 116. INTEREST, VESTED.

A subsequent condition of forfeiture on marriage without consent, where there is no devise over, will not be enforced. The reason of this rule is differently assigned, either because the bequest over affords a manifestation of intention that the condition is not merely in *terrorem*, or on account of the interest of the legatee over. *Id.* 117. CONDITION IN TERRORUM.

Testator gives 24,000*l.* upon trust, as to 6000*l.* to pay the interest to S B (his niece), during her life, and after her decease, the principal among her children; if she should die without issue, over. H declares similar trusts as to three other sums of 6000*l.* (making the remainder of the 24,000*l.*) for his three other nieces and their children. Proviso, that in case any of his said nieces should marry without such consent as therein prescribed, each, &c. so marrying should forfeit the interest of her 6000*l.*, and all other sums to which she may be entitled under his will, and the respective sums of 6000*l.*, and all such other sums, &c. should fall into his residue; and he gives the residue in trust for his two nephews and their children; in case of the death of either, without issue, his moiety to go over to, and be divided among his said nieces. Afterwards by codicil, he gives to each of his nieces 2000*l.* in addition, "subject to the same powers, provisions, directions, and limitations, as are contained in the will respecting the sums of 6000*l.*" S B, who was of age at the date of the will, marries without the consent required: Held, a forfeiture, extending not only to the future interest of her 6000*l.*, but to the capital, and also to the 2000*l.* given by the codicil, and to a fund set apart to answer an annuity to which S B would otherwise have been entitled on the death of the annuitant. Whether the forfeiture would also extend to her share of the residue, in the event of the contingency upon which it is given over to the testator's niece; *Qu.* *Id.* 108. CONDITION, BREACH.

Bequest of residue "to the widows and children of

seamen belonging to the town of Liverpool, held a valid charitable bequest, to be applied in aid of a subsisting charity for such poor sailors' widows and children as should in the judgment of the persons appointed to administer, be deserving of it. *Powell v. Att. Gen.*, 3 Mer. 48. CHARITY.

Bequest in trust for such "benevolent" purposes as the trustees in their integrity and discretion may unanimously agree on, not to be supported as a charitable legacy, the word "benevolent" not being to be restricted by the sense of "charitable," so as to authorize the court to say that the application of the property must be confined to such objects as are strictly speaking, objects of charity; therefore void for uncertainty, and distributable amongst the next of kin. *James v. Allen*, 3 Mer. 17. WILL, UNCERTAINTY; CHARITY.

Devise to R subject to the payment of legacies of 200*l.* each, to the testator's three nephews, to be paid as soon as the legatees should arrive in England, or claim the same, provided they should arrive or claim within three years: Held, the condition not performed by one of the legatees arriving in England and making his claim after the time specified, although ignorant till then of the will and of the testator's death, and no advertisement for legatees. *Burgess v. Robinson*, 3 Mer. 7. CONDITION, PERF. OF.

Testator gives 4000*l.* to trustees upon trust for his two daughters at twenty-one, and directed that the legacy duty due in respect thereof, shall be paid by his executors out of the residue; by codicil reciting this bequest, and that he is desirous of increasing the same to 5000*l.*, he revokes the gift of 4000*l.*, and gives 5000*l.* upon the same trusts, &c. By a second codicil reciting the former, and that he is desirous of further increasing to 6000*l.*, he revokes the gift of 5000*l.*, and gives in lieu thereof 6000*l.* upon the same trusts. This is not a revocation but substitution in each instance, and the 6000*l.* is therefore exempt from the legacy duty. *Cooper v. Day*, 3 Vern. 154. LEGACY DUTY; WILL, REVOC. OF; LEGACY, SUBSTITUTION.

Testatrix gives to the minister, &c. of A, 5*l.* per annum bank long annuities; to the minister, &c. of B, 5*l.* per annum like bank annuities; to the treasurer of C and D 100*l.* long annuities, stock each; to the governors of E 100*l.* long annuities, stock, and "30*l.* per annum farther part of my bank long annuities upon trust to apply the interest and dividends to and for the use of L D till she attains twenty-one," and then to transfer "the said 30*l.* per annum bank long annuities," to the said L D. She then gives to W C 150*l.* bank long annuities stock; and 10*l.* per annum "further part of my long annuities," in trust for H G. By a codicil reciting, "Whereas I may have made a wrong calculation of the value of my fortune in the funds at the time of my decease," she directs in case of deficiency, it may be deducted out of the residue, as she would have all her legacies paid to the full. The testatrix at the time of her death possessed of only 385*l.* long annuities, and her personal estate was insufficient to pay her debts. Upon a question whether the treasurer of C was entitled to a legacy of 100*l.* long annuities, stock, or only to 100*l.* to be raised by the sale of stock to that amount; Held that it was a specific legacy of so much stock, and decreed accordingly. *Att. Gen. v. Grote*, 3 Mer. 316. LEGACIES SPECIFIC.

300*l.* to A, to be paid to him, his executors, &c. within twelve months after the death of B, in case B shall happen to survive my wife. The latter words construed with reference only to the time of payment, and not to make void the legacy, B having died in the lifetime of the testator's wife. *Mansey v. Hudson*, 2 Mer. 130. INTEREST, VESTED.

Devise of an estate charged with two several lega-

cies to A and B; and in case A or B die without lawful issue, then the whole of the said two legacies to go the survivor, his executors, &c. A dies without issue in the testator's lifetime. Held, the legacy lapsed, the contingency on which it was given over being too remote. *Id.* LEGACIES LAPSED; LIMIT. TOO REMOTE.

M gives to the defendant all her freehold and copyhold estates upon trust to permit E to receive the rents, &c. during her life, and after her death to sell, and out of the produce to pay 100*l.* to such person as she should by will appoint: E by will, without reference to the power, gives 100*l.*, and the whole of her household furniture to the plaintiff: it was charged by the bill and not denied that the testatrix had no personal property at the time of her death, besides some household furniture to very small amount in value, but no evidence was gone into, and an enquiry was asked as to the state of the property at the time of making the will with the view of ascertaining that the testatrix must have intended the gift of the 100*l.* as in execution of her power. But the enquiry was refused and the bill dismissed. *Jones v. Tucker*, 2 Mer. 533. POWER, EXECUTION OF; PR. ENQUIRY AS TO TESTATOR'S PERSONAL ESTATE.

No enquiry as to the quantum of personal property to determine whether gift is or is not in execution of a power, as to an enquiry whether there be any thing but copyhold, to answer a devise of land; the question there being whether there was any thing for the will to operate upon at the time when it was made; whereas a will of personalty speaks at the death. *Id. ib.*

Where there are not, nor ever were, nor can by possibility be, any persons strictly answering the description of children, it is necessary to resort to evidence *dehors* the will, for the purpose of finding whether there were any who had acquired the reputation of children; and it is possible for illegitimate children to acquire that reputation. *Id. Woodhouselee v. Dalrymple*, 2 Mer. 419. BASTARDS; PR. EVID.

Testator by will charges all his estates with payment of debts, and makes his son residuary devisee; afterwards purchases copyholds which are duly surrendered to the use of his will, and by codicil devises those copyholds to his son in fee. The codicil held a republication of the will so as to subject those copyholds to the payment of debts. *Rowley v. Eytton*, 1 Mer. 128. CHARGE ON LANDS; WILL, REPUBLICATION OF.

On construction of will, legacy with prohibition to executor not to advance it unless "in case of an establishment or acquisition which may to executors seem advantageous:" Held a conditional legacy. *Pink v. De Thuissey*, 2 Mad. 157. LEGACY, CONDITIONAL.

Testator, after making a provision for the maintenance of his children, gives "all the rest, residue and remainder of his real and personal estate," to his son T, "to be a vested interest on his attaining the age of twenty-one," and "if he shall happen to die before," then to his daughter E, with remainders over. The rents and profits are to accumulate until T attains the age of twenty-one, or dies under that age. *Glanvill v. Glanvill*, 2 Mer. 38.

The testator bequeathed to A, "should she survive, and continue unmarried; all his goods, chattels, estate and effects at time of his death, to use, occupy and possess the same during the term of her natural life, and from and immediately after her death," he disposed of the same. A married. The conditions held to be only in *terrorem*. *Marples v. Bainbridge*, 1 Mad. 590. MARRIAGE; CONDITION IN TERROR.

Bequest of "120*l.* per annum, (that is to say) the interest of 4000*l.* of three per cent. consols" to A, and

direction that interest, as it becomes due, be added to principal, till A attains twenty-one, except 20*l.* per annum for clothes, gives a vested interest. *Stretch v. Watkins*, 1 Mad. 263. VESTED INTEREST.

Construction of will, whether issue take by way of purchase or limitation. *Lyons v. Mitchell*, 1 Mad. 467.

Devise of real estate in trust to sell, and out of the money to pay debts, &c. and with the surplus to maintain and educate the daughter of the testatrix until twenty-one, or marriage. But if she should die unmarried under twenty-one, all such money as should remain in the hands of the trustees, or such parts of the real estates as should remain unsold, (if any,) to be to the use of A. The daughter lived to attain twenty-one. This is a conversion out and out, and the real estate remaining unsold at her death goes to her personal representative. *Ashby v. Palmer*, 1 Mer. 296. CONVERSION; ADMON. OF ASSETS.

Legacy to A of 12,000*l.*, and to B 4000*l.*, the latter sum directed to be paid out of money in the hands of the testator's agent. At the time of testator's death, there was a sufficient fund in the agent's hands to answer this legacy; but the general assets did not extend to the payment of both. Legatee of the 4000*l.*, held entitled to be paid by priority. *Acton v. Acton*, 1 Mer. 178. PRIORITY OF PAYMENT.

Testatrix bequeaths all her personal estate to trustees in trust to sell, and out of the produce to pay all debts; "and in the next place to pay to A 300*l.* due on bond." The testatrix owed only 120*l.* to A upon bond; but the court decreed payment of the whole 300*l.* *Whitfield v. Clement*, 1 Mer. 402. ADMON. OF ASSETS.

Devise upon trust by mortgage, or out of the rents and profits, to pay debts, and afterwards to raise portions for the testator's daughters, "such portions to become due, and be considered as vested at the expiration of two years next after my decease, if my debts shall be then paid." This is a condition precedent to the portions becoming vested; and one of the daughters having died while her portion remained unpaid, upon a question between her representative, and the persons who would be entitled in the event of the portion not having become vested in her life-time, an inquiry was directed as to the time when the debts were, or might have been paid. *Bernard v. Mountague*, 1 Mer. 422. See 11 Ves. 508 a. note. INTEREST WHEN IT VESTS; CONDITION PRECEDENT.

Testator contracts for the purchase of a house, and afterwards by a codicil to his will, gives to A, his executor, "the house which he had given a memorandum of agreement to purchase, and which was to be paid for out of timber which he had ordered to be cut down." This amounts to a direction that the purchase money for the house shall be so provided for: and evidence was admitted to shew what was the order given by the testator, with reference to the cutting of timber. *Sandford v. Raikes*, 1 Mer. 646. ADMON. OF ASSETS.

Testator gives his personal estate to trustees upon trust to pay the interest to his daughter E D for her life, and after her decease to pay and divide the principal among the children of his said daughter, and the issue of a deceased child as she should appoint, and in default of appointment to go to, and be equally divided among them, and if but one, then to such only child, the portions of sons to be paid at their respective ages of twenty-one, and of daughters at their respective ages of twenty-one, or marriage. If no issue, or all die before their respective portions become payable, then over. The shares are so given as to vest immediately in the children of E D, though liable to be divested by all dying under twenty-one without issue. The share of a child so dying, was therefore held to

pass to its representative. *Skay v. Barnes*, 3 Mer. 335. **INTEREST, VESTED.**

A devise over upon a contingency, does not of itself prevent the shares from vesting in the meantime, provided the words of bequest be in other respects sufficient to pass a present interest, although such a devise over, the entirety may be called in aid of other circumstances to shew, that the present interest was intended to pass. *Id.* 340. **INTEREST, VESTED.**

Construction of a will, devising specific parts of the estate to certain persons for their lives, the residue after the death of those persons, to others, some of whom were the heirs at law; that the words "after the death," &c. meant only subject to the life estates, repelling the implication of an estate for life in the residue, if it could arise; and whether it could, where some of the devisees were not heirs, *quære?* *Dyer v. Dyer*, 19 Ves. 612. S. C. 1 Mer. 414.

Testator gave all his real and personal estate to his executors, in trust to pay legacies, and after a particular disposition gave the residue of his property in trust for his next of kin, directing his executors to pay any debts upon any evidence they think proper, except the claims mentioned in the margin: a general conversion into a mixed fund, applicable to all debts, none being mentioned in the margin, on evidence satisfactory to the executors, although not strictly legal. *Mildred v. Robinson*, 19 Ves. 386. **CONVERSION.**

Legacy without any interest to A, if claimed within fifteen years from the testator's death; if not the same sum without interest as aforesaid to B: no claim being made by A, decreed to B with interest from the end of five years at four per cent. *Careless v. Careless*, 19 Ves. 601. S. C. 1 Mer. 384. **INTEREST ON LEGACY.**

Testator directs the residue of his effects to be divided for certain charitable purposes named by him, "and other charitable purposes I do intend to name hereafter, after all my worldly property is disposed of to the best advantage." Codicil naming no other purposes. A bequest to charity to be executed by the court, having regard particularly to the objects specified. *Mills v. Farmer*, 19 Ves. 483. **CHARITY, CY PRES.**

Trust by will to permit testator's wife to receive interest and rents for life, for the maintenance of herself and children, and in case of her marriage that the interest, &c. shall not be paid to her any longer, but be applied by his executors and trustees (she being an executrix with them) for maintenance of the children, revoked on her marriage, and not restored by a general residuary disposition to her. *Duncan v. Duncan*, 19 Ves. 396. **LEGACY, CONDITIONAL.**

Under a bequest over, after an interest for life by words importing both a joint interest and a tenancy in common as to three, "or the survivor, share and share alike," the period to which the survivorship relates, depends not on any technical words, but on the apparent intention collected from the particular disposition, or the general context. *Newton v. Ayscough*, 19 Ves. 534.

Devise to trustees for ninety-nine years upon the trusts hereinafter expressed, and from and after the expiration or other sooner determination of the said term in strict settlement. The term on trust being declared, decreed to attend the inheritance, according to the limitations of the will, and no resulting trust for the heir upon apparent intention to devise immediate estates, subject to the term, not future estates expectant on its determination. *Sidney v. Shelley*, 19 Ves. 352. S. C. Coop. 206. **TERM TO ATTEND; HEIR AT LAW; TRUST RESULTING.**

Where a devise is made subject to be reduced to a certain extent on the happening of a given event, that is the condition or ground of reduction, and if the

event never happens, the ground of reduction is gone, and the devise remains entire and absolute. *Tregonwell v. Sydenham*, 3 Dow, 210.

Under words in will "to pay to each of my younger children (three daughters,) as and for their respective portions, a sum equal to one-fourth of what shall remain to my (eldest) son William, payable to each of my said daughters respectively, at her or their respective ages of twenty-one, or marriage, &c. held that all daughters were only entitled to a sum equal to a fourth of what remained to the eldest son, or each of them to one seventh, (such appearing to be testator's intent,) and that the time of testator's death was that at which the amount of his property and proportions of the shares were to be computed. *Colclough v. Gaten*, 3 Dow, 267.

Wherever lands, &c. which would descend to heir at law are devised for the purposes which law will not suffer to take effect, the heir at law shall have the benefit of the interest so devised as undisposed of, whether the testator intended he should have it or not. *Tregonwell v. Sydenham*, 3 Dow, 196. **RESULTING TRUST; HEIR AT LAW.**

Testator limiting remainder to his right heirs, shews his intention, that failing the devise, the heirs should take. *Id.* 208. **RESULTING TRUST; HEIR AT LAW.**

Portion by will on marriage with consent of the executors, or the major part of them, their heirs or executors, &c. One of the survivors consenting, and the other declining to interfere, inquiry directed whether the intended marriage was suitable, and if so, a proposal for a settlement to be received. *Goldsmid v. Goldsmid*, 19 Ves. 368. S. C. Coop. 225. **CONDITION OF CONSENT; SETTLEMENT BY COURT.**

A bequest by the obligee to one of joint obligors of debt due on bond, in these terms: "I remit and forgive to A, the sum of 500*l.*, which he stands indebted to me on his bond, and I direct said bond to be delivered up to him and cancelled." Held merely a personal bequest to A, and lapses by his death in lifetime of testator. Therefore surviving obligors and representatives of A are not released from bond. *Isen v. Butler*, 2 Price, 34. **LAPSED LEGACY; DEBTOR & CRED.**

Bequest over in case of death of devisee generally, and not expressly referable to any certain event or time, within or before which such dying must occur, to give effect to the remainder: Held not necessarily to refer to a dying in the lifetime of the testator, but will be construed so as to give effect to such intention on part of testator as may be presumed from the language of the will to have been his object. *Hervey v. M'Laughlin*, 1 Price, 264.

Bankruptcy held not a forfeiture under a clause in a will against alienation. *Wilkinson v. Wilkinson*, Coop. 259. **FORFEITURE; BANKRUPTCY.**

Direction to trustees to cut trees in aid of testator's real and personal estate: held not a trust, but a mere power, upon the whole of the will. *Gower v. Eyre*, Coop. 156. **TRUST; POWER.**

Maintenance ordered, upon the fair inference of intention, where legacy is given to children "when" and "as" they attain twenty-one, with survivorship in case of any dying under that age; and if all die, the legacy to cease. *Lambert v. Parker*, Coop. 143. **MAINTENANCE.**

Devise in trust to sell in such manner, and at such time as the trustees shall think proper. The period of conversion, as between those entitled for life and in remainder, depends not upon an arbitrary discretion, nor even a sound direction in each case, but upon some fixed rule, ascertaining a given period; as upon a trust to sell with all convenient speed; controlled in that instance by consent. *Walker v. Shore*, 19 Ves. 387. **TRUSTEES, DUTIES OF.**

Devise in trust for a son of the testator's nephew

A, at the age of twenty-four; if he have no son, to a son of the testator's great nephew B; but if neither have a son, then to a son of the testator's great niece's daughter, taking his name; whoever should take, not to be put in possession of any of the testator's effects until twenty-four; nor the executors to give up their trust "till a proper entail be made to the male heir by him;" is an executory trust in tail for an only son of A, in ventre at the testator's death, and not void for uncertainty, nor too remote. *Blackburn v. Stubbs*, 2 V. & B. 367. WILL, UNCERTAINTY; LIMIT, TOO REMOTE; TRUST EXECUTORY.

"Heir," or "heir male of the body," in the singular number, words of limitation, not of purchase, unless words of limitation superadded, or the context shews that those words are not used in their technical sense, as the word "issue," or "without impeachment of waste;" a limitation to trustees to preserve contingent remainders; or a direction so to frame the limitation, that the first taker shall not have the power of barring the entail. *Id.* 371.

Appointment of a sum of money by will, the appointee to pay an annuity and give bond for the payment. The appointment lapsing by the death of the appointee in the life of the testator, the annuity is a trust by way of legacy, and not a condition. *Taylor v. George*, 2 V. & B. 381. TRUST.

Annuities bequeathed to testator's brothers and nephews during their respective lives, payable out of lands held for a term of years, "provided my interest therein shall so long continue," and in case they should die before the expiration of the said leases of the said lands, to go to the plaintiff; held to be charges on the lands, and on the lease subsisting at testator's death, and on any future renewals obtained by the executors. *Stubbs v. Roth*, 2 Ball & B. 548. CHARGE ON LAND.

A devise of real estate to A, and the heirs of his body lawfully begotten, and in case of his death without leaving issue of his body, to go over, the testator then bequeathed the residue of his personal estate to A, and in case he should happen to die without issue of his body lawfully begotten, then, in such case, the residue should also go over. The bequest over of the residue not too remote, but a good executory bequest, as depending on the same event on which the real estate had been limited over. *Foley v. Irwin*, 2 Ball & B. 435. EXECUTORY BEQUEST; LIMITATION OF PERSONALS.

Testator expressing his will and desire that one-third of the principal of his estate and effects be left entirely to the disposal of his wife among such of her relations as she may think proper, after the death of his sisters: a trust for her next of kin at the time of her death, having made no disposition. *Birch v. Wade*, 3 V. & B. 198. TRUST, IMPLIED.

Construction of a will, whereby specific legacies are given out of a specific debt. *Smith v. Fitzgerald*, 3 V. & B. 2. LEGACIES, SPECIFIC.

Construction of will passing an estate originally on mortgage, but foreclosed, the testator's intent being to dispose of all his interest, though inaccurately mentioned both as land mortgaged, and as money due on mortgage. *Silverschildt v. Schiott*, 3 V. & B. 45. MORTGAGE.

Will of mortgagee, disposing of the money, carries his interest in the land. *Id. ib.*

Clear words in the operative part of a clause, not controlled by ambiguous words in the introduction. *El. Orford v. Churchhill*, 3 V. & B. 67.

Where there is a total want of persons properly answering the description; others, who do not so completely answer it, may be let in; grandchildren, for instance, under a liberal construction of the word "children," if there are none; but no such instance, if there are children. *Id. ib.*

Interest, from testator's death, upon legacies to his

grandchildren, by implication; the object being a provision and maintenance for the legatees, described as infant orphans, and some of them illegitimate. *Hill v. Hill*, 3 V. & B. 183. INTEREST ON LEGACIES.

Construction of a devise in fee, subject to, and chargeable with, annuities, upon the intention, collected from the whole will, a beneficial devise, and not a trust resulting to the heir at the surplus beyond the annuities. *King v. Dawson*, 1 V. & B. 260. RESULTING TRUST.

Distinction between a devise charged with debts, and on trust to pay debts. The former a beneficial devise, subject to the particular purpose; the latter limited to the particular purpose; and therefore the interest not exhausted is a resulting trust for the heir. *Id.* 272. RESULTING TRUST; TRUST TO PAY DEBTS.

Devise, after a direction that all the debts shall be paid, amounts to a charge. *Id.* 274. CHARGE ON REAL ESTATE.

Legacy, reciting the probability that the legatee was not living, upon express condition that he shall return to England, and personally claim of the executrix, or in the church porch: if he shall not so claim within seven years, to be presumed dead, and the legacy to fall into the residue. The legatee not having returned, and dying abroad within seven years, the legacy was held not due; the existence of the legatee, though appearing otherwise, being to be proved by the particular means prescribed, and therefore not within the cases from the civil law, where, the end being obtained, the means were not essential. *Tulk v. Houlditch*, 1 V. & B. 248. LEGACY, CONDITIONAL.

Devise of real estate, though in form residuary, is specific. *Hill v. Cook*, 1 V. & B. 175. REAL ESTATE.

Devise, after payment of debts, legacies, &c., of specific freehold and leasehold estates to A, subject to incumbrances, and of all other his freehold and leasehold estates, together with all his personal estate, to trustees, to sell, and out of the money, in the first place, to pay their expenses in execution of the will or trust, and, without further disposition, appointing the trustees executors: a resulting trust as to the produce of the real estate for the heir at law. *Id.* 173. RESULTING TRUST.

Where a testator means to convert real estate into personal for a particular purpose, if that purpose cannot be served, the court will not infer any other purpose. *Id. ib.* LAND DEVISED FOR SALE.

Devise of freehold estate, in trust to sell and apply the money towards payment of the legacies; the residue of the personal estate, after payment of debts, legacies, &c., upon trust to convert all the said residue of his personal estate into ready money to be laid out in freehold property, to be settled. The personal estate leaving a residue beyond the charges, the real estate a resulting trust for the heir at law, and charged with the legacies, not primarily, but only as an auxiliary fund to the personal estate. *Maugham v. Mason*, 1 V. & B. 410. RESULTING TRUST; CHARGE ON REAL ESTATE; TRUST TO PAY DEBTS.

Bequest to a son of the testator on his accomplishing his apprenticeship, with the dividends in the mean time for maintenance; and in case he shall die, before he accomplishes his apprenticeship, then, and in such case, to the other children. The legacy lapsed by the death of the legatee, having accomplished his apprenticeship in the testator's life. *Humberstone v. Standish*, 1 V. & B. 385. LEGACY LAPSED.

Bequest over, in case of the death of a legatee before a certain period, takes effect on his death within that period during the testator's life. *Id.* 388. LIMITATION OVER.

Where the vendor of an estate would have absorbed the personal assets in payment of his purchase-money, a rateable contribution was decreed, as between the

devisee of the estate, and the legatees and annuitants under the purchaser's will. *Headley v. Readhead*, Coop. 60. CONTRIBUTION; ADEMP. OF ASSETS; MARSHALLING ASSETS.

After a general direction that debts, funeral, and testamentary charges shall be paid, and a bequest of the personal estate, subject to the payment of those charges, the testator, in case his personal estate should not be sufficient to discharge "the same," charged his freehold estates with payment "thereof," and "subject thereto," gave all his freehold and copyhold estates, which he had surrendered, or intended to surrender, to the use of his will. The copyhold estates charged. *Noel v. Weston*, 2 V. & B. 269. CHARGE ON COPYHOLD ESTATES.

Construction of a residuary clause, after a bequest to the testatrix's younger children: "but in case I shall have but one child living at the time of my decease," or all but one die under twenty-one and unmarried, to another family; not a condition. Residuary bequest is therefore established in the event of the testatrix's death, having never had a child. *Murray v. Jones*; *Fawcett v. Jones*, 2 V. & B. 313.

Construction of devise, as applying to the body of the estate, or merely a reversion from the combination of it with other estates, and the general inaptitude of the expressions, &c. *Welby v. Welby*, 2 V. & B. 192.

Where discretionary power is given by will to trustees, to invest fund in real or personal estate, and it is to be collected from the whole will, that it shall be invested in real estate, though never invested, it shall be regarded as real estate. *Cowley v. Hartstonge*, 1 Dow, 361. TRUSTEES, DISCRETIONARY POWER; ADEMP. OF ASSETS.

If testator's intention is clearly manifested on will to give an unlimited discretion to trustees, the court will not controul it; but in general, discretion must be held to refer to the limitations in the will. *Id.* 378. TRUSTEES, DISCRETIONARY POWER.

Testator, by will, gives annuity to wife and legacies to children: knowing that his personal estate was insufficient to answer these purposes, he says nothing about his real estate, but appoints certain persons trustees of inheritance for the execution of his will. Semble. The trustees took an interest in real estates for the purposes of this will. *Trent v. Trent*, 1 Dow, 102. CHARGE ON REAL ESTATE.

Under the description of "children" in a will, illegitimate children existing at the date of the will, not entitled, unless proved by the will itself to be intended; and evidence can be received only for the purpose of collecting who had acquired the reputation of children. An only legitimate son therefore held entitled as devisee. *Swaine v. Kennerley*, 1 V. & B. 469. BASTARD.

Devise in trust for payment of debts, does not revive a debt, upon which the statute of limitation had taken effect by the expiration of the time before the testator's death. *Burke v. Jones*, 2 V. & B. 275. LIMITATION, STATUTE OF; TRUST TO PAY DEBTS.

Ademption of a legacy from a father to his then unmarried daughter, by a portion of equal amount, afterwards advanced by him on her marriage, as equity will not, where there is a contradictory evidence, reject the presumption arising from the will and marriage settlement, and decide against the legal effect and operation that it is to be attributed to them. *Dwyer v. Layne*, 2 Ball & B. 156. LEGACY, SATISFACTION OF.

Devise in trust to sell, but not for less than 10,000*l.*, and to pay several sums, amounting to 7800*l.*, and the overplus monies arising from the sale to A. A specific legacy of 10,000*l.* and the sale producing less, A and the others to abate. Legacies to charity void by the stat. 9 Geo. 2. c. 36. fell into the general

residue. *Page v. Leapingwell*, 18 Ves. 463. LEGACY, ABATEMENT OF.

A bequest of an annuity charged upon the testator's leasehold interest during the term of the said lease, extends to, and is a charge upon every renewal obtained by the devisee of the leasehold interest; the annuitant must contribute to renewal fines in proportion to his interest. *Winslow v. Tighe*, 2 Ball & B. 195. CHARGE ON LANDS; CONTRIBUTION; LEASE RENEWAL, FINES ON.

Under a bequest to such child or children, if more than one, as A may happen to be enient of by me; a natural child of which she was then pregnant cannot take, though a bequest to the natural child of which a woman was enient, without reference to any person as the father, would probably be good, having no uncertainty. *Earle v. Wilson*, 17 Ves. 528. BASTARD EN VENTRE; LEGACY.

A legacy to the heir not sufficient to defeat his claim to the undisposed real estate. *Kellott v. Kellott*, 1 Ball & B. 543. Affd. 3 Dow, P. C. 248. HEIR AT LAW.

Whether the case of resulting trust arises between the heir and next of kin, or heir and residuary legatee, the question is, what is the residue? *Id.* *ib.*

Devise when the devisee attains twenty-one, a resulting trust for the heir until that period, and by the previous death of the devisee, the remainder accelerated. *Chambers v. Brailsford*, 18 Ves. 368. HEIR AT LAW; TRUST RESULTING.

No devise by implication from the mere recital of an erroneous conception of right. *Dashwood v. Peyton*, 18 Ves. 27. ESTATE BY IMPLICATION.

Directions to trustees to correct any defect, or incorrect expression in the will, and to form the settlement from what appears to them to be the testator's real meaning, does not authorise them to change the limitations. *Stanley v. Stanley*, 16 Ves. 491. TRUSTEES, POWER OF.

Direction for sale or transfer of stock, without attention to rise or fall, the party must take it as it happens at the time of appropriation. *Exp. Pye*, 18 Ves. 141. STOCK.

Conversion directed by will, of real estate into personal, not to all intents, but for the purpose only of answering legacies and annuities, subject to that as to the real estate, a resulting trust for the heir, which cannot be affected by an unattested codicil, bequeathing a lapsed share of the residue. *Hooper v. Goodwin*, 18 Ves. 156. TRUST, RESULTING; HEIR AT LAW; CONVERSION OF REAL ESTATE.

The presumption of intention to satisfy a legacy, by a portion to a child, from a parent, or a person placing himself in *loca parentis*, not raised upon a legacy, not described as a portion; the legatee reported to be the testator's natural child, described not so, but as the daughter of another man. *Exp. Dubaut*, 18 Ves. 140. LEGACY, PRESUMP. OF SATISFACTION; PAR. & CHILD.

Copyhold conveyed in trust to sell, the money to be deemed part of his personal estate, and in trust for such uses as he should, by deed or will, appoint, and in default for his right heir. A will, executed on the same day, but not referring to the deed, directing a sale of particular property, and disposing of the personal estate in general terms, held not applicable to the estate conveyed by the deed, which went to the heir, no use being, by the subsequent instrument, declared, if the estate was converted. *Lowe v. Hackwood*, 18 Ves. 168. POWER.

Where in a will the intention of the testator being to provide an auxiliary fund for legacies, and not a complete conversion out and out, the residue of the real estate, after making good the deficiency of the personal in payment of legacies, is a resulting trust for the heir, notwithstanding a legacy given him, and the testator appointed and devised residuary legatees.

*Kellatt v. Kellatt*, 1 Ball & B. 533. **Affid. 3 Dow, P. C. 248. RESULTING TRUST; HEIR AT LAW.**

Devise of real and personal estate in trust for debts and legacies, void under the stat. 9 Geo. 2. c. 36. as a charge of charity legacies upon the real and leasehold estates, and money on mortgage; but on a deficiency of assets, the other legatees preferred to the heir. *Currie v. Pye*, 17 Ves. 462. **MORTMAIN; ADMON. OF ASSETS.**

Devise in trust to pay several persons 1000*l.* each, on the death of any, in case of a deficiency, the others abate; but if to pay debts and legacies, and one legatee dies, the trust is for the other legatees, if necessary, *id.* 466. **LEGACIES, ABATEMENT OF.**

Testatrix gave all her estate, real and personal, to her daughter and her heirs, and half the navigation money for her natural life, and in case she dies without issue, all to be divided between four nephews and nieces named; the part of one only for life, and then to be divided between the survivors. The limitation over too remote, there being no expression or circumstance to limit the generality of the words to a failure of issue at the time of the death: as to what property it extends to, *qu?* *Barlow v. Salter*, 17 Ves. 479. **LIMIT. TOO REMOTE.**

Devise for life, and in default of issue, to another for life, and in default of his issue, and under over; the limitation over void, as to the personal property, either as too remote, or an estate tail by implication. *Id.* 484. **Id.**

Devise in strict settlement, with a clause of forfeiture, by cutting any trees. Upon a bill by the infant remainder-man in tail, an inquiry was directed, whether any trees, in the park, not ornamental, or affording shelter to the mansion-house, are proper to be felled; and whether it would be for the benefit of all parties interested, that they should be felled, and sold, and the money laid out in other estates to be settled to the same use. *Delapole v. Delapole*, 17 Ves. 150. **PR. INQUIRY BEFORE MASTER; TIMBER.**

Devise to A and his heirs, with a direction, that yearly he and his heirs shall for ever divide and distribute according to his and their discretion, amongst the testator's poor kinsmen and kinswomen, and amongst their offspring and issue, dwelling within the county of B, 20*l.* by the year. This is in the nature of a charitable bequest, and the will being made in 1581, was sustained, and inquiries directed as to the poor relations dwelling within the county of B. *Att. Gen. v. Price*, 17 Ves. 371. **CHARITY.**

Legacies to the same persons by distinct instruments accumulative, subject to be repelled by internal evidence; as where the same sum is given for the same cause; whether by the mere equality of amount, *qu?* *Benyon v. Benyon*, 17 Ves. 34. **LEGACIES, ACCUMULATIVE.**

Construction of a will, giving to the testator's daughter by the description of heir under his will, the legacy of a legatee, who died during the testator's life, by way of special substitution, not merely by lapse to her, as the residuary legatee. *Rose v. Rose*, 17 Ves. 347.

Conversion of real estate into personal, by will for particular purpose, which failed; held a resulting trust for heir. *Williams v. Code*, 11 Ves. 500. **CONVERSION OF PROPERTY; HEIR AT LAW; TRUST, RESULTING.**

General residuary disposition of real and personal estate not herein-before specifically disposed of, held to comprehend specific legacies lapsed, the word "specifically" being construed "particularly." *Roberts v. Cook*, 16 Ves. 451. **RESIDUE; LEGACIES LAPSED.**

Resulting trust for the heir; the only express devise being to convey to the devisor's son, from and after his age of thirty, which he did not attain, and no devise by implication, from a declaration, that he shall

have no power over the estate, until his age of thirty. *Nash v. Smith*, 17 Ves. 29. **HEIR AT LAW, TRUST, RESULTING.**

Trust by will, subject to an interest for life, to pay and transfer to the testator's nephew and nieces, equally at twenty-one, with survivorship, in case any should die before his or their shares should become payable, and a limitation over, in case all should die, &c. Vested interest at the age of twenty-one, before the death of the tenant for life. *Hallifax v. Wilson*, 16 Ves. 168. **INTEREST, WHEN VESTED.**

Legacy at the decease of a person entitled to the fund out of which it is given, vested immediately, and payment only postponed. *Blamire v. Geldart*, 16 Ves. 314. **INTEREST, WHEN VESTED.**

Residuary devise and bequest for such of the testator's relations and kindred, in such proportions, &c. as his executor should think proper, recommending and advising his said executors and executors to give the greatest share to such person and persons, who in their opinion and judgment should appear to them to be his nearest relations, and most deserving, declaring his intention not to controul their discretion, but that every thing relative to that disposition, who were his relatives, and the proportions, should be entirely in the discretion of the said trustees and executors, and the heirs, executors, administrators, of the survivor of them: held, a trust and a power, the ground of the power being personal confidence, it is *prima facie* limited to the original trustees, not without express words passing to others, to whom by legal transmission the same character may happen to belong; and cannot be executed by the devisees and executors, for that specific purpose only, of the surviving trustee; a trust, therefore, executed by the court for the next of kin at the death of the testator, according to the statute of distributions. *Cole v. Wade*, 16 Ves. 27. The real estate, except what was converted in execution of the power taken by the next of kin as real: the will not operating a conversion out and out; the representatives, therefore, the trust being disappointed, taking the respective estates as they find them, having no equity against each other. The costs apportioned according to the value of the real and personal estates. *Waller v. Maunde*, 19 Ves. 424. **TRUST EXECUTED BY COURT; TRUSTEES, DISCRETIONARY POWER.**

A bequest of a sum of money "for building a house for twelve decayed gentlewomen," is valid and not against the mortmain acts in Ireland. Whether a bequest of a sum of money to be applied in clothing such poor children as should be educated in the school of the nunnery of W, be legal, *quere?* An inquiry directed to ascertain the character and description of the school. *Att. Gen. v. Power*, 1 Ball & B. 145. **MORTMAIN.**

Construction of a residuary claim, as comprehending a legacy given upon a contingency, which did not happen. *Bird v. Le Fevre*, 15 Ves. 589. **RESIDUE, WHAT.**

Trust to pay dividends of stock to the testatrix's niece for life, and after her death to divide the capital among the brothers and sisters of the testatrix, and in like manner to the survivors or survivor of them, the shares of those who died in the life of the niece, passed to their representatives. *Hallifax v. Wilson*, 16 Ves. 171. **INTEREST, VESTED.**

Residue bequeathed in trust to be laid out in real estates, to be settled to the same uses as estates devised to the trustee for life, successively without impeachment of waste with various limitations in strict settlement, all the estates for life being without impeachment of waste, and the ultimate remainder in fee, the trustees having laid out part of the fund in an estate with a considerable quantity of timber upon it, taking that to be a sound exercise of discretion,



the first tenant for life cannot cut the whole. *Burges v. Lamb*, 16 Ves. 174. **TENANT FOR LIFE; WASTE.**

Charge by will on real estate of simple contract debts of another person, considered as a legacy carrying interest from the death of the testator at four per cent. *Shire v. Westley*, 16 Ves. 393. **INTEREST, WHEN PAYABLE; CHARGE TO PAY DEBTS OF ANOTHER.**

Bequest of the produce of the sale of a copyhold estate to A, the wife of B, for life, and after her death, to divide the principal among the children of B and C, equally; and of the testator's reversionary interest in bank stock, on the death of D, if in his name at his decease, and if not, at D's death, equally among the same children: vested interests in all the children, comprising those who died, and those who came into existence after the death of the testator, and during the lives of the tenants for life. *Hether v. Shore*, 15 Ves. 122. **INTEREST, VESTED.**

A direction for maintenance, in general terms, comprehending all children not restrained by the bequest of the capital in terms limited to those living at the date of the will. *Freemantle v. Taylor*, 15 Ves. 363. **MAINTENANCE.**

Bequest of residue in trust, in case A shall, within six calendar months after the testator's decease, give security not to marry B; then, and not otherwise, to pay to the children of A, with a proviso to go over, if she shall refuse or neglect to give such security. A condition precedent. The six months are exclusive of the day of the testator's death; therefore, as he died on the 12th January, between eight and nine in the evening, a security given on the 12th July, about nine in the evening, was held sufficient. *Lester v. Garland*, 15 Ves. 248. **COMPUTATION OF TIME; CONDON, PRECEDENT.**

Bequest of 3000*l.* on trust to apply the dividends to the maintenance of A, until twenty-one, and afterwards to pay the whole dividends to him for life, with power to the trustees before his age of twenty-six, to raise and pay not exceeding 600*l.* towards or in order to his preferment or advancement in life, or his other occasions as they should think proper. Upon a claim of the whole at the age of twenty-one, as absolute property, inquiry directed as to his circumstances, and whether they required the advancement of any and what part, before he should attain twenty-six. *Lewis v. Lewis*, cited 15 Ves. 527. **ADVANCEMENT.**

Devise to A for life of an estate *pur autre vie*, with power to will it to B, and his lawful issue, in such manner as A shall think proper, and in case A shall die intestate, then to B and his lawful issue, with remainder over to plaintiffs. This is a vested estate tail in B, liable to be divested by the execution of the power in A. A and B can, by deed conveying their estates, bar the remainder over. *Osborne v. Bury*, 1 Ball & B. 53. **INTEREST, VESTED.**

Testator directed that all his plate, furniture, &c. at his mansion-house should remain there as heir looms, and devised the same to trustees, upon trust to permit the same to go, together with the mansion-house, to such persons as should, from time to time, be entitled to it for so long time as the rules of law and equity would permit; and devised his real estates to trustees to the use of several persons and their first and other sons, &c. successively in strict settlement. The absolute interest in the personal chattels vested in the first tenants in tail, and upon his death, under age passed to his representative. *Carr v. Ld. Erroll*, 14 Ves. 478. **INTEREST, VESTED.**

Bequest to the child or children of the testator's two daughters in terms creating a tenancy in common, viz. equally to be divided, &c. to be paid at twenty-one or marriage of daughters, with survivorship upon the death of any before his or their shares become pay-

able; the accrued share to be equally divided, and to be payable, &c. as the original shares; the issue of any dying in the lifetime of the two daughters to stand in the place of the parent, and a limitation over in case his daughters die without issue, or having had issue, such issue should die in the lifetime of his daughters. The event of a death of a child above twenty-one not being within the survivorship expressed, his interest vested in his representative subject to the ultimate contingent limitation. *Bayard v. Smith*, 14 Ves. 470. *Id.*

Legacy to the children of A, to be equally divided among them, and if either of them die before twenty-one, their share to go to the survivors, a vested interest in the children living at the testator's death subject to be divested in the event pointed out; after-born children, therefore, excluded. *Davidson v. Dallas*, 14 Ves. 576. **POSTHUMOUS CHILD.**

Legacy in trust to pay the interest to the separate use of A for life; and after her decease, as to the capital, for her children; if no child, to pay the interest to her husband during his life; and from and after his decease, in case he shall become entitled to such interest, then to pay the principal to other persons. Though the husband, having died during his wife's life, never became entitled to the interest, the limitation over was established, as distinguished from the case of express condition. *Pearsall v. Simpson*, 15 Ves. 29. **LIMIT OF PERSONALS.**

Upon appeal, the Ld. Chancellor's opinion being that the reversion of the copyhold estate passed under the general devise, "as to all such worldly estate and effects as it may please God to bless me withal, or I may leave, or I may be entitled to at the time of my decease, whether real or personal, not before given or disposed of," especially if there was no freehold estate: inquiries were directed to ascertain that fact, and also whether there was any custom of surrendering a vested interest in reversion or remainder expectant upon an estate tail. *Church v. Mundy*, id. 396. **INQUIRY BEFORE MASTER.**

Legacy of "5000*l.* sterling, or 50,000 current rupees," afterwards described as "now vested in" the E. I. Company's bonds, and sometimes mentioned as "the said sum of 5000*l.* sterling," held not specific, but general, as a demonstrative legacy, with a fund pointed out: a construction to be favoured for a natural child, as giving a provision in all events: the will also giving one legacy, clearly specific, viz. the sum of 3548*l.*, "which said sum is in two bills," described as then lying for acceptance. *Gillanne v. Adderley*, 15 Ves. 348. **LEGACY, SPECIFIC.**

Devise of real estate to be sold, and the produce, with the personal estate upon trust, to be laid out in lands, or the funds subject to the debts and legacies for the maintenance of a charity in Scotland, void as to the produce of the real estate, valid as to the personal property, by the effect of the option. *Curtis v. Hutton*, 14 Ves. 537. **MORTMAIN.**

Residuary clause to be "divided amongst my next of kin as if I had died intestate," a bequest to the next of kin, as they would take under an intestacy and the widow is not one of the next of kin in the ordinary sense in which the testator used the words. *Garlic v. Ld. Camden*, 13 Ves. 372. **NEXT OF KIN.**

*Primâ facie* bequest by a husband to his next of kin, does not include his wife, nor does a similar bequest by a wife under a power include her husband. *Id.* 382.

Legacy to A, to be paid to her as soon as she shall attain twenty-one, and in case she shall live to that age, and not otherwise, or upon her marriage with consent of the executors and not otherwise, but in case she shall die before she shall have attained twenty-one, or be married with such consent, over: held a condition precedent, and by her marriage



under age without consent, one executor being dead and the other resident abroad, reduced to the single contingency of her attaining twenty-one. *Knight v. Cameron*, 14 Ves. 389. CONDITION PRECEDENT.

A payment for mourning rings, though not directed by the will, allowed under the discretion given to the executors. *Price v. Archbp. Canterbury*, 14 Ves. 361. EXORS. POWER OF.

Bequest to the testator's two natural sons, with survivorship upon the death of either before twenty-one, and without issue; but in the event of both dying without issue, over; the interest beyond maintenance to be added yearly to the principal for their benefit, to be paid when they attain twenty-one. The limitation over upon the death of both established. As to the accumulation, held a vested interest, and the payment only postponed. *Kirkpatrick v. Kirkpatrick*, 13 Ves. 476. LIMIT. OVER OF PERSONAL.

Trust of a term by will to pay "the several legacies thereby given," and also "the several other legacies thereafter bequeathed." The subsequent part of the will reciting that the legacies given by the will to the testator's daughters were not an adequate provision, gave each of them a further legacy "in addition to the said legacies" given them respectively by the will. The legacies by the codicil are not charged upon the real estate. ASSETS MAINLY. *Bonner v. Bonner*, 13 Ves. 379. MARCHALING ASSETS; CHARGE ON REAL ESTATE.

Legacies to be paid out in money due on mortgage when recovered. The right to interest at four per cent., the mortgage producing five, does not depend upon the time when the money is recovered. *Wood v. Penoyre*, 13 Ves. 326. INTEREST ON LEGACIES.

A devise to J, W, C, &c. and their heirs each in due succession as named, with usual limitations in failure of issue in, and on the demise of A B, does not import an indefinite failure of issue in A B, but the limitation over to J, W, &c. is good by way of executory devise, these words meaning issue living at the time of the decease of A B the first taker. *Stratford v. Powell*, 1 Ball & B. 1. EXECUTORY DEVISE.

Distinction between marriage articles and wills; all the parties to the former considered purchasers to effectuate their intention; none of the parties mentioned in the latter are so, as the testator's intention is alone to be considered. *Id.* 25. MARRIAGE SETTLEMENT, C. OF.

Legacies to one younger child of the sum of 12,000*l.* of my funded property to be transferred in his name or employed as it shall appear most beneficial; to another the sum of 12,000*l.* in every respect the same; to a third the sum of 12,000*l.*, to be enjoyed by him in every respect as the former; the residue, real and personal, to the eldest son. The legacies to the younger children pecuniary, not specific; the fund, if deficient, to be equally divided among them. *Lambert v. Lambert*, 11 Ves. 607. LEGACY, SPECIFIC.

Distinction between a legacy given at a future time; the latter vested, and payment only postponed, the time being annexed, not to the legacy, but to the payment only. *Hixon v. Oliver*, 13 Ves. 113. LEGACY, WHEN VESTS.

Money under a direction to be laid out in land, considered as real estate under a general disposition by the will of a person, entitled to it absolutely in either shape, of "the money and land," in the absence of intention, the word "money" being answered by another fund, of stock. *Biddulph v. Biddulph*, 12 Ves. 161. MONEY TO BE LAID OUT IN LAND; ADMIN. OF ASSETS.

Devise by very general and extensive words, restrained upon the apparent intention. Devise to the first and other sons in tail male, and for want of such issue, to the daughter and daughters, her and their heirs as tenants in common, and for want of such

issue to three nieces, and their several and respective heirs for ever as tenants in common, and for want of such issue to the testator's right heirs. As to the estate of the nieces, the prior limitations having failed, and the implication of cross remainders, *qu?* *Green v. Stephens*, 12 Ves. 419. See further, 17 Ves. 64.

Maintenance not allowed upon a legacy by a grandfather to his grand-children at twenty-one with interest, though the father was not of ability to maintain them, the legacies with the interest being given over in the event of death under twenty-one. *Errington v. Chapman*, 13 Ves. 20. INFANT MAINTENANCE; GRANDCHILDREN.

A right of pre-emption given by will, whether at a price expressed, or to be fixed by the trustees, will be executed, the construction in the latter case being a reasonable price to be ascertained by reference to the master. But to pass such right to the heir or devisee, the intention to accept the offer must appear by some act, or at least by will. *El. Radnor v. Shafto*, 11 Ves. 448. RIGHT OF PRE-EMPTION GIVEN BY WILL.

Testator directed maintenance for his sons during minority, and for daughter till twenty-one or marriage, and gave her a legacy in case she should attain twenty-one payable at, and to carry interest from that time; having married at eighteen, she was allowed maintenance for the interval until twenty-one. *Chambers v. Goldwin*, 11 Ves. 1. INFANT MAINTENANCE.

Maintenance out of interest of legacy to grandchild, when youngest should attain twenty-one, refused. *Lomax v. Lomax*, 11 Ves. 48. MAINTENANCE; GRANDCHILDREN.

An express estate for life, with a power to dispose by will, does not give an absolute interest, so as to preclude the necessity of executing the power. *Reid v. Shergold*, 10 Ves. 370. POWER, EXECUTION OF; ESTATE FOR LIFE; POWER.

The words "what remains" at the close of a bequest of a specific fund, held a general residuary disposition, the full sense not being necessarily confined; comprising, therefore, personal estate bequeathed upon a contingency too remote; not being to take place until thirty years after the testator's death. *Crooke v. De launde*, 11 Ves. 330. RESIDUE, WHAT.

Leasehold estates, bequeathed in trust to pay the rents and profits to the persons for the time being, entitled under the limitations of real estate devised in strict settlement, with power to the trustees at any time, with consent of the persons so entitled, or if minors, at their own discretion to sell and invest the produce in real estate to the same uses. The leasehold estates vest absolutely in the tenant in tail upon his birth, and the power is void. *Hare v. Polhill*, 11 Ves. 257. INTEREST VESTED; POWER, VOID.

Devise of real estate to be sold, the object being a provision for legacies, is not an absolute conversion, and is therefore a resulting trust for heir at law as to surplus, though a residuary executor is appointed. *Berry v. Usher*, 11 Ves. 87. CONVERSION, RESULTING TRUST; HEIR AT LAW; SURPLUS; LANDS DEVISED FOR SALE.

Residue bequeathed to infants with survivorship among them in the event of death, under the age of twenty-one; maintenance not being directed by the will, was not ordered by the court, there being a limitation over upon the death of all under twenty-one to their sister, having no other interest in that fund though a distinct legacy by the same will. The case in which the court has given maintenance, has been where the fund being given to the children, with survivorship among them, their interests and the chance of taking the whole, as survivor, were equal; and no other person interested. *Exp. Keeble*, 11 Ves. 604. INFANT MAINTENANCE.

Construction of will confining a clause of survivor-

ship, not having issue, to the death of the tenant for life. *Jenour v. Jenour*, 10 Ves. 562.

Maintenance allowed in the case of children and grandchildren; though the interests were contingent with reference to case of survivorship, and though accumulation was directed, and no express authority for any application during minority, except for younger children surviving the eldest in the event of his death under twenty-one without issue. The court however refused to make the order on petition, and directed a bill to be filed. *Fairman v. Green*, 10 Ves. 45. INFANT MAINTENANCE; INTEREST, CONTINGENT; PR. PETITION.

On construction of will, held, that under a bequest to the younger children of A, an only surviving younger child was upon the whole will entitled; and the second having become the eldest was excluded. *Ly. Lincoln v. Peihum*, 10 Ves. 166. \* YOUNGER CHILDREN.

Portion by will given, over upon marriage without the consent of executors, a conditional consent upon the offer of a settlement retracted upon a subsequent refusal to settle, and the marriage taking place. Held, forfeiture not relievable against. *Dash v. Id. Bulkely*, 10 Ves. 230. CONDITION, BREACH OF; FORFEITURE.

Annuity, part out of general assets, part specific, upon intention out of funds, some of which were perpetual, others temporary, to be divided equally between A, B, & C, and their heirs or the survivor of them, "in order as they are now mentioned." Held, that the annuity was limited only with reference to the temporary funds, with an absolute power of disposition; and that A dying in life of testatrix, her share goes to B and C equally, the concluding words "in order," &c. being rejected as repugnant. *Smith v. Pybus*, 9 Ves. 566.

G, by articles settling in strict settlement, real estate then subject to a mortgage of 1500*l.* (which had been borrowed to pay fines of certain leasehold interests), and subject also to other incumbrances, covenanted to exonerate the real estate from the 1500*l.*, and to charge it on the leasehold. Afterwards G, by will reciting the articles, devised the leasehold to his eldest son "in order to exonerate his second real estates from the said sum of 1500*l.* and to enable his second son to pay the same, and other debts and incumbrances affecting the same;" and the will proceeded: "and I do hereby charge and incumber the said leasehold interest to be bequeathed, with the payment of the said sum of 1500*l.*" The testator also by his will confirmed the articles with the exception of certain directions therein made as to the rents and profits of the settled lands, which he thereby limited in a manner different from the articles. Held, 1st, that the words "in order to exonerate, &c., and to enable," &c. amounted to a direction, and that the devise was a trustee to pay out of the leaseholds not only the 1500*l.* but all other debts and incumbrances affecting the real; 2dly, that G, by charging such debts and incumbrances on the leasehold, meant to purchase the power of disposing of the rents and profits of the settled estate, as he did by his will differently from the provisions in the articles; 3dly, the testator's eldest son, who was tenant in tail of the settled estates, not having applied the leasehold property in exoneration thereof in pursuance of the will, and having died without suffering a recovery. Held, that the remainder man in tail had a right to compel the exoneration of the settled estate out of the leasehold. *Carey v. Carey*, 2 Scho. & L. 173. EXONERATION OF REAL ESTATE.

After a devise of freehold and leasehold interest charged with incumbrances that affected the testator's real estate, he bequeaths to the same devisee all the rest of his real and personal estates, adding "and I do hereby order and direct my second son to pay off

my just debts." This is an obligation on the son to pay off all the debts of testator in respect of the property given, and discharges a chattel interest bequeathed to another. *Id.* 188. CHARGE ON REAL ESTATE.

Bequest to testator's wife for life, and after her death to be divided between his brothers and sisters in equal shares; but in case of the death of any in life time of wife, the shares of him, &c. to be divided between his children. Held, vested, subject to be divested only by death in life of widow leaving children. *Smither v. Willock*, 9 Ves. 233. INTEREST VESTED.

Interest on the arrears of an annuity, bequeathed to a married woman for her sole and separate use, not given, though the fund was productive, and though there was a large residuum; nor in such annuities apportionable. Secus, semble, if it had been given as a separate maintenance. *Anderson v. Dwyer*, 1 Scho. & L. 301. INTEREST, WHEN PAYABLE; ANNUITY, ARRIARS OF.

Bequest of residue payable at a future time carries interest, though the legatee does not live to receive the principal. *Sisson v. Shaw*, 9 Ves. 289. INTEREST, WHEN.

Trust term by will of grandfather for raising portions provided among other events, that if the children be by their father in his life time advanced and preferred with portions as good or greater, to cease; personal property under the intestacy of father, held no satisfaction. *Twisden v. Twisden*, 9 Ves. 413. LEGACY, SATISFACTION OF.

Devise and bequest in trust to pay the income to A for use during life, with remainder in default of issue to B for his use during life; remainder in default of issue to C for life in same manner, with remainder over. The remainder after the limitation to A for life is void as too remote, and A being heir at law and residuary legatee, his title to the real estate and personal was established. *Boehm v. Clarke*, 9 Ves. 580. LIMITATION, TOO REMOTE.

Gift of 500*l.* by father to daughter, held not a satisfaction in part of legacy of 1000*l.* by previous will, the presumption against double portions in case of parent and child being repelled by circumstances, the gift not being by way of portion, but after marriage and from a particular motive appearing by declarations of testator to wife, which she proved. *Robinson v. Whitley*, 9 Ves. 577. DOUBLE PORTIONS; LEGACY, SATISFACTION OF.

Devise of a particular estate upon trust to raise and pay 400*l.* to A, held an exclusive charge not exonerated by subsequent direction for application of personal estate to debts and legacies, in exoneration of real estates before charged, which was referred to a prior charge upon estates, expressly excepting the estate charged with 400*l.* *Spurway v. Glynn*, 9 Ves. 483. CHARGE ON REAL ESTATES.

Devise upon trust by demise, sale, or mortgage or by rents and profits, to raise, &c. with all convenient speed after death of deviser, a sum, and subject thereto on other trusts. Held, interest payable at four per cent. from death. *Id. ib.* INTEREST.

Where the will, going beyond a mere charge, creates a particular fund for payment of debts, that shall be first applied in exoneration of descended estates, whether acquired after the date of the will or not, and of the personal estates even in favour of the next of kin taking it for want of disposition. Devise upon several limitations for life and in strict settlement with a direction, that incumbrances shall remain charged upon the estates respectively, until discharged by the several tenants for life, to whom they are respectively limited; all the rents and profits during the estate for life are to be applied to the incumbrances, principal as well as interest. *Milnes v. Slater*, 8 Ves. 295. INCUMBRANCES.

Bequest of the testator's fortune in India not ex-

tended under the general words, "temporal estate" in the introductory part of the will, to the property in England, part remitted from India between the will and the death, and some in its passage to England at his death. *Sadler v. Turner*, 8 Ves. 617. **CHOSE IN ACTION.**

After a legacy of stock in four per cent. consol. bank annuities, a legacy to same persons of "an additional sum of 200*l.* more, to be paid out of the four per cents." &c. was held pecuniary. *Dennis v. Test*, 9 Ves. 146. *S. C.* 1 Smith, 112. **LEGACY, SPECIFIC.**

The vesting of a legacy is not prevented by a provision for survivorship among the legatees, in case of the death of any under the age of twenty one. *Id. ib.* **INTEREST VESTED.**

Though, to effect the execution of a power by will, a direct reference to the power is not necessary, the intention must distinctly point to the subject of it; as if something is included which the testator had not otherwise than under the power, and part of the will, unless applied to it, would be wholly inoperative. *Bennett v. Aburrow*, 8 Ves. 609. **POWER, EXECUTION OF.**

Bequest to A for her and her children's use, a transfer decreed to A. *Robinson v. Tickell*, 8 Ves. 142.

Power not executed by general bequest of my estate and effects, which will pass only if the testator has an interest in; nor what he has an authority over. *Roach v. Haynes*, 8 Ves. 583. **POWER, EXECUTION OF.**

Devise to the testator's wife for life, and as soon after her decease or refusal to release dower as conveniently might be, upon trust to sell and divide the produce between five nephews, at such time as the sale should be completed, if then living; if any should die in her life or before the sale should be completed, his share to his children, if none to the survivors; the interests not vested till the sale. *Elwin v. Elwin*, 8 Ves. 547. **INTEREST VESTED.**

Legacy of "200*l.* 4 per cent. cons. bank anns." held not specific. The general assets, therefore, are liable to make up the deficiency of the fund. *Wilson v. Brownsmith*, 9 Ves. 180. **LEGACY, SPECIFIC.**

Devise to testator's wife for life, and from and after her decease to trustees on trust, to sell, and among other bequests, to lay out 500*l.* in an annuity for life of son. Held, a vested interest in son, if surviving the testator. *Bayley v. Bishop*, 9 Ves. 6. **INTEREST VESTED.**

Bequest of money in trust, to lay it out on government or other security, in purchase of annuity for life: Held on construction, to be laid out in annuity for life. *Id. ib.* **INVESTMENT.**

Testator married, but not then having children, gave the guardianship of all his children, born or to be born, to his wife and brother, or the survivor. The guardianship extends to all the children, by that or a future marriage. *Exp. El. Chester*, 7 Ves. 346. **TESTAMENTARY GUARDIAN.**

A tenant for life, in case she should so long live, and continue unmarried; in case of her marriage to her in fee; in case of her decease, unmarried, to her sister, B, in fee. A and B, and the husband of B, join in a sale by fine; the purchase-money was laid out in funds in names of trustees, without any declaration of trust, or agreement as to the application; nor was any notice of this fund taken in the wills of B and her husband. B, being the survivor, made a general disposition of all her personal estate in favour of A, although still unmarried: held absolutely entitled to the stock. *Scawen v. Blunt*, 7 Ves. 294. **ADMON. OR ASSETS.**

Where the suit is occasioned by a difficulty arising from the will of the testator, the costs are to be paid

out of the general fund. *Pearson v. Pearson*, 1 Sch. & L. 12. **PA. COSTS.**

Bequest to three children in thirds respectively, with a direction that they should not be put in possession till their respective attainments of particular ages, and in case of the death of either of the above-named children before the ages mentioned, that third to be equally divided between the two surviving children, and in the event of the death of two before the respective ages above-mentioned, then the whole to devolve to the surviving child; but should all his children die before they should attain their said respective ages, then the whole of his estate was given over. One died having attained the age mentioned; afterwards another died under that age; the share of the latter a vested interest in the child who died first, and the survivor attaining the age specified. *Wilmut v. Wilmut*, 8 Ves. 10. **INTEREST VESTED.**

Legacies to two sisters, with a direction in case of the death of either, reciprocally to devolve to the other, that direction confined to the case of lapse by the death of either, in the life of the testator, and did not prevent the vesting absolutely. *Cambridge v. Rous*, 8 Ves. 12. *Id.*

Residuary clause passes all personal property that is not disposed of, as by lapse contended, upon the particular expressions, to have been separated, and not intended to pass with the residue. *Id.* 13. **RESIDUE.**

Bequest of personal property to A for life, and after her decease, to her children, when at age of twenty-seven respectively, and in the event of her not leaving any child or children, or of the death of all under age of twenty-seven, over. The limitation over too remote. *Id.* 24. **IMITATION OF PERSONAL, 100 REMOTE.**

Leasehold estate renewable, being bequeathed with limitation, in nature of strict settlement, the habit being to renew annually, and to under-let, the decree declared that the fines upon renewal ought to be paid out of the rents and profits, that the person entitled for life, undertaking to pay those fines out of rents and profits, was entitled to the fines of renewal of under-lease, and a renewal to such under-tenants as should be desirous of it, was directed. *Mills v. Mills*, 6 Ves. 761. **FINES ON RENEWAL OF LEASE; TENANT FOR LIFE.**

A legacy bequeathed generally, without assigning any time for payment, bears interest only from a year after the death of the testator, though the fund out of which it is to be paid, consists of stock and other matters yielding immediate profit. *Pearson v. Pearson*, 1 Scho. & L. 10. **INTEREST ON LEGACY.**

Pecuniary legacies bear interest from the expiration of a year, although the fund may not become disposable till afterwards. *Id. ib.*

E being on bad terms with his eldest son, bequeaths him a trifling annuity, and bequeaths to M, the daughter of his said son, "if unmarried, and if she does not marry without the consent of his trustees, the sum of 400*l.* one moiety to be paid her upon her marriage, with such consent, the other moiety in one year after; but if said M was then married, or should marry without consent, said sum to sink into his personal fortune." M being unmarried, is not entitled immediately either to principal or interest. *Ellis v. Ellis*, 1 Scho. & L. 1. **LEGACY; CONDONA PRECEDENT.**

Bequest of personal estate not held specific merely from being combined with a devise of land. *Howe v. El. Dartmouth*, 7 Ves. 137. **LEGACY, SPECIFIC.**  
Bequest to testator's three children to be equally divided between them, share and share alike, but in case of the death of any without being married, and having children, the share of such child so dying to be divided between the surviving children, and so if one should only survive; any being married, and hav-

ing a child, her share vested. *Bell v. Phyn*, 7 Ves. 453. **INTEREST VESTED.**

Simple contract debts not charged upon real estate by will, first directing that all his debts, &c. might be paid by his executors, all the real estate being specifically devised. *Powell v. Robins*, 7 Ves. 209. **CHARGE ON REAL ESTATE.**

The produce of real estate, sold under a power in a will, passed by a residuary clause with the personal estate, the object being a conversion out and out; but part remaining unsold, held a resulting trust for heir at law. *Brown v. Bigg*, 7 Ves. 279. **ADMON. OF ASSETS.**

Devise charged with debts to trustees, and their heirs in trust to receive, &c. rents, &c. and thereout to support and educate the deviser's son, till twenty-one, and then to him. Held, not a use executed in son before twenty-one. *Bailey v. Ekins*, 7 Ves. 322. **USES & TRUSTS.**

Testator having directed transfer of 3 per cent. consols, three months after his decease, gave several other legacies of stock "as aforesaid." Those words upon construction referred to description of stock, not to the time of the transfer. *Sibley v. Perry*, 7 Ves. 522.

Annuitants fall under general character of legatees, unless distinguished by testator. Therefore, entitled under a residuary bequest in favour of legatees. *Id. ib.* **ANNUITANTS.**

If general substantial intent of will is charity, the failure of the particular mode shall not defeat it, but the law will substitute another mode. *Muggeridge v. Thackwell*, 7 Ves. 69. *Affid.* 13 Ves. 416. **CUM-ARITY; PERF. CY PRES.**

Legacy to "A, or in case of his death," &c. construed to mean to A absolutely, if living. *Turner v. Moor*, 6 Ves. 557.

Charge of legacies by implication upon fund arising from accumulation of rents and profits, dividends and interest. *Austin v. Hulsey*, 6 Ves. 475.

Testator directed residue of his personal estate, subject to payment of legacies, &c. with all convenient speed to be laid out in real estate, to be strictly settled, and that interest should accumulate, and be laid out in lands to be settled in like manner. Various circumstances having delayed the collection and investment of personal estate, the tenant for life was held entitled to interest from end of year after testator's death. *Sitwell v. Barnard*, 6 Ves. 520. **INTEREST; TENANT FOR LIFE.**

Bequest of debt which shall be owing on a particular day, taken as it stood at that day, and not affected by consignments from Indies, on account, since death of testator, which happened previous to day specified. *Innes v. Mitchell*, 6 Ves. 461. **LEGACY, ANTIPECTION.**

Bequest to A, her executors, &c. provided that, in case she shall die under twenty-one, or without having any husband living, it shall go over; held, vested at twenty-one, upon intention, the word "or" being construed "and." *Weddell v. Mundy*, 6 Ves. 341. **INTEREST, WHEN IT VESTS.**

Residuary bequest to A, in case she should have legitimate children, in failure of which, to go over, A having only one child born alive, who died before her, entitled absolutely. *Wall v. Tomlinson*, 16 Ves. 413.

Costs of a doubt upon meaning of will to be paid out of the general property. *Barrington v. Fris tram*, 6 Ves. 345. **PR. COSTS.**

Devise in trust to sell, and apply money to such persons as trustees should think had a just demand, &c. on A, at his death, in equal degree and proportion, according to principal sum, as far as the money would extend; the securities to be delivered up, but the money should be received in no other way than as a voluntary bounty. The fund being more than sufficient, is

liable to interest of bonds to extent of penalties. *Austin v. Gregory*, 6 Ves. 151. **INTEREST, WHEN PAYABLE.**

Legacy after limitations for life, and in default of children, to be paid equally between two persons, or the whole to the survivor of them: Held, not vested till the time of division. *Daniell v. Daniell*, 6 Ves. 297. **INTEREST, WHEN IT VESTS.**

Devise and bequest until a certain period, from nature of purpose and circumstances, held, not transmissible to representative. *Ex parte Davies*, 6 Ves. 147 a.

Testatrix gave a fund over which she had a power to appoint, &c. to trustees, in trust for her residuary legatee after named, and gave the general residue to A. By codicil she revoked the bequest of the residue and gave it to A & B. A was held solely entitled to the fund under the appointment. *Roach v. Haynes*, 6 Ves. 153. *Affid.* 8 Ves. 584. **POWER, EXECUTION OF.**

Residuary bequest construed to vest only as the property was received. *Gaskell v. Harman*, 6 Ves. 159. But see further, as to the decree in this cause, 11 Ves. 489. **RESIDUARY BEQUEST, WHEN IT VESTS.**

A direction for maintenance has not the same effect in favour of vesting as giving interest. *Hanson v. Graham*, 6 Ves. 249. **INTEREST, VESTING OF.**

An illegitimate child not entitled under the description of a child in a will, though the testator knew that some in the family were legitimate, and others not. *Godfrey v. Davis*, 6 Ves. 43. **BASTARD.**

A residuary bequest upon the whole will, vests only as the property is received: Held, therefore, that the representatives of a deceased residuary legatee are entitled only to part which was got in before his death. *Gaskell v. Harman*, 6 Ves. 159. *Innes v. Mitchell*, *id.* 461. From this decree plaintiff appealed; and the *J.d.* Ch. reversed that part of it which declares that the residuary property vested only as it was converted into money; his lordship holding that such an intention, though if clearly expressed, must, notwithstanding its convenience, be executed, and it is not the true construction of the whole will; and it is not to be collected unless clearly expressed. *S. C.* 11 Ves. 489. **INTEREST, WHEN IT VESTS; RESIDUE.**

A clause of survivorship between two legatees, if either of them should die, confined to a case of lapse, and did not prevent the legacies vesting. *King v. Taylor*, 5 Ves. 806.

Construction of a very inaccurate will, that the words "and all I am possessed of," were confined to a specific bequest of stock immediately preceding, meaning all interest in that fund, and did not compromise the general residue, which was, by a subsequent clause, expressly disposed of in a different manner. *Wilde v. Holtzmeier*, 5 Ves. 811.

The words "all I am possessed of," in a will, in legal construction, relate to the time of the death, not of the execution of the will, unless explained. *Id. ib.*

Devise to an infant grandson at twenty-one, with accumulations in the mean time, with similar limitations, in case of his death under twenty-one, to his sisters. Their father being dead, having left all his property, which was inconsiderable, to his wife, who married a person in low circumstances, maintenance was decreed, without an inquiry whether it was for the benefit of the infants, the court judging of that. *Greenwell v. Greenwell*, 5 Ves. 194. **INFANT MAINTENANCE; GRANDCHILD.**

Bequest, in trust to pay the annual produce into the proper hands of a married woman, is a bequest to her separate use. *Hartley v. Hurlie*, 5 Ves. 545. **FEME COVERT; SEPARATE ESTATE.**

Legacy general, notwithstanding an appropriation of part of the property. Legacy of a sum of money, Jamaica currency, decreed, with Jamaica interest,

from the death of the testator. *Raymond v. Brodbelt*, 5 Ves. 199. **LEGACY; INTEREST.**

Residue of personal estate bequeathed to the children of the testator's two daughters, their executors, &c., with a limitation over in case both his daughters should die without issue: a vested interest in the grandchildren, and the limitation over is too remote. *Rawlins v. Goldfrap*, 5 Ves. 440. **INTEREST, VESTED; LIMIT. TOO REMOTE.**

A direction by will to apply so much interest as might be necessary towards the maintenance and education of the testator's grandchildren, upon the decease of their respective mothers, the residue to accumulate for them all, was confined to so much as should be actually necessary, regard being had to their situation at the death of their mother, the father having, by his will, left them a considerable property, with a provision for maintenance. *Id. ib.* **MAINTENANCE OF INFANTS.**

The rule taken from the ecclesiastical court that a direction postponing the payment of a legacy does not prevent the vesting, prevails in courts of equity as to personal legacies, unless a contrary intention can be inferred, as where the time of payment forms part of the description of the person to take: the vesting of a residuary bequest, is especially favoured to prevent an intestacy; and a direction that the interest should accumulate and be paid with the capital after a deduction for maintenance and preferment, is not sufficient to prevent it. As to the real estate, the contrary rule prevails, but subject to exceptions. *Bulger v. Mutchell*, 5 Ves. 509. **INTEREST, WHERE IT VESTS.**

Legacy in trust for the testator's son for his own use and benefit, provided no misfortune in business shall in the meantime have happened to him, so as to deprive him or his family of the benefit of it; his son's fortune being amply sufficient by this fund to form a certain and permanent provision for him or his family; but in case he fail in business at any time before the age of thirty-two, then in trust for the support of him, his wife and children, as the trustees think proper, so long as he shall labour under the effects of any misfortune in trade; but as soon as he shall be freed and absolutely discharged from the effects of any misfortune or failure in trade, then (but not before) to be paid to him, otherwise the interest to be continued to be paid for the support of him, his wife and children, for his life; and if at his death he shall be under any difficulty from misfortune or failure in business in trust for his wife and children according to his appointment by will, and if he shall have no widow or child, according to his disposition. There was a considerable settlement. The son in the twenty-eighth year of his age being discharged under a deed of composition, the legacy was decreed to him, his trustees and his children not opposing it; but the court observed that if he should not be discharged, as in case it should end in a bankruptcy, the trustees would not be indemnified. *De Mierre v. Turner*, 5 Ves. 306. **TRUSTEES, LIABILITY OF.**

Legacy for the board and education of an infant until he shall be fit to be put out apprentice, and then a farther sum with him as an apprentice fee: the infant having attained nineteen, and not having been put out, was held entitled to the legacies. *Barton v. Cooke*, 5 Ves. 461. **LEGACY, WHEN PAYABLE.**

If a legacy is given for the benefit of an infant in one way, and it cannot be so applied, it may be applied for his benefit in another way, as if it was to put him into orders; and he became a lunatic. *Id. ib.*

Residuary bequest to the testator's nephews and nieces, *per stirpes*, equally for their lives, and after the death of either, that share of the principal to be paid equally to and among the children of such of his said nephews and nieces as should die; and if any die without leaving any child or children, that share

to go to and among the survivors or survivor of them in manner aforesaid. Upon the death of one without a child, that share goes to the survivors for their respective lives only, and will pass to their children respectively with the original shares: but upon the death of the last survivor without a child, his shares both original and accrued are undisposed of, notwithstanding another has left a child. *Milson v. Audry*, 5 Ves. 465.

A contingent legacy failed; the event which happened not being provided for; and as no necessary implication in favour of the legatee. *Parsons v. Parsons*, 5 Ves. 578. **LEGACY CONTINGENT.**

If a testator by will gives 2000*l.* a year by way of jointure to any woman he might marry, and after marriage, by codicil gives his wife the same jointure, she cannot claim both. *Osborne v. Dk. Leeds*, 5 Ves. 382. **LEGACIES, ACCUMULATIVE.**

Residuary disposition of all the testator's real and personal estate in trust to be remitted to England, was held specific and not to include a debt originally upon bond and judgment in *T.*, and afterwards further secured by bond and judgment in England, under which it was received, and being considered undisposed of, was applied in the first instance to the debts, &c. *Wisebett v. Murray*, 5 Ves. 149. **LEGACY, SPECIFIC.**

Bequest of various particulars, comprising all the testator's personal estate, to his wife for life, then after specifically disposing of and charging with legacies, certain parts after the death of his wife, he appointed her executrix, she paying debts and funeral expences. Held, a resulting trust as to the residue, there being no further disposition and no evidence. *Dicks v. Lambert*, 4 Ves. 725. *S. C.* 4 Bro. C. C. 326. **EXECUTORS BENEFICIALLY INTERESTED; TRUST RESULTING.**

Legacy of "my stock," or "in my stock," or "part of my stock," will make a legacy specific. *Kirkby v. Potter*, 4 Ves. 750. **LEGACY, SPECIFIC.**

Upon a question as to the amount of a legacy from a doubt as to a figure, an issue was directed instead of a reference to the master. *Norman v. Morrell*, 4 Ves. 769. **ISSUE AT LAW.**

A provision by will for payment of interest of debts, held not to extend to a debt by simple contract. *Tait v. J. Northwicke*, 4 Ves. 816. **INTEREST; SIMPLE CONTRACT DEBTS.**

Bequests to the testator's wife for life then after an appropriation to answer annuities to the children of the testator's brothers and sisters. All the children living at the death of the testator, and those born afterwards before the death of the wife, had vested interests; a codicil in favour of the same objects only restrained to those surviving at the time of distribution, being held to apply only to the capital of the fund appropriated to the annuities. *Middleton v. Messenger*, 5 Ves. 136. **INTEREST VESTED.**

Legacy of the money due on a note, held specific upon the intention; but the inclination of the court is against specific legacy, and to hold it a general legacy with reference only to the security, as the fund first to be applied to it. *Chaworth v. Beech*, 4 Ves. 555. **LEGACY, SPECIFIC.**

Testator gave to his sister the interest of 300*l.* upon bond for life, and, after her decease, to her daughter the interest due upon the said bond at her death, with the principal. The legacy is specific; and there being among other bonds one of the exact amount, it was held to refer to that, though an insolvent security, and the interest in arrear before the death of the testator. *Innes v. Johnson*, 4 Ves. 568. **LEGACY, SPECIFIC.**

Residuary bequest to trustees, upon trust to pay the dividends, &c., equally between the testator's two great nieces until their respective marriages, and from and immediately after their respective marriages, to

assign, and transfer their respective moieties or shares thereof unto them respectively, held a vested interest before marriage. One of the legatees being dead without having been married, the court directed one moiety to be paid to her executors, but would not permit the other moiety to be paid, but directed the interest and dividends of that moiety to be paid to the other legatee, with liberty to apply, in case of her marriage, or her death before marriage. *Booth v. Booth*, 4 Ves. 399. INTEREST, VESTED.

Bequest of the residue to A for life; and, after her death, legacies were given to B, or to her proper representative in case she should not be living at the decease of A, and to four other persons, or their representatives or representative. One of the four died in the life of testator, and another survived him, but died in the life of A. The former lapsed, and the latter vested. *Corbyn v. French*, 4 Ves. 419. LEGACY, LAPSED; INTEREST, VESTED.

Legacy to the testator's wife of the dividends of stock for her life, which he directs shall be continued in the same stock, and then to be shared equally, share and share alike, to his children that shall be then living. He also gave to his wife a leasehold house, of which fifty years were unexpired, for her life, and then to be let during the time of the lease to come, and the net produce thereof to be equally placed in the stocks for the benefit of his children that shall be then living, equally; and as to the residue of his estate whatsoever and wheresoever, the product he gave, &c., the same to be collected yearly, to his wife and children equally, share and share alike, that are then living: in other dispositions, the words "then" and "then living" were used with reference to some period expressed, viz. the age of twenty-one, or the death of the person to take for life: the stock and house vested at the wife's death in those children who survived her; the residue vested, at the testator's death, in his wife and all the children equally. *Reeves v. Bryner*, 4 Ves. 692. INTEREST, VESTED.

Portion by will *prima facie* a satisfaction of a portion by settlement. *Tolson v. Collins*, 4 Ves. 491. SETTLEMENT, SATISFACTION OF, PORTION.

Specific disposition by will, in trust to sell, and in the first place to pay debts, legacies, and charges of probate and execution of the trust, and in the next place, that the residue of the money be appropriated to the improvement of the city of Bath, is void, by stat. 9 G. 2. c. 36. As to a navigation share, which bequeathed at estate, goes to the heir, and as to money on real securities, as mortgages, trustee bonds, and commissioners' bonds for the improvement of the city of Bath, which go to the next of kin, the general residue undisposed of was first applied to the debts and other charges, and the deficiency was borne by the trust property that passed to the city of Bath, and that of which the disposition failed by the statute *pro rata*. *Howes v. Chapman*, 4 Ves. 542. MORTGAGE.

Bequest for the improvement of the city of Bath construed to mean improvements carrying on under an act of parliament, not by private persons. *Id. ib.*

By settlement 10,000*l.* provided for one daughter, or younger son: 15,000*l.*, if more. There being but one daughter, the father, by will, under a power reserved to him, appoints the time of payment, and the application of the interest of the 15,000*l.* provided for her by settlement, and gives her the further sum of 5000*l.* She was held entitled to 20,000*l.* *Phipp v. Id. Mulgrave*, 3 Ves. 613. SETTLEMENT, C. OF.

Bequest of personal estate, after a contingent limitation which did not take effect, established. *Id.* 614. LIMIT OF PERSONALTY.

Legacies to be paid out of a specific security which failed, held general upon the circumstances. *Robert v. Peacock*, 4 Ves. 150. LEGACY, SPECIFIC.

Bequest to A, and in case of her death to B, held an absolute interest in A. *Hinchley v. Simmonds*, 4 Ves. 160. INTEREST, VESTED.

Upon a devise to a charitable use, the heir has no right to the rents and profits accrued before the devise is carried into effect. *Att. Gen. v. Bwyer*, 3 Ves. 714. INTERMEDIATE PROFITS; CHARITY; HEIR AT LAW.

Legacy by will; the same sum given by a codicil to the same person upon a contingency, was held additional. *Hodges v. Peacock*, 3 Ves. 735. LEGACY, ACCUMULATIVE.

Testatrix gave nine legacies of 1000*l.* each, part of 14,500*l.* South Sea Annuities, and as to the residue of the said fund and all other her personal estate, including such of said legacies as should lapse by death, before they should be transferable, upon trust to convert into money such part of her residuary personal estate as shall not consist of South Sea Annuities, and invest such money with any money belonging to her at her decease in said fund, South Sea Annuities, and from time to time invest the dividends, &c. of all such South Sea Annuities, as shall constitute her residuary personal estate in the same fund, till the youngest of the said legatees shall or would, if living, have attained twenty-one, and then to transfer the whole of such South Sea Annuities to said nine legatees, equally with such survivorship, as their original shares; the nine legacies of 1000*l.* each only are specific; the remainder of the South Sea Annuities is part of the general personal estate. *Richardson v. Brown*, 4 Ves. 177. LEGACIES, SPECIFIC.

Devise, on condition of paying 500*l.* in six months, upon trust, to pay the interest to the devisor's wife for life, and after her death, the principal, according to her appointment in writing, with witnesses, whether sole or married, provided she shall release her dower within six months, and in case of her marriage without consent of the trustees, one moiety to go over; the wife who took other interests under the will, died within the six months, and not having married nor released dower, the 300*l.* did not vest in her. *Croft v. Slee*, 4 Ves. 60. INTEREST VESTED.

Two annuities of equal amount in the same will to same person, held not accumulative. *Holford v. Wood*, 4 Ves. 76. LEGACIES ACCUMULATIVE.

Legacy to A, if he be living, and in case of his death before the decease of B, to C, is contingent, viz. if A survives B. *Hodges v. Peacock*, 3 Ves. 735. LEGACY CONTINGENT.

Devise, after payment of debts; the debts are charged. *Shatterers v. Finden*, 3 Ves. 738. CHARGE ON LAND.

Real estate devised to be sold, and the produce disposed of with the personal, with a power to direct the fund to be laid out in land, no such direction having been given, it was held personal property. *Maberly v. Strade*, 3 Ves. 451. ADMON. OF ASSETS.

The rule, that legacies to the same persons by different instruments shall be accumulative, repelled by internal evidence, and the circumstance that all the legatees by the first instrument were legatees in the second, except those who were dead, or had quitted the testator's service. *Barclay v. Wainwright*, 3 Ves. 462. LEGACIES ACCUMULATIVE.

Slight circumstances are laid hold of to get rid of the rule that a legacy to a creditor extinguishes the debt, but a little difference between a portion and a legacy to a child, and as to the time of payment, will not prevail against the presumption of satisfaction. *Id.* 466. LEGACY, SATISFACTION OF; PARENT AND CHILD; DEBT, SATISFACTION OF.

Devise to A and her heirs, but if she dies under twenty-one and unmarried, to B and her heirs. A dies in the life of the testator under twenty-one and without issue, but having been married, the heir is

entitled. *Williams v. Chitty*, 3 Ves. 546. TRUST RESULTING; HEIR AT LAW.

Real estates devised, held liable to simple contract debts under a direction in the beginning of the will, that debts and funeral expences should be first paid; that which descended to the heir by the failure of the devise to be first applied. *Id. ib.* ADMON. ON ASSETS; REAL ESTATE.

Leaschold property bequeathed in remainder, in trust for a child *en ventre*, if a son, for life, and after his decease, for such of his issue male as should be his heir at law at his death; if no such then living, for such persons as should then be the legal representatives of the testator; a son being born, and dying without issue, the limitation over was established in favour of the next of kin, according to the statute at the time of distribution. *Long v. Blackall*, 3 Ves. 486. LIMITATION OVER.

Vesting of a legacy postponed to the time of payment, and a limitation over in nature of a cross-remainder implied, from the general intention, reversing a decree that it vested at twenty-one. *Mackell v. Winter*, 3 Ves. 536. INTEREST, WHEN IT VESTS.

Limitation over upon the death of a person unmarried and without issue, unmarried in its usual sense, meaning never having been married; "and" was construed "or" for a reasonable construction. *Marberly v. Strole*, 3 Ves. 450.

Words of a survivorship added to a legacy in common in a will, are to be applied to the death of the testator, unless an intention to postpone the vesting is apparent. *Id.* 451.

Testatrix gave to A the dividends of 500*l.* stock, till he should attain the age of thirty-two, at which time she directed her executors to transfer the principal to him, the legacy does not vest till the age of thirty-two. *Batford v. Kebbell*, 3 Ves. 363. INTEREST, WHEN IT VESTS.

Legacy in trust for testator's mother and sister for life, and after the death of the survivor, for all and every the child and children of his sister living at her death, share and share alike, each receiving his or her share of the principal at twenty-one, and if but one child should be so surviving, in trust to pay the whole to such surviving child at twenty-one, the payment only is postponed, not the vesting. *Wadley v. North*, 3 Ves. 364. INTEREST VESTED.

Testator in India gives all his estates and effects to A in England, in trust, and directs his property to be remitted to him, and after several legacies, he gives A 800*l.* and requests him as soon as the property is remitted to lay out the same in the funds or other securities which shall appear most advantageous or those who shall be benefited by it hereafter, the 800*l.* is a beneficial legacy, not in trust. *Id. ib.*

Testator gave his wife real and personal estate in bar, full satisfaction, &c. of all dower or thirds which she can have or claim in, or out of, any part of his real and personal estate, or either of them; he gave the residue to four persons, and afterwards by codicil, directed them to dispose thereof in charities; part of the residue being invested in real securities, goes according to the statute, as undisposed of, and the widow is not barred. *Pickering v. Ld. Stamford*, 3 Ves. 332. *affd. id.* 492. HUSB. & WIFE; DOWER; DISTRIBUTION.

Testator gave real and personal estate to one daughter, in satisfaction of her child's part of whatsoever more she might have expected from him or out of his personal estate; he also gave a provision to his wife in full of her dower, thirds, or other claim at law or in equity, or by any local custom to any other part of his real or personal estate; the residue to his other daughter; upon her death in his life, he by codicil gave it according to the appointment of his wife; the power not being duly executed, the residue goes according to

the statute as undisposed of, and the widow and daughter are not barred. *Id.* 335. CUSTOM OF LONDON; DISTRIBUTION.

There being a provision in marriage settlement to raise 5000*l.* for a child at twenty-one, the father by will adds 5000*l.* more, and charges the whole specifically on residuary real fund, which he had also by the same will made liable to debts and legacies in aid of his personal estate; the charged estate shall not be exonerated by the personal estate, for the charge is considered as a real devise, and cannot fall on the personality. *Ld. Dudley and Ward v. Ward*, 7 Bro. P. C. 566. ADMON. OF ASSETS; EXEMPTION OF PERSONAL ESTATE.

A, by will, devises his real estate to trustees in trust to sell the same in order to pay off the incumbrances, to apply the residue as he directed with respect to residue of his personal estates. He devises the residue of his personal estates after payment of debts and legacies, to executors on trusts. Held on construction that surplus money produced by sale of real estates was charged with the payment of simple contract debts. *Kidney v. Cousmaker*, 7 Bro. P. C. 573. ADMON. OF ASSETS; CHARGE ON REAL ESTATE.

A condition inconsistent with the gift is void: therefore upon a bequest to A for life, and at his decease to his heirs, executors, &c. but if he attempts to dispose of the principal, over; he takes the absolute interest, and the condition being inconsistent with it, is void. *Bradley v. Peizito*, 3 Ves. 324. CONDITION.

Testator by his will gave legacies to A, and B, describing them as grandchildren of C, and their residence in A.; by a codicil he revoked these legacies giving as a reason that legatees were dead; that fact not being true, they were held entitled upon proof of identity. *Campbell v. French*, 3 Ves. 321. MISTAKE.

Upon the ground of an express maintenance and other indications of the intention of testator, *Ld. Ch.* inclined to the opinion that the rule for interest upon a legacy given by a parent to a child till the time of payment was not applicable, but the bill of the children was dismissed upon circumstances of acquiescence, laches, and the consequent difficulty of taking the accounts. *Mitchell v. Bourr*, 3 Ves. 283. INTEREST ON LEGACY; PARENT & CHILD.

Contingent legacy out of real and personal estate payable two years after the event by codicil, the testator reciting that he found his estate would not bear that payment during the life of A, being chargeable with an annuity for her life, declared he revoked that part of his will, and that the said legacy upon the same event was to be paid twelve months next after the death of A, and not before; A dying before the contingent event, the legacy is not payable till the expiration of two years after it. *Woodsworth v. Younger*, 3 Ves. 73. LEGACY WHEN PAYABLE.

Devise in trust to sell for payment of debts and funeral expences with a particular disposition of the surplus money, the personal estate not being otherwise disposed of than by the appointment of an executor who was not one of the trustees, is first liable to the debts, &c. especially as the produce of the sale was not sufficient for them. *Gray v. Minnethorp*, 3 Ves. 103. ADMON. OF ASSETS.

Testator directed that his wife should have liberty to occupy his house for a year, provided she continues so long in L. Then by a distinct clause he directed his executors to pay her a guinea a week during her stay at L: her residence there beyond the year does not entitle her to a continuation of the weekly payment. *Walker v. Watts*, 3 Ves. 132.

Where a charity cannot be executed as directed, but the general purpose appears distinct, and may be in

substance attained by another mode, it shall be executed *cy pres*; but a personal bequest attached to a void charity, as an endowment, must fall with its principal. *Att. Gen. v. Whitchurch*, 3 Ves. 141. **CHARITY, PERPETUITY.**

Annuity by will charged upon real estate for A for life, payable to him only upon his own receipt and no other, and to cease immediately on alienation, ceases by the bankruptcy and bargain and sale of the estate of A. *Donnell v. Belford*, 3 Ves. 149. **ANNUITY; BANKRUPTCY; ASSIGNMENT.**

Testator gave his sister M and his brother W the interest of the residue equally; at the death of M, one-half of the principal to her children, her husband by no means to have any part, but to be entirely for the children; if none, to W's children, and after the death of W and his wife, the other half to his children, and he excluded his eldest brother from any benefit. M's life interest is not to her separate use; the interest of the other moiety during the lives of W and his wife, would have vested in M, and therefore lapsed by his death in lifetime of the testator. *Broune v. Clark*, 3 Ves. 166. **LEGACY LAPSED.**

Though a general charge of debts upon a devised estate will not prevent the previous application of an estate descended, yet if the devised estate is selected and appropriated to the debts, it is liable before the estate descended, but this arrangement does not bind the creditors. *Manning v. Spooner*, 8 Ves. 114. **ADMONITION OF ASSETS; CHARGE ON REAL ESTATE.**

Real and personal estate devised to the executor in trust to pay debts and legacies, the rest and residue to himself, the only purpose of devising the real appearing to be to insure payment of the debts, without any intention to disinherit the heir: it was held only a charge, and that the heir was entitled to the surplus of the real estate. *Halliday v. Hudson*, 3 Ves. 210. **CHARGE ON REAL ESTATE; HEIR AT LAW.**

Condition by will requiring consent of trustees to marriage, not applicable to the second marriage of a natural daughter, who had married between the date of the will and the death of testator, having approved it, and was a widow at his death. *Crommelin v. Crommelin*, 3 Ves. 227. **CONDITION; CONSENT.**

"I return A his bond," in a will, is not a release, but a legacy, and having lapsed, the bond remains in force against a surviving co-obligor. *Maitland v. Adair*, 3 Ves. 231. **BOND; RELEASE; LAPSED LEGACY.**

Legacy in trust, to pay out of the interest 60*l.* a year to the testator's wife for life, and remaining interest during her life to B, duke of M, and in case of his death to his eldest or only son, and for want of issue male to his eldest or only daughter, for want of such issue female, to sink into the residue; and after the death of his wife, the testator gave the principal to the said duke, if then living, but if then dead, to his eldest or only issue male then living, and for want of such issue male, to his eldest or only daughter, for want of such issue female, to sink into the residue. B, duke of M died, leaving two sons and a daughter; both the sons died; the eldest left a son, duke of M, who filed the bill; the plaintiff is entitled to the surplus interest, but the principal is contingent till the death of the testator's widow. *Dk. Manchester v. Boulham*, 3 Ves. 61.

Devise in fee and bequest of personal estate to A, and in case of his death under twenty-one, without leaving issue to B. Codicil affirming the will in all respects, except by directing that A should not be entitled till twenty-five. A dying between the ages of twenty-one and twenty-five without issue, B has no title. *Scott v. Chamberlayne*, 3 Ves. 302.

Under a devise of manors, lands, &c. to A, his executors, &c. for a term of eleven years, in trust to receive the rents, issues and profits of the premises that should from time to time accrue and become due, and

dispose of the same for the benefit of a *cestui que trust*, A may, by the directions of the *cestui que trust*, and for his benefit, assign the advowson of a rectory appendant to a manor to a purchaser, for the said term of eleven years, to intent that purchaser may present for the next turn, in case of an avoidance before the expiration of term; and in case of such avoidance, the purchaser may present accordingly. *El. Albemarle v. Rogers*, 7 Bro. P. C. 522. **ADVOWSON; VENDOR & PURCHASER.**

Testator gave his wife 400*l.* a year, in addition to 500*l.* a year under her settlement, in consideration of the expence and care she would incur in the maintenance of their children; she must maintain them when at home, but is not to be charged with education or maintenance at school. *Collier v. Collier*, 3 Ves. 33. **LEGACY, CONDITIONAL.**

A bequest of two bonds and a mortgage to a married woman, with a direction that they should be delivered up to her whenever she should demand or require the same, is a bequest to her separate use. *Dixon v. Olmuis*, 2 Cox, 414. **HUSB. & WIFE; SEPARATE ESTATE.**

A devised to each of the children of B 50*l.* to be paid to B for their use; B left each of them 260*l.* if they attained twenty-one: Held no satisfaction. *Pullen v. Cross*, 3 Anst. 830. *S. P. Field v. Mestyn*, id. 831. note. **DEBTS, SATISFACTION.**

Where an estate is devised, subject to a yearly charity, if charity cannot take effect for a period, although without default of devisee, the arrears shall accumulate. *Att. Gen. v. Bolton*, 3 Anst. 820. **CHARITY; INTERMEDIATE PROFITS.**

Testator gave the residue of his personal estate to his wife, desiring her to provide for his daughter A out of the same, as long as she, his wife, should live, and at her decease to dispose of what shall be left among his children, in such manner as she shall judge most proper. This is not an absolute trust for the children after the death of the wife. *Pushman v. Filliter*, 3 Ves. 7. **TRUST.**

A devised all his estates to widow for life, remainder to nephew, he paying 2000*l.* to appointee of widow, and made her executrix and residuary legatee. The estates were held under church leases, which testator renewed after will; *quære*, if a revocation? The widow by will, "in pursuance of power," appointed plaintiffs; and devised estates "so given by her said husband's will, and all her interest, &c. therein" to trustees for nephew, on his paying the said 2000*l.* "according to the true intent, &c. of husband's will, but not before or otherwise." Supposing the renewal of leases a revocation, the widow shall be presumed to have designedly given effect to real intent of husband. *Penrice v. Garnons*, 3 Anst. 821. **WILL, REVOCATION OF; RENEWAL OF LEASES; POWER, EXECUTION OF.**

Where testator, by will, devised to daughters as tenants in common his residue, and afterwards made a codicil expressly for a particular purpose, but thereby also re-devised the residue to daughters omitting the words of severance, the codicil was construed by will, and they took as tenants in common. *Mathews v. Bowman*, 3 Anst. 727. **CODICIL.**

P. gave by will "to his three daughters, 500*l.* each, to be paid them severally within five years after his decease, if then alive, or any issue of their several bodies, to be paid by son, the residuary devisee, the interest from his death at four per cent. for so many of the five years as his son should keep it in his hands, but if there should be no issue living of any of daughters, at end of five years, then annuity for life of 20*l.* each, and the several sums of 500*l.* to be paid to them so dying without issue, should be equally divided between the survivors and their issue." One of the daughters dies within five years,



leaving issue, and having previously assigned her interest. The assignee held entitled to the 500*l*. *Oseland v. Oseland*, 3 Anst 628. **INTEREST VESTED.**

Testator gave his personal estate to his mother for life, remainder to his children, on condition that his mother should see the fines for renewal of a lease and the interest of a mortgage paid, and be consulted as to the manner of raising the fines, that she may give her approbation as she may think proper: she is only to keep down the interest. *Buckridge v. Ingram*, 2 Ves. J. 651. **TENANT FOR LIFE; INCUMBRANCES, KEEPING DOWN.**

Testator by will duly attested, gave an annuity to his daughter, charged on his real estate in aid of his personal; by codicil not attested, he gave his real and personal estate to his mother for life during her life; the personal estate is discharged from the annuity, but it remains a charge on the real. *Id. ib.* **CHARGE ON REAL ESTATE.**

Devise of real estate to be sold, and the produce, with the personal estate, to testator's wife for life, with power to appoint a moiety by deed or will, with two or more witnesses: the estate was not sold; the wife, having no other real estate, by will with three witnesses, gave specific legacies, some described to have been her husband's, and all the rest, residue, and remainder, of her estate and effects of what nature or kind soever, and whether real or personal, and all her plate, china, linen, and other utensils which she should be possessed of, interested in, or entitled to at her decease: the power is executed by the residuary clause. Evidence of conversations with the person who drew the will, to shew the testatrix had no other real estate, rejected. *Standen v. Standen*, 2 Ves. J. 569. **PR. EVIDENCE.**

Testator gave real estates to be sold, and the produce to be considered as part of his personal estate, and thereout and out of his personal estate, gave legacies to his next of kin, heir, and others, he gave other estates to be sold, and the produce to be considered from thenceforth as other part of his said personal estate, and to be disposed of in manner following: he then gave legacies, and some estates specifically, and other legacies out of his said trust monies and personal estate, and gave his executor 1000*l*. to be disposed of according to any instructions he might leave in writing, and gave all the residue of his goods and chattels, personal estate and effects, whatsoever, subject to debts, legacies, &c. No instructions being found, the heir is entitled to the 1000*l*. *Collins v. Wukeman*, 2 Ves. J. 683. **HEIR AT LAW; RESULTING TRUST.**

Testator gave the interest of a bill of exchange on the E. I. Comprny to his wife for life, and directed that after her death the bill should be sold and the money divided among certain persons, with survivorship in case of the death of any in her life. This bill, which constituted the bulk of the testator's property, was paid in his life; that was not an ademption of the legacy. *Coleman v. Coleman*, 2 Ves. J. 638. **LEGACY, ADEMPITION OF; LEGACY SPEC.**

Where a testator having both freehold and copyhold estates, charges his real estate with payment of his debts if he has surrendered the copyhold to the use of his will, the freehold and copyhold shall be applied rateably; but if he has not surrendered the copyhold, it shall not be applied until the freehold is exhausted. *Groucock v. Smith*, 2 Cox, 397. **COPYHOLD; CHARGE ON REAL ESTATE.**

This clause beginning a will, "First, I will and direct that all my legal debts, legacies, and funeral expences, shall be fully paid," is not sufficient alone, to charge legacies on real estates specifically devised; for which the intent must be clear. *Kightly v. Kightly*, 2 Ves. J. 328. **CHARGE ON REAL ESTATE.**

Testator created a term for debts and legacies, and

gave 1000*l*. to his niece to be paid immediately after his decease, if she should be then married, if not the interest of the said legacy to be paid her for life, to be calculated and paid to the day of her death or marriage; if she should die unmarried, the legacy to lapse for the benefit of the estate, and by codicil he gave her 200*l*. in addition to what he had given her by the will: held that the additional legacy is to be raised out of the same fund, and subject to the same conditions, and the legatee having married after the testator's death is entitled. *Crouder v. Clowes*, 2 Ves. J. 449. **LEGACY CONDITIONAL; CHARGE ON LAND.**

A legacy substituted for another, shall be raised out of the same funds and subject to the same conditions. *Id. ib.* **LEGACY SUBSTITUTED; LEGACY CONDITIONAL.**

Legacy by a grandfather in trust for five children by name, and all and every the child and children of his son equally, the shares to be assigned at twenty-one or upon marriage of the daughters, with power to advance money for putting out all and every, or any of the sons to businesses. The first attaining twenty-one is entitled to receive his share then. *Prescott v. Long*, 2 Ves. J. 690. **LEGACY, WHEN PAYABLE.**

Covenant in marriage articles by the husband, to pay his wife if she should survive, 200*l*. as jointure, and 50*l*. to provide herself with a house yearly for life; afterwards by will, he gave her for life, an estate and house, above the yearly value of 100*l*. a year, with the household goods, &c. and an annuity of 100*l*. commencing and payable at different times, from those in the articles: held not a performance, nor intended as a satisfaction, no such intent being expressed. *Richardson v. Elphinstone*, 2 Ves. J. 462. **MARRIAGE SETTLEMENT, SATISFACTION OF.**

Testator devised all his real estate to his sister for life, remainder to her children as she should appoint; for want of appointment to all her children and their heirs as tenants in common. His sister having two daughters, by a codicil declared to be a codicil to his will, not then at hand, he gave one of them an annuity, and directing his annuities to be paid out of his three per cent. stock, he charged them on his real estate in case of a deficiency; and directing the residue of his personal estate to be invested in freehold lands and hereditaments, he recommended to his sister to settle and convey or join with her husband in settling and conveying all his estates and property, which she might derive from him after his decease, to the use of her two daughters for life in such parts, shares, and proportions, as he should approve, with the remainder to their respective issue, and cross remainders, and the usual powers and clauses in strict settlement. The testator's sister died in his life and her two daughters were his co-heiresses. Some real estates were purchased between the executions of the will and codicil. As to the real estate the will is not revoked, but is republished by the codicil, and the two nieces are entitled to all the real estates, and to those directed to be purchased, as tenants in common in fee. *Meggison v. Moore*, 2 Ves. J. 630. **WILL, REVOCATION OF; CODICIL; WILL, REPUBLICATION OF.**

Devise of freehold and copyhold surrendered to the use of the will to trustees and the survivor and his heirs, in trust to pay debts and legacies, an annuity to the testator's son, and for other purposes; then on the marriage or attaining twenty-one of his granddaughter, to convey to her for life, remainder to trustees, &c. remainder to her first and other sons in tail male, remainder to her daughters in tail general, remainder to such persons for such estates, and subject to such charges and conditions as he should by any deed or instrument, with two or more witnesses, appoint: the next day by deed poll, with two witnesses, reciting his will, and that he had reserved a power of disposing of his estate, further, he directed his trust-

tees, immediately after the death of his granddaughter, and failure of her issue to convey all his real estate to the first and other sons of his son in tail male, then to his daughters in tail general, then to the right heirs of the survivor of his trustees, his heirs and assigns for ever. No conveyance was made. The granddaughter died without issue; then the son died without issue, leaving one trustee surviving. Under the will alone, the trustees have a mere legal estate, and all the equitable interest beyond the express dispositions would result to the son as heir; but the deed was considered as a codicil sufficiently executed to pass copyhold but not freehold. The last limitation is a contingent remainder to the heir of the surviving trustees, and a conveyance was directed with an insertion of trustees to support that remainder as to the copyhold; the rents and profits of the copyhold during the life of the trustee, and all the freehold to go to the heir of the testator. *Haubergham v. Vincent*, 2 Ves. J. 204. S. C. 4 Bro. C. C. 353. DEED C. OF; REMAINDER, CONTINGENT.

Testatrix directed her real estate to be sold, and all her estate to be converted into money for the purpose of her will; the will was satisfied without touching the real; no equity for the next of kin against the heir. *Chitty v. Parker*, 2 Ves. J. 271. 4 Bro. C. C. 411. MARSHALLING ASSETS; NEXT OF KIN.

Though a gift of a legacy may release a debt, yet where the bond remains uncancelled, it must clearly express the intention so to do. *Wilnot v. Woodhouse*, 4 Bro. C. C. 227. DEBT, RELEASE OF.

Money was to be laid out in land to be settled to the husband for life, remainder to raise portions for younger children, the money was afterwards invested by direction of the husband in S. S. annuities, afterwards by will, he devised generally all his manors, &c. to certain uses, the money in the funds must be laid out in land. *Hickman v. Bacon*, 4 Bro. C. C. 333. MONEY AGREED TO BE LAID OUT IN LAND.

In an executory trust to be effected by the court, it is sufficient, if it can satisfy itself of the testator's intention to carry it into execution; therefore, where testator gave his real estate to A, to devise in strict settlement, and ordered other estates to be sold, and converted into personalty, and the produce, with the residue of his property to be laid out in land in A, contiguous and convenient to his estate in A, and by strong expressions (though without direct words) shewed he intended it to go to the same uses, it was decreed so to be. *Brown v. De Laet*, 4 Bro. C. C. 527. TRUST, EXECUTORY.

Devise of lands made chargeable "with what I shall hereafter charge upon it:" a legacy not expressly charged shall be paid out of the land. *Compton v. Oxenden*, 4 Bro. C. C. 402. S. C. 2 Ves. J. 261. CHARGE ON LAND.

After a clear gift to a college of three presentations to a living, their interest cannot be extended by doubtful words. *Emanuel Coll. Can. v. Bp. Norwich*, 4 Bro. C. C. 481.

A residue to be divided by executors at an indefinite term vests at the death of the testator, unless an intention is manifest to the contrary upon the face of the instrument. *Stapleton v. Palmer*, 4 Bro. C. C. 490. INTEREST, VESTED.

The testator being married, and in ill health, devised the estates in question, after failure of issue male of his own body (and issue male would have taken under his marriage settlement), to the defendant, who was his heir at law, for life, with remainder over: Ld. Northington declared, that the devise being after a general failure of issue male, was too remote and void, and that the defendant took as heir at law; and the declaration reversed upon a bill of review. *Lytton v. Lytton*, 4 Bro. C. C. 141. LIMIT, TOO REMOTE.

Devise to A for life, with liberty to leave the same

to whom she thought most deserving of it, recommending to her to have a due regard to the testatrix's mother's relations, is not mandatory as to the objects of the appointment. *Randal v. Hearle*, 1 Anst. 124. TRUST; WORDS, RECOMMENDATORY, &c.

Bequest of real and personal estate to take a house for a school to educate children, and grandchildren of particular persons, and other children; good as to the particular objects, but bad as a general charity. *Blanford v. Fackrell*, 4 Bro. C. C. 394. CHARITY.

A devised the residue of his property to his wife, in trust to divide it among their children in such manner as they should deserve. One of the seven children sold her share, and covenanted to make it up a full seventh; this is good: and on a specific performance, she can make a good conveyance without the mother joining. *Musprat v. Gordon*, 1 Anst. 34. VEND. & PURCH.; TITLE.

Legacies nearly similar given to the same persons by different instruments, legatees not entitled to both. *Moggridge v. Thackwell*, 1 Ves. J. 464. S. C. 3 Bro. C. C. 517. Affid. 13 Ves. 416. LEGACY, ACCUMULATIVE.

Legacies to the same persons by different instruments generally, presumed additional, unless contrary intent appears, of which simple repetition, if exact, is sufficient proof. *Id.* 472. *Id.*

A bequest of money to be laid out in land, and applied to a charitable use; but until an eligible purchase can be made to be laid out at interest, and the interest applied in the same manner, does not give any alternative to the trustees, but is void by the statute; and so is a bequest made in favour of two persons by name, if given to them by officiating in a charity, void by the statute. *Grievs v. Case*, 2 Cox, 301, 302. S. C. 4 Bro. C. C. 67. 1 Ves. J. 548. MORTGAGE; PARTNERSHIP.

Legacies of New S. S. annuities, declared to be pecuniary, not specific, though the testator had more of that stock than sufficient to pay them. *Simmons v. Vallance*, 4 Bro. C. C. 345. LEGACY, SPECIFIC.

Devise of real and personal estate to trustees, to pay, &c. to testator's wife for life, then to pay a legacy to his daughter; this is a vested legacy in the daughter, and transmissible. *Molesworth v. Molesworth*, 4 Bro. C. C. 408. Reversing S. C. ante, 3 Bro. C. C. 5. to 7. INTEREST, VESTED.

Devise of lands to be sold in aid of personal estate, "and after death of my wife, the estates not sold, and the personal estate not applied to be subject as aftermentioned; the rents and produce to be carried on in accumulation of 3 per cents. as aforesaid during her life, and also for five years after her death, and to be laid out in land; then if my son M shall be living, and any lawful issue of his body, and if my son G shall be living, and any lawful issue of his body, to them for life, as tenants in common, then to their issue in moieties; if only issue of one, to that issue; if but one, to that one, with power of settlement; my wife to receive such provision as aforesaid, neat and clear, and the residue only to be subject to the devise over, to take place after her death, to her son, his heirs, &c.; and if she should have any other issue, to them, their heirs, &c., on failure of issue of his sons and grandson." The devise over is attached to the single event of both sons being dead without issue at the death of the wife, or five years after at most; and one son being alive at that time, though without issue, it never took effect: but the son is not entitled to the estate absolutely, on account of the contingent interest in his issue. *Grievs v. Bainbridge*, 1 Ves. J. 562.

Devise of land to be sold, money produced by the sale charged with simple contract debts on the intention, though doubtful. *Kidney v. Coussmaker*, 1 Ves. J. 436. CHARGE ON REAL ESTATE.

"After paying debts" amounts to a charge for

debts, for which very little is sufficient, the court leaning that way : but the leaning of the court to charge land with simple contract debts, must be warranted by the intention. *Id.* 440. 443. CHARGE ON LAND.

Where testator combines real estate with personal generally, the real estate is subject to all the burthens of the personal. *Id.* 444. CHARGE ON REAL ESTATE.

Testator devised to all the children of his two sisters A and B; A, long before the date of the will, changed from the Jewish to the Roman Catholic religion, was baptised by a new name, and became a professed nun at Geneva. Bill by the children of C, a third sister, living with B at Leghorn, upon ground of mistake in testator, and evidence of intent to provide for his sisters at Leghorn, dismissed. *Delmare v. Robello*, 1 Ves. 412. MISTAKE.

Devise, properly attested, of land upon several trusts, remainder to such trusts as testator should by any deed appoint; whether land would pass by the deed of appointment? sent to law upon a case stating the devise to be to uses. *Hubergham v. Vincent*, 1 Ves. J. 410. POWER TO APPOINT, EXECUTION OF.

A devised to trustees to pay debts, and then to hold till his son should attain twenty-one; then to the son, he paying the father of the testator 10l. per quarter. The annuity does not commence till the estate of the son comes in esse. *Turner v. Probyn*, 1 Aust. 66. ANNUITY, WHEN COMMENCING.

In this case, a portion proceeding from a parent held vested in a deceased child, upon what was collected by the court, as the intention of the parties, against very strong expressions to the contrary. *Woodcock v. Dk. Dorset*, 3 Bro. C. C. 569. INTEREST, VESTED.

Testator declaring his debts should come out of the real estate and the personal, gave the real to trustees charged with some charitable legacies, and one to each trustee; by codicil he removed one trustee, and revoked his legacy, appointing another with the same legacy. He revoked all the charitable legacies, and gave a less legacy to one of the charities mentioned before, and other new charitable legacies without specifying any fund; all held to be charged on the real estate, and, therefore, void as to the charitable legacies. *Leacroft v. Maynard*, 1 Ves. J. 279. S. C. 3 Bro. C. C. 233. CHARGE ON REAL ESTATE; MORIMAIN.

Codicil considered as part of the will, and intent drawn from the whole. *Hill v. Chapman*, 1 Ves. J. 407. CODICIL.

Plate excepted by bequest of personal estate to wife, after her decease over, and recited to be hereinafter given to daughter, but not father nor son; undisposed of. *Frederick v. Hall*, 1 Ves. J. 396.

Legacy out of a fund in the East Indies given over in case of death of legatee before he might have received it, vested from death of testator. *Hutcheon v. Mannington*, 1 Ves. J. 366. INTEREST, VESTED.

Testator, after giving life interests in stocks to each of his daughters, afterwards the principal among his grandchildren, in pursuance of a power in articles of partnership appointed his executors to carry on the trade in his room, with power to dissolve or nominate any other person, and gave them his share of the capital, and all freehold and leasehold in trust to carry on the trade as long as they should think fit, and after expiration of partnership to sell the estates, and with the produce and profits of trade, and all the rest of his estate form a fund to accumulate twelve years, then among the grandchildren living. By codicil he substituted his partner, who was his son-in-law, in the room of one executor removed, and desired, that if his executors should continue in trade, and his grandsons T and J should attain twenty-one, his executors would nominate each a partner for a quarter, when executors should think fit, with legacies at the same time, to sink into the estate, if they should de-

cline the partnership or die before twenty-one; executors to advance any further sum they might want to carry on trade; the rest of his property among all the grandchildren, except T and J. By another codicil he left it entirely to executors to appoint J or not, if not appointed his legacy to be void: T and J both entitled to be partners, and to their legacies at twenty-one; one executor, (their father) being for admitting them, the other two against it; but if all had without fraud united in declaring J unfit, they might have excluded him, in which case he could have taken nothing under this devise. *Wainwright v. Waterman*, 1 Ves. J. 311. PARTNERSHIP.

Wife entitled, under bond by the husband upon the marriage, to the sum payable three months after the death, for her life, then for the children; if none, for her absolutely. By will he gave all real and personal estate he then had, or might die possessed of, upon trust to pay her the rents and interest for life, then the whole equally to the children; if none, over; and revoked all former settlements and wills; there were no children; the widow entitled to both. *Forsight v. Grant*, 1 Ves. J. 298. S. C. 3 Bro. C. C. 242. SETTLEMENT, SATISFACTION OF.

Gift of a residue to children not to be claimed till twenty-two, but the interest given in the meantime, is vested. *Dadson v. Hay*, 3 Bro. C. C. 404. INTEREST, VESTED.

Devise of an annuity of 50l. to be purchased by executor, who, till the purchase, was to pay annuitant 40l. a year; executor, instead of purchasing, paid 50l. a-year from testator's rents; annuitant held entitled to 40l. the first year, and 50l. a-year afterwards. *Broune v. Spooner*, 1 Ves. J. 291.

Interest of residue of personal estate given by will to a woman for life, then the residue of her nieces; if they die without issue, over; the last limitation over is too remote, and on the death of the aunt, the nieces take the whole. *Everest v. Gell*, 1 Ves. J. 286. LIMITATION TOO REMOTE.

Testator leaves a residue in trust for four, with survivorship; two died; the survived share shall survive as well as the original shares, being the case of an aggregate fund. *Worlidge v. Churchill*, 3 Bro. C. C. 465. SURVIVORSHIP.

Legacy to a feme covert, "her receipt to be a sufficient discharge to the executors," is equivalent with saying "to her sole and separate use." *Lee v. Prieaux*, 3 Bro. C. C. 381. LEGACY, FEME COVERT.

First, a devise to A at twenty-one, and if she die under twenty-one, to her children, or if she die under twenty-one and no children, then over. A survived twenty-one and had children, and then died in the life-time of the testatrix; decided at law, that A's children could not take, the above being a condition precedent, contrary to the opinion of Lord Thurlow C. *Doo v. Brabant*, 3 Bro. C. C. 393. CONDITIONAL LIMITATION; CONDITION PRECEDENT.

Devise of W. acre to A for life, upon condition that A suffer a recovery of B. acre and settle it, and if he does not then after the decease of A, W. acre to go to B; A took W. acre, but did not settle B. acre, the heir of A is not bound to convey pursuant to the condition, nor are A's assets liable to make good the breach of the condition. *Freeke v. Ld. Barrington*, 3 Bro. C. C. 274. LIMITATION, CONDITIONAL; CONDITION, WHO BOUND BY.

A legacy given to daughters equally to be divided between them, with a devise also thus, "and all my estate at St. O. to be equally divided between them," when they arrive at twenty-four years of age; the legacy held to be vested immediately, and only the time of payment postponed. *May v. Wood*, 3 Bro. C. C. 471. INTEREST VESTED.

Testator having given to charities, legacies, and also a residue in bank stock, and having no bank

stock at his decease, but having three per cent. annuities which would satisfy the legacies in that shape, and leave a residue; but if sold would not purchase bank stock to satisfy the legacies in that form, a decree taken by consent, that the legacy should be paid in three per cents. according to the sums given; an infant not opposing, his legacy, ordered to be paid in the same manner; but if the testator's property had been sufficient, the legacies should have been paid in bank stock. *Finch v. Inglis*, 3 Bro. C. C. 420. ADMON. OF ASSETS; LEGACY HOW PAYABLE; INFANT.

Testator by his will taking notice that he had not surrendered copyhold estates which he devised, but directing his son to convey them, and devising to the son other estates, though the copyholds are not devisable by custom, yet the surrenders decreed to be made. *Wardell v. Wardell*, 3 Bro. C. C. 116. COPYHOLD SURRENDERED.

Testator bequeathed the residue of his personal estate in trust to pay 12l. per annum to the schoolmaster of R, and to apply the surplus, if any, in the clothing, and putting out apprentice two children of R, and one child of W, and he made no further disposition of it; the residue being more than sufficient for the specific purposes of the will, the surplus is not considered as undisposed of, but must be applied in increasing the number of the objects of the charity. *Att. Gen. v. Hurst*, 2 Cox, 364. S. C. nom. *Att. Gen. v. El. Winchelsea*, 3 Bro. C. C. 374. SURPLUS RESIDUE; CHARITY.

A legacy charged on land to be purchased with the residue of a personal estate will lapse by the death of the legatee before the day of payment, as if charged upon lands actually purchased. *Harrison v. Naylor*, 2 Cox, 248. S. C. 3 Bro. C. C. 108. LEGACY, LAPSED; CHARGE ON REAL ESTATE.

Latent ambiguity arises dehors the will, and evidence is admissible to explain it; as in case of two manors of the same name, or an inadequate description of a child; not to explain a patent ambiguity upon the face of the will. *Fangh v. Read*, 1 Ves. J. 259. S. C. 3 Bro. C. C. 192.

Legacy payable at twenty-one, with proviso to go over, if legatee should at any time become seized of the real estate, to which he was entitled in remainder after an estate tail limited upon an estate for life, subsisting when he became twenty-one. Even supposing there is a contingency left, he must have the legacy at twenty-one; but it may be disputed afterwards upon the happening of the contingency. *Griffith v. Smith*, 1 Ves. J. 97. LEGACY, CONDITIONAL.

Jewels, &c. to A for life, then to such grandchildren as she should appoint; in default of appointment, it shall go equally. *Watts v. Boddington*, 3 Bro. C. C. 95. POWER TO APPOINT.

Interest of legacy to A for life, remainder to B and C, or in case one should die, living A, then to the survivor; B and C, both die in the life of A; the legacy was vested, and went to the survivor. *Scarfild v. Hoves*, 3 Bro. C. C. 90. INTEREST, VESTED.

Executor not entitled to his legacy without proving the will, although the will expressed it as a mark of gratitude for past favours. *Read v. Delagnes*, 3 Bro. C. C. 95. EXECUTOR; LEGACY; RENOUNCMENT OF TRUST.

Testator reciting that he is possessed of a certain sum in navy bills bequeaths it; this is a specific legacy, and shall pass only such navy bills as he possessed at his death. *Pitt v. Ld. Camelford*, 3 Bro. C. C. 160. LEGACY, SPECIFIC.

Legatee entitled, notwithstanding a mistake of his name. *Campbell v. French*, 3 Ves. 322. MISTAKE.

No difference between a lapse and what is not disposed of, except for construing intention. *Bennett v. Batchellor*, 1 Ves. J. 67. S. C. 3 Bro. C. C. 28. RESIDUE.

Testator gives the accumulation of rents till A should attain twenty-one, to be laid out, and to permit A to receive the interest during life; after his death, he gives the said monies to the issue male of A, and in default to the plaintiffs; A died without issue, the issue would have taken as purchasers, and therefore the limitation to the plaintiffs takes place. *Knight v. Ellis*, 2 Bro. C. C. 570. LIMITATION OVER.

The words "if he shall happen to die without issue," may be so controlled by the context of a will as to mean children, and the remainder over will in that case not be too remote. *Att. Gen. v. Bayley*, 2 Bro. C. C. 553. LIMITATION, TOO REMOTE.

Testator having a debt secured on lands, gives the mortgage-money to the mortgagor, and desires that he will give a reversionary interest therein to a third person; the mortgagor selling the estate, shall bring the mortgage-money into court for the use of the devisee, subject to the life estate. *Lewis v. King*, 2 Bro. C. C. 600. PAYMENT INTO COURT; MORTGAGOR & MORTGAGEE.

Gift to testator's brother, without any restriction as to his children, to whom he shall leave, before or after his death, such part of the testator's inheritance as their conduct may deserve; but if at the death of his brother, there should be no children, then to A; this is an executory devise, which if it took place, would defeat the interest of the children of the brother. *Lientand v. Agassiz*, 2 Bro. C. C. 615. DEVISE, EXECUTORY.

Bequest of all other unbequeathed goods and chattels is residuary, notwithstanding a subsequent bequest to the same person of debts due to testator. *Bennett v. Patchellor*, 1 Ves. J. 63. S. C. 3 Bro. C. C. 28. RESIDUE.

Testator gives legacies in money, and dies abroad, where the will was made; currency shall be understood, if sterling is not expressed. Semble, that as to the interest on such legacies, an inquiry ought to be directed to ascertain in what country the fund, out of which the legacy is payable, has been deposited, and interest shall be paid according to the rate of interest in that country. *Malcolm v. Martin*, 3 Bro. C. C. 50. INTEREST, AT WHAT RATE.

Testator ordered his trustees out of certain funds to pay to his wife what should be to be returned of her portion, and to invest the residue in funds to pay her the interest for life, then to pay the interest to his niece for life, then to pay the principal to her children, if any, if not, to the younger children of H W W, if any, if not to the defendant W W, and gave the residue of his effects to his wife. The niece and nephew had neither of them children: the intermediate interest from the death of the niece to that of the nephew, shall not follow the principal but fall into the residue, and go to the wife's executors as personal estate of the testator undisposed of. *Wyndham v. Wyndham*, 3 Bro. C. C. 58. INTERMEDIATE PROFITS.

Testator being indebted on mortgage, and being possessed of 5000l. stock, by his will gave to A and B all the stock he had in the three per cents., being about 5000l., except 500l. which he gave to C, and he devised other specific parts of his property to be sold, and the produce to be applied in discharge of the mortgage. Testator himself afterwards sold out 2000l., part of the 5000l., and paid off the mortgage with it. This adeemed the legacy *pro tanto*, and the specific legatees can have no relief from the funds by the will appropriated for payment of the mortgage. *Humphreys v. Humphreys*, 2 Cox, 185. LEGACY, ADEMPMENT OF.

A bequest of a debt is adeemed by the debt being paid to the testator in his lifetime whether the payment be compulsory or voluntary, or whether the sum be expressed in the bequest or the debt bequeathed

generally. *Stanley v. Pottle*, 2 Cox, 180. **LEGACY, ADEMPMENT OF.**

When a testator expresses himself so ambiguously as to make it necessary to come to this court, the costs shall be paid out of his general assets. *Jolliffe v. East*, 3 Bro. C. C. 25. **COSTS.**

**Legacy** to A payable at twenty-one or marriage with interest, is a vested legacy; and executor having become bankrupt, might have been proved under the commission; his certificate therefore a bar, and the residuary legatees not liable. *Wallcott v. Hall*, 2 Bro. C. C. 305. **LEGACY VESTED; EXOR. LIAB. OF; BANKCY. CERTIFICATE.**

J, bequeathed, in these words: "I give to N the sum of 400*l*. which he owes me on mortgage of his estates in Shropshire, and I further order my executor to give him up all bonds owing from him to me, and which shall be found in my custody at my decease, with all interest due thereon." N had given the testator a bond as a collateral security for the mortgage money. N died before the testator: this is a lapsed legacy, and the executor of N must pay the money. *Toplis v. Baker*, 2 Cox, 118. **LAPSED LEGACY.**

Devises of real estates to A and B, and their heirs, to the use of them and their heirs, in trust to permit C to receive the rents and profits for life, and after her decease to stand seised of the said premises in trust for the second son of D and the heirs male of his body, remainder in trust for the third, fourth, and other sons of D in tail male, remainder in trust to E, for life, without impeachment of waste, remainder to trustees to preserve, &c. remainder to the first and other sons of E in tail male, &c. proviso that in case there should not be a second son of D at the time of the death of C, then until such second should be born, the said trustees should pay the rents and profits of the said estates to such person as was next in remainder and should be entitled to receive the same in case no such son should be born. C having cut timber, this was sold under an order of the court, and the produce paid into the bank. At C's death D had no son, and E was dead leaving F his eldest son. The produce of the timber belongs to F absolutely, and shall not abide the event of D's having a son. *Dare v. Hopkins*, 2 Cox, 110. **TIMBER.**

Where an intention appears in a testator to give the whole of a fund to a charity, the objects whereof are not sufficient to exhaust the whole, the court will apply the residue as nearly to the testator's designation as it can; but such defects will not be supplied without some such intention appearing to guide the court, which cannot go so far as to dispose of a fund merely on seeing a general intention in the testator to die testate as to the whole. *Att. Gen. v. Painter Stainers' Comp.*, 2 Cox, 51. **CHARITY.**

Tenant devised his estates to trustees, upon trust as counsel should advise, to convey, settle, and assure the said premises to or for the use of, or in trust for his daughter J for her life, and after her death, then on the heirs of his body, &c. The court directed the estates to be settled upon J for her life, with remainder to her first and other sons in tail general, with remainder to her daughters in tail general, &c. The limitations being to both sons and daughters in tail general, there is no necessity for a subsequent limitation to J, and the heirs of her body. *Bastard v. Proby*, 2 Cox, 6. **SETTLEMENT BY COURT.**

A legacy payable out of land at a future day, although given with interest, in the meantime shall not be raised if the legatee die before the time of payment. *Gawler v. Stauderwick*, 2 Cox, 15. **LEGACY LAPSED.**

Testator devised all his manors, messuages, lands, &c. to trustees in trust for A for his life, with remainders to his first and other sons in tail male, and for want of such issue, he devised all the same manors,

&c. to his daughters and granddaughters respectively during their lives, and after their decease to the heirs male of their bodies, to take as tenants in common, and on failure of such issue, he devised the remainder of his whole estate to his own right heirs. The devise will create cross-remainders amongst the daughters and granddaughters. *Staunton v. Peck*, 2 Cox, 8. **CROSS-REMAINDERS.**

Where the testator in his will and codicils has clearly shewn his intent to exempt his personal estate from his judgments and specialty debts, the court will charge them on the lands descended in exoneration of those devised. *Reeves v. Newenham*, 2 Ridgw. P. C. 11. **EXONERATION OF LANDS DEVISED.**

Testator having by his will devised all his lands to A subject to an annuity for his wife, and afterwards by a codicil devised part of those lands to B & C, confirming all his devises and bequests in favour of his wife. The lords held, that she ought not to be restrained from resorting to this part of the lands for her annuity, and reversed a decree for an injunction made by the court of exchequer. *Id.* 2 Ridgw. P. C. 11. **Vern. & Seriv. 482. CHARGE ON LAND.**

Testator had four daughters, A, B, C, and D, and by his will gave 4000*l*. to each of his daughters, A and B, with a direction, that if either of them died unmarried, 3600*l*., part of the 4000*l*., should be divided among his surviving daughters, and the child or children of such of them as should be then dead; A died unmarried; C had five children; two of whom survived A; but the other three died in her life-time. The five children of C took vested interests in equal fifths of the fund, as well those who died before, as those who survived A. *Stanley v. Wise*, 1 Cox, 432. **INTEREST, VESTED.**

Testator charged his real estate with 1000*l*. to be applied as the residue of his personal estate was thereafter directed. He then gave the residue of his personal estate, after his debts, legacies, and funeral expenses were paid, to certain trustees for the benefit of his relations in manner therein mentioned. The personal estate was deficient for payment of his debts. The 1000*l*. is payable to the trustees for the relations, without being subject to the claims of the creditors. *Killet v. Ford*, 1 Cox, 442. **LEGACY, SPECIFIC.**

A widow will not be barred of her dower by a provision made by will, unless there be a clear indication of the testator's intention, or unless some other part of the disposition of his property would be defeated by the widow's taking both. The testator's having given all his real and personal estate on trust, in the first place to pay such provision to the wife, is not of itself a sufficient indication of such intention. *Thompson v. Nelson*, 1 Cox, 447. **DOWER.**

Testator appointed four executors, and gave to each of them, who should prove his will, and take upon themselves the execution thereof, a legacy of 1500*l*., and an annuity of 100*l*. All the executors proved the will, and soon afterwards a bill was filed to carry the trusts of it into execution. After this, M, one of the executors, ran away with the infant daughter of the testator from a boarding school, and went through a ceremony of marriage with her in foreign parts, which marriage was afterwards declared null in the spiritual courts. Although M did prove the will, yet as he did not appear to have done it with an intention of really acting in the execution of it, he is not entitled to his legacy. *Harford v. Browning*, 1 Cox, 302. **EXECUTOR'S RENUNCIATION OF TRUST.**

A bequest for preaching a sermon on Ascension day, for keeping the chimneys of the church in repair, and for a payment to be made to the singers, in the gallery of the church, are all bequests to charitable uses, within 43 Eliz. *Turner v. Ogden*, 1 Cox, 316. **CHARITABLE USES.**

Testator gave 1000*l.* to M, and the issue of her body, and in default of such issue, he gave the said 1000*l.* to be equally divided between the daughters then living of J and E his wife. This devise takes in daughters of J and E, born after the testator's death, and therefore the limitation is too remote. *See v. Audley*, 1 Cox, 324. **LIMITATION TOO REMOTE.**

Testator gave the residue of his personal estate to trustees for the use of B during his life, and to the lawful heirs of his body after his demise; but in case of his dying without issue of his body after his decease, "I give all such residue to O." This creates a contingency with a double aspect, and in the event of B having no child, the limitation to O is good. *Trotter v. Oswald*, 1 Cox, 317. **LIMITATION, CONDITIONAL.**

**Legacies, when cumulative.** 1. The same legacy given by different instruments, shall be cumulative. 2. Probate being granted as of a will and codicil, is conclusive as to the fact of their being distinct instruments. *Baillie v. Butterfield*, 1 Cox, 392. **LIGACIES, CUMULATIVE.**

A larger legacy being given after a less, to the same legatee in the same will, the legatee decreed to take both. *Curry v. Pile*, 2 Bro. C. C. 225. **LEGACY, ACCUMULATION.**

A, having given his real, leasehold, and personal property, which leasehold was bishops' leases, renewable as a general fund, charged with annuities to trustees to pay rents and profits to B for life, with remainder to the plaintiff; the fines for renewing the leases which he directed should be renewed, are to be paid out of the whole fund not appropriated between the tenant for life and the remainder-man. *Stone v. Theed*, 2 Bro. C. C. 243. **FINES; LEASE, RENEWAL OF; APPORTIONMENT.**

A, by will, gave lands to trustees for terms, remainder to T Lord Foley, and C Foley for life. The trusts of the terms were for payment of scheduled debts, and to make an allowance to Lord Foley and E Foley; the debts being stated to be paid, a trust results to the tenants for life; a demurrer by the trustees to a bill by creditors for an account as having no interest, therefore overruled. *Davidson v. Foley*, 2 Bro. C. C. 203. **TRUST, RESULTING.**

Testator by will limited his estate in E. to several persons in succession; he then devised his estate in S. to trustees, in trust to sell, and out of the purchase money to pay all his debts, legacies, and funeral expenses; but in case the S. estate should be deficient for those purposes, then the deficiency should be made good out of the E. estate. He then gave several specific and pecuniary legacies, and all his personal estate not before disposed of, to his wife; and after making this will, the testator sold the estate, and received the purchase money. Held, that the debts, legacies, and funeral expenses should be raised out of the E. estate, in exoneration of the personal estate. *Williams v. H. of Landaff*, 1 Cox, 254. **CHARGE ON REAL ESTATE.**

C, by his will, devised all his freehold and copyhold estates to his two daughters, A and M, and all other daughters that he might thereafter have, as tenants in common in fee: he had afterwards another daughter, L. He then gave directions for another will, by which he gave all his real estates to his two eldest daughters, and a sum of 15,000*l.* to his daughter, L. The attorney took the minutes of this second will in writing; but, before it was prepared, the testator died: these minutes were proved in the spiritual court as a testamentary paper. Held, 1st, this paper being proved in the spiritual court, is sufficient to pass freehold estate; 2d, but is so totally void as to the residue, that it will not put L to her election, and she will take her share of the freeholds under

the first will, as well as the 15,000*l.* under the second; 3rd, the testator gave the 15,000*l.* to his daughter, L, to be paid to her at twenty-one or marriage, without interest for the same in the mean time; but if she died before twenty-one or marriage, then the 15,000*l.* was not to be raised, but was to sink into the residue of his personal estate. And he directed that, out of the interest of the 15,000*l.*, certain sums of money should be applied for the maintenance of L. The interest of this legacy, beyond the maintenance, is vested in L, and must be appropriated to accumulate for her benefit. *Curry v. Askew*, 2 Bro. C. C. 58. 1 Cox, 241. and see 8 Ves. 492. 498. 499. **WILL, WHAT A SUFFICIENT; COPYHOLD.**

Bequest of all testator's estate to A, to pay the testator's mother for life, and after her decease, "I then give to A, &c., the residue to B, with power to dispose of it by will:" the legacy to A vested immediately, and was transmissible. *Benyon v. Maddison*, 2 Bro. C. C. 75. **INTEREST, VESTED.**

Devise to sell the residue after payment of debts, and the money to be part of the personal estate; upon a total insolvency, held to be equitable assets. *Batson v. Lindgreen*, 2 Bro. C. C. 94. **ASSETS.**

Giving the interest of a legacy to the legatee, or for his maintenance, vests the legacy. *Hoath v. Hoath*, 2 Bro. C. C. 3. **INTEREST, WHEN VESTED.**

Legacies to be paid from a farm when A's son attains twenty-one, the farm not being carried on, are not to be paid out of the residue. *Mayott v. Mayott*, 2 Bro. C. C. 125. **LEGACIES, HOW PAYABLE.**

A bequest that 4000*l.* and a further sum of 1500*l.* shall pertain to J, after the death of R without lawful issue, is too remote, and the whole shall vest in R. *Glorer v. Strothoff*, 2 Bro. C. C. 33. **LIMITATION, TOO REMOTE.**

Testator seized of freehold and copyhold estates in the counties of H and C, devised all his lands, tenements, and messuages and hereditaments in those counties, to his wife for life, remainder to his first and second sons in tail, remainder to his wife in fee, having in the beginning of the will, declared that as to all his worldly estate he disposed thereof as therein followed; but not having surrendered the copyhold to the use of his will, the court would not supply the want of a surrender, there being freehold estates to answer the words of the devise. *Milbourne v. Milbourne*, 1 Cox, 247. S. C. 2 Bro. C. C. 64. **SURRENDER OF COPYHOLD.**

W by his will, devised his real estate to trustees in trust to sell and to apply the purchase money, in the first place, in payment of all the charges, and all other his debts and legacies, and as to the residue of the purchase money, to pay one moiety to his daughter M, and to lay out the other moiety in government securities, and to pay the dividends for the maintenance of the three sons of his daughter A, until they should attain their respective ages of twenty-four years, and when they should have attained that age, he gave that moiety equally to be divided amongst them; but if they all should die under twenty-four, then he directed that such moiety should sink into and be deemed part of the residue of his personal estate, and be applied in such manner as his personal estate was thereafter given and disposed of. He then gave several specific legacies; and all the residue of his personal estate he gave to his daughter A and to H, equally to be divided between them. The debts and legacies are payable in the first instance out of the purchase money of the real estate. *Webb v. Jones*, 1 Cox, 245. S. C. 2 Bro. C. C. 60. **ADMON. OF ASSETS.**

On legacies to a natural child of the testator, with directions to apply a competent part of the interest for maintenance, interest is payable from the testator's death. *Newman v. Bateson*, 3 Swan. 689. **INTEREST ON LEGACIES.**

Testator authorised his executors, at any time before T L should attain the age of twenty-six years, to raise by sale of a sufficient part of certain bank annuities, any sum of money not exceeding 600*l.*, and pay and apply the same towards the preferment or advancement in life, or other the occasions of T L as the said executors should think proper; and at the age of twenty-six, he gave the said 600*l.* to T L absolutely. The executors declining to act, the court will not give this 600*l.* to T L before twenty-six, without referring it to the master to inquire whether T L's situation requires the 600*l.* or any part thereof to be advanced. *Lewis v. Lewis*, 1 Cox, 162. **ADVANCEMENT OF LEGACY; PR. REF. TO MASTER.**

Where legacies are given by different instruments (whether will and codicil, or two codicils), to the same persons, they will in general be accumulative. *Foy v. Foy*, 1 Cox, 163. **LEGACY, CUMULATIVE.**

A makes a lease to B for seven years, and on the lease is indorsed an agreement, that if B shall within a limited time be minded to purchase the inheritance of the premises for 300*l.*, A would convey them to him for that sum: B assigns to C the lease and the benefit of this agreement. A dies, and by will gives all his real estate (generally) to D, and all his personal estate to C and D equally. Within the limited time, but after the death of A, C claims the benefit of the agreement from D, who accordingly conveys the premises to C for 300*l.* This sum of 300*l.* when paid, is part of the personal estate of A, and E is entitled to one moiety of it as such. *Lawes v. Bennett*, 1 Cox, 167. **PERSONAL ESTATE; ADMON. OF ASSETS.**

Testator gave legacies to his three children, payable after the death of his executrix, and directed that if any of the children should die unmarried and without issue, before the death of the executrix, the legacy should go to the surviving children. One of the daughters married, but died without issue in the lifetime of the executrix. The legacy survived to the other children. *Hemcorth v. Taylor*, 1 Cox, 112.

Testator gave to A B C D and E 500*l.* each to be paid to them at their respective ages of twenty-three years; and if they should die before that time, then their respective legacies were to sink into the residue of his personal estate. These legacies do not carry interest, and no maintenance can be allowed to the legatees. *Descrambes v. Tomkins*, 1 Cox, 133. **LEGACY, INTEREST ON; MAINTENANCE.**

Two legacies of equal sums being given to the same person, the one by the will, the other by a codicil, the legatee shall take both in this case, the rule in favour of the benefits being accumulative, as given by different instruments, was supported by particular expressions of kindness towards the legatee. *Ridges v. Morrison*, 1 Bro. C. C. 389. **LEGACIES, CUMULATIVE.**

Bequest to an hospital of 3400*l.* in the 3 per cents. the dividends to be divided among four widows, this is a pecuniary, not specific legacy. *Peterborough v. Mortlock*, 1 Bro. C. C. 565. **LEGACY, SPECIFIC.**

Testatrix gave 500*l.* stock in long annuities to A, the same to B; 200*l.* long annuities to C, the interest thereof to accumulate, an enquiry admitted into the state of her property, to shew she meant such sums of money, not annuities of this amount. *Fonnerneau v. Poyntz*, 1 Bro. C. C. 472. **LEGACY, SPECIFIC.**

Personal estate bequeathed to F II, her executors, administrators, and assigns; but in case of the death of F II, without issue, remainder over; this remainder over too remote, as it must be construed a general dying without issue. *Bigge v. Bensley*, 1 Bro. C. C. 187. **LIMIT. TOO REMOTE.**

Devise of estate to second son, J, after the decease or marriage of the wife, charged with 100*l.* to testator's daughter, M. M died, living the wife; but

held, the legacy vested in M, and transmissible to her representative. *Goodwyn v. Munday*, 1 Bro. C. C. 191. S. C. 2 Dick. 551. **INTEREST, VESTED.**

A charge of legacies under a will includes only those which follow, and not others at a great distance separated by other bequests. *Hone v. Medcraft*, 1 Bro. C. C. 261.

Rent charge devised to a wife, not a bar of dower unless so expressed or the circumstances such as to shew it must be intended. *Pearson v. Pearson*, 1 Bro. C. C. 292. **DOWER.**

Testator gave the use of 800*l.* to his wife for life, and after her decease made a disposition of parts of the principal; he then gave several other devises, and afterwards to J 100*l.* J died, living the widow: held, that his legacy was vested and transmissible. *Monkhouse v. Holme*, 1 Bro. C. C. 298. **INTEREST VESTED.**

R seized in fee of estates in C, which were mortgaged to a considerable amount, and also of an estate in the I. of W., and being seised for life with an ultimate remainder or reversion in fee, after limitations in tail to himself as heir at law to his brother, of an estate which was so devised by his brother, and possessed of an equal interest in money bequeathed by him to be laid out in lands, devised the mortgaged lands to several uses, and *inter alia* to the plaintiff for life, remainder to her sons in tail, remainder to her daughters as tenants in common: he devised the estate in the I. of W. to his executors as trustees for twenty-one years, among other uses, to pay his bond and book debts, if his personal estate should not be sufficient; and by a further clause to pay all his debts: the trust term, after the personal estate, shall exonerate the mortgaged estate. Two other questions were agitated: 1st, Whether the reversion in the brother's estate, which had fallen in since R's death, was assets to pay his debts: 2nd, As to the interest of the plaintiff and her granddaughter (the daughter of a deceased daughter) in the devised estates? which were not determined. *Tweedale v. Coventry*, 1 Bro. C. C. 240. **EXONERATION OF REAL ESTATE.**

W T devised to his wife for life, remainder to trustees to preserve contingent remainders, remainder to E for life, remainder to trustees *at supra*, remainder to the heirs of body, remainder over. In a subsequent clause he declared his intention, that C should have only a life estate; upon a bill filed by the remainder-man for a conveyance in which E should take only a life estate, it was demurred to, and the demurrer allowed, because these are legal estates. *Thong v. Bedford*, 1 Bro. C. C. 313. **PL. DEMURRER; JURISDICTION.**

N devised an annuity of 300*l.* per annum to his wife for life, then to accumulate to make a portion for his first daughter who should marry, then in order to raise portions for other daughters, then to remain to his eldest son, and on his decease to the heirs male of his body, and in case his having no issue, remainder to the next eldest son and his heirs male. The daughters married in the life of the wife; the eldest, and two other sons of testator died, leaving the wife without issue: this is not personal estate vesting absolutely in the eldest son (on the principle that it would be an estate tail in land), neither does it vest as an executory devise in the fourth son of testator who survived; but it is an annuity, and being exhausted by the events, there being nobody to take it as such, sinks into the residuary estate of the testator. *Turner v. Turner*, 1 Bro. C. C. 317. S. C. Ampl. 776. **ADMON. OF ASSETS.**

A, by will, devises all his estates to his eldest son in tail male, with remainders over; part of the property consisted of an estate in Jamaica, and, therefore, the testator added the following clause: "And

I recommend to my executors, that all sugars, rum, and other plantation produce that is sent to the port of London, be consigned to the house of Collet, Evans and Co. until such time as any of my sons shall set up in the business of a sugar factor; then my desire is, that the consignment may pass through his or their hands." C, a natural son of the testator's, set up the business of a sugar factor, during the minority of the devisee, and accordingly got the consignments. Upon the devisee's coming of age, C accounted with him, but insisted on being entitled to his commission, not only upon the produce which he had actually sold, but also upon the produce which had been consigned to him, but was not then arrived in the port of London: held, that the words of the above clause were not imperative, or amounted to words of bequest in favour of C, but were recommendatory only: held also, that C was entitled to a commission only upon what he had actually sold, and not upon what was only consigned, but not delivered to him. Decretal order of chancery confirmed. *Beckford v. Beckford*, 4 Bro. P. C. 33. **PRINCIPAL AND FACTOR; ACCOUNT.**

B devised his estate to trustees, to pay yearly rents and profits in discharge of his wife's jointure, his sister's annuity, and in payment of his debts, and the interest thereof; then to certain uses. The creditors file a bill, praying a sale, but this court cannot, under such a devise, decree the estate to be sold. *Lingard v. Derby*, 1 Bro. C. C. 311. **SALE OF REAL ESTATE; DEBTOR & CRED.**

T gave the residue to trustees, *inter alia*, to lay out one third part in securities, the interest to accumulate for the benefit of the children of his niece; and if she should survive her husband, and have issue under twenty-one years of age, the trustees were to apply the interest for their maintenance till twenty-one, and upon the children attaining their ages of twenty-one, equal shares of the principal to be transferred to them; the interest accrued between the elder and the younger children coming of age decreed, to be divided between them. *Hawkins v. Combe*, 1 Bro. C. C. 335. **INTERMEDIATE PROFITS.**

Testator ordered his estate to be sold, and after giving a legacy to his wife, directs the remainder to be vested in the executors for payment of debts; the money arising from the sale is equitable assets. *Lucas v. Calcraft*, 1 Bro. C. C. 135. **ASSETS, EQUITABLE.**

Words of confidence, desire, or request, in order to raise a trust, must not only attach on a precise subject of property, but also describe with precision, the objects of bounty; in this case, a bequest of leaseholds to a brother, hoping "he will continue them in the family," was held insufficient. *Harland v. Trigg*, 1 Bro. C. C. 142. **WORDS RECOMMENDATORY, &c.**

C provided by his will a maintenance for his second son, out of the real estate; he afterwards gave large legacies to his younger children with maintenances out of the interest; the second was entitled to both maintenances. *Clive v. Walsh*, 1 Bro. C. C. 146. **DOUBLE PORTIONS, &c.**

Devise of lands to be sold, and other lands to be purchased in another county; A to be tenant for life, (sons waste,) of the lands to be purchased; and the rents and profits of the lands to be sold to be to the same uses; A cannot cut down timber on the lands to be sold, since he thereby would have the benefit of double waste. *Plymouth v. Archer*, 1 Bro. C. C. 150. **TENANT FOR LIFE; TIMBER; WASTE.**

T provided, by a codicil to his will, that his wife, (whom he had made tenant for life,) might cut timber for her own use and benefit, at reasonable times; what timber the tenant for life shall be restrained from cutting. *Chamberlayne v. Dumas*, 1 Bro. C. C. 166. **S. C. DICK. 600. O'Brien v. O'Brien, Amb. 107, 108. WASTE; TENANT FOR LIFE; TIMBER.**

P, in his lifetime granted two annuities to T, his son, and there being subsisting accounts between them, by will gave him an annuity of 600*l.* on condition that he should, within three months, execute a release of all demands on his estate; the release tendered including the two annuities, granted during the life; T did not forfeit his annuity of 600*l.* by refusing to execute it; but a release settled by the master, omitting those annuities being tendered, and refused; the court held, that he forfeited the annuity under the will. *Taylor v. Popham*, 1 Bro. C. C. 168. **CONDITION, BREACH OF.**

Devise to testator's wife, not doubting she will give what shall be left to my grandchildren, not sufficiently certain to raise a trust. For such purpose the objects must not only be defined, but the subject of property precisely ascertained, so as to be incapable of diminution by the party. *Wynne v. Hawkins*, 1 Bro. C. C. 179. **WORDS RECOMMENDATORY, &c.**

Devise of personalty to B, and the lawful heirs of his body if he should have any; but if he should die without lawful heirs 1000*l.* to S, and 500*l.* to C: the contingencies too remote. *Att. Gen. v. Hird*, 1 Bro. C. C. 170. **LIMIT, TOO REMOTE.**

Introductory words, referrible to all testator's worldly estate, amounting to a charge of simple contract debts; under such a charge, copyhold lands are liable, as well as freehold; in this case there was also a copyhold which had not been surrendered: this was also declared liable. *Coombe v. Gibson*, 1 Bro. C. C. 273. **CHARGE ON LAND; COPYHOLD.**

R by will gave an estate to his wife for life; and if there should be no issue between them, to defendant, charged with two sums to be paid to M and W; afterwards M being dead, by codicil he ordered the legacy to be paid to W and A; W died, living the wife; the charge was vested, and transmissible to his representatives. *Dawson v. Killet*, 1 Bro. C. C. 119. **INTEREST, VESTED.**

A devises lands to her sister B for life, remainder to trustees to preserve, &c., remainder to the heirs of the body of B, remainder to her other sister C for life, with remainders to trustees to preserve, &c., remainder to the heirs of the body of C, remainders over, B died in testatrix's lifetime; C suffered a recovery, and then contracted to sell estate. On a bill by C. against purchaser, it was held, that B would have taken an estate tail in the premises if she had survived the testatrix; and that having left an only daughter, C could make no title, and therefore bill was dismissed. *Ambruse v. Hodgson*, 3 Bro. P. C. 416. **ESTATE TAIL.**

When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail; the word "heir" in such case is always taken to be a word of limitation, not of purchase. *Id. ib.*

Testator gave several legacies, and ordered his real and personal estate to be sold, his debts and legacies paid, and the residue to certain legatees in the proportion of their legacies. Two of the residuary legatees died, living the testator. These shares are lapsed, and so far as they are constituted by personal estate, shall go to the person next of kin, and so far as they are constituted of real estate, to the heir at law. *Ackroyd v. Smithson*, 1 Bro. C. C. 503. **S. C. SHORTLY, 3 P. W. 22. note. S. P. Amb. 582. See 7 Pri. 258. LEGACIES, LAPSED.**

Testator devises the residue to his children, but if any of his daughters shall marry without the consent of her mother, or guardian, her share to go to those unmarried. This is a condition subsequent, and a daughter who married without consent is entitled. *Jones v. Suffolk*, 1 Bro. C. C. 528. **CONDON. SUBSEQUENT, BREACH OF.**



Testator devised subject to this contingency: "if either of the devisees should marry into the families of R or G, and have a son, I give all my estate to him, with remainders over; if not, to B." The devisees married, but not into the favoured families. B files his bill, but dismissed; for the devisees have their whole lives to perform the condition. *Randal v. Payne*, 1 Bro. C. C. 55. CONDON. PERF. OF.

Residue to executors in nature of joint tenancy; will revoked by codicil as to one, other takes the whole. *Humphreys v. Taylor*, Dick. 161.

Question as to cross remainders in will. *Eastland v. Reynolds*, Dick. 317.

Legacy to children of A, lawfully begotten, or to be begotten, extends only to those born in testator's lifetime. *Sprackling v. Ranier*, Dick. 344.

Real and personal, by will, to be sold; legacies, &c. therewith to be paid; residue by fifths to five persons. One dies before testator: held to be real estate to heir of testator. *Digby v. Lingard*, Dick. 500.

Legacy given, devised, and bequeathed: on construction of will, held chargeable on real estate. *Hassel v. Hassel*, Dick. 327.

Held on construction, greater legacy not satisfaction of lesser debt. *Field v. Mostin*, Dick. 543.

Legacy on death of tenant for life does not lapse by death of legatee before that period. *Gibbs v. Monday*, Dick. 551.

Residuary bequest in favour of infant grandchildren, payable at twenty-one or marriage, or to the issue of those dead, with survivorship and accumulation till the time of payment, and a limitation over, absolutely, in case of the death of all without issue before that time. The father, in consequence of bankruptcy, being wholly unable to maintain his children, maintenance was directed by the court, taking the consent of the persons to whom the property was given over. *Fendall v. Nash*, 5 Ves. 197. INFANT MAINTENANCE; GRANDCHILD.

Devise of residue to an infant, payable at twenty-one, remainder over; the infant died under age; the interest from the death of the testator to that of the infant shall go to her representative, not to the remainder-man. *Chaworth v. Hooper*, 1 Bro. C. C. 82. INTERMEDIATE PROFITS.

Two equal legacies in the same will, and to the same legatee, only one shall pass. *Garth v. Meyrick*, 1 Bro. C. C. 30. LEGACIES, ACCUMULATIVE.

Residue to six grandchildren, the name of one repeated, that of another omitted; all of them shall take. *Id. ib.*

Where will recites and refers to a voluntary deed, which is not found at the testator's death, but is by verdict of jury, declared to have existed at the time of such death; this reference and recital in the will shall establish the deed, and it shall be considered as incorporated with, and constituting part of, the will. *Healey v. Copley*, 7 Bro. P. C. 496. VOLUNTARY CONVEYANCE.

Residuary bequest to a very large amount in favour of infant grandchildren, payable at twenty-one or marriage, with survivorship, the interest to accumulate, and be paid with the capital, and in case of the death of all before the time of payment, over to their mother absolutely. The father's income, though considerable, bearing no proportion to the fortune bequeathed, and there being several children, the court directed maintenance, taking the consent of the mother. *Curdish v. Mercer*, 5 Ves. 195. INFANT MAINTENANCE; GRANDCHILD.

Legacy given, devised, and bequeathed, held on construction of will to be chargeable on real estate. *Hassel v. Hassel*, Dick. 527.

A devises lands to his eldest son for life, remainder to the heirs male of his body lawfully begotten; remainder to the youngest son in like manner; remain-

der to any afterborn son of the testator for life; remainder to the heirs male of the body of such afterborn son; and for want of such issue, to his brother T for life, with remainder to the heirs male of his body. The testator was on his death-bed at the time of making his will, and died in about three weeks afterwards. The younger son, however, died before him, and the eldest enjoyed the estate, but died without issue, and without having barred the entail. Upon a question, whether the limitation over to the testator's brother ought not to be considered as depending upon a general failure of issue, and consequently too remote, it was held, that a remainder after estates tail was vested in the brother, and that the testator had not the event of a second marriage in his contemplation. *Jones v. Morgan*, 3 Bro. P. C. 323. LIMITATION OVER.

S gives the residue of his estate to his daughter E for life, and after her death to be equally divided among her children, when the youngest should attain twenty-one. But if his daughter should die without any child, or the youngest should not arrive at twenty-one, and none of them should have left lawful issue, then he gave the residue to other persons. E had only one daughter, who married and had four children, but both she and all the children died in the lifetime of E. Held, that upon the death of E without any child then living, the devise took effect. *Thickness v. Liege*, 3 Bro. P. C. 365. LIMITATION OVER.

One bequeaths several leasehold estates held for years under the Duchy of Cornwall to his wife, during so many years of the term as she shall live, and after her decease, if the terms of the several leases be then in being, unto and amongst, &c.; the wife got an additional term; and held it shall not be for her own benefit, but should go to the uses of the will. *Raise v. Chichester*, Amb. 715. LEASE, RENEWAL OF; TRUST; TENANT FOR LIFE.

A gives by will to B 500*l.* and by codicil an annuity, and by another codicil in these words "I add this codicil to my will; I give to B 1000*l.*" Held, that B should have both the 500*l.* and 1000*l.* *Halton v. Hooley*, Loffl. 122. CODICIL; LEGACY, ACCUMULATIVE.

L M gave 4000*l.* bank stock to trustees, in trust to pay the dividends to his daughter E for life; and after her death, he directed the principal to be divided equally between her children at their ages of twenty-one or marriage; but if they should die before, then to his son L: the daughter had two children who both attained twenty-one, but one of them died in her lifetime. Held, that this legacy did not vest absolutely in the children of E on their attaining twenty-one, but only in such of them as should be living at the time of her death. *Randall v. Metcalfe*, 3 Bro. P. C. 318. VESTED INTEREST.

Devise of freehold houses to A for life, remainder to B, he paying thereout to C and D legacies three months after the death of his wife. C and D died living the wife. Held raiseable for their representatives. *Jeele v. Titchener*, Amb. 703. INT. VESTED.

Testator enumerates mortgages, bonds, and notes due to him, and gives out of the interest an annuity to A for life, and after her death directs the securities to be vested in trustees for charitable uses; some of the securities are paid off and new securities taken after the will. Held a general bequest of the amount of the value of the securities to be made good out of the general assets. *Att. Gen. v. Pagin*, Amb. 566.

Residue under particular circumstances will not take in lapsed legacies; the residue being given as a small residue of about 100*l.*, and the lapsed legacies amounting to 20,000*l.* In general the residue takes in lapsed legacies; as to real estates it is otherwise, but the legatee must be a general legatee. *Att. Gen. v. Johnston*, Amb. 577. 580. LAPSED LEGACIES; RESIDUE.

A gives all his worldly substance to his daughter J, provided she marries with the consent of his execu-

tors; but if she should marry without such consent, or should die without issue, then he gives his estate to other persons. The daughter married with consent, but died without ever having any issue. Upon a question when this bequest over, took effect, it was held to take effect upon the death of the daughter without issue living at that time. *Keily v. Fowler*, 3 Bro. P. C. 299. **CONDITION.**

Devise of land to wife, that she might give her children such fortunes as she should think proper or they deserve. There being five children, and the eldest being provided for, an appointment of a guinea to him, and the rest among the other children, was held a good appointment. *Burrell v. Burrell*, Amb. 660. **POWER, EXECUTION.**

Devise of lands, "which he has before given to A," over to B on a given event, is a devise by implication to A. *Bibin v. Walker*, Amb. 661. **IMPLICATION.**

Testator bequeathed to his daughters 1500*l.* each to be paid them respectively at the time of their marriage, with consent of his executrix and executor, who are made guardians during their minority, with a clause for maintenance and education till twenty-one. Held, a child attaining twenty-one, her legacy was vested; the condition is to be understood as confined to marriage under twenty-one. *Knap v. Nokes*, Amb. 662. **INTEREST VESTED.**

Devise of lands to be sold, and part of the money arising by sale to go to charitable uses, and the residue of the money is given over. So much as is given in mortmain shall lapse to heir, and not go to residuary legates. *Cravenor v. Hallum*, Amb. 643. **MORTMAIN.**

R devises all his real estates to his son J for life, on condition that he should, in twelve months after the testator's death, suffer a recovery of his own testate, and settle it to certain uses mentioned in his father's will; but if he should neglect or refuse so to do, then the testator declared, that the devise of his real estate to his said son J, should cease and be void; and that in that case, the same should go according to the uses before limited in the same manner, as if his said son was really dead. J suffered a recovery of his own estate, but declared the same to other uses than those mentioned in his father's will; he nevertheless continued in the possession of the devised estate. But it was held, that not having complied with the condition, he was not entitled to any benefit or advantage under the will. *Dk. of Montagu v. Ld. Beaulieu*, 3 Bro. P. C. 277. See S. C. Amb. 533.

A devises an exchequer annuity of 1000*l.* to trustees in trust for J, for so many years as he should live, and from and after his decease for such persons as at the time of his death, should be the heir male of his body, and in case there should be no such person, then in trust for the heir male of B, J's father. J died an infant, and without issue, and about four years afterwards B had another son born, G, who also died an infant without issue. Held that absolute property of annuity vested in G, and that upon his death it belonged to B as his administrator. *Id. ib.* **VESTED INTEREST.**

Devise of lands to wife for life, and after her death to the son, he paying out of such lands 600*l.* to testator's daughter within six months after death of wife, with power of entry in case of non-payment, the daughters died in the life of testator's wife: Held their legacies vested, and on his death to be raised for their representatives. *Manning v. Herbert*, Amb. 575. **INTEREST VESTED.**

A man by his will gives to his executor an annuity of 200*l.*, and charges his real estate with the payment of it. The testator by a codicil, attested by two witnesses only, gives his executor another annuity of S. 400*l.* payable as mentioned in my will. Held that the executor was well entitled to both the annuities; but the annuity given by the codicil was payable out

of the personal estate. *Wright v. Ld. Cadogan*, 1 Bro. P. C. 486. **LEGACY ACCUMULATIVE.**

Bequest of personality to A for life, and after A's death to his heirs male of his body, &c. for ever, and for want of such issue, to B for life, &c. A takes absolutely, and gift over to B, void. *Tothill v. Pitt*, 1 Mad. 488. **LIMITATION OVER OF PERSONALS.**

Bequest of the remainder of his effects, annuities, mortgages, &c. to a charity; the devise of the mortgages is void, but being part of enumerated residue, the court will order them to be applied first in payment of debts before any other part of the personal estate, to leave a larger fund for the charity. *Att. Gen. v. Caldwell*, Amb. 635. **CHARITY, MARSHALLING ASSETS.**

A devise to A and B, and their heirs in default of issue male and female of the testator's own body, is at the testator's death, a devise in possession, and not an executory devise; the contingency being determined at the instant the will takes place, viz. at the death of the testator without issue. *French v. Cardell*, 3 Bro. P. C. 257. **EXECUTORY DEVISE.**

Power contained in a will for the devisees for life, when in possession, to cut down timber as four trustees or the survivors or survivor of them should direct, &c.: all the four trustees being dead, held that the court would execute the trust, by referring it to a master to see what timber was fit to be cut down from time to time. *Hewett v. Hewett*, 2 Eden, 332. S. C. Amb. 508. **POWER, EXECUTION BY COURT; PR. REFERENCE TO MASTER.**

Bequest of money to build and endow an hospital upon land not already in mortmain, held to be void under the stat. 9 G. 2. *Pelham v. Anderson*, 2 Eden, 296. **MORTMAIN.**

Bequest of personal estate to A during his life, and if he had no heirs, then over; held the bequest over, was void, as being too remote. *Bodens v. Ld. Galway*, 2 Eden, 297. S. C. Amb. 478. **LIMITATION OF PERSONALS.**

Bequest of money to A upon condition that he should pay an annuity to B, and in case B should die without issue, then to be equally divided amongst such of testatrix's nearest relations which should at that time be living: held the bequest over, was too remote. *Destouches v. Walker*, 2 Eden, 261. **LIMITATION OF PERSONALS.**

Bequest of residue of real and personal estate to the children of A equally, with a bequest over thereof to other persons; if A should die without leaving issue, this is a vested interest defeasible, and the children as they are respectively born, shall take the accruing interest equally. *Shepherd v. Ingram*, Amb. 448. **INTEREST, VESTED.**

Where there is a devise of a residue with devise over on a contingency; the devisee is entitled to the rents and profits till the contingency happens. *Id.* 450. **INTEREST, VESTED; INTEREST, CONTINGENT.**

A woman, by marriage articles, reserves a power of disposing of her present or any future estate, real or personal, by deed or will; a devise is a good execution of her power, the legal estate being in trustees: devise to first and other sons, and in default to daughters as tenants in common, and in default of such issue, over, raises cross-remainders between the daughters. *Wright v. Englefield*, Amb. 468. S. C. 2 Eden, 239. **POWER, EXECUTION OF.**

Where there is an estate of freehold, limited to the ancestor, no subsequent limitation to his heirs or to the heirs of his body, can make them purchasers. *Dubber v. Trollope*, Amb. 462. **ESTATE BY PURCHASE.**

J gives the residue of his estate to his daughter C, to dispose of as she shall think fit; but if she should die unmarried, or intestate, then what was left to her should go to his brother's children; C possessed this

residue, and disposed of it in making purchases, and taking securities in her own name. She afterwards died intestate and unmarried: held, that all her personal estate belonged to her next of kin; and that no part of it could be considered as the specific personal estate of her father, or go to his brother's children. *Lighthorne v. Gill*, 3 Bro. P. C. 260. ADMINISTRATION OF ASSETS.

Testator devises leasehold premises to his executors, after payment of certain sums, to pay the rents to A for life, and then that his natural daughter should have the same for her life; and in case she should die, having no lawful issue, he bequeathed the premises to his executors, to be sold for the purposes of the will: held, the devise over to the executors not too remote. *Taylor v. Clarke*, 2 Eden, 202. LIMITATION OF PERSONALS.

Bequest of money to testator's wife and the issue of her body, and failing such issue, to such of her heirs whom she should appoint by written will: held, that the subsequent words did not controul the previous limitation, and therefore that a bequest over of the money was void, as being too remote. *Houston v. Ives*, 2 Eden, 216. LIMITATION OF PERSONALS.

J, by will, devises his real estates to trustees, in trust for several persons for life, with remainders to their first and other sons in tail male successively; but directs his trustees, upon the birth of any son of each tenant for life, to revoke the issue before limited to their respective sons in tail male, and to limit the premises to such sons for their lives, with immediate remainders to the respective sons of such sons in tail male: held, that this clause of revocation and resettlement, as tending to a perpetuity, and repugnant to the estate limited, was void, and of no effect. *J. d. Spencer v. Dk. Marlborough*, 3 Bro. P. C. 232. PERPETUITY.

A, by will devised his colliceries, &c. to trustees, upon trust, to dispose and convey the same in such manner as his daughter M, whether sole or covent, should direct or appoint; and for want of such direction or appointment, to apply the money arising thereby to certain purposes in his will mentioned. He then declared, "that though his meaning was to give his said daughter the absolute disposal of the said colliceries, &c. to prevent the expences and trouble that must attend the management of affairs of such a nature, under the direction of the court of chancery; he requested his said daughter to direct the money arising therefrom, to be applied in such manner as he had directed the same in default of her direction and appointment." The daughter made an appointment in favour of her husband absolutely; but this appointment was held to be void, as being contrary to the testator's intention. *El. Bute v. Stuart*, 1 Bro. P. C. 476. POWERS, EXECUTION OF.

A devises certain premises (subject to a mortgage of 3500*l.*) to his three daughters, to be divided equally; one dies; mortgage bequeaths to the two survivors all the money due on the mortgage and the interest, so that it do not altogether exceed 4000*l.* and if it do not amount to 4000*l.* then to be made up; the other daughter dies, leaving all her real and personal estate to the third: held, that the charge is merged in the inheritance. *Price v. Gibson*, 2 Eden, 115. MERGER OF CHARGE ON ESTATE.

Testator gives the residue of his personal estate to his three children, A, B, and C, share and share alike, as tenants in common, and not as joint tenants; but by a codicil revokes C from being one of his residuary legatees, and gives a pecuniary legacy instead: held, that this third does not belong to the two other residuary legatees, but shall go according to the statute of distributions. *Creswell v. Cheslyn*, 2 Eden, 123. DISTRIBUTION.

Where testatrix, by will, directed a sum of money

to be laid out in land, and settled, after some previous limitations, on her own right heirs; and afterwards made a general residuary devise of all her real and personal estate: Held, that upon the evident intent of the testatrix to exclude the residuary devise, the heir at law was entitled to a remainder in fee in the lands to be purchased. *Robinson v. Knight*, 2 Eden, 155. RESIDUARY DEVISE.

A, having agreed to purchase a real estate, the purchase money for which exceeded the amount of his personal estate, by his will made a few days afterwards, attested by three witnesses, as to all the worldly goods that it had pleased God to bless him with, gave and bequeathed to his wife and two sons all his goods, cattle, chattels, personal estate and effects whatsoever; and in case they died without issue, &c. he gave the children's share of the personal estate and effects over: testator dying before the purchase could be completed, held, that the agreement ought to be specifically performed; and that the words of the will, being insufficient to comprehend real estate, the estate ought to be conveyed to the eldest son and his heirs, &c. *Cane v. Cane*, 2 Eden, 139. SPEC. PERF.

A pedigree made by a testator's direction, and found among his papers, not admitted to explain a will equivocal, but not unintelligible. *Crosley v. Clary*, 3 Swan. 322. See S. C. Amb. 397. PR. EVID.

Where a testator devises a leasehold for years to one for life (who has no children), with remainder to his first and other sons in tail male; remainder to another for life, and to his first and other sons in tail male, with several remainders over; if the second tenant for life has a son born before the first tenant for life has a son, the remainder in tail limited to that son will vest; and all the subsequent remainders which were good, as possibilities, while the contingency of a nearer heir's coming in case were in suspense, are *ipso facto* from that moment determined; and though such tenant in tail should die an infant the next day after his birth, yet the ownership of the term must vest, and his administrator must take it subject only to be defeated by the birth of a son of the first tenant for life, which will still be prior to such intestate infant in the order of limitation. *J. y. Pelham v. Gregory*, 3 Bro. P. C. 204. LIMIT. OF ESTATE; INTEREST, VESTED.

J S devised lands to his son M, and other lands to his son J, and in case both of them should die unmarried, and without lawful issue, then his three daughters were to have the lands as tenants in common, and not as joint tenants. Both the sons died unmarried, and without issue; and two of the daughters died in the lifetime of the surviving son, leaving issue: Held, that the three daughters had such a contingent interest vested in them upon their father's death, as was transmissible to their representatives; and that the surviving daughter was not entitled to the whole. *Wilson v. Bayly*, 3 Bro. P. C. 195. VESTED INTEREST.

Where A, by will, executed before the statute of mortmain, directs B to settle a freehold estate to pay a sum not exceeding 100*l.* per annum, in such manner, and upon such trust, on such a part of the poorer people of a parish as he should think proper; and B, in pursuance thereof, by will executed after the statute, appoints a sum less than the 100*l.* per annum: Held, 1st, that the appointment is not void by the statute; and, 2ndly, that the amount to be appointed was discretionary in B, and not to be increased under the 43 Eliz. to the whole amount given by the will of A. *Att. Gen. v. Bradley*, 1 Eden, 482. STAT. C. OF MORTMAIN.

Residue of testator's estate directed to be invested in government securities, and the interest paid to his wife; and after her death to be sold, and the money

thereby arising to be divided amongst his daughters and grandchildren: Held, that the share of a daughter dying in the lifetime of the wife was vested. *Hatch v. Mills*, 1 Eden, 342. **VESTED LEGACY.**

Testator devises his real estates to trustees to several persons for life, with remainder to their first and other sons in tail male successively; but directs his trustees, upon the birth of every son of each tenant for life, to revoke the uses before limited to their respective sons in tail male, and to limit the premises to such sons for their lives, with immediate remainders to the respective sons of such sons in tail male: Held, that this clause of revocation and resettlement was void, as tending to a perpetuity, and being repugnant to the estate settled. *D. Marlborough v. El. Cudolphin*, 1 Eden, 404. **PERPETUITY.**

Devise to his son and his heirs, but in case he should die without issue, not having attained twenty-one, then over: he attained twenty-one. Held, he took by purchase, and not by descent. *Scott v. Scott*, Ambl. 383. S. C. 1 Eden, 458. **ESTATE BY PURCHASE.**

In case of a will, the intent shall prevail unless contrary to law, i.e. if the limitations are allowable by law; not that the words must be taken in such signification as the law imposes on them. In a will, words taken in law as of limitation, shall be taken as words of purchase if so intended. *Austen v. Taylor*, Ambl. 377.

Devise to J for life; remainder to his issue male, and to his and their heirs, share and share alike; and for want of such issue, to his issue female, and her and their heirs; remainder to J K, his heirs and assigns, with a proviso that if J K or his issue, or any of them shall alienate, mortgage or incur, or do any act to defeat the bequests, he or they shall pay, and he charges the premises with, 2000*l.* to such persons who should or ought to take next under the above limitations. J had two daughters and no son, and he and his daughter suffered a recovery. Bill to be paid the 2000*l.*: Held, J K took an estate tail, and that the proviso was repugnant to the estate. *King v. Burrell*, Ambl. 379. S. C. 1 Eden, 424.

Devise of a sum of money to A for life; then to her daughters and younger sons in such shares as she should appoint; and in default of appointment for the daughters and younger sons equally, and to the survivors; and in case no daughter or younger son, or that they should die before twenty-one or marriage, then over: Held, that the portions vested in A's children at twenty-one, though they died in her lifetime. *Salisbury v. Lamb*, Amb. 384. S. C. 1 Eden, 465. **INTEREST, VESTED.**

A devise of 30,000*l.* S. S. annuities to trustees in trust, to pay the dividends to J. S. until an exchange of certain lands shall be made between him and W, and then the capital to be equally divided between them. W, dies before the time limited by the will for making the exchange expires: held, that J. S. is absolutely entitled to the whole legacy. *Ld. Curndish v. Louth*, 3 Bro. P. C. 186. **LEGACY, SURVIVORSHIP AS TO.**

Bequest of 100*l.* to A, to be improved till he should attain the age of twenty-one; and in case he should die before twenty-one or afterwards without issue, then the money to be equally divided between the testator's sons and daughter: held the limitation over too remote. *Gray v. Shaine*, 1 Eden, 153. **LIMITATION OVER OF PERSONALS TOO REMOTE.**

Devise to A for life, with remainder to his first and other sons, remainder to his daughters, and in default of such issue the premises to stand charged with two sums, to be paid after the death of A without issue, and subject to such charge, over, with a power to A of jointuring the whole estate, which he executed, A dying without issue: held that the sums

only carried interest from the death of the jointress, who survived him. *Reynolds v. Meyrick*, 1 Eden, 48. **INTEREST, WHEN PAYABLE.**

Bequest to the children of testator's daughter, to the number of four, of the sum of 1000*l.* each, if more, the 4000*l.* to be divided between such as should be living at testator's death: but if his daughter should die without issue, then over; a child by another husband, born after testator's death, cannot take, and the bequest over is good, being not a limitation over, but an absolute legacy. Bequest of the residue to his daughter and her issue, and for want of such issue, over; the limitation over too remote, and therefore void. *Salkeld v. Vernon*, 1 Eden, 64. **LIMITATION OVER OF PERSONALS.**

Appointment at the end of will of A and B to receive and pay the contents before mentioned, makes them executors. *Pickering v. Towers*, Amb. 364. S. C. 1 Eden, 142. **EXECUTORS.**

Devise to L, for his natural life, and no longer, provided he takes the name of R, and after his decease, to such son as he should have lawfully begotten; and for default of such issue to W, and his heirs for ever; held, that upon the true construction of the will, and to effectuate the manifest general intent of the testator, L, must be construed to take an estate in tail male. *Robinson v. Hicks*, 3 Bro. P. C. 180. **ESTATE TAIL.**

Devise of lands to "the thirteen fellows of Christ's and the fellows of Gonville and Caius, living at the testator's death," is a devise for the whole body corporate, not of the particular fellows in their natural capacities, and valid under the exception in the statute of mortmain. *Att. Gen. v. Tuncard*, 1 Eden, 10. S. C. Ambl. 351. **MORTMAIN.**

Where a testator, making provision for the different branches of his family, gives a fee simple estate to one, and a settled estate to another, imagining that he had power so to do; a tacit condition is implied to be annexed to the devise of the fee simple estate, that the devisee thereof shall permit the settled estate to go according to the will; and if in that respect he should disapprove the will, what is devised to him shall go to the person so disappointed. It being presumed, that if the testator had known his defect of power to devise the settled estate, he would out of the estate in his power, have provided for that branch of his family who was not entitled to the settled estate; and have declared that no person should enjoy a legacy or devise, who controverted his power, as to any benefit given to another. *Bor v. Bor*, 3 Bro. P. C. 167. **IMPLIED CONDITION.**

One by will gives annuities, and directs the residue of her estate to be disposed of in charity to such persons, and in such manner as her executors or survivor shall think fit. On the death of them new trustees were appointed to sustain the annuities, but they could not dispose of the residue, it being a trust confined to the executors personally. *Hibbard v. Lamb*, Ambl. 309.

A provision by a will by a father to a child is admeied by a subsequent portion given by the father in his lifetime. The court leans against double portions. *Watson v. Lincoln*, Ambl. 326. **ADMEITION OF LEGACY.**

Wills construed to charge real estate by implication for the benefit of creditors, such implication, however, may be afterwards destroyed. *Thomas v. Britnell*, 2 Ves. 313. **CHARGE ON REAL ESTATE.**

One partner by will gives to the other 2000*l.* which appears to be due to him on the last settlement, in trust, &c., if he did not draw it out of trade: held these last words made it a specific bequest; without them it would not have been specific. *Ellis v. Walker*, Ambl. 309. **LEGACY SPECIFIC.**

One partner by will gives one-ninth of one-twelfth of the profits reserved to him to his partners, he after-

wards, on the expiration of the partnership, renews it with the same partners, giving them a greater interest than they had under the former articles: Held they were entitled to one-ninth of the testator's interest in the partnership at his death, and that the renewal of the articles was not an adoption nor revocation of the devise. *Backwell v. Child*, Ambl. 260. WILL, REVOC. OF; LEGACY, ADEMP. OF.

One having a daughter thirty years old, settles his estate on himself and wife for their lives, remainder for 500 years, remainder over, and declares the trust of the term to raise after the death of him and his wife, 850*l.* for his daughter, her executors, and administrators; the daughter died in the lifetime of her father: Held, the representatives were entitled. *Smith v. Partridge*, Ambl. 266. INTEREST VESTED.

One joint legatee, being outlawed, a codicil adeems his share, the other takes the whole. *Alexander v. Alexander*, 2 Ves. 645.

Devise to A for life, and after her decease to B and her children, or such of them as shall be then living, the children take vested interests; and if any die in the lifetime of A, the whole goes to the survivors. *Dansen v. Hawes*, Ambl. 276. INTEREST VESTED.

Bequest of "400*l.* E.I. bonds," under the circumstances not specific; but a legacy of quantity to be made good out of the general assets, the testatrix having repeatedly in this bequest omitted the word "my," which she had used in other bequests clearly specific, and having only one East India bond at her death. Bequests of South Sea stock in parcels to a larger amount than testatrix was possessed of, held specific, the bequest of the last parcel being called "the remaining S. S. stock standing in her name." These legatees must abate in proportion. *Sleech v. Thornton*, 2 Ves. 510. LEGACIES SPECIFIC; LEGACIES, ABATEMENT OF.

Charge by will of the whole real estate in aid of personal, for debts and legacies not restrained by subsequent devise of a particular part for that purpose, without negative words. *Ellison v. Airey*, 2 Ves. 568. CHARGE ON REAL ESTATE.

Devise of all real and personal estate "in trust," "by" "B, C, D," &c. must be construed by the subsequent acts to be done by them, and amounted here to a devise "to" them. *Bullock v. Stones*, 2 Ves. 521.

Under a devise that all testator's debts "should be first paid and satisfied:" Held that a customary estate surrendered in trust for several persons, and for the use of such as the testator should appoint, was subject to the testator's debts, the first disposition running over all. *Godolphin v. Bennet*, 2 Ves. 271. COVENANT; TRUST TO PAY DEBT.

Devise of real and personal estate to the first son of A when he should attain twenty-one, with a direction for his proper maintenance and education. A having no son at the time of the will, the testator's death, or the decree, held that the profits of the personal estate should accumulate; that as to the real estate it was good executory devise, but that the profits thereof descended to the heir until a son should be born, when they should be applied to his maintenance. *Bullock v. Stones*, 2 Ves. 521. ACCUMULATION.

Bequest of two navy bills describing them and the money due thereon. Testator afterwards received the navy bills in the course of payment, decreed the value of the bills to be answered out of his personal estate. *Bronson v. Winter*, Ambl. 59. LEGACY, ADEMP. OF.

W, by will, gives his wife an annuity of 100*l.* for life, and 500*l.* which together with the annuity, he declares to be in full for her dower or thirds out of his real or personal estate. On deficiency of assets,

held the wife should not abate in proportion with the other legatees. *Davenport v. Fletcher*, Ambl. 244. DOWER; ABATEMENT OF LEGACIES.

Devise to J for life, remainder to his first and other sons in tail male, with a proviso that if the devisees entitled to the possession of the estate shall be severally under the age of twenty-six, the trustee shall receive the rents and apply them as directed. J died leaving a son under twenty-six; and held the proviso was void as against him. *Lade v. Holford*, Ambl. 479.

M by will devises land to his wife for life, remainders over, with remainder to W and P in fee; he leaves 400*l.* to be laid out in the purchase of lands or on any other security as his trustees should think fit and convenient, to be settled as his lands devised, the intermediate limitations being at an end, and W being dead, the estate came to P who was an infant, and being upwards of twenty, made a will, and gave all his estate to the plaintiff, and afterwards died two days before he was at the age of twenty-one. The 400*l.* not being laid out, held it did not pass by the will as money. The trustees had no election to consider it as money or land. The infant could not. The construction, to be laid out in land and on security till a purchase could be found. *Earlson v. Saunders*, Ambl. 241. MONEY TO BE LAID OUT ON LAND.

He devises his manors, advowsons, &c. to trustees to pay his son 1000*l.* for life, and the rest of the profits to be laid out in land during his son's life, and then settled: Held the son had a right to present to living when vacant, not under the devise, but as heir at law, it being a fruit undisposed of. *Sheppard v. Id. Harborough*, Ambl. 165. ADVOWSON; HEIR AT LAW.

Devise of lands to his sister, paying 100*l.* a year to his wife, for life, and several legacies, within twelve months after the death of his wife; several of the legatees died in the lifetime of the wife, and held their representatives were entitled. *Tunstall v. Brachen*, Ambl. 167. S. C. 1 Bro. C. C. 124. in note. INTEREST VESTED.

Estate given to a wife during widowhood, with remainder over, it is good as a limitation, but if given over on her marrying again, within a limited time, it operates as a forfeiture. *Jordan v. Holkham*, Ambl. 209.

One having two sons, G and T, and a daughter, devises several estates to his two sons and their issue, with cross-remainders, and declared, that if either of them should die without issue living at his death, so that his estate should come to his brothers, the surviving brother should pay 2000*l.* to his daughter, within one year after his brother's death, and charged the estate with it. G died, leaving two sons, afterwards T died without issue. *Qu.*, whether the 2000*l.* should be raised? Held it should. *Tollett v. Tollett*, Ambl. 177. PORTION, IF RAISABLE.

J devised all his land, &c. to his daughter B for life, remainder to trustees, to preserve, &c., remainder to the use of the first son of B, remainder to the heirs male of the body of said first son, with divers remainders over; and in case of the death of B, without issue of her body living at her decease, then testator devised said lands to his trustees, until his cousin C should attain the age of twenty-one. And in case of the death of C under twenty-one and without issue, then to D for life, remainder to the first, &c. son of D in tail, remainder to E for life, remainder to his first, &c. son, in tail, remainders over. *Ld. H.* inclined to confine the contingency in the will of J, of B's dying without issue of her body living at her death, to the death of C under twenty-one, and that the subsequent limitations to C after attaining twenty-one, and to D and E are not contingent, but vested remainder.

*Lethieullier v. Tracy*, 3 Atk. 775. REMAINDER VESTED OR CONTINGENT.

Pecuniary legacies abate in proportion, notwithstanding a direction in the will that they are to be paid "in the first place," or a direction as to the time of payment. If, however, an intention that any legacies are to be paid in full is to be collected, or reasonably inferred, it will be otherwise, as where a legacy is meant as a purchase of dower to which the party is entitled. *Blower v. Morret*, 2 Ves. 420. LEGACIES, ABATEMENT OF.

Devise of residue to A and B. Codicil revokes every legacy, thing, and part as to A; B shall take the whole. *Humphrey v. Tayleur*, Ambl. 136. S.C. 1 Dick. 161.

If an estate is limited to two jointly, the one capable of taking and the other not, he who is capable shall take the whole. *Id.* 138.

Annuity out of personal estate, devised to A during life of his executor. A dies in the life of the executor, the annuity does not cease but goes to A's executor. *Savory v. Dyer*, Ambl. 139. S.C. 1 Dick. 162.

Devise of residue of real and personal estate, which consisted partly of a term to a charity, whether it be an old term or created *de novo*, is within the statute of mortmain. *Att. Gen. v. Grares*, Ambl. 155. MORTMAIN.

Annuity, by will, to a wife otherwise unprovided for, and sums for children's maintenance. On a deficiency of assets, held on the intention of the testator, that they should not abate in proportion with the general legacies. *Lewin v. Lewin*, 2 Ves. 415. LEGACIES, ABATEMENT OF.

Under a bequest of the residue of a personal estate to A, if he attain twenty-one, the profits will accumulate. *Trevanion v. Virian*, 2 Ves. 430. ACCUMULATION.

After a bequest before the mortmain-act of 50*l.*, charged on land to P J, the minister of a baptist meeting-house, certain other premises were devised away, charged with an annuity of 10*l.* "to the minister belonging to that meeting-house." This held a valid charitable bequest for the ministers in succession, and not personal to P J. *Att. Gen. v. Cook*, 2 Ves. 273.

Devise of Bank-stock to daughter for life, remainder to such child or children of her as should be living at her death, and if she should not leave any child, or if all children should die without issue, then to J. The daughter had a son born at the time of making the will. Held, the words, without issue, were to be construed without leaving issue, and that the remainder over to J was a good remainder, and not too remote. *Sheppard v. Lessingham*, Ambl. 122. LIMIT, OF PERSONALS; LIMIT, TOO REMOTE.

Bequest of residue of personal estate, after a life interest, to the use of all and every the children of testator's daughter, equally to be transferred, delivered, and paid to them severally, when by law able to receive and give discharges: Held to be vested in each child on coming into being, and transmissible, though subject to be varied by the birth of others. *Evel v. Wallace*, 2 Ves. 118. INTEREST VESTED.

Devise of use of personal to A for life, and afterwards to B, though B dies first, transmissible. *Id.* 119.

Devise of house and appurtenances to wife during widowhood, but that the eldest son when twenty-one or married might have it on notice. The wife having married after the death of the former eldest son unmarried, and during the minority, &c. of the existing eldest, it was declared, that he would not be entitled to the enjoyment on attaining twenty-one or marriage upon giving notice. The intervening interest in the premises and appurtenances being undisposed of, held to fall into the residue of the real and personal estates:

*Dk. Bridgewater v. Egerton*, 3 Ves. 129. INTERMEDIATE PROFITS.

Devise to trustee in fee, if B attains twenty-one, or has issue, to B and heirs of his body, but if B dies before twenty-one and without issue, over. B attains twenty-one, and dies without issue. An estate tail vested in B at twenty-one, or on having issue, and the limitation over, a remainder which takes place on failure of issue of B. *Brownswood v. Edwards*, 2 Ves. 243. INTEREST VESTED.

A particular sum being given for maintenance, will not bar the party from being entitled to the surplus profits. *El. Stafford v. Buckley*, 2 Ves. 171. MAINTENANCE.

A by will gives all his real and personal estate to trustees in trust for the payment of his debts and legacies, and then to the use of his eldest son J and his heirs for ever; and failing issue of his said son J, then to the use of his second son L and his heirs for ever; and failing issue of that son, to his third son G and his heirs for ever; and failing issue of that son, then to the use of "every other son that I shall or may have and their heirs for ever; and failing my issue male then to the use of my issue female, and their heirs for ever." Held, that according to the intention of the testator his sons took successively an estate in tail male; and that upon the death of the eldest son, leaving only a daughter, the second son took in the order of succession. *Fitzgerald v. Lealie*, 3 Bro. P.C. 154. ESTATE, TAIL.

Devise of real and personal estates to trustees, their executors, &c. out of rents and profits to pay certain annuities and legacies: Held, a trust, not a chattel interest in the trustees. *Gibson v. Rogers*, Ambl. 93. S.C. 1 Ves. 485. 4 Ves. 288. (n.) TRUST.

Bequest of a moiety between two; one of them dying in testator's life-time, no survivorship, and his moiety is undisposed of. *Peat v. Chapman*, 1 Ves. 542. LAPSED LEGACY.

Devise of 100*l.* to a daughter to be paid by executor in a month after death of the widow, to whom the real estate was devised for life, and afterwards to his son the executor in fee, appointing two trustees or overseers to see the will performed. On deficiency of assets the real estate charged with the 100*l.* *Lypet v. Carter*, 1 Ves. 499. CHARGE ON REAL ESTATE.

Devise of the residue of real and personal estate after provision made for payment of annuities and legacies to the child or children of his natural daughter, and in case she should die without issue to S & J. Held, the intermediate profits till a child born should go to the residuary devisees, and not to the heir at law. *Gibson v. Rogers*, Ambl. 96. S.C. 1 Ves. 485. 4 Ves. 288. (n.) INTERMEDIATE PROFITS.

Term to raise portions, and the trustees to hold the estate till the son attain twenty-one, and then to convey to the son, there being no direction as to the intermediate profits: Held, they should go to the heir at law as undisposed of; that case was distinguished from the present by reason that the trustees were to convey at twenty one, and nothing given before to the son. *Bland v. Bland*, cited *id.* INTERMEDIATE PROFITS.

Archbishop P. devised his options to trustees, regard being had in the disposition of them according to their discretion to his eldest son Dr. P.; the husbands of his daughters, his present and former chaplains, &c. Held, a personal trust, and the trusteeship of C. being vacant, one of the trustees might present the other, he being within the description in the will. *Potter v. Chapman*, Ambl. 98. S.C. 1 Dick. 146. PRESENTATION TO BENEFICE; TRUST.

Devise of "rents, profits, and produce" of W. I. stock to be assigned to trustees, and applied by them in disencumbering an estate in Scotland of debts, and also in payment of other debts, funeral expences, and

legacies. Held, on rehearing, that such charges could only be paid out of the annual perception of rents and profits; and that part of the former decree which had directed a sale was reversed. *Conyngnam v. Conyngnam*, 1 Ves. 522. SALE, POWER OF.

Money charged on estate in Novis, held to carry only English interest, the sum which was charged in favour of W held to be included in the bequest of a large sum to W's younger children; the testatrix supposing that they were entitled to the charge, although it was not the case, and decreed that no more should be raised than the sum bequeathed. *Stapleton v. Convey*, 1 Ves. 427. INTEREST; CHARGE ON LANDS ABROAD.

On appeal, devise of land on contingency to Robert or "his heirs." Robert, before the contingency happens, conveys "all his right, title, claim, and demand" therein by deed to his younger son and his heirs as a provision, and dies. The contingency happening, Robert's heir cannot claim this against his father's account. "Or," construed "and." *Wright v. Wright*, 1 Ves. 409. CONTINGENT INTERESTS, IF DEVISEABLE.

Real estate directed to be sold, and together with personal, applied, *inter alia*, in charitable purposes, and "that the trustees should place out all the residue of testator's estate and the interest therein on securities, and divide it, &c." Held first, that the bequest as to the charity was valid; and next, that the whole as to other matters was turned into personality. *Durour v. Motteux*, 1 Ves. 320. ADMIN. OF ASSETS; LAND DIRECTED TO BE SOLD.

Legacies of stock are specific or general legacies according to the intent of testator from the will and the circumstances, whether he meant to confine it to the stock he then had. *Aetyn v. Ward*, 1 Ves. 425. LEGACIES, SPECIFIC.

Dying without issue, held to mean without issue at her death. *Chamberlain v. Jacob*, Amb. 72.

Devise of all testator's "real" and personal estate "subject to debts," affects copyhold lands unsundered, for the benefit of the creditors, there being no freehold lands; if there had been, it would have been otherwise. *Ithell v. Beane*, 1 Ves. 215. N. C. Dick. 132. CHARGE ON REAL ESTATE; COPYHOLD.

Testator "desires" J "to leave" D 500*l.* at her death, out of the money he bequeathed her: held to amount to a legacy from the original testator, and not to lapse by D's death in J's life time, he having served the testator. *Medlicot v. Bores*, 1 Ves. 207. WORDS PRECATORY; INTEREST VESTED.

Bequest of 400*l.* to R to be paid in a year, and of a further sum of 100*l.* at the death of his mother; the latter held also a vested legacy. *Jackson v. Jackson*, 1 Ves. 217. INTEREST VESTED.

Devise to trustees from, and immediately after determination of precedent estates, to use of A in fee, charged and chargeable with legacies, to be paid in twelve months; they run over all the precedent estates as well as the fee. *Carter v. Carter*, 1 Ves. 168. CHARGE ON REAL ESTATE.

Devise of 400*l.* to be put out on good security for T B, that he may have the interest for his life and for the heirs of his body; if he dies without issue, then over. The whole property vests in the first taker, and the limitation too remote. *Butterfield v. Butterfield*, 1 Ves. 133. LIMITATION TOO REMOTE.

Devise of freehold and leasehold estates to trustees in trust by rents and profits, or by sale or mortgage, to pay debts and legacies which his personal estate should not be sufficient for, and subject thereto, in case J B should attain twenty-one, in trust for him, his heirs and executors: Held that the rents and profits, till J B attained twenty-one were not undisposed of, but passed by the devise to the trustees; and were after payment of legacies, annuities, and interest of the debts, to be

applied to sink the principal of the debts. *Popham v. Aylesbury*, Amb. 68. INTERMEDIATE PROFITS.

Legacy to be paid at a future day is vested, but not where the sum is not certain. *Maddison v. Andrew*, 1 Ves. 59. INTEREST VESTED.

Devise of 1500*l.* to a grand-daughter, to be at her own disposal, if she married with consent of her father and mother, or trustees, and not otherwise; she dies at thirteen intestate and unmarried; it is not vested nor transmissible. *Elton v. Elton*, 1 Ves. 4. S. C. 3 Atk. 504. INTEREST, IF VESTED.

A gave several legacies, and declared that if any of the persons should die before they became due, they should not be deemed lapsed legacies, and then said "to B, the wife of R, and to her executors or administrators, I give 50*l.*" B died in the testator's lifetime, and her husband administered: Held, not a lapsed legacy, but shall go to the husband. *Sibley v. Cook*, 3 Atk. 572. LEGACY LAPSED.

If a man devises a real estate to S, and his heirs signifying his intention that if S die before him, it should not lapse; the heir is not excluded unless the testator nominates another devisee. *Id.* 573. LEGACY LAPSED.

A sale directed on the words "rents and profits" alone, though generally contrary to testator's intention in aid of a creditor, on the ground of law, that in a will those words meant and passed the land itself. Another construction, however, as to legatees, upon the addition of the words "as the rents and profits, &c." should advance the money. *Baines v. Dixon*, 1 Ves. 41. POWER TO SELL.

Executory trust for three, for their lives as tenants in common; if any died without issue living at their deaths, their shares to go to survivors, with contingent remainders in tail, and remainders over. Two of them dying in testatrix's lifetime, held, their shares lapsed and went over. *Sperling v. Toll*, 1 Ves. 70. LEGACY, LAPSED.

A legacy out of real estate to be paid within twelve months after the death of A. The legatee survives A but one month; it does not lapse, but goes to the representative. *Hodgson v. Rayson*, 1 Ves. 44. INTEREST, VESTED.

Devise to A in fee, with directions to settle on descendants of his mother for their several lives, &c. A may limit an inheritance to elude the general intent. *Godolphin v. Godolphin*, 1 Ves. 21.

Where goods, lands, and chattels, are given by will altogether as one fund, and a legacy is given, subject to the exception of what was given before; it is a charge on the fund. *Edgell v. Haywood*, 3 Atk. 538. CHARGE ON FUND.

A, by will, gave to trustees 312*l.*, and several jewels, in trust, to sell and apply the produce as a composition for his son's debts, provided the creditors should accept the same within four months, and discharge his son; and if not, then he gave the same to his son's children. Testator died on 15th December, and on 13th April following, the son's creditors filed their bill for the composition, submitting to release the son, and praying that the time might be enlarged: Held, that the creditors, by filing their bill within four calendar months, and thereby declaring their acceptance of the legacies towards satisfaction of their debts, and offering to release, have performed the condition annexed, according to the true intent of the will; and the court has so determined upon the performance of a condition in several cases, though the executors have suffered the time to elapse. *Franco v. Abours*, 3 Atk. 342. CONDITIONAL PERF.

In this case, an absolute term of ninety-nine, limited to C, amongst other limitations of a real estate under a will, was with reference to the true construction of the several parts of the will, considered not as an absolute term, but as determinable on the death of C.

*Corbyn v. Helyar*, 2 Cox, 340. cited Burr. 923. (63). **LIMITATION, C. OF.**

Legacy payable at twenty-one, with a certain allowance, in the meantime; the legatee dies before twenty-one: his administrator not entitled to the legacy till such time as he would have attained twenty-one. *Roden v. Smith*, AmbL. 588. **LEGACY, TIME OF PAYMENT.**

Where a condition is annexed by a will to a devise, either of real or personal estate, and no notice is required to be given, nor any person obliged to give notice, there the legatees must perform the condition, or cannot be entitled; and where they do not, if there is a devise over, a forfeiture incurs. Suppose an estate limited to A for life, and to B on certain conditions, and to C in *formi prædicta*, it will take in every condition in the preceding limitations to B. *Chauncey v. Graydon*, 2 Atk. 616. S. C. 2 Ves. 264. **NOTICE; CONDITION.**

Where either real or personal estate is given upon a contingency, and that contingency does not take effect in the life of the devise over; yet if real, his heir, if personal, his executor, will be entitled. *Id.* 621. **INTEREST VESTED.**

A provision out of a real estate for an executrix will not bar her, neither will specific legacies given to one, bar either of the residue of the personal estate, but are put in only to give one a preference to the other. *Walker v. Jackson*, 2 Atk. 626. **EXECUTORS.**

Where a testator expresses himself in the present tense, it relates to what is in being at the time of making the will. *Abney v. Miller*, 2 Atk. 597.

A direction to trustees to pay a principal sum after the death of a father and mother to their issue equally, to sons at twenty-one, and to daughters at twenty-one or marriage, is only a circumstance or qualification in the person receiving, and not intended to accelerate the payment, or vest it in the children, for the direction of the payment is the gift, and will not vest till the time of payment comes. *Seamer v. Bingham*, 3 Atk. 57. **INTEREST, VESTED.**

Testator bequeathed residuary personal estate to his daughter F, (an infant) to be paid to her at twenty-one or marriage; and if she should die before twenty-one or marriage, he bequeathed the same to such son of F as should first attain twenty-one; and if no son attain twenty-one, then to P. F died under twenty-one, and unmarried. Held, that the interest of the residue, from the death of F to the time it will vest in the son of F, who is an infant, must accumulate, and is part of the residue, till the bequest to the son vests. *Green v. Ekins*, 2 Atk. 473. **ACCUMULATION.**

Testator devised lands to wife for life, remainder to S, till grandson attained twenty-three, and when he attained twenty-three, testator devised to him, in fee, on condition that he paid H 60*l.* within two years after he attained twenty-three; and testator gave H powers of attorney. H lived till the grandson attained twenty-three, but died within two years after he attained that age. Held, that the 60*l.* should be raised, and paid to the representatives of H. *Enes v. Handcock*, 2 Atk. 507. **INTEREST, VESTED.**

Testator devised to trustees, in trust for N and the heirs of his body, and to pay such sums out of rents for maintenance as B should appoint: by codicil, he directs trustees, during N's minority, to pay rents to plaintiff, so much as she pleases for his maintenance, and the residue to her own use: by another codicil, he directs trustees shall not settle the estate on N and the heirs of his body, till twenty-six, and till then, such maintenance as trustees and plaintiff shall think fit. Held, that rents vested in N at twenty-one, and the time of receiving only prolonged till twenty-six; and trustees decreed to account for rents, &c., from N's age of twenty-one to twenty-six. *Smith v. Newport*, 2 Atk. 344. *Id.*

There is no difference between a direction to trustees to pay, and a gift; the testator is equally the donor in both cases. *Nicholls v. Judson*, 2 Atk. 301.

Testator says, "I make D my sole heir and executrix, and if she dies without issue, then to go to plaintiff." Held, that the limitation over of the personal estate was void, and cannot be confined to D's dying without issue living at the time of her decease. *Beauchamp v. Dormer*, 2 Atk. 308. **PERSONAL ESTATE, LIMIT. OF.**

"Then," in the grammatical sense, is an adverb of time, but, in limitations, a word of reference, and relates to the determination of the first limitation in the estate. S. C. *Id.*

A limitation over of personal estate, after the death of the first taker without issue generally, is void. S. C. *Id.*

Courts of equity will carry the limitation of a personal chattel or trust of it no further than the judges have done in the case of legal limitations of terms for years. S. C. *Id.*

According to Lord Hardwicke's note of *Forth and Chapman*, Lord Macclesfield held, that the words, "leave no issue," must relate to the time of the deaths of the testator's two nephews, William and Walter, and could not be extended to a dying without issue generally. S. C. *Id.*

No authority can be produced where it has been held that a limitation of personal estate shall be confined to a dying without issue living at the death of the first taker. S. C. *Id.*

If the court should admit of a distinction between chattels real and personal, it would introduce confusion. S. C. *Id.*

The wife is not barred of her paraphernalia, by a bequest of the use of all household goods, furniture, plate, jewels, linen, &c., for life. *Marshall v. Blew*, 2 Atk. 217. **PARAPHERNALIA.**

Such a bequest entitles her to use the goods any where, or even to let them out to hire. S. C. *Id.*

Heir male takes by purchase, though he is not heir general from the manifest intention in will. *Neucoman v. Bethlem Hospital*, AmbL. 8. **TITLE; ESTATE BY PURCHASE.**

Where testator devised four parts of his personal estate to B, and the children born of her body, and B had no child at the date of the will, but had one child born afterwards, and B died in testator's lifetime; held, that the legacy was not lapsed, for B did not take an estate tail but as a joint tenant with the child, and that the child took the whole by survivorship. *Butler v. Bradford*, 2 Atk. 220. **LEGACY, LAPSED.**

Children are words of purchase, and not of limitation, except it is to comply with a testator's intention, and it can take effect no other way. *Id.*

Where there are two executors, and a legacy is left to one for mourning for himself, his wife, and children, he shall have a moiety of the residue notwithstanding. *Id.* **EXORS. BEN. INTERESTED.**

Direction to raise and secure annuity of 50*l.* per annum for charity, by purchase of lands of inheritance, "or otherwise," held, not within statute of mortmain. *Surrey v. Hollins*, 9 Mod. 221. **MORTMAIN.**

Case where, from the general tenor of will, legacies which were charged on certain funds not existing at time of death, were held not adeemed. *Wingfield v. Norton*, 9 Mod. 428. **ADEMP. OF LEGACIES.**

Bequest of 3000*l.* to trustees, upon trust to invest same either in a purchase or at interest, and pay interest to testator's wife during her life, and after her decease to divide the whole, principal and interest, "among his four children, share and share alike, and the survivors of them, but not before they should have respectively attained the age of twenty-one years, or days of marriage." C, the plaintiff's wife, who was one of the four children, attained twenty-one, but died in the lifetime of her mother. Trustees



laid out the part of the money in the purchase of freeholds and copyholds, and lent another part on bond. Held, that C had a vested interest; and that survivors meant such as should be living at the death of the child before twenty-one, and not such as were living at the death of the mother, and that the representative of C was entitled to a fourth of the bond, and a fourth on the whole in government securities, and which had not been invested in land. *Weedon v. Fell*, 2 Atk. 124. VESTED INTEREST.

A, by will, devised all her real and personal estate to B, to pay her legacies thereout, and then she gave to C 2000*l.*, in trust for his daughter D, to be paid within eighteen months after her decease, which she should place out at interest, and pay the same, with the produce thereof, to his daughter, for her own use, at eighteen or marriage. C died in the lifetime of testatrix, and his daughter died six months after. This legacy is a charge on both funds; and as the court always goes as far as possible to hinder the raising of portions out of land for the benefit of representatives, it was decreed that this portion shall not be raised; though, if D had survived the eighteen months, his representative would have been entitled, notwithstanding C was dead; so if she had died under eighteen, or unmarried, provided she survived the eighteen months. If a legacy is payable, or given at a certain time out of personal estate, with interest in the mean time, it is a vested legacy; but if out of a real estate, and the party dies before the time, it sinks into the inheritance; and the construction is the same, if charged on a mixed fund, where it is given or payable at a certain time. *Van v. Clark*, 1 Atk. 510. INTEREST, VESTED.

Where residue was directed by testator to be divided among six persons at the death of his wife, and two died before her; held, that the interest of the two was vested and transmissible, and depended not on surviving wife. *S. C.* 1 Atk. 511.

Where testator gave 300*l.* to trustee, in trust to be paid, within three years after his decease, to W, for her separate use, and after her decease, 200*l.* thereof to her son T, and the other 100*l.* to her son C, and W and T die within the three years; decreed, that the money should be paid, though charged on stock funds. *S. C.* *Id.*

A proviso in the will of R, that if his personal estate and houses and lands at W should not be sufficient to pay his debts, then his executors to raise the same out of his copyhold premises, enables the trustees, if the rents are not sufficient, to sell the copyhold lands, to satisfy the testator's intention of paying his debts. *Bateman v. Bateman*, 1 Atk. 421. POWER OF SALE.

A, by will, gives to the Latin school of Yeovil 5*l.* to be paid yearly for teaching three boys. This shall be construed a perpetuity for teaching three boys in succession. *Cheeseman v. Partridge*, 1 Atk. 436. CHARITY.

A wife during coverture appoints by deed poll 300*l.* to be paid to her husband, to be employed by him to such charitable uses, or other purposes and intents as he should think fit. Held, that the husband had the complete ownership of the 300*l.* and notwithstanding other directions in his will, it might be applied to satisfy his debts. *Hinton v. Toyes*, 1 Atk. 465. *Id.*

Where lands are devised to trustees, to be sold for payment of debts, and the heir is an infant, he has no day to shew cause, when he comes of age; but if the lands are not devised to a particular person, it is otherwise. *Blatch v. Wilder*, 1 Atk. 421. INFANT, PAROL DEMUR.

Testator devised lands to his wife for life, remainder to his son, R, in fee, and gave to A a legacy of 150*l.* to be paid in a twelvemonth's time, after his son, Ro-

bert, should come to enjoy the premises. Robert died in the lifetime of the wife, and left a son. Held that this was a condition annexed to the estate, and the legacy, with interest at 4 per cent. from the death of testator's wife, decreed against Robert's son and heir. *Miles v. Leigh*, 1 Atk. 573. CHARGE ON LAND.

A gives an annuity of 20*l.* to his daughter, and the heirs of her body, quarterly, without any abatement. B, the surviving executor of A, gives to the daughter of A and her daughter, an annuity of 20*l.* by his will, to be paid quarterly, without any abatement, out of his freehold houses in Holborn, and if they die without issue, then to return to the plaintiff, his heir; and by an indorsement upon the will, in pencil, not executed according to the statute of frauds; he says "I hope this 20*l.* will not be taken for another 20*l.* annuity her father left her and her daughter." This indorsement held invalid, because nothing can enlarge or diminish what affects real estate, unless it be executed according to statute of frauds. *Heather v. Ridder*, 1 Atk. 425. STAT. OF FRAUDS.

Where a person gives a debt by will to a corporation, it vests in them in law, and they may recover it in the ecclesiastical court. *Att. Gen. v. Pyle*, 1 Atk. 435. CORPORATION.

A devises his real and personal estate for payment of debts. The personal estate not being sufficient, the executors may sell the real estate, although no directions are given in the will, as to who shall sell, and the money arising from the sale is legal assets in the hands of the executors. *Blatch v. Wilder*, 1 Atk. 420. POWER OF SALE; ASSETS, LEGAL.

One devises the sum of 2,000*l.* S. S. stock; at the time of making his will he had just 2,000*l.* S. S. stock; he afterwards sold 1,500*l.* of it, and three-fourths of the residue was turned into annuities, by act of parliament. Held, the bequest was not specific, nor adeemed. *Bronkton v. Winter*, Ambl. 57. LEGACY, ADEMP. OF; LEGACY, SPEC.

A bequest of certain quantity of stock will not be held specific from the circumstance of the testator having that exact quantity at the time of the bequest. *Id.* 59. LEGACY, SPEC.

When one bequest is made in satisfaction for that to which the legatee is previously entitled, the thing given in satisfaction must be of the same nature, and attended with the same certainty as the thing in lieu of which it is given, as land for land, money for money. If personal estate be given for personal estate, one shall not be with a contingency, and the other without, for here the same certainty is wanting. *Bellasis v. Uthwatt*, 1 Atk. 428. LEGACY, SATISFACTION.

W II, by will, gave 550*l.* to his daughters, and then devises his land in trust for a term of ninety-nine years, with a power to raise a less term, upon trust that if his wife should, within four years, pay off the 550*l.*, then the lands to go to her for life, and after her death to W H, his son and his heirs, male and female, and for want of such issue, to him and his heirs for ever. Declared that this is a conditional limitation in the wife, taking place as an executory devise; that the freehold descended to the son, as heir at law to the testator, till the four years elapsed, or his wife had performed the condition, as part of the inheritance undisposed of; and that, by this devise, the son had a good estate tail of inheritance expectant on the termination of the term of ninety-nine years. *Haywood v. Stillingleet*, 1 Atk. 422. EXECUTORY DEVISE.

Where a particular chattel is specifically described, and distinguished from all other things of the same kind, and is not found among the testator's effects, it fails. If given first to A, and then to B, they must divide it; and if disposed of, in the testator's lifetime,

it is an ademption of such legacy. *Purse v. Snaphin*, 1 Atk. 417. **LEGACY, SPEC.**

The mortgagee for a term of years being in possession, devises the premises as an estate of inheritance, to three several persons for life successively, with remainder to their first and other sons, remainders over; the remainders over are void as tending to a perpetuity. *Brett v. Saubridge*, 3 Bro. P. C. 141. **PERPETUITY, REMAINDER OVER.**

Devise of personal estate to A for life; several legacies after A's death; residue at her decease, to be divided between B, C, D, and E. B and C die in life of A. Held vested legacies in them. *Corbett v. Palmer*, 2 Eq. Ab. 548. **INTEREST, VESTED.**

Where legacy is left by will smaller than debt, accompanied with annuity, they are never considered as a satisfaction of debt, unless so expressed in will. *Stanway v. Styles*, 2 Eq. Ab. 355. **SATISFACTION OF DEBTS.**

A devised lands to his son B, but if he should die without issue male of his body then living, or which might be afterwards born; that then his daughter M should receive, at her age of twenty-one, or day of marriage, which should first happen, 3500*l.* over and above 2500*l.* before given her; and in case the contingency of his said son's dying without issue male, should not happen before his daughter's said age or day of marriage, that then she should receive the said 3500*l.* whenever such contingency might happen; and the testator charged this legacy or portion on his real estate. M having attained twenty-one, married, and died in the lifetime of her brother B, who afterwards died without issue male. Held that the husband and administrator of M was entitled to this legacy, and that it was a subsisting charge on the testator's real estate. *Wither v. Ring*, 3 Bro. P. C. 135. **CHARGE ON REAL ESTATE.**

The testator devises, as to all his worldly estate, that his debts be paid within a year after his decease; and then devises his real estate to trustees for a term in trust for his wife for life, remainder to his son successively in tail male; and gives several legacies. The real estate is chargeable with the debts, in case the personal do not suffice. *Hutton v. Nichol*, *Forres*. 110. *Id.*

A devises his freehold, copyhold, and leasehold, and all his real and personal estate not before devised, to three trustees, their heirs, &c. in trust, to pay his son B an annuity; and if he should have any child or children, the residue of the rents, during B's life, for the education and benefit of such child or children; and after B's decease, a moiety of the trust estate to such child and children as he shall leave, their heirs, &c.; the other moiety to the child and children of his grandson C, and every other child and children of his daughter S, their heirs, &c.; and if B die without issue, the first moiety to C, and other child and children of S, and their heirs, &c. and directs an annual payment to such wife as B shall marry. The testator died; B married, and had issue a son and daughter, and died: the limitation to the daughter of C is well supported by the estate in the trustees; or if not, is good as an executory devise; and the profits, &c. shall go to the children of B. *Chapman v. Blissett*, *Forres*, 145. **EXECUTORY DEVISE.**

A devises (as touching his worldly estate after payment of his debts, which he wills to be first paid,) his lands, in mortgage, to B, his wife, for life, and after her death to C, and directs the residue of his personal estate to be placed out at interest; B to have the interest during her life, and after her death to C, and gives B 1500*l.* provided she accept the devise, and bequests in lieu of dower. There is not sufficient personal estate to pay the debts and legacies; if the mortgagee take part of the personal estate, the legatee shall

for so much stand in his place. *Lutkins v. Leigh*, *Forres*. 53. **MARSHALLING ASSETS.**

Devise of land to husband and wife for their lives, and after the death of the wife, then to their children, upon the death of the wife, the husband's estate determines. *Cowper v. Cowper*, 2 P. W. 739. **ESTATE PUR AUTRE VIE.**

If one owes debts by bond, and devises his lands to J in fee, and leaves a specific legacy, and dies, and the bond creditors come upon the specific legacy for payment of his debts, the specific legatee shall not stand in the place of the bond creditor, to charge the land, and why. *Hustlewood v. Pope*, 3 P. W. 324. **ADMON. OF ASSETS.**

One devises all his personal estate to his daughter, and all his real estate to trustees in trust, to pay debts, &c. remainder to his daughter in tail, remainder over; the personal estate shall, in the first place, be all applied to pay the debts. *Id.* *ib.*

A devises all his real and personal estate to trustees their heirs and executors, in trust to pay 15*l.* per annum to the plaintiffs, his two sisters, for their lives, and after several legacies, the surplus in trust for the dissenting ministers, at Reading, &c., and gives 300*l.* legacies to his trustees; afterwards the testator, by two deeds of a subsequent date, conveys all his real estate, and makes a gift of his personal estate to the use of the same trustees and their heirs, &c.; proviso, both deeds to be void on his tender of 10*l.* to them. There was also a proviso in the will, that if the sisters disputed the will, they should forfeit their annuities. Testator after he had executed the deeds, still kept the same in his own custody. The trustees refuse paying the sisters their annuities, who thereupon bring their bill insisting that the deed had revoked the will, and that there was a resulting trust for them as heirs at law, or at least that they (the sisters) were entitled to their 15*l.* per annum annuities. The defendant insisted on the plaintiffs' having forfeited their annuities; decreed that the annuities should be paid to the two sisters the plaintiffs, but the surplus to go to the dissenting ministers. *Lloyd v. Spillet*, 3 P. W. 344.

One devises a rent charge to be sold to pay legacies amounting to 800*l.*, and if the rent-charge should sell for 1000*l.* the testator gives a further legacy of 200*l.* The rent-charge sells for above 800*l.*, and less than 1000*l.*; what exceeds the 800*l.* shall belong to the heir as a resulting trust. *Stonehouse v. Evelyn*, 3 P. W. 252. **HEIR AT LAW; RESULTING TRUST.**

The words "Imprimis, I will that all the debts that I shall owe at the time of my decease, be discharged and paid," are sufficient to make the real estate liable, in case of a deficiency of personal assets. *Legh v. El. Warrington*, 1 Bro. P. C. 511. **CHARGE ON REAL ESTATE.**

One by his will devises that all his debts and legacies shall be paid by his executor out of his personal estate, if that shall be sufficient, but if not, then that his executor within twelve months after his death, shall sell or mortgage so much of his real estate as shall be sufficient for that purpose, and (*inter alia*) gives a legacy of 1000*l.* to J S, who dies within a year, and the personal estate is not sufficient; this is a vested legacy, and shall be paid to the executor of the legatee, though charged upon land; for the words within twelve months, denote the ultimate time, but the executor may pay the legacy sooner. *Wilson v. Spencer*, 3 P. W. 172. **INTEREST, VESTED.**

Devise to A until B shall attain forty years; B dies before forty A's estate ceases; *secus*, if the devise to A be made a fund to pay debts or portions, which cannot be raised until B shall have attained his age of forty, in which case the word "shall" is taken for "should." *Lemax v. Holmendon*, 3 P. W. 176. **CONTINGENT LEGACY; CONDITION SUBSEQUENT.**

Devise of lands to trustees in fee in trust, within

six years after the testator's death, to raise and pay 1500*l.* to his daughter A; A dies within the six years; the 1500*l.* shall go to her administrator, here being no certain time limited when, but only the ultimate time, within which it shall be raised. *Cowper v. Scott*, 3 P. W. 119. INTEREST, VESTED.

Where estate is devised on condition that if first devisee should refuse or neglect to comply with the condition, (viz. a release of all demands within six months), a limitation over: Held, a conditional limitation and not relievable against. *Weedon v. Ozenham*, 2 Eq. Ab. 646. cited 1 Mad. Ch. 42. note (u), as MS. CONDITIONAL LIMITATION; CONDITION BREACH, WHEN RELIEVED.

A will begins "As to all my worldly estate, my debts being first paid, I give, &c." the real estate is liable to the debts; nothing being devised till the debts are paid. *Harris v. Ingledew*, 3 P. W. 91. CHARGE ON LANDS.

Legacy at twenty-one, or marriage with consent, but not otherwise: Held, that condition of consent applied only to marriage under age. *Dobbins v. Bland*, 2 Eq. Ab. 645.

Real estate is expressly charged with payment of debts, and personal estate is given to executor: Held, that executor was not beneficially entitled but that therefore personal estate shall be applied to discharge real estate in favour of heir at law. *Lacy v. Bromley*, Fitzgibbon, 41. ADMON. OF ASSETS; EXONERATION OF REAL ESTATE.

One by will gives a legacy to a daughter to be paid to her when she should attain twenty-one, or be married with the consent of his executors; proviso, that if the daughter marries without the consent of the executors the legacy to go over; this condition, though general, must yet be intended if she marries under twenty-one, *sans* consent of the executors, and on the daughter's coming to twenty-one, the court will decree the legacy to her. *Deshoby v. Boyville*, 2 P. W. 547. LEGACY, CONDITIONAL.

Where lands are devised to maintain an infant till twenty-three, and then to account, he shall not have an account, until he attains twenty-three, unless the trustee be insolvent. *Tilley v. Simpson*, Mos. 244. ACCOUNT.

Devise of a personal estate to A for life, and afterwards for her children, and the yearly interest and produce to be for their maintenance, till the sons attain twenty-one, and the daughters eighteen, at which ages their respective portions to be paid; and for want of such issue, then to B; A dies without issue and the devise over to B was held to be good, the words for want of such issue, being the same as for want of such children. *Staines v. Maddock*, 3 Bro. P. C. 108. LIMIT. OVER.

Lands are devised to trustees and their heirs, in trust to pay several legacies and annuities, and then to pay the surplus of the rents and profits to A during her life, for her separate use, or as she should direct; and after her death, the trustees were to stand seised to the use of the heirs of her body, with other remainders over. Held, that this was a use executed in the trustees and their heirs during the life of A, and that she had only a trust in the surplus rents and profits during her life; and that the subsequent limitation to the trustees, to the use of the heirs of her body, was a use executed in the persons entitled to take by virtue thereof; and therefore, there being only a trust estate in the ancestor, and a use executed in the heirs of her body, their different interests could not unite so as to create an estate tail by operation of law in the ancestor. *Ld. Say and Sele v. Ly. Jones*, 3 Bro. P. C. 113. USES & TRUSTS.

A devised his real estate to his son F during his life, remainder after his decease to his eldest son that should be then living, remainder over. F suffered a

recovery, and declared the use to himself in fee: Held, that F took only an estate for life, and that the recovery was bad. For where a particular estate is expressly given, it shall not be altered by any implication from subsequent words; especially where such implication, if admitted, defeats the general intent of the will. *Foord v. Foord*, 3 Bro. P. C. 124. ESTATE FOR LIFE.

A, by will, devises 500*l.* to his infant grandson without appointing any time for payment, with proviso, that if the grandson dies before twenty-one, then the legacy to go over to B; the grandson shall have the interest of the legacy during his infancy. *Taylor v. Johnson*, 2 P. W. 504. Mos. 98. LEGACY, INTEREST OF.

If I devise a legacy of 100*l.* to A, payable at his age of twenty-one, and A dies before twenty-one, A's executors or administrators shall not have the legacy till such time as A (had he lived) should have attained twenty-one; and my executors shall have the interest in the meantime; but if I give a legacy to A of 100*l.* payable at his age of twenty-one, and if he dies before, then to B, and A dies before twenty-one, B shall have the legacy presently, and not stay till such time as A should have come to twenty-one. *Laundy v. Williams*, 2 P. W. 478. LEGACY, WHEN PAYABLE.

Devise of a personal estate to A for life, and afterwards for her children, the yearly interest and produce to be for their maintenance until the sons should be twenty-one, and the daughters eighteen, at which respective ages their respective portions to be paid them, and for want of such issue to B; A dies without issue; the devise over to B good; the words "for want of such issue," being the same as "for want of such children." *Maddox v. Swaine*, 2 P. W. 421. LIMITATION OVER.

Where trustees were directed to sell the whole real estate to pay debts, and to pay surplus to A and B; if only part of estates are sold, and fully pay the debts, the remainder unsold shall go to A and B, as if actually sold. *Collingwood v. Wallis*, 1 Eq. Ab. 395. S. P. *Davers v. Folkes*, id. 396. LANDS DIRECTED TO BE SOLD.

Will cannot be set aside in equity for fraud and imposition, because, if of personal estate, it may be set aside in the ecclesiastical court, and if of real estate, at law by issue *deviseavit vel non*. *Kerrick v. Bramby*, 7 Bro. P. C. 437. FRAUD; JURISDICTION.

A devise of lands to B and C, and the survivor of them and their heirs, equally to be divided between them, share and share alike; B and C are joint tenants for life, with several inheritances. *Barker v. Gyles*, 3 Bro. P. C. 107. JOINT-TENANCY.

J devised his real estate to his son M for life, and after his death if he leaves any issue male, to other persons; and to one of those other persons he gave legacy of 500*l.* at twenty-one. M died without issue; legatee also died: held, that legacy was not contingent, on his becoming entitled to real estate. *Baynes v. Bertie*, 5 Bro. P. C. 62. LEGACY, CONTINGENT.

A, by will, gave all his personal estate to trustees, until W should attain twenty-four years, and from thenceforth in trust for him, his executors, administrators and assigns. W lived to twenty-one, but died before twenty-four: held, a vested interest in W, at death of testator, and that age of twenty-four was only directory as to time of payment. *Love v. L'Estrange*, 5 Bro. P. C. 69. VESTED INTEREST.

A, seised in fee, has a son B, and a sister C, &c. and devises his lands to his son in tail general; and if his son B should die without issue, and his wife should survive him, then the wife to have the premises for life, remainder to C in fee; B, the son, dies without issue, but testator's wife dies before him; C is not entitled to the remainder in fee, because the

contingency is annexed to all the devise over. *Davis v. Norton*, 2 P. W. 390. REM. CONTINGENT.

Devise of 100*l.*, and of 50*l.* per annum to A and his heirs, and if A die without heirs, then to a charity; A dies without issue, living the testator: the will void as to the whole, and the charity cannot take. *Att. Gen. v. Gill*, 2 P. W. 369.

Where there is a proviso in a will, that in case what is left to one daughter shall exceed in value what is given to another, the former shall refund *pro tanto*; what is given to either of the daughters' children is to be looked upon as given to the daughter. *Thomas v. Bennet*, 2 P. W. 343.

A legacy given to J S, shall not be taken to be a satisfaction of a subsequent debt. *Id.* DEBT, SATISFACTION OF; DEBTOR & CREDITOR.

J by his will gives a legacy of 1000*l.* to his niece B, at eighteen, or marriage; and by a codicil directs that this legacy shall be made 6000*l.* payable at twenty-one or marriage; the niece was eighteen, and under twenty-one, at the time of the testator's making his codicil: held, that she was entitled to interest for the whole 6000*l.* from the death of the testator, though she had not then attained twenty-one. *Acherley v. Vernon*, 3 Bro. P. C. 89. INT. WHEN PAYABLE.

J devises 100*l.* to A, at his age of twenty-one; A dies before twenty-one; his executors shall not have the legacy until such time as A should have come to twenty-one if he had lived. *Chester v. Painter*, 2 P. W. 336. LEGACY, WHEN PAYABLE.

A devises 500*l.* legacy to the second son of I S, and devises other legacies to the other sons of I S, and declares, that if any of the younger sons of I S should die before they are capable of receiving their share; the share or legacy of him so dying shall go to the survivor; the second son dies in the testator's lifetime; this 500*l.* given to the second son shall not survive. *Kider v. Wager*, 2 P. W. 330. LEGACY, Lapsed.

One devises to his wife six messuages, and the rest of his real estate equally to his two daughters in fee, and afterwards on the marriage of his eldest daughter, he covenants to settle one moiety on her and her husband: the devise of the six houses shall be good, and subsist out of the remaining moiety. *Id.* 332. LEGACY, SATISFACTION OF.

A has two daughters, B and C, and devises one moiety of his real and personal estate to B, the other moiety of his real and personal estate to C; and afterwards, A, in consideration of marriage, covenants to settle a moiety of his real estate upon the husband that marries B: the husband shall have one moiety by the settlement, and the wife the moiety of the other moiety by the will. *Id. ib.*

One devises lands to trustees in fee in trust, to apply the profits until sale for the benefit of all his four children, and the survivors and survivor of them equally; and on further trust, that as soon as the trustees shall see necessary for the benefit of the children, they should sell the premises and apply the money for the benefit of his four children equally, to be paid at twenty-one or marriage; A, the eldest of the four children, attained twenty-one, and married, and died without issue, intestate, leaving a wife: decreed, the land being in all events devised to be sold, though the time for sale was left to the executors, was personal estate, and A's widow must have a moiety of A's share; and the profits of the land, until sale, must go as the money arising upon sale would. *Daughy v. Bull*, 2 P. W. 320. LAND DIRECTED TO BE SOLD; ADMIN. OF ASSETS.

One devises that his executors shall sell his lands, and invest the money in purchasing an annuity for J; the testator dies, and the annuitant dies three months after the testator, yet the administrator of the annuitant shall compel a sale, and shall have the money

arising therefrom, and also the rents and profits till the sale. *Yates v. Compton*, 2 P. W. 309. INTEREST, VESTED.

A, by will, gives all his personal estate to his wife for life, and then gives to his grandchildren T and F, 100*l.* each, if they attain twenty-one or marriage: held, these legacies were not payable till after the wife's death; but the legatees were entitled to have security for payment at that time. *Young v. Burdett*, 5 Bro. P. C. 54. LEGACY, TIME FOR PAYMENT; SECURITY.

A will says in the beginning, "after testator's debts and legacies paid," and then the will gives several legacies and portions to the testator's daughters, and then says that "after legacies paid, the surplus of the personal estate shall go to the son;" after which follows a devise of land to the son, but if he dies without issue in the life of any of the daughters, then to the daughters: there is out of the personal estate, a sufficiency to pay great part, though not all of the legacies; in such case, the deficiency is not chargeable upon the land. *Davis v. Gardiner*, 2 P. W. 189. CHARGE ON LAND.

A, amongst other legacies, leaves 1000*l.* to his niece B, at eighteen or marriage, and gives the residue of his personal estate to be laid out in land, and settled in strict settlement on C, for ninety-nine years, remainder to his first son, &c. in tail; afterwards A, by codicil, devises that the 1000*l.* given by his will to his said niece should be made up 6000*l.* payable at twenty-one or marriage. The niece was eighteen at the time of the testator's making his codicil, and under twenty-one: decreed, she should have the interest of the 6000*l.* from the death of the testator; and that C was only entitled to the residue, exclusive of the 6000*l.* *Acherley v. Wheeler*, 1 P. W. 783. 9 Mod. 68. 10 Mod. 518. Fort. 183. Com. Rep. 381. 513. See note (c), *id. ib.* PARENT & CHILD; INTEREST ON LEGACY.

Legacy when apprenticeship served, held, on construction of will, to be only directory as to time of taking, and not a condition. *Sidney v. Vaughan*, 2 Bro. P. C. 251. INTEREST, VESTED.

A, having issue three daughters, B, C, and D, devises 1000*l.* to B, to be paid her at the age of twenty-one or marriage, upon condition that she married with the consent of his executors, and likewise devises to her several messuages, &c.; and after several other legacies, he devises the residue of his estate to the executors for the benefit of his children; though B married a person who made his addresses to her in her father's lifetime, which the father knew, and was dissatisfied at, and had notice by the executors of her father's will, yet there being no limitation over, this will not amount to a forfeiture, being only in *testoreum*. *Semphill v. Bayly*, Prec. Chan. 562. FORFEITURE; CONDON. BREACH OF.

A directs that his estate should be sold after his death, for several purposes, and amongst others, that 200*l.* should be disposed of as he by a note should appoint, and dies intestate, having given no directions. This 200*l.* shall be a resulting trust for the heir at law. *Emlyn v. Freeman*, Prec. Chan. 541. RESULTING TRUST; HEIR AT LAW.

After a decree of foreclosure has been made absolute, and the mortgagee for many years in possession, he made his will, and thereby disposed of the mortgage debt in these words: "And if Mr. S's debt be paid, as I doubt not but it will, I order my executor to pay the sum of 4800*l.* (which was the exact amount of the debt) amongst the children of my nephew:" held, that this devise did not open the foreclosure, and that the testator's calling it a debt did not alter the nature of his estate in the premises. *Tooke v. Ely*, 5 Bro. P. C. 181. MORTGAGE FORECLOSURE, NOW OPENED.

Legacy at twenty-one with interest in meantime is a vested legacy. *Harrison v. Buckle*, 1 Stra. 238. LEGACY, VESTED.

One having two sons and a daughter, by will gives to each 2000*l.* payable at twenty-one; provided, if assets fall short, to pay the legacies, the abatement shall be borne out of the legacies; testator leaves assets to pay, which the executrix wastes; the daughter's legacy shall have the preference. *Marsh v. Evans*, 1 P. W. 668. ADMON. OF ASSETS; LEGACY, ABATEMENT OF; DEVASTAVIT.

Devise to A for life, remainder to B in fee, provided that if C, within three months after A's death, pays B 500*l.* then C to have the land in fee: C dies in life of A; A dies: the heir of C, though not named, is entitled to the benefit of devise. *Marks v. Marks*, 1 Stra. 129. S. C. 10 Mod. 419. PRE-EMPTION, RIGHT OF.

One devises a house to his cousin, directing that an annuity of 1200*l.* per annum shall be paid her, and that she shall maintain her son there; the son chuses to go from her, still the cousin shall have her annuity in the same manner as if the son had died. *Blackborn v. Edgley*, 1 P. W. 604. CONDITION.

Legacy of 1600*l.* to be laid out in land shall be taken as land; but if a deficiency of assets, then not specific, but shall contribute in proportion: the legacy is what vests by assent of executor. *Hinton v. Pinke*, 1 P. W. 539. MONEY DEVISED TO BE LAID OUT IN LAND; ADMON. OF ASSETS; SPEC. LEGACY; LEGACIES, ABATEMENT OF.

One by will gives all his lands, money, &c. to his wife, provided, if wife dies without issue, then 80*l.* shall remain to his brother after his wife's death; the brother dies in the lifetime of the wife: it was decreed the legacy good. *Pinbury v. Ellis*, 2 Vern. 758. 766. S. C. Prec. Chan. 483. 1 P. W. 563. INTEREST, VESTED.

One seised in fee of the manors of A and B, mortgages A for 4000*l.* and by will charges all his real estate, with payment of his debts and devises, &c. to C, and B to D, and dies: the devisee of A shall compel the devisee of B to contribute to pay the mortgage on A; but if the will prove void, then no contribution. *Carter v. Barnadiston*, 1 P. W. 505. CONTRIBUTION; PAYING OFF INCUMBRANCES.

One devises to her grandchild a debt of 4000*l.* owing to the testatrix by J S; provided, if any part of the debt should be paid in before the testatrix's death, then so much as should be paid in to be made good to the grandchild out of the surplus of her estate: afterwards the testatrix released 2000*l.* of the said debt to J S without having reserved any of the money: decreed, that this was no ademption of the legacy, *pro tanto*, but that the legatee or her representative was entitled to the whole 4000*l.* as much as if same had been paid in to the testatrix. *Thomonde v. Suffolk*, 1 P. W. 461. LEGACY, ADEMPMENT OF.

Real estate is, by will, charged with the payment of the legacies above mentioned, this will not extend to the legacies in the codicil; secus, if the land were charged with the payment of the legacies generally. *Masters v. Masters*, 1 P. W. 423. S. P. Amb. 556. CHARGE ON LAND.

One devises lands to his wife for life, and after her death to his son in fee, upon condition to pay his daughter 1000*l.* within a year after the death of J S, with a proviso, that if the money be not paid, the daughter may enter and receive the profits till payment: J S dies, living the wife; the daughter shall have the 1000*l.* during the life of the mother, and in default of payment, equity will decree a sale of the reversion. *Bacon v. Clerk*, 1 P. W. 478. Pre. Ch. 500. LEGACY, WHEN PAYABLE.

One devises his lands for payment of his debts; bonds, and simple contract debts shall be paid

equally; but if he only charges his lands with the payment of his debts, so that the lands descend subject to the debts, the bonds shall be preferred before the simple contract debts; but if the heir sell the land before the action brought, then both to be paid equally. *Freemoult v. Dedire*, 1 P. W. 430, 431. ADMON. OF ASSETS; TRUST TO PAY DEBTS.

A had issue three sons; B, his eldest, who died in his lifetime, leaving a daughter, and C & D: A devises lands to his wife for life, and after her death to D and his heirs; provided, that if C do, within three months after the death of the wife, pay to D the sum of 500*l.*, then the land to remain to C and his heirs; C died in the lifetime of the wife; the heir of C shall take advantage of this condition, and not the right heirs of the testator. *Marks v. Marks*, Pre. Ch. 486. CONDITION, WHO MAY PERFORM.

On construction of a devise: held, that the words heirs male of the body of his great-grandfather are good words of purchase to pass the estate to him who is heir male, though not heir general. *Brown v. Barkham*, 1 Stra. 35. ESTATE BY PURCHASE.

A, by his will, ordered all his personal estate to be sold for the payment of his debts and legacies; and in case it should prove insufficient, he devised his real estate to his executors, for the purpose of making good the deficiency. He then devised his real estate, after such time as his debts and legacies should be paid by the rents and profits thereof, to E for life; and in case E should have any issue male, then to such issue male and his heirs for ever. And after the decease of E, in case he left no issue male, then after such time as the testator's debts and legacies were fully paid, he devised part of his said real estate to J in fee, and the residue to N in fee. E entered into possession, and kept down the interest of the debts; but afterwards suffered a common recovery of the whole estate, and declared the uses thereof to himself in fee: held, that an estate for life was vested in E at the time of the recovery, notwithstanding the debts were not paid, and that he could make a good tenant to the *præcipe*: held also, that the remainders limited to J & N were contingent remainders, and well barred by this recovery. *Barnardiston v. Carter*, 3 Bro. P. C. 64. S. C. 1 P. W. 509. RECOVERY; TENANT FOR LIFE.

A, seised in fee, devises to B, his executors &c. for ninety-nine years, in trust for himself and his wife for their lives, and the life of the survivor, and after the death of the survivor in trust, for the heirs of their two bodies, and in default of such issue, then in trust for the heirs of the body of the husband, and in default of such issue, in trust for the heirs of the survivor of the husband and wife; husband and wife have issue a son, and the husband dies, and then the son dies in the lifetime of the mother without issue; the mother administers to her husband and son, and assigns the term to the defendant: decreed, her assignee well entitled, and that the term should not go to the heir of the husband as attendant on the reversion. *Hayter v. Rod*, 1 P. W. 360. ASSIGNMENT OF TERM.

A man makes his will in the following manner. As to the disposal of my worldly estate, I give and devise, &c.: and then gives his lands to his eldest son in tail, remainder to his three other sons in tail, and devises copper mines and other estates to his eldest son, to be sold for payment of his debts, and gives his daughter 1500*l.*; there being personal estate sufficient to pay this legacy, whether real estate by the words of this will shall be charged therewith? *Peulet v. Parry*, Prec. Chan. 449. CHARGE ON LANDS.

Devise of lands to A, and the heirs male of his body. A dies in the life of the testator leaving issue. The devise is void, and the issue cannot take. *Hutton*

v. *Simpson*, 2 Vern. 722. Pre. Ch. 439. Gilb. Eq. Rep. 115. 120. **DEVISE LAPSED.**

A, devises lands in trust, to convey to B for life, remainder to his first &c. sons, for their lives successively, and so to their issue male for their lives, remainder over. Though this be a vain attempt of a perpetuity, yet the trustees shall make a strict settlement as may be, making all the persons in being but tenants for life; but the limitation to the son unborn must be in tail. *Humberston v. Humberston*, 2 Vern. 738. Pre. Ch. 455. Gilb. Eq. Rep. 128. S. C. 1 P. W. 332. **SETTLEMENT; PERPETUITY.**

If a man, by will, impowers his wife to dispose of his personal estate with the consent of the trustees, the wife, without such consent, cannot by her will devise it, and therefore, the husband as to that part, is dead intestate. *Sympton v. Hornby*, Prec. Chan. 1452. **POWER, EXECUTION OF.**

One devises 1200*l.* to A, B, C, and D, the four children of J, to be divided amongst them according to the discretion of J, whom he makes executor, and wills that he shall not be compelled to pay any of the legacies within a year after the testator's death. A dies before the testator. B dies within six months after the testator; and before any allotment or distribution, J pays to C 900*l.* and takes a receipt from C in full of his share of the 1200*l.*, and by will gives 400*l.* to D in full of his share. Held, first, that A dying in the life of the testatrix, a fourth part of the 1200*l.* was not a lapsed legacy; secondly, the administrator of B was not entitled to any part of the 1200*l.*; thirdly, C having received 900*l.* and given a receipt in full of his share, his representative could claim no part of the 1200*l.*; fourthly, the father ought to pay interest for the 1200*l.* from a year after the testator's death. *Bird v. Lockey*, 2 Vern. 743. **INTEREST VESTED.**

A, by will, devises particular estate to B, his second son, on condition that if by death of C, his first son, B should come into possession of C's estate, then B should relinquish the devised estate to D. C dies. B becomes entitled to C's estate, but it is much incumbered. Held, that incumbrances must be satisfied. *Newburgh v. Newburgh*, 2 Bro. P. C. 247. **PAYING OFF INCUMBRANCES.**

A devises 500*l.* a piece to his three daughters, at their ages of twenty-one or marriage, to be paid out of his stock, and devises the rents of his real estate to his wife for life in lieu of dower, and for the maintenance of his children, and towards making up their portions; and after his debts and legacies paid, devises the lands to his son, who together with his wife he made executors. The stock was but of 100*l.* value; the wife being dead and the two eldest daughters having had their portions paid them: Held, the lands were liable in the hands of the son to the youngest daughter's portions. *Tompkins v. Tompkins*, Prec. Chan. 397. S. C. Gilb. Eq. Rep. 90. **CHARGE ON LANDS; PORTIONS.**

A man devises his personal estate to the use of his relations without specifying any in particular; it shall be distributed according to the statute of distributions. *Roach v. Hammond*, Prec. Chan. 401. S. C. 1 P. W. 327. **DISTRIBUTION.**

One, by will, devises that his debts and legacies should be paid in the first place, and then devises his lands to his sister for life, remainder to her issue, remainder over, and made the sister executrix. Decreed, the lands to be charged with the debts. *Trott v. Vernon*, 2 Vern. 708. **CHARGE ON REAL ESTATE.**

One devises portions to his children, A, B, and C, and if any die before twenty-one or marriage, the portion of the child so dying to go to the survivor; one of the children dies in the lifetime of the testator. This is not a lapsed legacy, but shall go over to the surviving children. *Perkins v. Micklethwaite*, 1 P. W. 274. **LEGACY LAPSED.**

A debtor without taking notice of the debt, devises a sum as great or greater than the debt to his creditors. This shall be a satisfaction. Secus, if it were devised on a contingency, or if it were less than the debt. *Talbot v. Shrewsbury*, Prec. Chan. 394. S. C. Gilb. Eq. Rep. 89. **DEBTS, SATISFACTION OF.**

A clear implication is necessary to disinherit heir at law. *Boutell v. Mohun*, Prec. Chan. 381. **HEIR AT LAW.**

J devised a lease for lives (after payment of his debts) to his two grandchildren, H and W, but if either of them died without heirs of their own bodies, then the share of him so dying, should go to the testator's other grandchild. W died without issue; and on a bill filed by a mortgagee to foreclose, it was held, that H and C were entitled to redeem in equal moieties. *Wastneys v. Chappell*, 3 Bro. P. C. 50. **MORTGAGE, REDEMPTION OF.**

By a marriage settlement a term was limited to trustees for raising on failure of issue male, 3000*l.* for daughters' portions, payable at eighteen or marriage. The father and mother die leaving issue two daughters only, who at the death of the father (who survived the mother) were fifteen or sixteen years of age, and who had by the father's will 500*l.* a piece, devised to them, payable at the same time with their original portions, but the estate was devised to JS, one of the daughters being married and being of the age of twenty; held on her bill that she must have maintenance from the time of her father's death till the portion became due, and from thence interest at five per cent. till paid. *Greenhill v. Waldoe*, Prec. Chan. 367. S. C. Gilb. Eq. Rep. 31. **MAINTENANCE; SETTLEMENT, C. OF.**

A devises his real estate to his son charged with his debts and legacies, and devises 2500*l.* to his daughter at the age of twenty-one or marriage, provided that if she should marry in the lifetime of her mother, without her consenting in writing, then 500*l.* to cease and be applied towards payment of the debts. The daughter attains twenty-one and marries without her mother's consent, the whole portion shall be raised for it was vested in her at the time of the marriage. *King v. Withers*, Prec. Chan. 348. S. C. Gilb. Eq. Rep. 26. 3 P. W. 414. Ca. Temp. Talb. 117. 3 Bro. P. C. 131. **INTEREST VESTED.**

Legacy given upon a man's dying without issue, the man dies leaving issue, which issue within six months after died without issue, the legacy not due, it not being intended to rise upon any remoter contingency than the man's dying without issue living at his death. *Nichols v. Hooper*, 1 P. W. 198. 2 Vern. 686. **LEGACY LAPSED.**

A devised to his wife a rent-charge of 200*l.* for thirteen years, in trust nevertheless, for the payment of his debts and legacies; he also devised to her certain lands in augmenting of her jointure. The surplus of this rent-charge, after debts and legacies paid, is not a beneficial trust for the wife, but a resulting trust for the heir. *Wych v. Packington*, 3 Bro. P. C. 44. **RESIDUE; RESULTING TRUST.**

A devised a term for years to his wife for life, and after her death to the child she was then enceint with, but if such child died before twenty-one, then he devised one-third part of the said term to his wife, whom he made executrix. The wife not being enceint at the time of the devise, held 1st, That the devise to her was good, though the contingency never happened. 2ndly, That she have the undisposed surplus of the personal estate, and to go in a course of administration. *Jones v. Westcomb*, Prec. Chau. 316.

A legacy devised to J, when of the age of sixteen, and interest in the meantime; J dies before sixteen. The legacy vested and shall go to the executor of J. *Stapleton v. Cheale*, 2 Vern. 673. Prec. Chan. 317. S. C. **INTEREST VESTED.**

A devises a lease for twenty years, to wife for life, remainder to his son, she paying 10*l.* per annum to his son during her life; the son dies in the lifetime of his mother, the rent continues during the life of the wife, and shall go to the executor of the son, and the wife is compellable to pay her proportion for a renewal of the lease. *Lock v. Lock*, 2 Vern. 666. INTEREST VESTED.

Devise of 50*l.* per annum to the wife of A during the life of B, for her separate use. The wife of A dies, the 50*l.* per annum shall be paid to the executor of the wife of A during the life of B. *Rawlinson v. Montague*, 2 Vern. 667. INTEREST VESTED.

A devised his estate to trustees, in trust for H, and E his wife for their lives, and the life of the long liver of them; remainder to the first son of E for ninety-nine years, if he should so long live; remainder to the heirs male of the body of such first son, remainder to all and every the sons of the said E for ninety-nine years, if every such son respectively should so long live, remainder to the heirs male of every of them, to take, not jointly, but successively one after the other, according to the births of each of them, the sons to take the term of ninety-nine years, with immediate remainder to his said heirs male. On a bill brought for a conveyance of this estate, according to the testator's will, it was decreed, that in such conveyance where any part of the estate was limited in use to the plaintiff for ninety-nine years, if he should so long live, there should be a limitation over to trustees and their heirs during his life, to preserve the contingent uses in remainder, and then to the first and other sons of the plaintiff successively. *El. Stamford v. Hobart*, 3 Bro. P. C. 21. CONVEYANCE.

Who take under words "poor relations." *Anon.* 2 Eq. Ab. 191. DISTRIBUTION.

Legacy of 1000*l.* which devisor had on mortgage on college lease, to be paid when devise came of age, held first that it was vested, but secondly, it should not carry interest from testator's death, and thirdly, that it was a specific legacy and chargeable only on mortgage. *Chambers v. Jeffery*, 2 Eq. Ab. 541. INTEREST VESTED; INTEREST, WHEN PAYABLE; LEGACY SPECIFIC.

B made his wife executrix, and devised to her the use of his table-plate for life, and after to C his grandson, but made no disposition of the surplus of his personal estate. Parol evidence was admitted, that the testator intended his wife should have the surplus to her own use; it being only to rebut the construction of a court of equity, which would create a resulting trust, and make the executrix a mere trustee for the next of kin. *De. Beaufort v. Ly. Granville*, 3 Bro. P. C. 37. RESIDUE.

Lands devised in fee in trust to raise 300*l.* as portion to be paid at twenty-one or marriage, lapses by death of legatee before those times. *Langley v. Oates*, 2 Eq. Ab. 541. LEGACY LAPSED.

Legacies of 100*l.* each to three children at twenty-one or marriage, and if any should die before that, his legacy to survive to others. One died before testator, held his legacy survived. *Hucksman v. Stroud*, 2 Eq. Ab. 541. LEGACIES LAPSED OR SURVIVED.

Lands are devised to three persons and their heirs, to the use of them and their heirs, upon the trusts after mentioned, and then the testator directs them to convey part to A for life, and other part to B in tail, but gives no direction as to the remainder in fee. Though two of the trustees were related to the testator, yet the remainder in fee will not belong to them, but be a resulting trust for the testator's heir. *Hobart v. Co. Suffolk*, 2 Vern. 644. RESULTING TRUST; HEIR AT LAW.

Real estate made liable to a legacy, the personal estate proving deficient, and it being the testator's in-

tention that it should be raised at all events. *Jones v. Selby*, Prec. Chan. 288. CHARGE ON REAL ESTATE.

Legacies are given to A, B, and C, to be paid at their respective marriages, and if any of them die, their legacies to go to the survivors. One of them dies unmarried; the survivors shall not receive her legacy before their respective marriages. *Moore v. Godfrey*, 2 Vern. 620. LEGACIES, WHEN PAYABLE.

A devises lands to B, his son and his heirs, and declares that out of the lands, he shall pay 200*l.* to his daughter at her age of twenty-one. She marries and dies under age. Legacy not vested. *Garter v. Bletsoe*, 2 Vern. 617. Pre. Ch. 267. S. C. *Gilb. Eq. Rep.* 11. INTEREST, VESTED.

J devised 3000*l.* a-piece to his three daughters, A, B, and C, at twenty-one, or marriage. If any died before, to go to the survivors: B died in the life of the testator; her legacy shall go to the surviving daughters. *Ledsome v. Hickman*, 2 Vern. 611, LAPSSED LEGACY.

Where a time is annexed to legacy, and not to the payment, and legatee dies before that time, it is lapsed. *Snell v. Dee*, 2 Salk. 415. LEGACY LAPSED.

J S, being entitled to a debt of 20,000*l.* due from the crown, devised the same to six of his relations, equally to be divided between them, share and share alike; and if either of them die, to the survivor or survivors of them. All the legatees survived the testator, but before the debt was recovered, one of them died: held that the legatees were joint tenants, and that the representative of the legatee dying, was not entitled to any part of this legacy. *El. Bindon v. El. Suffolk*, 4 Bro. P. C. 574. JOINT TENANCY.

One devises in these words: "As to my temporal estate wherewith God hath blessed me, I give and dispose thereof as followeth: first, I will that all my debts be justly paid, which I shall at my death owe or stand indebted in, to any person or persons, whatsoever; also I devise all my estate in G, to A B," and this was all the real estate the testator had: held per Lord Keeper, this will creates a charge on the real estate for the payment of debts. *Boulter v. Smith*, Prec. Chan. 264. CHARGE ON REAL ESTATE.

A devise of two farms to the father and mother, for their lives, remainder to trustees till A and B, respectively came of age, and then to convey one farm to A, and the other to B. A died before the time came for the conveyance; A being to have had an estate in fee, the conveyance shall be made to his heir. *Hick v. Taylor*, 2 Vern. 561.

A, by will, gives his granddaughter 200*l.* on condition she continue with his executors till she was twenty-one, but if she was taken from them by the father, who was a papist, before twenty-one, or married against the consent of his executors, then he gave her but 10*l.*; the daughter was placed by the executors with a clergyman, who, before she was twenty-one, with consent of one of the executors, permitted her to make a visit to her father, and he took that opportunity to marry her to a papist; decreed she should only have the 10*l.* *Creugh v. Wilson*, 2 Vern. 572. LEGACY CONDITIONAL.

A, by will, devises his lands to trustees to sell, and to dispose of the money as he by writing should appoint, and for want of appointment to his four nephews; A, by writing, appoints his trustees to pay several sums to several persons, but not near the value of lands: decreed the surplus to the heir, and not to the nephews, as an interest resulting, and not disposed of. *City of London v. Garraway*, 2 Vern. 571. HEIR AT LAW; RESULTING TRUST; LANDS DEVISED TO BE SOLD; POWER.

A is entitled to 8000*l.* in the chamber of London, and whilst a stop was put to payment there, he made his will, and declares that when the executors should receive the 8000*l.* he gives 2000*l.* to three hospitals,



afterwards an act passed for settling a fund for paying a particular interest for the orphan's debt, and the 8000*l.* is then worth, to be sold, but 6300*l.*, yet decreed the whole 2000*l.* to be paid. *Colwall v. Bonython*, 2 Vern. 547. LEGACY SPEC.; LEGACY, ABATEMENT OF.

A disinherits his son, and by will gives the greatest part of his estate to B, and tells B, if his son behaved well, he might pay him 20*l.* a quarter, and if he used that well, he might make it up 40*l.* a quarter: decreed 40*l.* a quarter to the son. *Kingsman v. Kingsman*, 2 Vern. 659. TRUST.

A man having mortgages, one of which was a mortgage in fee of lands in D, on which he had entered, devises those lands to his two daughters and their heirs, and the other mortgages to them, their executors, &c. One of the daughters dies, her share of the land in D shall go to her heir, and not to her administrator. *Noyes v. Mordant*, 2 Vern. 582. And see *Forrester v. Cotten*, Amb. 388. S. C. 1 Eden, 532. But see 1 Swan, 408. in note. ADMON. OF ASSETS; INTEREST, VESTED.

A, living in Antigua, and having a plantation there, devises 50,000 lb. weight of sugar to the children of B, to be paid by his executors in ten years after his death. The executors not delivering the sugars within the time, on a bill brought by one of the children; decreed the value of the plaintiff's legacy to be computed according to the medium rate of sugars in Antigua, at the end of ten years, and paid with interest from the time it became due. *Symes v. Vernon*, 2 Vern. 653. LEGACIES, HOW COMPUTED.

A devises 4000*l.* to his son, to be paid at his age of twenty-five, and interest in the meantime, and he to have a maintenance thereout, and directs the 4000*l.* to be raised out of a trust estate: the son dies under twenty-five. This is a vested legacy, and shall go to his executors. *Cuce v. Cuce*, 2 Vern. 508. INTEREST, VESTED.

A by will, computing the surplus of his personal estate after debts and legacies paid, would amount to 5,800*l.*, gives the 5,800*l.* to some of his grandchildren in several proportions; and wills if the surplus fell short they should abate in proportion; if it amounted to more, it should be divided between them in the same proportions. Decreed, that a mortgage on an estate devised to two of her grandchildren should be paid out of the personal estate, although by this means the personal estate would fall short of the 5,800*l.* *Hawes v. Warner*, 2 Vern. 477. 3 Ch. Rep. 206. S. C. ADMON. OF ASSETS; PAYING OFF INCUMBRANCES.

Legacies are given by a will to four grandchildren, upon condition that as they came of age they should release all claims to the testator's estate. This condition must be taken distributively, and such only as refused to release shall forfeit their legacies. *Id.* 478. LEGACIES, CONDITIONAL.

A, by will gives portions to his daughters, but mentions no time when to be paid, but adds a proviso, that his daughters should marry with consent of his wife, and if any married without such consent, her portion to go over. On a bill brought by the daughters for their portions, the court decreed the portions to be paid, but on security to refund if the condition should be broken. *Aston v. Aston*, 2 Vern. 452. 1 Ch. Rep. 164. Prec. Ch. 226. S. C. PORTIONS, WHEN PAYABLE; CONDITION SUBSEQUENT; SECURITY.

A, by will, devised a chattel estate to his executor, that out of the profits his daughter should receive the interest of 2000*l.*, and that the principal should be raised out of the surplus profits. The executor mortgages this estate for 1800*l.*: Held, that the 2000*l.* and interest should be first raised. *Savage v. Humble*, 3 Bro. P. C. 5. ADMON. OF ASSETS.

Devises of lands to A, charged with a portion of

600*l.*; part of the lands are entailed by an ancient deed: Held, that the entailed lands are not liable to this portion. *Ferrind v. Jackson*, 3 Bro. P. C. 2. ESTATE IN TAIL; CHARGE ON LANDS.

A directs 1000*l.* to be laid out in the purchase of lands, that the rents and profits thereof might come to his nephew W for his life: but the testator made no disposition of these lands after the death of W. Held, that the lands belonged to the testator's heir at law. *Fletcher v. Chapman*, 3 Bro. P. C. 1. REVERSION; HEIR AT LAW.

A makes two of his daughters his executrices, and directs them to distribute a sum of 400*l.*, and also the residue of his personal estate among themselves and their brothers and sisters, according to their needs and necessities, as they in their discretion should think fit. The court restrained the exercise of this power, by decreeing a double share to the eldest son and heir, looking upon him as a necessitous person. *Wurburton v. Wurburton*, 4 Bro. P. C. 1. DOUBLE PORTION; DISCRETIONARY JURISDICTION.

A, by will, gives 500*l.* to his daughter, to be paid by his executors at her age of twenty-one, out of his personal estate, and rents of his real, and if not raised by that time, the executors to stand seised and take the rents till the 500*l.* was raised, and after payment gives the land to his son. The daughter marries at eighteen, and dies under twenty-one; the husband takes administration: Decreed, the portion to be raised, and that by a sale, though the land by reason of the incumbrances, would produce little more than the 500*l.* *Jackson v. Farrand*, 2 Vern. 424. Prec. Ch. 109. S. C. INTEREST, VESTED; PORTION, HOW RAISED.

Devise of lands to a man's wife who was entitled to dower, without saying in recompence or satisfaction of her dower: held to be a voluntary gift, and no bar of dower. *Hitchin v. Hitchin*, Prec. Chan. 133. DOWER, SATISFACTION OF.

Divers legacies given by a will, and the will is, that if any legatee died before his legacy was payable, it should go to his brothers and sisters; a legatee died in the testator's life-time, no lapsed legacy, but shall go to his sister. *Darrel v. Molesworth*, 2 Vern. 378. LEGACY, LAPSED.

One devises several parcels of land to his several children in tail, and if any of them die before twenty-one or unmarried, such child's part to go to the surviving children; if any of the children die unmarried, though above the age of twenty-one, his share shall go to the surviving child, but such survivor shall have such share for life only; what goes over on one child's death, shall not go over again a second time. *Woodworth v. Glashbrook*, 2 Vern. 388.

A, having entailed his land on his son, subject to a mortgage by will, devises his leasehold and personal estate to pay his debts and legacies, and directs, if his personal estate is applied to pay the mortgage, it should be kept on foot to make good his daughter's portion, and gives her 3000*l.* to be paid at twenty-one or marriage, if married with consent, if not, but 1000*l.*, she died at six years of age; the portion shall not be raised for the benefit of her administrators. *Yates v. Philpott*, 2 Vern. 416. Prec. Ch. 140. S. C. PORTION, LAPSE OF.

Devise of a legacy to a daughter, but if she marry without her mother's consent, then 500*l.* of the daughter's legacy to go to the son. The daughter marries without the mother's consent; the son shall have the 500*l.* *Strutton v. Grymes*, 2 Vern. 357. CONDON., BREACH OF?

Devise of express legacies to the executors and also to the next of kin, and no disposition of the surplus: how the surplus shall go. *Bayley v. Powell*, 2 Vern. 361. S. C. GIBB. EQ. REP. 225. Prec. Ch. 92. S. C. SURPLUS; DISTRIBUTION.



One devises lands to his son by his second wife, in tail male, remainder to his eldest son by his first wife, provided that if the land should come to his eldest son, that then he or his heirs should pay 1000*l.* to the testator's daughters within four months after the estate should come to them, and in default of payment, the trustees to enter and raise the money. The son by the first wife dies, leaving a son. The son by the second wife suffers a recovery of a moiety of the lands, and dies without issue; so that the moiety only of the premises comes to the son of the son by the first wife; though no part of the premises ever came to the eldest son, yet the moiety of the lands shall be liable to the payment of the whole 1000*l.* without any apportionment. *Hooley v. Booth*, 2 Vern. 359. CHARGE ON LAND; APPORTIONMENT.

A devises household goods to his wife for life, and afterwards to his son; the court allowed this a good devise over, and to be the same as if the devise had been only of the use of the goods to the wife for life. *Hyde v. Parrat*, 1 P. W. 1. S. C. 2 Vern. 331. LIMITATION OF PERSONALS.

A, devised his lands after debts paid, and then says, My debts are only those contained in the schedule. A, afterwards contracted new debts; the payment of the first debts is all that is required by the will. *Lodding v. Kims*, 3 Lec. 433. CHARGE TO PAY DEBTS.

One devises 3000*l.* to his daughter at twenty-one or marriage, provided she marry with the consent of A B, and if she married without such consent, then she was to have but 500*l.*, and the 3000*l.* legacy to cease. The daughter marries without consent; yet she shall have her whole 3000*l.* because it is not devised over, but only to fall into the surplus. *Gurrel v. Pritty*, 2 Vern. 293. CONDITION, BREACH OF.

One, on the marriage of his daughter; gives a bond to the husband for the daughter's portion, and afterwards by will, devises land of much greater value to the husband and the wife, and their heirs. The devise no satisfaction of the bond, though there be a defect of assets to pay the testator's debts. *Goodfellow v. Burchett*, 2 Vern. 298. BOND, SATISFACTION OF.

Legacy of 300*l.* to be paid to A, at his age of twenty-three; if he die before, to go over to B; A dies before twenty-three. B shall have it presently. *Papworth v. Moore*, 2 Vern. 283. LEGACY, WHEN PAYABLE.

One settles a house on his daughter for life, with remainders over, and then by will, devises the goods and furniture of the house to such persons as were to have the house after his death. By the settlement, the goods and furniture shall go according to the devise, and shall not be under the power of the first taker to dispose of, nor subject to her or her husband's debt. *Offley v. Offley*, Prec. Chan. 26. LIMIT, OF PERSONALS.

A devise to trustees for payment of debts and legacies, and the trustees are made executors; the estate falls short; the debts must be paid first, because the trustees being made executors, the money is legal assets. *Greaves v. Powell*, 2 Vern. 248. Semble, S. C. id. 405. ASSETS; ADMON. OF ASSETS.

Devise of lands to A for life, remainder to such child or children as should be living at his death, and to their heirs; A paying 40*l.* to B. This is a charge not only on A's estate for life, but also on the remainder. *Sadd v. Carter*, Prec. Chan. 27. CHARGE ON LANDS.

Devise of lands to his cousin A and his heirs, in trust to be sold for payment of his debts and legacies, and makes A executor, the surplus after debts and legacies no resulting trust for the heir, as it would have been in a like case on a conveyance executed. *Contingham v. Mellish*, Prec. Chan. 31. S. C. 2 Vern. 246. HEIR AT LAW; TRUST, RESULTING.

One by will, having two daughters, gives 20,000*l.* to each, payable at twenty-five or marriage, so as such marriage be with the consent of the mother and the trustees, and after the age of sixteen; if either of the daughters marry before sixteen, or without the consent, such daughters to have only 10,000*l.* portion. Testator afterwards treats with the plaintiff for a marriage with his eldest daughter, and he dying before the marriage had, she afterwards marries the plaintiff with consent of her mother and the trustees, but before the age of sixteen, yet she shall have the whole 20,000*l.* *Salisbury v. Bennet*, 2 Vern. 223. 3 Ch. Ca. 135. cited. CONDITION, BREACH OF.

J S, by will, devises his lands to his brother, who was the heir at law, in fee; gives legacies, and makes his brother executor, desiring him to see his will performed. The real estate is charged with the legacies. *Alcock v. Sparhawk*, 2 Vern. 228. CHARGE ON REAL ESTATE.

One charges his lands with 6000*l.* for the child of which his wife was enfeint, if it proved a daughter, with a clause of entry for non-payment. A daughter is born and dies. The 6000*l.* shall go to her administrator. *Norfolk v. Gifford*, 2 Vern. 208. Lapsed PORTION.

A, by will, devises his land to B in fee, paying 400*l.*, whereof 200*l.* to be at the disposal of his wife by her will, to whom she should think fit. The wife dies intestate, her administrator shall have this 200*l.*, the property thereof being absolutely vested in the wife. *Robinson v. Dugate*, 2 Vern. 181. INTEREST, VESTED.

Real estate decreed to be charged with an annuity given by the will; though no express words to charge the land, the executor being devisee of the land. *Eliot v. Hancock*, 2 Vern. 143. CHARGE ON REAL ESTATE.

A devises lands to B in tail, remainder to C; and gives his executor power to raise out of his estate 500*l.* for his next heir, and desires him to see his debts paid. This gives the executor a power to sell the lands to pay his debts. *Wareham v. Brown*, 2 Vern. 154. POWER OF SALE.

A, by will, devised to B 400*l.* in full satisfaction of all the monies which he owed B, and subjects his real estate to the payment of his debts. The debt which A owed B was in all 800*l.*, but was barred by the statute of limitations. Court will suppose the testator mistaken in his computation, and the whole debt of 800*l.* shall be paid. *Gifton v. Mill*, 2 Vern. 141. S. C. Prec. Chan. 9. DEBT, SATISFACTION OF.

One mortgages his lands, and by will appoints them to be sold for payment of the mortgage money; and afterwards, in another part of his will, devises a moiety of the mortgaged premises to A B. The personal estate shall be applied to pay off the mortgage in favour of devisee. *Johnson v. Milksepp*, 2 Vern. 112. PAYING OFF INCUMBRANCES.

One makes his nephew executor, and devises to him and his heirs all his lands, in trust to sell and to pay all his debts and his children's portions, and gave to his children 100*l.* a piece. The money arising by this sale is not legal assets, and the debts and children's portions are to be paid in equal proportions. *Anon.* 2 Vern. 133. ASSETS.

An estate by implication cannot be against the plain intent of the party expressed in his will. *Smith v. Clever*, 2 Vern. 60. TITLE BY IMPLICATION.

A devises lands in trust to pay one-third of the rents to his wife in satisfaction of dower, until his son, then two years old, attains twenty-one. The wife receives a third of the rent from the trustees, and dies; and afterwards the son dies during his infancy. The administrator of the wife shall have her third of the rents till such time as the son might have attained twenty-one. *Cootes v. Needham*, 2 Vern. 65.

One devises 100*l.* to his daughter for her portion,

charged upon a real estate, and payable at twenty-one. Daughter dies before twenty-one. The portion shall sink in the land; otherwise if no time had been limited for the payment of the portion, for in that case it goes to the executor of the daughter. No difference where the portion is secured by a settlement or a will, if severed out of a real estate, and the party dies before it is payable. In either case it sinks into the lands. *Smith v. Smith*, 2 Vern. 92. **PORTION, LAPSE OF, &c.**

Devise of a portion to a child with interest, but not to be paid to the child till twenty-one. Child dies under twenty-one. Portion shall go to the administrator of the child. *Collins v. Metcalfe*, 1 Vern. 462. **INTEREST, VESTED.**

A devises to B rent out of a lease for years, determinable on lives, to be paid half-yearly if the *cestui que vie* lived so long. B dies during their lifetime. Decreed, the rent was not determined, but should be paid to the executors of B during the term. *Gifford v. Goldsey*, 2 Vern. 35.

"I will all my debts shall be paid before any of my legacies or gifts hereinafter mentioned." Then the testator gave several pecuniary legacies, and after devised lands to A on condition to pay 5*l.* per annum to D. *Per cur.* Testator's lands are not subjected to the payment of his debts. The general clause at the beginning of the will shall be intended only of the personal estate, and the pecuniary legacies thereout devised. *Eyles v. Cary*, 1 Vern. 457. **CHARGE ON REAL ESTATE.**

One devises his land for payment of his just debts; testator, while a student at Cambridge, had been, by surprise, prevailed upon to give a covenant for payment of a portion to his sister, but afterwards the testator all along contested this debt, yet decreed this to be a debt, to be paid within the general provision. *Hollis v. Carr*, 1 Vern. 431. **CHARGE TO PAY DEBTS.**

Debts arising by a misfeasance, as for an escape or breach of trust, or contracted *multi fide*, not within a general provision for payment of debts. *Id. ib.*

One devises all his lands to A and the heirs of his body, remainder over, and in another part of the will, devises to A all his personal estate, and makes him executor, willing him to pay his debts. This is a charge upon the lands, as well as on the personal estate to pay the debts. *Clovesley v. Pelham*, 2 Vern. 411. **CHARGE ON LANDS.**

A directs his lands shall descend to his three daughters in such shares and proportions as his wife, by deed, shall appoint. She makes a very unequal distribution. Whether equity will relieve against it. *Wall v. Thurborne*, 1 Vern. 355. **POWER, ILLUSORY APPOINTMENT.**

Devise of a personal estate to a trustee in trust for testator's only son, and the heirs of his body, and if his son die during his minority, and without issue, then to A, and makes his son executor, and B executor in trust for his son during the son's minority. The son lives to eighteen, and then dies without issue; the personal estate shall go to the executor of the son, and not to A. *Whitmore v. Weld*, 1 Vern. 326. 2 Ch. Rep. 383. 2 Ch. Ca. 167. S. C. **ADMON. OF ASSETS.**

A, on his marriage, settled a rent-charge on his wife for her jointure, and afterwards devises to the wife part of the land charged with the rent-charge. Bill is that the rent-charge might be apportioned. Bill dismissed. *Knight v. Calthorpe*, 1 Vern. 347. **RENT-CHARGE, APPORTIONMENT OF; SETTLEMENT. C. OF.**

Devise of lands to trustees in fee, is trust to pay debts and legacies, and after these paid, then to sell, and if any of the testator's name would buy it, such person to have it for 200*l.* less than the value: One of the testator's name brings a bill for this pre-emp-

tion, but delays bringing it until twenty-five years after testator's death. Bill dismissed. *Huckstep v. Matthews*, 1 Vern. 362. **LENGTH OF TIME; PRE-EMPTION.**

Black acre is devised to J, with a proviso that if he be evicted, he shall have White acre. J is evicted of a moiety of Black acre; he shall only have a satisfaction *pro tanto* out of White acre. *Tyte v. Tyte*, 1 Vern. 270.

Lands devised to be sold for payment of portions; one of the children dies after the portion becomes due, and before the land sold; the administrator is entitled to the money. *Bartholomew v. Meredith*, 1 Vern. 276. **INTEREST, VESTED.**

A devise to a man and the heirs of his body, and if he shall go about to alien, his estate shall cease, and the lands go over to a charity; the devise over is void, it tending to create a perpetuity. *Comp. of Penitents v. Gov. of Christ's Hosp.*, 1 Vern. 161. **LIMIT. OVER VOID; PERPETUITY.**

Where mortgagee devises mortgage to A for life, remainder in fee to B, and mortgage is redeemed. Tenant for life takes one-third, and remainder man two-thirds of mortgage money. *Brent v. Best*, 1 Vern. 70. **MORTGAGE.**

Where land is devised to pay debts and legacies out of rents and profits, the land may be sold; otherwise, if out of annual rents and profits; but if such trust is by deed, the land cannot be sold in either case. *Anon.* 1 Vern. 104. **SALE WHERE DIRECTED.**

Devise of 400*l.* to be laid out in finishing a house; testator lives to lay out as much himself, but leaves the house unfinished; the 400*l.* shall not be laid out. *Husband v. Husband*, 1 Vern. 95. 2 Ch. Ca. 127. S. C. **LEGACY, ADEMP. OF.**

"My debts and legacies being first deducted, I devise all my estate, real and personal, to J." This amounts to a devise to sell for payment of debts. *Newman v. Johnson*, 1 Vern. 45. **DEVISE TO PAY DEBTS.**

A freeman of London settles a jointure on marriage in lieu of his wife's customary share of his personal estate, and then by will gives two-thirds of his personal estate to his daughters, and one third to his sons, and decreed according. *Love v. —*, 1 Vern. 6. **CUSTOM OF LONDON.**

Goods devised to A for life, and after the death of A to the heir of B. B dies in the life of A. Decreed the goods should go to him that was heir of B at his death, and not to him who was his heir at the death of A. *Davers v. Clarendon*, 1 Vern. 35. **INTEREST VESTED.**

Legacies were given to infants, to be paid at twenty-one. They shall have maintenance during their minorities. *Rennesey v. Parrot*, 1 Ch. Ca. 60. **INFANT MAINTENANCE.**

Where a man vests his estate in trustees for performance of his will, and for payment of debts and legacies, and then makes his will, directing the trustees to pay several legacies, and the surplus to his heir, and makes his wife executrix, but does not expressly give the personal estate to her, the personal estate, in this case, shall be applied in ease of the real. *Grey v. Grey*, 1 Ch. Ca. 296. **EXONERATION OF REAL ESTATE.**

Legacy to a child, at twenty-one. It shall have interest in meantime, especially where no maintenance is provided for it. 2 Vent. 346. **INFANT MAINTENANCE.**

If a man devises his lands to S, and desires that the said S should pay his debts, or if it be, the said S paying his debts, or if, immediately after the devise of his lands, he appoints or desires that his debts should be paid, or if he use any expression in his will whereby it appears that he had any intent to charge his lands with his debts, in such case his land will stand charged; but in the case at bar, where the testator

had, in the beginning of his will, said, that he desired that all his just debts should be paid, and afterwards, in the said will, he gave several legacies and devised lands; it was held, that his devisee was not charged with the payment of the debts. *Augu. 2 Freem. 192.* CHARGE ON REAL ESTATE.

### 3. What Estate is given.

- (a) Generally.
- (b) Fee Simple.
- (c) Estate Tail.
- (d) For Life.
- (e) Joint Tenancy.
- (f) Tenancy in Common.

#### (a) Generally.

Devise, subject, as to part, to a devise to trustees and their heirs for debts in aid of the personal estate, and, as to part, to mortgages in fee, to sons and a daughter, and their respective issue male, in strict settlement, &c., with power to the sons respectively, when in possession, to convey or appoint all or any part to trustees on trust, by the rents and profits to raise a rent charge, as and for a jointure for any wife or wives, for each such wife's natural life only, and also to charge portions by deed and to lease for twenty-one years. Execution of the power, by conveyance to trustees and their heirs on trust, by the rents and profits to raise and pay a jointure during the wife's natural life only, and charging portions, with covenant for title, and for quiet enjoyment by the trustees during the natural life only of the wife. As to the estate of the trustees at law, *quare?* the court of K. B. certifying that they took an estate in fee, and the court of C. P. that they took no estate whatsoever. *Wykham v. Wykham, 18 Ves. 395.* POWER.

A money legacy to two, not executors, jointly and between them, is not a joint tenancy, but is a tenancy in common, the words meaning the same as "to be equally divided between them." *Perkins v. Baynton, 1 Bro. C. C. 118.* TENANCY IN COMMON; JOINT TENANCY.

A man, having daughters by his first marriage, died, leaving his second wife *en ventre*, having first devised part of a trust estate to his wife for life; and if the child *en ventre* proved a daughter, then the trustees to convey to his daughter, and to pay them the profits in the mean time. The child proved a daughter. What estate shall the wife take by the devise? *Ball v. Smith, 2 Vern. 633.*

A devise to A for life, and after his decease, to the heirs male of the body of A, and the heirs male of the body of every such heir male, severally and successively, as they should be in priority of birth, &c., remainder over. Whether this be a tenancy in tail, or for life only? *Legate v. Sewell, 1 P. W. 87. 2 Vern. 551.* ESTATE TAIL; ESTATE FOR LIFE.

#### (b) Fee Simple.

Testator gave to his heir one shilling, and devised to W all his lands, and in the next sentence, gave to him all his goods, chattels, personal and testamentary estate. Held, that the fee simple of the lands passed to W. *Bradford v. Belfield, 2 Sim. 265.*

A testator, after giving his wife an annuity for her life to be issuing out of "all his real estate, lands, and hereditaments in P" devised "the said estate, lands, and hereditaments" to his daughter and her heirs; but in case his daughter died under twenty-one and without issue, he devised "the said estate, lands, and hereditaments" to his wife for her life, and

after his decease to the children of A, share and share alike. Held, that subject to the previous interests given to the daughter, and to the wife, the children of A living at the testator's death, took an estate in fee in the lands in P. *Wilkinson v. Chapman, 3 Russ. 145.*

Gift of a mortgage security for money will pass the fee, if the estate be mortgaged in fee. *Renvoize v. Cooper, 6 Mad. 371.*

Devise to testator's wife, she paying his debts, and 15*l.* to A B if so much can be shared, and rest of the estate to go to A B after her death, gives her the fee and power of sale. *Dolton v. Hewen, 6 Mad. 9.* POWER OF SALE.

Devise to the testator's wife, and after her decease to the heirs of her body, share and share alike; and in default of issue to be lawfully begotten by him, to be at her own disposal. A dies, and leaves six children by his said wife: Held, that the wife took an estate for life only, and that each of the six children took a fee-simple in remainder, expectant on the determination of the mother's life estate in one sixth part, as tenant in common. *Gretton v. Haward, 1 Mer. 448.* ESTATE FOR LIFE.

General disposition of all the testator's estates, real or personal, to his wife and two children, to be equally divided among them, subject to annuities; on death to devolve to his children equally; the portion of the wife, upon her death, to his children equally; upon their death before her, their portion to her during life, with a limitation over; upon the death of all without issue of the children, whether an estate for life or absolute to the wife; *quare?* *Chalmers v. Sturt, 2 V. & B. 222.*

Testator devised real estate to A in tail male, remainder over, and gave a sum of money in trust to be laid out in land to be settled to the same uses; by codicil he devised the same real estate to B and his heirs, and gave every thing that he had given by his will to A, in as ample a manner to B; B is tenant in fee of the real estate, and is entitled to have the money paid to him. *Younge v. Combe, 4 Ves. 101.*

Construction of a will and several very inaccurate codicils upon a disposition on the personal estate; as to the interest, whether absolute or for life; as to the extent, whether general or specific and exempt from debts. *Cave v. Bissett, 3 Ves. 155.*

Whether the word "hereditament" alone will carry a fee; *quare?* *Denn v. Moore, 3 Aust. 781.* ESTATE FOR LIFE-SIMPLE.

Whether a devise of lands to A "after payment of my just debts and funeral expences," will carry the fee; *quare?* *Id. ib.*

A devise of all "my lands, tenements, and hereditaments to A," will carry the fee if that appears to be the general intent of the testator. *Id. ib.*

Devise to G for ever, that is, if he have a son or sons who shall attain twenty-one; but if G should chance to die without son or sons to inherit, my will is, that the son of my son W shall inherit. This is a fee-simple to G with an executory devise to the son of W. *Heath v. Heath, 1 Bro. C. C. 147.* EXECUTORY DEVISE.

Devise of all my estate at C H to A for life, remainder to B and C, is a devise in fee to B and C. *Price v. Gibson, 2 Eden, 115.*

Devise of all that "estate" testator bought of M, held to pass the fee; so held also as to another charge which was a devise of "the reversion" of that tenement his sister lived in after her death. Held, contra as to other devises, being, first, "all those houses he bought of T W, containing three dwellings with all their appurtenances;" and next as to a devise of "the tenement in the possession of M B presently after his death." *Bailis v. Gale, 2 Ves. 48.*

The words "I devise all my temporal estate" the same as "I devise all my worldly estate" pass a fee,

and this the plainer, where it is afterwards said "all the rest of my real estate; the word rest being a term of relation." *Turner v. Wise*, 3 P. W. 295. Ca. temp. Talb. 284.

Devise to daughters to augment portions, construed a devise of fee-simple. *Carpenter v. Chapman*, 9 Mod. 92.

A devises all the rest and residue of his real and personal estate whatsoever. This will pass a fee. *Murry v. Wyse*, 2 Vern. 564.

A message was settled upon A for life, remainder to B in tail, remainder to A in fee. A devises all his right, title, and interest in this house to B who was his son, but without adding any words of inheritance. Held, that by this devise the fee passes. *Cole v. Raulinson*, 3 Bro. P. C. 7.

Devise of land to A, paying out of the rents or out of the land a certain sum, is no fee-simple, otherwise if the devise was paying a certain sum generally, without saying, out of the land. *Hucker v. Buckland*, 2 Vern. 106.

A, being seised of lands of 10*l.* per annum in possession, and 34*l.* per annum in reversion, gave certain legacies to be paid at certain different times, and then devised all his lands to his youngest son R, who did not pay the legacies within the time: Held, that a fee passed to R, because it appeared that the sums to be paid were more than the profit of the lands in possession would amount to in that time. *Reake v. Ley*, 1 Freem. 479. CONDON, BR. OF, RELIEF AGAINST.

#### (c) Estate Tail.

Devise to A, B, C, &c. share and share alike for their lives, remainder to their respective children for their lives, and so to be continued from issue to issue for life; but if any of them die leaving no issue, their shares to go to the survivors for their lives, and the issue of such of them as shall be dead, and for default of any issue, then over: held that A, B, C, &c. take estates tail with cross remainders. *Mortimer v. West*, 2 Sim. 274.

Devise to A for life, and to her heirs, the issue of her body for ever for their lives, and in case A has no son, then to her eldest daughter, followed by a proviso containing a devise over if A left no issue, or they should become extinct, creates an estate tail in A. *Itcece v. Steel*, 2 Sim. 233.

Devise of freehold and leasehold to A for life, and after his death to the heirs of his body, their heirs, executors, &c.: held this gives A an estate tail in the freehold and absolute interest in the leasehold. *Kinch v. Ward*, 2 S. & S. 409.

Devise in trust to permit A B to enjoy estate during his life, and after his decease, his first and other sons and daughters now living, successively for life, as they were in priority of birth, but the sons to be preferred in succession to the daughters, and the heirs of the body or bodies of such sons and daughters respectively issuing, and for default of such issue in trust to testator's own right heirs for ever: held on death of A B, his eldest son entitled to estate as tenant in tail, and not a mere life estate, and then to next child of A B in succession. *Green v. Staples*, 5 Mad. 85.

Devise to A, and after his death to his first and other sons, and default of male issue, then unto his eldest and other daughters, and to their heirs male for ever. An estate in tail male in A. *Wight v. Leigh*, 15 Yes. 564.

The devise to J W, &c. and their heirs in due succession, as named, with usual limitations, gives an estate tail to the first taker, who having a son born alive, and since dead, is as his personal representative, entitled to the personal estate absolutely. *Stratford v. Powell*, 1 Ball & B. 1.

Devise and bequest to A, and the heirs of his body, with limitation over, in case of no such heirs; held, an estate tail in real estate, and an absolute interest in personal, the limitation over being void; but if expressed "if he leaves no such heirs," it would be good, as confined to the time of the death, and not after an indefinite failure of issue. *Crooke v. De Fandes*, 8 Ves. 197.

A limitation that will create an entail at law, will have the same effect upon an equitable estate; therefore, a devise in fee to pay debts, and then to the use of A in trust for B for life, remainder to the heirs male of his body, is an entail in B. *Brydges v. Brydges*, 3 Ves. 120.

Where the issue cannot take but through the father, there, though the father has only an estate for life, given him by express words, yet he must, by necessary implication, to effectuate the intention of the deviser, take an estate tail to convey that estate to his issue. *Manderhill v. Carrick*, 3 Ridgw. P. C. 365.

Devise to trustees to pay debts, then to stand seised to the use of A for life, without impeachment of waste, after his decease to the use of the heirs of his body severally, respectively, and in remainder, is an estate tail in A. *Jones v. Morgan*, 1 Bro. C. C. 206.

Devise to trustees to pay out of rents and profits, after deducting rates, taxes, and repairs, the residue to C S, and his assigns for life, and after his decease to the use of the heirs male of the body of C S, and in default of such issue, remainder over, not an estate tail in C S, the uses not being executed in him. *Henpland v. Smith*, 1 Bro. C. C. 75. See observations on this case, 11 Ves. 465.

Devise of lands to A for ninety-nine years, if he should so long live, and after the determination of the term, to the heirs of the body of A, and in default of such heirs, over: held an estate tail in the heir of the body of A, as an executory devise. *Harris v. Barnes*, Amb. 666. DEVISE EXECUTORY.

Devise of land to W for life, remainder to his first son for life, remainder to the right heirs male of his body, remainder to the second, &c. sons of W, and the heirs male of their bodies, remainder to T for life, and after to his first heir male of his body, and for want of such, over: held T took an estate in tail male. *Dubber v. Trallope*, Amb. 453.

A devise to a man for life, and if he die without heir male, remainder over, makes an estate tail. The words "for want of such issue" make an estate tail by implication. *Id.* 463.

Devise of premises to A, and the issue of his body living at his death, and for want of such issue over; is an estate tail in A. *University of Oxford v. Clifton*, 1 Eden, 473. S. C. Amb. 385.

Devise to S for life, remainder to his eldest son and his issue male, and for want of issue of S, to, &c. S died without issue, and, held he took an estate tail in remainder, like in *Stanley v. Leonard*. *Langley v. Baldwin*, Amb. 355. S. C. 1 Eden, 87.

Devise to T for life, remainder to trustees to preserve, &c. remainder to the heirs male of T and their heirs; provided if T should die without issue male living at his death, then over: Held T took an estate tail. *Wright v. Pearson*, Amb. 358. S. C. 1 Eden, 119.

One having several children devises land to one of them and his heirs, and for want of such to the heirs of his other children: Held, the first devise was an estate tail. *Pickering v. Towers*, Amb. 363.

Devise to G and heirs of his body, the males having the preference, and succeeding according to their birth, and the trustees to preserve contingent remainders during the life of G: Held G took estate tail. *Sayer v. Matterman*, Amb. 344.

Feme covert by will pursuant to power, leaves to

her husband "all the profits and revenues of my estates of A and B for life, and after his death my said estates to my children if I should leave any to survive me, but if I leave no such child or children, nor the issue of such, the said estates to J II, making him sole heir in default of issue, and after the death of my husband." The children take an estate tail, not fee simple, and the remainder to J II is good, not a contingent executory limitation on her dying without children living at her death, but a general dying without issue. *Southby v. Stonehouse*, 2 Ves. 611.

A devise of testator's "estate at A," without more, will comprehend his whole interest in the lands rather than be referrible to the mere locality. If, however, words of limitation be added, they will determine the extent of the benefit. *Id. ib.*

G devised to A for life, and no longer, and after his decease to such son as he shall have, lawfully to be begotten, taking the name of R, and for default of such issue, then to B and his heirs for ever: Held that A must, by necessary implication, to effectuate the manifest intention of the testator, be construed to take an estate in tail male, notwithstanding the express devise to A for his life, and no longer. *Robinson v. Robinson*, 3 Atk. 736. 1 Burr. 38. 2 Ves. 225.

So in a cause between the will of some testator and his heir at law, Jekyll, M. R., declared that A, the devisee (above-mentioned) was entitled only to an estate for life, with remainder to his eldest son, and if but one son, for his life, and that the remainder would go over to W R testator's heir at law. *Id.* 738.

Devise to A for life with power to trustees to settle a jointure on his wife, and subsequent thereto, in strict settlement on the issue of such marriage; but if A should die without any issue of his body, then over. The latter words give him an estate tail by implication. *Allanson v. Clitherne*, 1 Ves. 24.

A devised to B and his heirs, and said afterwards, "if he shall die without heirs of his body;" this controuls the devise to an estate tail. *Lampley v. Flower*, 3 Atk. 398. *Vide Lee v. Prieaux*, 3 Bro. C. C. 381, where this case is stated from the register book.

A devise to A for life, and to the heirs of his body so unites the two estates as to make the first taker tenant in tail. *Sheppard v. Gibbons*, 2 Atk. 444.

A devised all his lands, &c. to his wife, and if it should happen that she should have no son nor daughter by him begotten upon her body, and for want of such issue, then the said premises to return to his brother B, if he should be then living, and to his heirs for ever, paying to two other brothers 150*l.* within a year after the wife's death. Decreed to be an estate tail in the wife, and not an estate for life only; that by "no son nor daughter," must be understood "no issue;" and that she ought not to be restrained from committing waste. *Wyll v. Lewis*, 1 Atk. 432. WASTE.

To one for life, and to the heirs of his body, has always been held to be an estate tail; but where it is to one for life, and after his death to the issue of his body, there is no instance where it has been so construed. *Meure v. Meure*, 2 Atk. 265.

A devises lands to J, his wife for life, then to his son H for life, then to his son G, and his heirs for ever; if he died without heirs, then to his two daughters K and L. This is an estate tail in G. *Tyle v. Willis*, *Forres*. 1.

A, having the reversion in fee of lands, settled upon the marriage of B, his son, in the usual manner, devises all lands in that settlement on failure of issue of the body of B, and for want of heirs male of his own body to his daughter F, and the heirs of her body.

This will does not give an estate tail by implication to B. The devise to F is executory, and is void, as being on too remote a contingency. *J. y. Janeshorough v. Far*, *Forres*. 262. LIMITATION TOO REMOTE; ESTATE BY IMPLICATION; EXECUTORY DEVISE.

Where there is a devise to the heirs male of the body of any person, he shall take an estate tail. *Newcomen v. Bethlem Hosp.*, *Ambl.* 793.

A devised 10,000*l.* to trustees in trust, to be laid out in lands, and to be settled on B for life, without waste, remainder to trustees and their heirs for the life of B, to support contingent remainders, with a power to B to make a jointure; remainder to the heirs of the body of B, remainders over; and by the same will devises lands to B, to the same uses, and dies, leaving C executor; B sues C, the executor, for the deeds relating to the lands that are in his hands, and to have the money laid out in lands and settled: decreed, that B had but an estate for life in the lands, and so not entitled to the deeds; but that they were to be brought into court, and that the lands to be bought with the money were to be settled on B for his life only, remainder to his first, &c. son. But on appeal, B was decreed to have an estate tail in the lands devised, and consequently to be entitled to the deeds relating thereto, though as to the lands to be purchased, that being executory, and in the power of the court, B was to be but tenant for life, with remainder to his first, &c. son. *Papillon v. Poise*, 2 P. W. 471. 2 Kcl. 27. DEEDS, POSSESSION OF.

J being seized of some lands in fee, and *cestui que* trust of other lands, devises them to A for life; remainder to his first and second son in tail male, (going no farther); and after A's death, without issue male, then to a charity: held, that A was tenant in tail until issue born, saving as to the trust estate. *Att. Gen. v. Sutton*, 3 Bro. P. C. 75. S. C. 1 P. W. 754.

In a devise of land to A for life, and if A die without issue, then to B; though here is an express estate for life to A, yet the subsequent words will turn it into an estate tail; but where lands are devised to A for life, remainder to trustees, &c. remainder to his first, &c. son in tail male, &c., and if A dies without issue, then, &c., this will not give an estate tail to A; but the words "without issue," must be intended "without such issue." *Blackburn v. Edgley*, 1 P. W. 606. \*

Devise of land to the testator's second son for life, he or his heirs, paying a rent thereout to the eldest son for life, and after the death of the second son and his wife, remainder to the first, &c. son of the second son; the wife of the second son had an estate for life by implication, by the opinion of Ld. Ch. Parker. *Willis v. Lucas*, 1 P. W. 472. 10 Mod. 416. S. C.

One devises his lands for payment of his debts, and then to A for life, with power to make leases, &c. remainder to the heirs male of the body of A; though this be but the devise of a trust, and executory, and expressed to be to A for life, yet it is an estate tail in A, barrable by a fine and recovery; secus, in case of marriage articles to settle an estate on A for life, remainder to the heirs male of his body, this being an agreement to do a future act, and in which the issue are particularly considered, and looked upon as purchasers. *Bule v. Coleman*, 1 P. W. 142.

Devise to A and his posterity. Ld. Keeper thought this would create an estate tail only; but the M. R. being of opinion that such a devise would amount to a fee, Ld. Keeper ordered precedents to be searched. *Att. Gen. v. Bamfield*, 2 Freem. 269.

A, by deed on his marriage, settled his estate upon the issue of the marriage, remainder to his own right heirs; and if he should die without issue male, and leave one daughter, then the lands to be charged with

3000l. for her at twenty-one, and 150l. yearly maintenance, in the meantime; A having then no issue, by his will devised thus: "and whereas by the settlement made on my wife, I have reserved the inheritance of my lands in myself, after the estate tail therein is spent: now in case I die without issue, or that such issue shall die without issue of his or their body, or that the estate tail limited by that settlement shall determine, I give all my said manors to my kinsman B, and to his first and other sons in tail male, remainder to C in fee." A had afterwards a daughter: held, that this daughter was entitled under the will to the whole estate as tenant in tail, and that B took nothing. *Cornwall v. Williams*, Colles' P. C. 117. WILL., C. OF, WHO TAKE.

A devise by a father to a second son and his heirs for ever, and for want of such heirs, then to the right heirs of the testator, is an estate tail: but had the devise over been to a stranger, the second son would have taken a fee simple, and consequently the devise over had been void. *Nottingham v. Jennings*, 1 P. W. 23. PARENT & CHILD.

A, having a son and two daughters, devised the estate in question to his son and his heirs; provided that if the son should die before twenty-one, or without issue of his body, then it should go to testator's two daughters. A died, and the son lived to twenty-one, and made his will, and devised the estate to plaintiff. The court inclined, that the son had but an estate tail, and so the devise to the daughters took effect, the son having died without issue. *Helier v. Jennings*, 1 Freem. 509. 1 Ld. Raym. 505. S. C. nom. *Helliard v. Jennings*, Com. 91. 1 Freem. 510. 12 Mod. 276. Carth. 514.

A house, together with the furniture thereof, is limited to a feme, and such heir of her body as should be living at her death, and in default of such, remainder over. The female has an estate tail in the house, and the absolute property in the furniture. *Richardson v. Abbergareenny*, 2 Vern. 324. LIMITATION OF PERSONALS.

Devise to A for life, remainder to the heir of his body, (though in the singular number,) is an estate tail. *Id. ib.*

A devised his land to his wife if she did not marry, and if she did, then his eldest son should enter presently, and hold the land to him and the heirs male of his body, remainder to his other sons in tail male. The wife did not marry; yet decreed that the son took an estate tail by the will, though he should not enter till the marriage or decease of the wife. *Lawford v. Cheek*, 3 Lev. 125. CONDON. PRER. OR.

Where A devised to B for life, and to his heirs, and for want of heirs to C, in like manner, and for want of heirs of him, to D, and his heirs for ever. B and C were brothers, and D was their cousin and heir: held, that B and C took but an estate tail, and that the remainder over to D was good. *Parker v. Thacker*, 3 Lev. 70.

A devised land to B his son, and if C his daughter survived B and his heirs, then she should have the land. Adjudged, that B had but an estate tail; but if the will had said that S, a stranger, should have the land if he survived B, B would have taken an estate in fee. *Webb v. Herling*, Cro. Jac. 415.

#### (d) For Life.

Devise to A for ninety-nine years, if he should so long; remainder to his first son, then unborn, for ninety-nine years, if he should so long live; and so on in tail male to such first son lawfully issuing for ever; and for want, and in default of such issue of such first son, to the second and other sons successively for ninety-nine years only, in case he should so

long live; and that such elder son, or the issue of such elder son should have no greater estate than for ninety-nine years, determinable at his decease; and if there should be no issue male of A, at the time of his (A's) death, or in case there should be such issue male at that time, and they should all die before twenty-one without issue male, then to B for ninety-nine years, if he should so long live, &c.: Held, that A took under the will an estate for ninety-nine years in the freehold estates, determinable with his life, and the same estate in the leasehold, if they should so long continue; and that, upon his death, his first son would take an estate for ninety-nine years in the freehold, determinable with his life, and the remainder of the term in the leaseholds: but that the limitations to the second and other unborn sons of A were void as tending to perpetuity; and the limitations over to B, &c. after these void limitations were not accelerated, but were void also. *Beard v. Westcott*, 1 Turn. & R. 25. LIMIT. TOO REMOTE.

Devise to M J, and to all and every the child and children, whether male or female of her body lawfully issuing, and unto his, her and their heirs as tenants in common: Held, M J took estate for life, with remainder to her children as tenants in common. *Jeffery v. Houghwood*, 4 Mad. 398.

Produce of estate devised for sale directed to be paid between J and A, the wife of B, in equal proportions, share alike; and in case either should die leaving children, trustees to stand possessed of moiety so given to J and A to and for the use and benefit of such child or children at twenty-one, equally to be divided if more than one; and until twenty-one money to be invested in funds. Interest for children's maintenance. If either J or A should die without children, survivor to take share: Held, J and A only tenants for life. *Farthing v. Allen*, 2 Mad. 310.

Devise of "all my said manors, tenements and effects, real and personal," to one for life; and after his decease to his issue male and the heirs male of such sons successively one after another; with remainder to A, "and in default of his issue male as before;" then over to B, "and in default of his issue male as before;" then to the plaintiff. A held entitled for life, with remainder to his first and other sons in tail male; B to take in remainder in the same manner, and that the plaintiff was entitled to the ultimate remainder in fee. *McNamara v. Ld. Wentworth*, Coop. 241.

In a devise of real estate, words of limitation are required to give more than an estate for life; as are words of qualification to restrain the extent and duration of the interest in personal property. *Adamson v. Armitage*, 19 Ves. 418. REAL ESTATE.

Devise and bequest of real and leasehold estates to the testator's widow and her heirs, "in the fullest confidence that after her decease she will devise the property to my family:" Held, an estate for life only, with remainder in trust for the testator's heir as *personae designatæ*. *Wright v. Atkins*, 19 Ves. 299.

Devise to trustees and their heirs, in trust to receive the rents, &c. until A shall attain twenty-one; and immediately after he shall attain twenty-one, to convey to the use of A for life; and from and after the determination of that estate by forfeiture or otherwise in his lifetime, to trustees and their heirs during his life, upon trust to preserve the contingent uses; and after his decease to the use of his first and other sons in tail male; and for default of such issue, or in case of the death of A, takes a vested remainder for life after an estate in the trustees for so many years as his minority may last. *Stanley v. Stanley*, 16 Ves. 491.

Devise to B after the death of A. B being the heir at law, a necessary implication for A for life. *Dashwood v. Peyton*, 18 Ves. 40.

Testator appointed his daughter in law his sole executrix, to have and enjoy all his real and personal estate, all the goods, cattle, chattels, enumerating several other articles of personal property during her life, but not to diminish nor commit waste on the lands; and his highest heir at law to enjoy the same after her death. An estate for life only in the whole, both real and personal estate, with remainder to the heir at law. *Gwynne v. Muddoch*, 14 Ves. 488.

Devise in these terms: "I give to A my farm and lands at R to him, his heirs and assigns, for ever; and I also give to A my farm and manor of E." An estate for life only in the latter. *Paice v. Abp. Canterbury*, 14 Ves. 364.

Devise of "my copyhold estate at P, consisting of three tenements, and now under lease," &c. but not specifying for what interest, an estate for life only passes. *Pettitward v. Prescott*, 7 Ves. 541.

Devise after the death of the devisor's wife, if the devisee is heir, the wife takes for life by implication, otherwise not. *Upton v. Ld. Ferrers*, 5 Ves. 806.

Devise to trustees and their heirs in trust to receive and pay over rents and profits to A, a feme covert, for life for her separate use; and after her decease to convey to her daughters as tenants in common in tail; remainder over. A takes an equitable estate for life, and may, by lease and release, make a tenant to the trustee for an equitable reversion; each daughter takes a vested estate when she comes in case, subject to be divested as the number increases; the conveyance in execution of the trust need not wait the death of A. Personal estate not exempted from the debts, &c. by a charge upon the real. Cross-remainders implied. *Burnaby v. Griffin*, 3 Ves. 266.

Devise to E during his life only, and after the determination of that estate to the said E's lawful issue male, and the lawful issue male of such heirs, the eldest always of such sons of the said E to be preferred before the youngest according to seniority in age, and for want of such issue in E, remainder over. This gives E an estate for life only. *Manderville v. Carrick*, 3 Ridg. P. C. 352.

Devise of all the rest, residue, and remainder of estate, both real and personal, unto A, to be placed at interest until her age of twenty-one or day of marriage, and then the whole thereof, together with the interest accumulated thereon, to be paid to her, to and for her use during her natural life, and from and immediately after her decease, unto the heirs of her body lawfully begotten, equally to be divided between them, share and share alike; and in default of such issue, or of the death of A before her age of twenty-one or day of marriage, then unto her the testatrix's brother, is an estate for life in A. *Jacobs v. Aytz*, 4 Bro. C. C. 542.

Estate for life in real estates and in personality by implication. *Ramsden v. Hassard*, 3 Bro. C. C. 236.

Testator gave legacy to his son, an estate in fee to a nephew; then several parts of his freehold estates, and a future purchase of freehold to be made with part of his personal property; and all his leasehold to his wife for life, then to his son and his issue lawfully begotten or to be begotten, to be divided among them as he should think fit; if he die without issue, all, as well present freehold and leasehold, as the estates to be purchased, to be sold, the produce to go over; no part of his present freehold, or the estates to be purchased, to be sold during life of wife and son; all the rest, residue, and remainder of his property and effects, whatsoever and wheresoever, after paying debts, &c., to the wife. The son is tenant for life, and the devise is good; but estates not mentioned do not pass by it. *Hockley v. Mawbey*, 1 Ves. J. 143. S. C. 3 Bro. C. C. 82. Devise over.

Testator gave 500*l.* "to the sole uses of N, or of her children for ever." N took an interest for life in

the 500*l.*, and it belonged to her children after her death. *Newman v. Nightingale*, 1 Cox. 341.

Bequest of 1000*l.* to testator's sister, and in case of her demise, 800*l.* to A, and the remaining 200*l.* to B the sister entitled for life, then to go in the proportions. *Billings v. Sandom*, 3 Bro. C. C. 293.

Testator gives freehold and leasehold estates to his heir at law for life, remainder to B for life, and to his first and other sons; remainder to S and W for their joint lives, and to the survivor of them, the survivor is only to take an estate for life in the freehold, though he takes the whole interest in the leaseholds. *Arcs v. Melhuish*, 1 Bro. C. C. 519.

Bequest to A, and his heirs male, equally to be divided among them, share and share alike, construed to A for life, remainder to his children equally. *Wilson v. Vansittart*, Amb. 562.

Devise to trustees of money to be laid out in land, and to be settled as counsel should advise, in trust for A, and the heirs male of his body, to take in succession and priority, and the interest of the money till laid out to be paid to A, his sons, and issue. A shall have but an estate for life, with remainder to the first and other sons in tail, &c. *White v. Carter*, Amb. 679; affirming 2 Eden, 366.

Bequest of money in the funds to A, in trust for B an infant, and for such younger son or sons as B shall have, equally to be divided between them; and in case there shall be but one younger son, then the whole to him. Held, that B took only a life interest, subject to which his younger children took the whole. *Garden v. Patteney*, 2 Eden. 323. S. C. Amb. 499.

B devised thus, "all my freehold estate of any nature or kind whatsoever, which at present is in my power to dispose of, I give to my wife." The question, whether the wife took an estate for life or in fee, was sent to B. R. *Snelson v. Corbett*, 3 Atk. 369.

Testator devised his estate to A in case his daughter should die leaving no heirs of her body: Held, a gift to the daughter for life, with contingent remainder to such heir of her body as should be living at the time of her death. *Read v. Snell*, 2 Atk. 646. IMPLICATION.

"Leaving" is a participle of the present tense, and relates to the time of the daughter's dying. S. C. *Id.*

No weight has been laid on the want of the words "for life," when the intention of the testator has otherwise appeared, especially in the case of a trust executory, for then a court of equity is bound to see a settlement made agreeable to the intention of the testator. S. C. 2 Atk. 648.

A gave B all his lands, tenements, and messuages whatsoever, after debts, legacies, and funerals paid. The debts being charged only contingently on the real, if the personal estate should be deficient: Held, that plaintiff took only a life estate. *Merson v. Blackmore*, 2 Atk. 341.

In devise to C for life; remainder to trustees during his life to preserve contingent remainders; remainder to the heirs of the body of C: Held, that C took only an estate for life, and that heirs of the body were to be construed words of purchase. *Colson v. Colson*, 2 Atk. 246. See 2 Eq. Ab. 318.

A bequest of an annual sum, to be raised for the support of the children of H, to be paid them from time to time as their necessities require without regard to their father or mother, cannot be confined to the minority of the children. *Alexander v. M'Callock*, 1 Cox. 391. ANNUITY.

A devises lands to his sister B and C, and their heirs and assigns, upon trust; that until his granddaughter D should marry or die, to receive the profits, and thereout to pay her 100*l.* a year for her maintenance; the residue to pay debts and legacies. After payment thereof, in trust for the said D, and upon further trust, that if she lived to marry a protestant

of the church of England, and at the time of such marriage he of the age of twenty-one or upwards, or if under that age, such marriage be with the consent of the said B, then to convey, with all convenient speed, after such marriage, to the use of the said D for life, sans waste, voluntary waste in houses excepted; remainder to her husband for life; remainder to the issue of her body, with remainders over; and upon further trust, that if the said D die unmarried, then to the uses of B for life; remainder to the son of his other granddaughter E in tail; remainder to the defendant C, remainder to his first and other sons; remainder to A's right heirs; and upon further trust, that if D marry not according to the will, then upon such marriage to convey to trustees, as to one moiety to the use of D for life, then to trustees to preserve contingent remainders; remainder to her first and every other son, being a protestant, with remainders over; and as to the other moiety, to the son of his daughter E in like manner. A dies, D attains her full age; and upon a treaty of marriage with F, applies to B and C for a conveyance to herself for life; remainder to her intended husband for life; remainder to the issue of her body: B executes such conveyance, but C refuses; D suffers a recovery of the whole to the use of herself in fee, and then marries F, who made a considerable settlement upon her: she covenants to settle her estate upon husband and wife; remainder to first, &c. sons in tail; remainder to survivor of husband and wife in fee. They bring a bill to compel C to convey, &c.: decreed not an estate tail to D, but an estate for life sans waste, *ut supra*, as being the intent of A upon the will, with remainders over in strict settlement. *Ld. Glenorchy v. Bosville*, For. 4.

Devise to A for life without impeachment of waste, remainders to trustees to preserve, &c., remainder to heirs of the body of A. Held, that A is only tenant for life. *Papillon v. Poyce*, Fitzgibbon, 38.

One devises a third of all his estate whatsoever to his wife, and two thirds of all his real and personal estate to his son J and his heirs; the wife has but an estate for life in the third part of the real estate. *Chester v. Painter*, 2 P. W. 335.

One having a wife and four daughters, devises lands to one of his daughters after the death of his wife; this is a devise to the wife for life by implication, though the daughter was only one of the co-heirs. *Hutton v. Simpson*, 2 Vern. 723. Pre. Ch. 439. *Gill*, Eq. Rep. 115. 120.

Devise to A the testator's wife for life, and then to be at her disposal, provided it be to any of his children, gives an estate for life with a power to dispose of the fee. And where such devise, with an after-taken husband, did by lease and release and fine, convey the premises to a trustee, and his heir to the use of the wife for life, without impeachment of waste, remainder to her daughter by her first husband, and the heirs of her body; remainder to the son by the first husband and his heirs: this adjudged a good execution of the power. *Tomlinson v. Dighton*, 1 P. W. 149. S. C. Salk. 239. 10 Mod. 31. Com. Rep. 194. POWER, EXECUTION OF.

A devise of lands to the heir after the death of the wife, by necessary implication, gives an estate for life to the wife. Otherwise, where the devise is to a stranger. *City of London v. Garraway*, 2 Vern. 571. HEIR AT LAW.

A devise to J and his children, if he have children, they take with their father; but if he have none, it is an estate tail. A devise to a man and his children of his personal estate; a child born after the death of the testator, shall not take. A devise to two and their heirs of their bodies, it is a joint estate for life, and several inheritances; and so it is if there is a devise over; but if there is a devise over, and one of them dies without issue, a moiety shall go over to the re-

mainder-man. A devise to the use of A, and for want of such issue to B. A has a son and a daughter, they shall take as persons described, but shall take only an estate for their lives. *Cook v. Cook*, 2 Vern. 545.

A devises lands to trustees to pay debts and legacies, and then to settle remainder on her son B and the heirs of his body, with remainders over, and directs that special care should be taken in the settlement, that it should never be in the power of her son to dock the entail. Decreed the son should be only tenant for life, without impeachment of waste, and should not have an estate tail conveyed to him. *Leonard v. Sussex*, 2 Vern. 526.

A devise to trustees and their heirs in trust for A for life, and to his first, &c. sons in tail, but if A dies without an heir male of his body begotten, then to go over. A is only tenant for life, and the words "if he dies without an heir male," &c. do not give him an estate tail by implication. *Bampfild v. Popham*, 2 Vern. 427. S. C. 1 P. W. 54. Salk. 236.

If lands are devised to one generally, he takes but an estate for life, unless it appear plainly the testator intended him a greater, or that he is like to be a loser, or his person chargeable. *Fairfax v. Heron*, Prec. Chan. 68.

Devise of lands to the heirs at law for twenty years after the death of the wife; this is an estate for life in the wife by implication, otherwise if the devise is to a stranger. *Faulkner v. Faulkner*, 1 Vern. 22. ESTATE BY IMPLICATION.

#### (e) Joint Tenancy.

Devise and bequest of leasehold, freehold and copyhold estates, to trustees, their heirs, executors, &c., upon trust to sell, and pay debts, &c.; and after payment thereof, to pay and apply the rents, &c. to A for life, and after his decease, devising and bequeathing to the heir or heirs at law of B, and the heirs, executors, &c. of such heir or heirs, to whom the trustees were directed to convey and assign accordingly. Co-heiresses of B being also the co-heiresses of the deviser, take, not as co-parceners by descent, but as joint tenants by purchase; and therefore subject to survivorship. *Straime v. Burton*, 15 Ves. 365. ESTATE BY PURCHASE.

Joint-tenancy under a bequest of personal property to more than one, without words of severance. *Id.* 371.

Heir, being also devisee, takes by purchase, not by descent, if the devised estate is not of the same nature. *Id. ib.* HEIR AT LAW; ESTATE BY PURCHASE.

Residue bequeathed to two, they take a joint interest. Agreement for severance as to the whole may be inferred from their conduct; dividing as the property was received. *Crooke v. De Vandes*, 11 Ves. 330.

Construction of will giving a vested interest, though subject to contingent charge, and creating a tenancy in common as to part of the property, and as to the residue a joint-tenancy, there being nothing to controul the legal effect of the words. *Jackson v. Jackson*, 7 Ves. 635; but on appeal it was held that though by residuary disposition to testator's two sons "and the survivor, their or his heirs, executors," &c., they took as joint-tenants the leasehold and personal estate embarked in trade, upon all the circumstances, the transactions for twelve years, as between themselves a severance was to be implied both as to the profits and the capital. S. C. 9 Ves. 691.

Legacy and residue bequeathed to two without words of severance, is a joint interest, and cannot be taken in common, under effect of previous disposition



of the interest with words of severance, viz. to be equally divided. *Crooks v. De Vande*, 9 Ves. 197.

Notwithstanding the leaning of late to a tenancy in common, an interest given to two or more either by way of legacy or otherwise, is joint, unless there are words of severance, as "equally among," &c., or an inference of that sort arises in equity, from the nature of the transaction, as in partnerships, a joint mortgage, &c. *Morley v. Bird*, 3 Ves. 628.

Request to two, without words of severance, they take jointly. *Id. ib.*

A legacy given two or more persons without words of severance, makes a joint-tenancy, therefore his Honour determined, that where, in a will as to a residue, two thirds were given to and amongst the children of A and B; they took as tenants in common, but the remaining third being given to the children of C, they took as joint-tenants. *Campbell v. Campbell*, 3 Bro. C. C. 15.

Devise of the residue of personal estate to the wife for life; if she die without issue living at her death, to testator's two brothers, or if one of them shall be dead, to the survivors; they both died in the life of the wife; the legacy was vested in both as joint-tenants, and therefore goes to the representative of the survivor. *Barnes v. Allen*, 1 Bro. C. C. 181. INTEREST, VESTED.

"I give to my two sisters A and B the residue of my personal estate:" Held, joint-tenancy. *Keys v. Luffkin*, Dick. 392.

Devise to trustees, as soon as his three daughters attained their respective ages of twenty-one, to convey to them and the heirs of their bodies as joint-tenants; this not a joint estate, but to be construed, as it may be, so that the conveyance must be at twenty-one respectively, with cross remainders. *Marryat v. Townly*, 1 Ves. 102.

It has been held, where there has been a devise of an estate to A at the beginning, and to B at the end of a will, they shall take as joint-tenants. *Ulrick v. Lichfield*, 2 Atk. 373.

Devise of a residue of a personal estate to three, is a joint devise, and shall not survive. *Webster v. Webster*, 2 P. W. 347.

A devise of land to A & B, and the survivor of them and their heirs, equally to be divided betwixt them share and share alike; A & B are joint tenants for their lives, and have several inheritances. *Barker v. Giles*, 2 P. W. 280.

Devise to two, equally to be divided, and to the survivor of them; they are joint tenants. *Clerk v. Clerk*, 2 Vern. 323.

#### (f) Tenancy in common.

Bequest of an annuity to the children of A, in equal shares and proportions, to continue during their lives, and the life of the survivor of them: the children take as tenants in common, and there is no survivorship between them by implication; therefore the share of one dying goes to its representative. *Jones v. Randall*, 1 Jac. & W. 100.

Devise to A & B "between them." These words constitute a tenancy in common. *Lushbrook v. Cock*, 2 Mer. 70.

A devise, after the death of the survivor of testator's daughter, to all and every the child and children of his daughter, S S, who should be living at the time of her death, and to the heirs of such child or children for ever, equally, share and share alike; afterward revoked by a codicil reciting the devise, and in lieu of it, directing the trustees, upon the death of the survivor of his daughters, to convey the lands charged with 1000*l.* for a granddaughter, to the two sons of his daughter, S S, and their heirs; the 1000*l.* to be paid

by the grandsons so soon as they became entitled to the possession of the estate; the grandsons take as tenants in common. *Synge v. Hales*, 2 Ball & B. 499.

Bequest in the form of a letter to the testator's mother and sisters, expressed thus: "to be divided among you:" a tenancy in common among those living at that time, and the shares of those who died in the testator's lifetime lapsed. *Ackerman v. Burrows*, 3 V. & B. 54.

Bequest to A & B, with direction that B shall be maintained, &c. during minority out of fund, and power to place B out apprentice: held, to create a tenancy in common. *Gant v. Lawrence*, Wightw. 395.

Devise to testator's wife for life, and after her decease, unto and among all and every their children in such manner, &c. as she should in her life or by will appoint; empowering her to sell and receive the interests for life, and appointing, after her decease, both principal and interest to and among their children in such proportions as aforesaid. All the children having died in life of mother, who died without appointment, were held entitled as tenants in common to several estates of inheritance. *Casterton v. Sutherland*, 9 Ves. 445.

Bequest to A for life, and after her decease to B & C in equal moieties, and in case of the decease of either in the life of A, the whole to the survivor of them living at her decease: B & C have vested interests as tenants in common, subject to be divested only upon the contingency expressed. *Harrison v. Foreman*, 5 Ves. 207. INTEREST, VESTED.

Bequests to be equally divided, share and share alike; they take in common and no survivorship. *Bolger v. Mackell*, 3 Ves. 510.

Words of survivorship in a will shall not defeat the effect of words importing a tenancy in common, but shall be referred to some time, as the death of the tenant for life, or even to the death of the testator, though a construction not to be adopted if there can be any other. *Russell v. Long*, 4 Ves. 551.

Legacy to A for life, and after her decease to her children; if she should have none, to B & C, share and share alike, or to the survivor; a vested interest in B & C, upon the death of the testator, as tenants in common; although she survived them, dying without children. *Perry v. Woods*, 3 Ves. 204. INTEREST, VESTED.

Gift of a share over to the children of my late cousins, W U, and J U, share and share alike, at their respective ages of twenty-one; that is a tenancy in common among those then living, and one of them dying in the life time of the testator, that share is lapsed. *Martin v. Wilson*, 3 Bro. C. C. 324. LAPSED LEGACY.

Legacy of 10,000*l.* to two sisters to be equally divided when they should arrive at twenty-one, is a tenancy in common; and one dying under twenty-one, her share shall go to her representative. *Jolliffe v. East*, 3 Bro. C. C. 25.

Gift of a particular fund for life, then to residuary legatees as such, then the residue given to them as tenants in common; the particular fund is part of the residue, and vests accordingly in them as tenants in common. *Pitt v. Benyon*, 1 Bro. C. C. 589.

Devise of the profits of land in trust for his six younger children, to be distributed in joint and equal proportions: held, a tenancy in common. *Ettricks v. Ettricks*, Ambli. 656.

Devise of lands to younger children equally, as tenants in common, with benefit of survivorship: held, to refer to a survivorship spoken of in the former part of the will, and therefore to be a tenancy in common, with a limitation to the survivors after the death of any before twenty-one without issue. *Hawes*

v. *Hawes*, 3 Atk. 524. 1 Ves. 13. 1 Wils. C. B. 165.

The court inclines against joint-tenancy, as an inconvenient estate; and so do courts of law, now, though formerly they favoured it. S. C.

In deeds, which receive their operation from the statute of uses, the words "equally to be divided" make a tenancy in common. *Sed secus*, in common law conveyances. In *Rigden v. Vallier*, 3 Atk. 731. 2 Ves. 252. *Ld. Hardwicke* said, that though deeds to uses must be construed like common law conveyances as to words of limitation, yet he saw no harm in construing them otherwise as to words of regulation and modification of an estate, as the words "equally to be divided," are.

Devise to trustees by sale or mortgage to pay debts, the remainder to go and be equally divided among three children, and the survivor of them and their heirs for ever, a tenancy in common. *Stones v. Heathly*, 1 Ves. 165.

Where testator devised to trustees in fee, in trust for his three sisters and their assigns, and as his said sisters should severally die, he gave the premises to their several heirs: Held, that the sisters should take as tenants in common, and not as joint-tenants. *Sheppard v. Gibbons*, 2 Atk. 441.

The words "share and share like," have been held for 200 years to be a tenancy in common. *Heath v. Heath*, 2 Atk. 122.

Will can never relate to a child who was not in *esse* till some years after testator's death. *Id.* *Posthumous Child*.

The word "respectively" will separate an estate, and make it a tenancy in common. *Id.*

Testator devised to A and B generally, and added, "my meaning is, that the rents of my houses should be equally shared between A and B:" Held, that they take as tenants in common, and not as joint-tenants. *Prince v. Heylin*, 1 Atk. 493.

A devise of a leasehold interest to A and her three sons, equally amongst them, creates a tenancy in common, though there is no mention of any division to be made. *Warner v. Ilme*, Prec. Chan. 491. S. C. *Gilb. Eq. Rep.* 146.

The words "equally divided between them," make a tenancy in common in a will, but not in a deed. *Thrustout v. Peak*, 8 Vin. Ab. tit. Devise, pl. 11.

Devise of a debt to two, share and share alike, equally to be divided between them, and if any of them die, then to the survivor, they are tenants in common, and not joint-tenants. *Ld. Bindon v. El.* *Suffolk*, 1 P. W. 96.

A, by will, devises lands to trustees and their heirs in trust, that the profits should be equally divided between his wife and daughter during the wife's life, and after her death, he devised the same to the use of his daughter in tail, with remainder; the daughter died during the mother's life. Decreed this to be a tenancy in common between the mother and daughter, and that during the mother's life, the daughter's moiety did not descend or result to the heir, but was an interest undisposed of, and in nature of a tenancy *pur autre vie*, and should go to the administrator of the daughter. *Phillips v. Phillips*, 2 Vern. 430. Prec. Ch. 167. 1 P. W. 34. S. C.

One assigns a term to trustees, in trust to permit himself to receive the profits during his life, and after his death, in trust to permit his two daughters B and C, the executors and administrators to receive the profits during the residue of the term, equally to be divided between them, they paying so much within two years to his other two daughters; B dies, C mortgages to D: Held, that B and C were tenants in common, and not joint-tenants by the intention of the father, which was to make distinct provisions for them. *Hanell v. Hunt*, Prec. Ch. 164.

A devise of a term to A, and B paying 25*l.* a year out of the rents to one during his life, viz. 12*l.* 10*s.* by each of them, is a tenancy in common. *Kew v. Rouse*, 1 Vern. 353.

Devise to A for life, the reversion to B and C, to be equally divided betwixt them; B and C tenants in common for life only. *Peiton v. Banks*, 1 Vern. 65.

A devise to two persons to be equally divided between them, makes it a tenancy in common. *Thickness v. Vernon*, 1 Vern. 32.

#### 4. What passes by.

- (a) Real and Copyhold.
- (b) Personal.
- (c) Property acquired after the Will.

##### (a) Real and Copyhold.

A testator who died in 1818, after devising a freehold house to his wife and her heirs, devised the residue of his freehold estates, situate in four specified parishes, or elsewhere in the county of Cambridge to two trustees and their heirs, upon the trusts thereafter declared concerning the same, that is to say, upon trust, that they should sell his several copyholds in the parishes aforesaid, and after satisfying the costs of the sale out of the monies thence arising, should pay the residue to his executor, for the purpose of satisfying in the first place certain legacies; and he then devised all the residue of his real and personal estate to A B. The testator, besides freeholds and copyholds, situate in the four parishes, had freeholds not situate in the county of Cambridge, and copyholds not situate within the four parishes, and all the copyholds had been surrendered to the use of his will: Held, that the beneficial interest in all the freeholds, whether situate in the county of Cambridge or elsewhere, passed to the residuary devisee; that the legacies were a charge only on the copyholds situate in the four parishes; that no estate in those copyholds passed to the trustees, but only a power to sell; that any surplus of the monies arising from the sale which might remain after satisfying the legacies, passed by the residuary clause; that the copyhold not situate within the four parishes passed to residuary devisees. *White v. Vitty*, 2 Russ. 484. See this case further, 4 Russ. 584.

A testator devised "all my manors, messuages, lands, tenements and hereditaments, whether freehold, leasehold or copyhold, situate in the several parishes of M, C, I. and W, and also in the city of B, or elsewhere in the kingdom of England;" he had no lands in England, except in the places specified in the will, but he had a large estate in Wales, in the county of Carmarthen; *quare*, whether the devise passed Carmarthen estate? *Okeden v. Clifden*, 2 Russ. 309.

Devise of "all my freehold messuages, &c., the copyhold parts thereof having been duly surrendered to the uses of this my will," passes unsundered, as well as surrendered copyholds. *Oxenforth v. Cawkwell*, 2 S. & S. 558. *COPYHOLD, SURRENDER OF.*

By the custom of the manor of Shap, the legal interest in lands of customary tenure, parcel of the manor, is not devisable, but is transferred by a deed of bargain and sale, having the effect of a surrender, in which the operating words are "bargain, sell, and surrender," and on the presentment or production of which, admittance is granted to the alienee; but an equitable interest in such customary lands is capable of being passed by devise, without regard to the custom. A tenant of this manor who was seised of customary lands, conveyed them by deed of bargain, sale, and surrender to a trustee upon trust for such

person as the tenant by any deed, instrument in writing, or by his last will or any codicil thereto, or any instrument in the nature of a last will or codicil, to be by him legally executed, should appoint or devise the same; and under the conveyance the trustee was admitted: held, that the equitable interest in the lands would not pass by an unattested codicil of the tenant. *Willan v. Lancaster*, 3 Russ. 108. CUSTOM OF MANOR.

A testator makes a general devise of all his lands in nine parishes; in five of them he had only lands in fee; in three others he had only lands over which he had a power of appointment; in the other he had lands in fee, and also lands over which his power extended. All the lands pass by his will, except the lands in the latter parish, which were subject to his power. *Napier v. Napier*, 1 Sim. 28. POWER, EX-CUTION OF.

Neither the words "I give and bequeath all my effects (after paying of every due demand)," though immediately preceded by directions touching the rents of a copyhold estate, nor the words "what title I have left to call my own," will include the equity of redemption of that copyhold. *Henderson v. Farbridge*, 1 Russ. 479.

Testator having surrendered some only of his copyhold to use of will, devised all his copyhold messuages, &c. whatsoever and wheresoever, and which he had surrendered to use of his will: held, that surrendered and unsundered passed equally. *Strutt v. Finch*, 2 S. & S. 229. COPYHOLD.

Under a general devise of all the rest, residue, and remainder of and in all and singular the property, estate and effects, which the testator should be possessed of or entitled to, or over which he should have a disposing power at his decease, of whatsoever kind, &c. the same might be: held, that the legal estate in mortgaged premises did not pass, but descended to the testator's heir at law. *Innre. Horsfall*, 1 McClel. & Y. 292. MORTGAGE.

The words "worldly estate," held to pass real and personal estate. *Muddle v. Fry*, 6 Mad. 270.

A devise of "all my real estate" will carry copyhold surrendered, and if no freehold, will for favoured objects carry copyhold not surrendered. *Wentworth v. Cor*, 6 Mad. 363. COPYHOLD.

On construction of devise, held that although words of devise would, standing alone, have been sufficient to have carried the legal estate in the mortgaged premises which may be so devised; yet being qualified by the subjection to the payment of debt, a purpose to which the money secured was alone applicable, and not the premises, it must be taken not to have been the intention of the testator that the legal estate therein should pass; and that therefore heir at law is a necessary party to reconveyance on paying off mortgage. *Silvester v. Jayman*, 10 Price, 78. MORTGAGE; PARTY; MORTGAGE, REDEMPTION OF; HEIR AT LAW.

An estate which the testator had contracted to sell, held to pass by a devise of all his real and personal estate to trustees, in trust to sell. *Hall v. Wright*, 1 Jac. & W. 494. ESTATE CONTRACTED TO BE SOLD.

Direction that all testator's children shall share equally in all his property, gives them the real estate in fee. *Patton v. Randall*, 1 Jac. & W. 189.

Devise of all lands do not pass land held in mortgage, as it continues personal estate, till final order of foreclosure; and devise of lands held in mortgage at time of will do not pass that land, if testator obtains final order of foreclosure before death. *Thompson v. Grant*, 4 Mad. 438. MORTGAGE.

J W, being seised and possessed of considerable freehold, copyhold, and leasehold estates in the county of H; and in possession, as mortgagee of certain leasehold houses at K, in the county of M; but having

no other property in the said county of M, and having other estates vested in him as mortgagee, besides those at K, makes his will, devising "all his freehold, copyhold, and leasehold messuages, &c. in the county of H, and in the town of K," to A W for life, and after her death, "all and singular other his freehold, copyhold, and leasehold messuages," &c. in the counties of H and M, or elsewhere, to F W and A T for their joint lives, and after their several deceases, "all the said freehold, leasehold, and copyhold messuages," &c. unto and equally among their children; and gives to A W "all the residue of his real estate not before disposed of, and all other his estates and interests whatsoever, vested in him as mortgagee or trustee," &c. "and all the residue of his personal estate, ready money, and securities for money," &c. subject to the payment of debts and legacies: held, that the mortgaged premises at K passed under the devise of all the freehold, copyhold, and leasehold messuages, &c. in the county of H, and in the town of K. *Woodhouse v. Meredith*, 1 Mer. 450. MORTGAGE.

Bequest of "the whole of my property of whatever description, freehold, leasehold, &c. of which I may be possessed at death," held to pass real estate agreed to be purchased. *Holmes v. Baker*, 2 Mad. 462. LANDS AGREED TO BE PURCHASED.

Devise of copyhold estate by the description of copyhold ground-rent good. *Walker v. Shore*, 19 Ves. 387. COPYHOLD.

Construction of a residuary devise as including under the general words, "estate and effects," a copyhold, not surrendered in favour of a younger son, subject to debts, the will reciting that the eldest son was provided for, and no freehold estate. *Pennington v. Pennington*, 1 V. & B. 406. RESIDUE; COPYHOLD.

Devise of profits will pass land. *Allan v. Backhouse*, 2 V. & B. 74. affd. 1 Jac. 631. RENTS & PROFITS.

Under a devise of "all my real property," copyhold estate passed to the devisee and his heirs. *Nicholls v. Butcher*, 18 Ves. 193. COPYHOLD.

Devise by general words, viz. messuages, lands, tenements, and hereditaments, for payment of debts, will include copyholds, if required; and the want of a surrender will be supplied. *Kidney v. Cousmaker*, 12 Ves. 136. TRUST TO PAY DEBTS; COPYHOLD.

Copyholds not intended to be comprehended in a devise to the wife in general terms, real and personal estate, so as to entitle her to have the surrender supplied. *Church v. Munday*, 12 Ves. 426. COPYHOLD.

Decree upon the answer admitting a contract, and a letter offering to sell at a valuation; for a conveyance on payment of the purchase money into the bank by the plaintiff on a certain day in default of payment, the bill to be dismissed with costs. No binding contract until payment, the estate, therefore, did not pass by a previous devise, but descended to the heir. *Ginsburgh v. Louther*, 12 Ves. 107. PR. DECREE; CONDITION PRECEDENT; CONTRACT FOR PURCHASE.

By general devise, an estate in which deviser has acquired an equitable title passes. *Broome v. Monck*, 10 Ves. 605.

Devise of copyhold estates in general terms unrestrained, to a child, passes all copyholds surrendered and not surrendered to use of will. *Blunt v. Clitherow*, 10 Ves. 589. COPYHOLD.

Estate contracted for after general devise will pass by republication, and must be paid out of personal estate. *Broome v. Monck*, 10 Ves. 605. CONTRACT; REPUBLICATION.

Where a written agreement for the purchase of an estate has been executed, the purchaser has the estate

in equity, and it will pass by his will which will not be revoked by the subsequent conveyance. *Rose v. Cunningham*, 11 Ves. 554.

Estate contracted for will pass by a subsequent devise of all lands, the devisor being equitable owner under the contract. *Capel v. Girdler*, 9 Ves. 510. LANDS AGREED TO BE PURCHASED.

Rule that trust estate will pass by a general devise is confined by objects appearing on will inconsistent with that intention. *Exp. Morgan*, 10 Ves. 101. TRUST.

Under general word "estate" in will, real estate passes unless restrained by apparent contrary intent. *Woolam v. Kenworthy*, 9 Ves. 137.

The word "estate" in a will, unless qualified, passes both real and personal estate. *Barnes v. Patch*, 8 Ves. 604.

Copyhold estates purchased and surrendered to uses declared or to be declared by will concerning the same, passed according to a will previous to the purchase, devising all copyholds generally, and therefore containing a description applicable to them. *Att. Gen. v. Vigor*, 8 Ves. 256.

A remote reversion in real estates and lands to be purchased and settled, will pass by general words in a will as "all and every other my lands, tenements, and hereditaments," though the uses are immediate. But the purchase being postponed to the death of the devisor, the reversion in the estates to be purchased and settled to the same uses subsequent to his death, not being an interest vested to him, did not pass; and though, upon the settlement, a power of appointment was implied, the will particularly executing express powers, did not amount to an execution of that implied power. *Id. ib.*

Lands originally held under old mortgages passed by a general disposition by will as the testator's estate though no release of the equity of redemption appeared. *Id. ib.*

Every gift of land, even a general residuary devise, is specific, and that only to which the party is entitled at the time can pass; in the case of personal property, what he has at his death will pass, and if the description is specific, it may operate as a direction to purchase. *Namock v. Horton*, 7 Ves. 399.

Estate held by copy of court roll, according to custom of manor, but in case of intestacy distributable as personal estate, and in other respects differing from copyhold; held to pass under a residuary bequest of personal estate, and not with copyhold messuages, &c. with limitations in strict settlement, upon whole will and circumstances. *Watkins v. Lea*, 6 Ves. 633. CUSTOMARY ESTATE.

Lands originally held under old mortgages, pass by general devise; though no release of equity of redemption appears. *Att. Gen. v. Bowyer*, 3 Ves. 714. See S. C. further, 5 Ves. 300. ADMON. OF ASSETS; MORTGAGE.

The legal estate in mortgaged premises did not pass by a general residuary devise by the mortgagee. *Dk. Leeds v. Munday*, 3 Ves. 348. MORTGAGE.

Devise of lands not in settlement will pass the reversion of the settled lands. *Glover v. Spendlowe*, 4 Bro. C. C. 337.

Personal estate to be laid out in land, but lent on mortgage instead, considered as land, having been always out in trustees, and the uses never united with the possession, and passed by such general words in will as would pass land, as "all my estates, &c. wherever and wheresoever." *Rashleigh v. Master*, 1 Ves. J. 201. S. C. 3 Bro. C. C. 99. MONEY DIRECTED TO BE LAID OUT; ADMON. OF ASSETS.

Testator gave to his executors "all his goods, estates, bonds, debts, to be sold," &c. The word "estates" will pass a copyhold, which was surren-

dered to the use of the will. *Jongsma v. Jongsma*, 1 Cox, 362. COPYHOLD.

Devise of "all I am worth" will pass real estate. *Hurstep v. Bromman*, 1 Bro. C. C. 437.

An equity of redemption in copyholds passes by will without surrender. *Macnamara v. Jones*, 1 Bro. C. C. 481. EQUITY OF REDEMPTION; COPYHOLD, SURRENDER TO USE OF WILL.

A, seised in fee, and in possession of several real estates, and of the reversion in fee of the manor of S, subject to the estate tail of three persons who were living, devises all his estates generally to trustees in trust to be sold, and to invest the money for benefit of younger children. This reversion falls in after the death of A; held that reversion passed by will, and was well vested in trustees for the benefit of the testator's younger children. *Atkins v. Atkins*, 3 Bro. P. C. 408. REVERSION.

Devise of the residue of real and personal estate to executors for A, till he attain twenty-one, and then the trust to cease, passes the whole beneficial estate to A. *Peut v. Powell*, Ambl. 387. S. C. 1 Eden, 479.

Whether by words "all the rest of my estate and fortune" in a will, copyhold estate as well as freehold passed; *qu.?* *Dod v. Dod*, Ambl. 275.

By a devise of land mortgaged in fee, the equity of redemption alone passes; if for years, the reversion and equity of reversion passes. *Forrester v. Leigh*, Ambl. 174. MORTGAGE.

One devises to J all his freehold, leasehold, and copyhold estates in E, and gave the rest of his estates, both freehold and leasehold, to M. He had freehold and leasehold in M, but no copyhold out of E. Held J took the fee in the freehold and copyhold, and the absolute property in the leasehold in E. *Macree v. Tall*, Ambl. 182.

The word "estate" in a will, without words to restrain the generality of the sense, will carry a fee. *Id. ib.*

Lands agreed to be purchased pass by general words in a will, such as "or elsewhere." Republication by a codicil. *Potter v. Potter*, 1 Ves. 437. S. C. 3 Atk. 719. and Ambl. 98. upon other points. LANDS AGREED TO BE PURCHASED.

It has been held that, where estate is mentioned generally, accompanied with personal things, it should be restrained to personal, but never where real estate is mentioned; for then the personal things mentioned shall be considered only as an enumeration of those specific things. *Bailis v. Gale*, 2 Ves. 51.

Devise of "all lands, messuages, &c." will pass copyholds, where the introductory words shew testator's intent to dispose of all his estate. *Goodwyn v. Goodwyn*, 1 Ves. 226. COPYHOLD.

Devise of profits is a devise of land. *Johnson v. Arnold*, 1 Ves. 171.

C gave all his messuages, lands, tenements, and hereditaments in A. and elsewhere, and all other his real estates to trustees for 500 years, and after the determination of the term he gave all the premises to his wife for life sans waste. All the estates having come originally from the wife, testator could not mean to sever the copyhold from the freehold; therefore, by the general words of the will, the copyhold passed. *Carr v. Ellison*, 3 Atk. 73. Vide *Smith v. Baker*, 1 Atk. 386. COPYHOLD.

By a devise of all lands and tenements, only freeholds will pass; yet, if he had nothing but copyholds, they shall pass; and leaseholds, if there are no other, will pass by these words. *Exp. Caswell*, 1 Atk. 560.

Whatever words there may be in a will relative to copyhold lands, they can have no effect if there were no surrender; for nothing can pass a legal estate, but what will pass it in law. *Trodd v. Downs*, 2 Atk. 304. S. C. 9 Mod. 292. COPYHOLD.

Copyhold surrendered to use of a will, will pass by a

general devise of lands, notwithstanding there are freeholds. *Tendril v. Smith*, 2 Atk. 85. COPYHOLDS, SURRENDER TO USE OF WILL.

Trust of copyhold estate, and copyhold surrender to use of will, will pass by will untested. *Tuffnell v. Page*, Dick. 76.

"All my freehold lands in tenure of L, and the residue of my estate, consisting of ready money, plate, jewels, leases, judgments, mortgages, &c., or in any other thing whatsoever and wheresoever, I give to A, or her assigns for ever." The court will intend an intestacy in favour of the heir at law, unless there is a clear intention to pass the real estate. *Timevell v. Perkins*, 1 Atk. 102.

Devise of plate, jewels, linen, household goods, and coach and horses, will be confined to things of the same nature; and goldsmiths' notes, and bank-bills do not pass by those words. *Id.*

Where a man devises all his estate, real and personal, to a wife or child, and has no other real estate but the copyhold, it shall pass by those general words. *Smith v. Baker*, 3 Atk. 386. COPYHOLD.

If a testator, after devising all "his lands, tenements, and hereditaments," foreclose an equity of redemption of a mortgage in fee, such estate will not pass by these general words, because a foreclose is considered as a new purchase of the land. *Castorne v. Scarfe*, 1 Atk. 605. MORTGAGE, FORECLOSURE.

A testator's setting out in his will, to give and dispose of his worldly estate, is a strong proof that he intends to dispose of the inheritance of his lands, when there are sufficient words in the following parts of the will for that purpose; the words, estate at such a place, or in such a place, may carry a fee. The whole complexion of a will ought to be considered. *Ibbetson v. Beckwith*, Forres. 157. See vide *Denn v. Gaskin*, Cowp. 657.

Where there is a surrender of copyhold lands to the use of the will, they will not pass by a general devise of lands. *Hawkins v. Leigh*, 1 Atk. 387. See 1 P.W. 60. COPYHOLD.

If I devise all my lands and hereditaments in Dale, and have a manor in Dale, the manor, as it is an hereditament in Dale, will pass; but if I have the manor in Dale, and also land there, not parcel of the manor, it is a question whether the manor will pass by devise of all my lands. *Hastewood v. Pope*, 3 P.W. 322.

If I have a freehold and copyhold lands in Dale, and devise all my land and hereditaments in Dale to pay my debts, only my freehold shall pass: that be sufficient; secus, if I have surrendered the copyhold to the use of my will. *Id. ib.*

J, having lands in A and B, settles lands in A, to particular uses, remainder to his own right heirs; then devises all his lands in B, and elsewhere, not formerly settled: hereby the reversion of lands in A passes. *Chester v. Chester*, Fitz. 150. S. C. 3 P.W. 55.

Tenant in tail, with remainders in tail, the reversion in fee to tenant in tail, the land having been mortgaged for a term of years by donor, previous to those estates, and so every of them having an equity of redemption incident to it. Tenant in tail by will appoints the mortgage to be paid off, and then mortgaged term to be assigned to his mother, and by same will, (being seised in fee of other lands,) devises all lands to W and his heirs, by which reversion of mortgaged premises passes, on the estate tail and remainder in tail being spent: held, that the equity of redemption, which was incident to the reversion in fee of tenant in tail did not pass to mother by the will, and was therefore not severed from the reversion. *Amhurst v. Litton*, Fitz. 99. Affd. 5 Bro. P. C. 254.

REVERSION, SEVERANCE FROM.

"I devise all my land and estate in D to J;" decreed,

a fee passes, these words charging not only the lands, but also the testator's interest in the land. *Barry v. Edgeworth*, 2 P.W. 523. ESTATE, FEE SIMPLE.

J S, after the devise of several parts of his real and personal estates to several persons, devises the interest and produce of the surplus of his real and personal estate to his grand-children, until their age of twenty-one; this will pass the absolute right and property of the real and personal estate to the grand-children after that age. *Newland v. Shephard*, 2 P.W. 194.

By a devise of a house, *cum pertinentiis*, only the garden and orchard will pass with it; but by a devise of a house with the land appertaining thereto, the land usually occupied therewith will pass. One devised that his cousin A should continue to live at his house, and be at the charge of keeping the house and the servants, and coach-horses, which the testator employed in ploughing the ground, and spend the corn arising therefrom, in the house; here the land enjoyed with the house shall pass to the cousin A. *Blackburn v. Edgley*, 1 P.W. 603.

A devise thus: "I make my niece G executrix of all my goods, lands, and chattels," and dies, not having any leasehold interest, yet her lands of inheritance pass not by these words. *Piggott v. Penrice*, Prec. Chanc. 471. ESTATE REAL.

A begins his will with disposing of all his worldly estate, and then wills that all his debts be first paid, and gives his wife a moiety of what is left, after his debts paid. The real estate is charged with the debts, and a fee in a moiety of the surplus of the real estate passes to the wife. *Brachcroft v. Beachcroft*, 2 Vern. 690. ESTATE, FEE SIMPLE.

A devises to his brother B, all his lands and hereditaments, and all his personal estate desiring him to pay his debts and legacies. A fee passes. *Ackland v. Ackland*, 2 Vern. 687. ESTATE, FEE SIMPLE.

A, having settled all his estates of inheritance upon his wife for life as a jointure, by will says, "all the rest and residue of my estate, chattels, real and personal, I give to my wife, who I make sole executrix:" held, that the reversion of the jointure lands did not pass by this devise, but the personal estate only. *Markant v. Twisden*, Gilb. Eq. Rep. 30. Ld. Keeper said, that this case differed from *Murray v. Wise*, 2 Vern. 564; and that no resolution was ever carried so far as to construe these words to pass a fee.

A articles to purchase lands in trust for B, and before any conveyance made, B by will directed all his freehold estate to be settled on C, and his first son, &c. The lands article for will pass by the will. *Greenhill v. Greenhill*, 2 Vern. 679. Prec. Ch. 320. S. C. LANDS AGREED TO BE PURCHASED.

A devise of lands, out of settlement, will pass as well those lands of which the testator was seised in fee at the time of making his will, as those which were comprised in a settlement made on his marriage, the particular uses of which were determined by his having no male issue. *Visc. Falkland v. Lytton*, 3 Bro. P. C. 24.

A, by virtue of several settlements, being tenant in tail after possibility of issue extinct, of some lands, remainder in fee, to trustees in trust for him and his heirs, and to some other lands being tenant for life, remainder to his first, &c. sons, remainder to trustees in fee, in trust for the right heirs of B, whose heir he was, and as to other lands being tenant in tail, remainder to the right heirs of his father; and having no issue, by will devised to his nephew all his lands, tenements, and hereditaments, out of settlement; decreed all the lands so settled to pass by this devise. *Strode v. Russell*, 2 Vern. 621. 3 Ch. Rep. 169. S. C.

Lands with a power of revocation, will not pass by a devise of lands out of settlement. *Id.* 624.

Mortgages in fee though forfeited, will not pass by a general devise, of "all my lands, tenements, and hereditaments;" nor will they pass by such a general devise, though the equity of redemption is afterwards foreclosed or released. *Id. ib.*

A devised a farm to B, for life, and after some legacies, devises all other his personal estate, lands, tenements, and hereditaments, not before devised, to C. The reversion of the farm passed by the general devise to C. *Kingsman v. Kingsman*, 2 Vern. 560. REVERSION.

A, seised in fee, devises blackacre to B for life, and devised to C, all his lands not before devised, to be sold. By this devise of all his lands, &c. the reversion of black acre was well devised to C. *Rooke v. Rooke*, 2 Vern. 461. Pre. Ch. 202, S. C. 1 Freem. 519.

One devises all his goods, chattels, and estate, whatsoever, on condition to pay his debts and legacies; these words pass his real estate, he having by will devised a considerable legacy to his eldest son, and other legacies and the surplus of his estate after his wife's death, to be equally divided between his four children. *Lumley v. May*, Prec. Chan. 37.

#### (b) Personal.

A testator, seised of estates in fee, and holding certain lands and tithes in the county of H, under church leases for lives, devised all his lands and hereditaments in the counties of H, and G, and all other his real estate to his daughter, and the heirs of her body, and for default of such issue, to F, and his heirs. The daughter at the testator's death, and ever afterwards, was of unsound mind. Her husband having taken out administration to the testator, with the will annexed, procured from time to time, renewals of the leases. She survived him as well as all the *cestui que vies* named in the testator's leases, and died without issue, and without having done any act to bar such interest as F had under the devise: held, that the leaseholds for lives passed by the will; and that F was entitled to the benefit of the subsisting leases, which had been obtained by way of renewal of the old leases. *Fitzroy v. Howard*, 3 Russ. 225.

Seemle, that by a devise of a W. I. plantation, the stock, implements, utensils, &c. upon it will pass. *Lushington v. Sewell*, 1 Sim. 435.

A policy of insurance for 3000*l.* on A's life was assigned to trustees, and, by a deed of even date, trusts were declared of it by the description of "the sum of 3000*l.* for which A's life was insured," and power was given to B, to dispose of it by will. B, after reciting the settlement, bequeathed 1000*l.*, part of the sum of 3000*l.* to A, and the remaining sum of 2000*l.* to C. At A's death, 9000*l.* was received under the policy: held that the whole fruits of the policy were subject to the trusts of the settlement, and passed by the bequests to A and C, in proportion to their legacies. *Courtney v. Ferrers*, 1 Sim. 137. BONUS; POLICY OF INSURANCE.

A, being possessed of a lease of manor lands and hereditaments for twenty-one years, granted by the warden of an hospital, assigned by his marriage settlement, the premises and all his interest, benefit, and advantage of a renewal therein, &c. to trustees upon trust, out of the rents and profits, to pay the rents, perform the covenants, raise a competent sum for renewing the lease from time to time as should be customary, and renew the lease accordingly, and subject thereto to pay the rents to A, during his life, and after his death to stand possessed of the leasehold

premises, on certain trusts for the sons of the marriage, and on failure of those trusts for A absolutely. A, by his will devised his manor, hospital lands, and hereditaments, situate in, &c. held by lease from, &c. to the same persons who were trustees of his marriage settlement, with directions to perform the covenants in the new lease, or any leases hereafter to be procured, to collect out of the rents a competent sum for renewing the lease, and to renew the same from time to time. After the date of his will, A surrendered the existing lease, and obtained a renewed lease. Held, that this renewed lease passed by, and was subject to the trusts of this will. *Colegrave v. Manby*, 2 Russ. 238.

A testatrix gave the interest of the residue to her brother during life, and after his death she gave the residue to her executors in trust for four persons by name, and the survivors and survivor of them, to be paid to them respectively when they should attain twenty-one, with interest in the meantime; two of those four persons who died during the life of the brother, held that they did not take vested interests in any part of the residue, but that the whole of it belonged to the two survivors. During the lifetime of the testatrix's brother, one of the two survivors assigned all her furniture, plate, &c. and all other the estate and effects, of or to which she was then possessed or entitled, to trustees upon trust for her creditors; the assignment did not pass her contingent interest in the testatrix's residuary estate. *Pope v. Whitcombe*, 3 Russ. 124. INTEREST, VESTED.

A testatrix, who was entitled to a distributive share of the assets of an intestate, to whom, at her death, no administration had been taken out, bequeaths "all such sums of money as should be owing to her, at the time of her decease, from G B." These words will not pass her beneficial interest in a sum of money which was then due from G B to the estate of the intestate. *Collins v. Doyle*, 1 Russ. 135.

A testator, after expressing an intention to dispose of his whole estate, and giving legacies of 100*l.* to each of five persons, desires all his goods and moveable effects to be equally divided between them, and then bequeaths 20*l.* to a person whom he appoints executor; afterwards, by a codicil, he directs the money to be paid to those five persons in twelve months, and his utensils and goods to be given to them in one month after his decease. Held, that the words "goods and moveable effects," are to be limited to utensils and articles, *ejusdem generis*, and that the testator died intestate with respect to the beneficial interest in the general residue of his property. *Sutton v. Sharp*, 1 Russ. 146.

A bequest of "my furniture, plate, books, and live stock, or what else I may be possessed of at the time of my decease," will pass the general residuary estate, though followed by specific bequests and devises to the same person, and by gifts of pecuniary legacies to various other persons. *Fleming v. Burrow*, 1 Russ. 276.

A testator directs that his household furniture, &c., and utensils in and about his mansion house at H, should go with the mansion house, and that for that purpose his trustees should make an inventory of the furniture, &c., and utensils which should be found in and about his mansion house and premises at the time of his decease. These words do not pass farming utensils on lands at H, occupied by the testator, along with the mansion house. *Fitzgerald v. Field*, 1 Russ. 427.

Testator, after bequeathing to A and B legacies of stock, unequal in amount, and giving several legacies to public charities, requests the said A and B to be his executors, and gives to them as such one hundred guineas each: he then orders his books, jewels, plate, and household furniture to be sold, and after desiring

mourning to be provided for his servants, and five guineas each to be given to several persons named in the will, and to his two executors for a ring as a token of remembrance, concludes his will in the following manner: "In case there is any money remaining, I should wish it to be given in private charity." Held, that the general residue of the testator's personal estate, consisting of a leasehold estate, money in the funds, and a balance in cash, was not comprehended in the residuary clause, which was confined to the residue of the produce of the articles which the testator directed to be sold. *Ommaney v. Butcher*, 1 Turn. & R. 260.

Testatrix, by her will, disposes of certain long annuities, and of a sum in cash, and then uses the following words; "I believe there will be sufficient money left to pay my funeral expenses." By a codicil to her will, the testatrix expresses herself thus: "If there is money left unemployed, I desire it may be given in charity." Held, that the general residue of the testatrix's personal estate, including a sum of 2500*l.* trust monies, in which she had a vested reversionary interest at the time of her death, subject to be devested by the appointment of her mother, passed under the words "money left unemployed," and was well given to charity. *Id.* 265.

Bequest of household furniture and other household effects in dwelling house and premises, comprises all property kept therein either for use or ornament of the same. *Cole v. Fitzgerald*, 1 S. & S. 189.

The words "securities for money," in a will, pass stock in public funds, unless force of expression is controlled by context. *Quere* as to bank stock? *Besoby v. Pack*, 1 S. & S. 500. **STOCK.**

General gift of income, arising from personal property, is equivalent to general gift of property itself, and it makes no difference whether it be given through trustee, or to legatee direct. *Hay v. Swiney*, 1 S. & S. 487.

Bequest, after the death of certain annuitants, of a sum set apart by the court for payment of them, or of such part of it as should not, by reason of their deaths, have been assigned or transferred. Held, that a sum which had been ordered to be transferred on the death of an annuitant, but had not been actually transferred, did not pass. *Hooper v. Goodwin*, 1 Jac. 375.

Seamble, bequest of "the manor and hospital lands which he held by lease," passes a renewed lease. *Colegrave v. Manby*, 6 Mad. 84.

Words of will were, "all my other effect I will to J, &c. to be sold for his benefit," held all residue of testator's property, including money, passed thereby to J. *Hearne v. Wiggington*, 6 Mad. 119.

Testator possessed of 5000*l.* three per cent. consols, bequeathed 2000*l.* thereof to trustees in trust, as to 1000*l.* for G, and as to 2000*l.* for B. Held that testator meant to give trustees 3000*l.* in trust. Bequest to them being mentioned only once, and the legacy of the 2000*l.* to B, being mentioned twice. *Alford v. Green*, 5 Mad. 92. **WILL C. OR, MISTAKE.**

On construction of will, held word "effects" coupled with context, operated as a bequest of the whole personal estate. *Mitchell v. Mitchell*, 5 Mad. 69.

Devise of real estate to M for life, and direction "that timber or wood which should be on his real estates, should from time to time be used for repairing the houses thereupon, or otherwise, for the benefit or advantage of his estate, and that the same should be sold, and the money arising therefrom should be applied," &c. Held devise to M carried the under-wood, and that trustees leaving sufficient timber for repairs, might cut all fit timber, except ornamental. *Butler v. Borton*, 5 Mad. 40. **TIMBER.**

Reasons for the rules on which a residuary bequest

of personal estate, is extended to that which testator subsequently acquires. *Bland v. Lamb*, 2 J. & W. 405. **RESIDUARY.**

Very special words are required to confine a residuary bequest to property belonging to testator at date of his will. *Id. ib.*

Bequest of the balance in the hands of testator's agents at the time of his death, held to include a sum which he had by letter directed them to invest in the funds; but which was not invested till after his death. *Hill v. Mason*, 2 Jac. & W. 248.

Under a bequest of "all debts due, and owing to the testator at the time of his death," a bond conditioned for replacing a sum of stock sold by the testator, after the date of his will, and lent by him to the obligor, was held to pass; the day stipulated for the reinvestment being passed at the time of his death, therefore, not comprehended in the residuary devise, enumerating (among other things) "his government stocks and funds." *Festington v. Tashon*, 3 Mer. 434.

Legacies of 1000*l.* stock, held not to pass additional capital, given as bonus by bank under 56 G. 3. c. 96. subsequent to will, and before testator's death. *Norris v. Harrison*, 2 Mad. 268. **BANK OF ENGLAND; BONUS; LEGACY.**

J tenant for life, remainder, to W for life remainder to J in fee; during life of J, houses on estate were burnt down, and insurance money paid to J the insurer, and placed in funds in his name; J by will devised estate to R in fee, and his personal estate to W. W applied part of insurance money in repairing house on estate; insurance money unapplied remains in J's name, W by will stated the circumstances as to fund so standing in his brother's name, and bequeathed residue of his personal property. Held insurance money passed to R as devisee of J. *Id. ib.* **INSURANCE MONEY.**

Money at a banker's, held to pass under a bequest of all debts due to the testator at the time of his death. *Deaquies v. Noble*, 1 Mer. 541.

An unlimited gift of the produce of any thing, as the interest of stock, gives the principal also. *Stretch v. Watkins*, 1 Mad. 253.

Testator gives "all his stock, cattle, horses, and carriages" to his wife absolutely, and gives his farm "and stock, and crop thereof" to his said wife during widowhood. Held live stock upon the farm given to the wife during widowhood, passed to her absolutely under the former clause. *Randall v. Russell*, 3 Mer. 190. And see case of *Hardman v. Johnson*, *id.* 347.

Bequest to a woman of a fund, with the interest thereon, to be vested in trustees, the income arising therefrom to be for her sole use and benefit, vests the capital for her separate use. *Adamson v. Armitage*, 19 Ves. 416. S. C. Coop. 283. **FEME COVERT.**

Bequest of the produce of a fund, is a gift of that produce in perpetuity, and consequently of the fund itself, unless not the intention on the face of the will. *Id.* 418.

Bequest of "all the testator's money in the bank of England," held to pass stock in the funds, testator having never had any cash in the bank. *Gallini v. Noble*, 3 Mer. 691.

Bequest of leasehold premises, and all my estate, term, and interest therein, the interest acquired under a subsequent renewal of the lease does not pass. *Slatter v. Norton*, 16 Ves. 197. **LEASE, RENEWAL OR.**

Testatrix reciting that she was possessed of 12,000*l.* three per cent. consolidated bank annuities standing in her name, gave and bequeathed the same or so much of such bank annuities as should be standing in her name at her death. At the date of her will, and at her death she had near 15,000*l.* in that fund, besides other stock. The excess beyond the sum

mentioned did not pass. *Hotham v. Sutton*, 15 Ves. 319.

A residuary bequest in general terms: Revocation by a codicil as to "plate, linen, household goods, and other effects," (money excepted.) The exception prevents the restrained construction in general, of the words, "other effects," viz. *ejusdem generis*. Stock, therefore, which does not pass under the word "money," was included with leasehold and all personal property, except money and bank notes. *Id.* 320.

Construction of an obscure will, 1st, That the income only, not the capital, was disposed of; 2ndly, That the disposition was in favour of the younger children, excluding the eldest. A legacy not as an independent bequest, with a time for payment, or distribution appointed afterwards, but the time annexed to the substance of the bequest; the interests do not vest before that period. *Sansbury v. Read*, 12 Ves. 75. WILL, C. OF, WHO TAKE; INTEREST VESTED.

The word "effects" in a will, restrained to articles *ejusdem generis* with those specified, though the consequence was a residuum undisposed of. *Rawlings v. Jennings*, 13 Ves. 39.

Testator gave all his waggon ways, rails, stiths, and all implements, utensils, and things at his death, used or employed, together with, or in or for the working, management, or employment of his collieries, and which may be deemed as of the nature of personal estate, in trust to be held or enjoyed with the collieries. Decree by *Ld. Rosslyn* that under this bequest, and upon the circumstances, money due from the fitters and others, and in the Tyne bank, coals at the pits and stiths, corn, hay, horses, timber, oil, candles, fire-engines, and other articles of stock in trade, passed. The decree affirmed upon a rehearing by *Ld. Eldon*, but with considerable doubt, was reversed by the House of Lords. *Stuart v. Mary. Bute*, 11 Ves. 657, reversing *id.* 3 Ves. 212.

"Goods and chattels" will pass all personal estate, but after furniture, &c. are restrained to articles *ejusdem generis*. *Id.* 666.

A silversmith bequeathing all his furniture, books, goods, and chattels, his stock in trade would not pass, though the plate in his house, as household furniture, would. *Id. ib.*

Contract for purchase generally; by a devise of real estate before the purchase is complete, the money will pass. *Broome v. Monck*, 10 Ves. 615. CONTRACT FOR PURCHASE.

Bequest of leaseholds for years determinable upon lives, for life, with remainder over, for all the residue of the testator's term and interest to come therein at his decease: the term expired in the life of the testator, who continued to hold, and paid half a year's rent before his death as tenant by the year; upon the general words unrestrained, comprising the interest from year to year, and the intention upon the whole will, a subsequent lease obtained by the executrix, the widow and tenant for life under the will, was held subject to the uses of the will, as the residue of the term at his death, if any, however short, would have been. *James v. Dean*, 11 Ves. 383. affil. 15 Ves. 236.

A renewed lease does not pass by a previous will bequeathing the lease or the premises held on lease. *Id.* 387.

Bequest of the debts that shall be due at the death of the testator, by mortgages, bonds, or open accounts from certain persons, extended from the explanation of a similar bequest, by another clause to debts of every description; therefore, including judgments. *Stenhouse v. Mitchell*, 11 Ves. 352.

Bequest of "all my property in A except" a particular chose in action described in the will: other

chooses in action of testator found in A, do not pass, notwithstanding the exception. *Fleming v. Brook*, 1 Scho. & L. 318. CHOSE IN ACTION.

By a devise in general terms, a trust estate will pass, unless an intention to the contrary can be collected from expressions in the will or purposes or objects of the testator. *Ld. Braybrooke v. Inskip*, 8 Ves. 417. TRUST.

Devise of all freehold lands would include leases for lives, though the limitations are inapplicable. *Watkins v. Lea*, 6 Ves. 642. LEASE FOR LIVES.

Under residuary disposition by will to natural son, his heirs, executors, administrators and assigns for ever, to and for his and their own use and behoof, a trust estate did not pass. *Exp. Brettell*, 6 Ves. 576. BASTARD; TRUST.

General devise of all manors, messuages, lands, tenements and hereditaments in the county of Y. or elsewhere, with long limitations in strict settlement, and a residuary disposition of the personal estate also by very general words. The *Ld. Ch.* was clearly of opinion that two leasehold houses passed with the personal estate, and not under the devise of the land; but granted a case. *Thompson v. Lawley*, 5 Ves. 476.

A general devise by a trustee did not pass the trust estate. *Att. Gen. v. Buller*, 5 Ves. 339. TRUST.

Testator gave, devised and bequeathed all his messuages, lands, tenements, and hereditaments whatsoever and wheresoever, and all monies in the funds to trustees, their heirs, executors, administrators and assigns, according to the several and respective estates and interests therein, and declared the trust of the rents, issues, and profits, dividends, interest, and proceeds, subject to ground rents and other outgoings in respect of his said messuages, lands, &c.; the leasehold estates pass with the freehold upon the subsequent words. *Hartley v. Hurle*, 5 Ves. 540.

Stock included in a will under the word "securities," legacies being charged for which the securities properly so called were not sufficient. *Dicks v. Lambert*, 4 Ves. 725.

On construction of will, held that the capital of the residue passed by implication though the interest and dividends only were expressly given. *Phillips v. Chamberlaine*, 4 Ves. 51.

Testator gave all the residue of his personal estate to his wife, except such parts as should be in and about his house; which parts he gave to his son, and directed the household furniture to go as heir looms, and gave all arrears of rent which should be due to him at his death to his son; a bond to secure an old arrear of rent, and cash, both found in an iron chest, in which the steward kept the cash arising from the rents, belong to residuary legatee. *Jones v. Ld. Sefton*, 4 Ves. 166.

Under a bequest of the use of a house with all the furniture and stock, of carriages and horses, and other live and dead stock for life; plate passed; wine and books did not. *Porter v. Tournay*, 3 Ves. 311.

Testator gave 1000*l.* stock to a married woman for her separate use, and whenever she should die, to be absolutely in her own power to dispose of by will or writing purporting to be her will, to any person or persons, purpose or purposes she should then think proper; but in case of failure of any such disposition or appointment, to go over. This is not a power but an absolute gift, qualified only to exclude the husband upon the death of his wife, therefore it passed by general words in her will. *Hales v. Margerum*, 3 Ves. 299. POWER.

Testator devised all his manors, messuages, lands, tenements, tithes, and hereditaments, and all his real estate whatsoever, "except what is hereinafter mentioned and devised," to the use of all his children suc-



cessively, in strict settlement; and gave two of them annuities which he charged upon a rectory held by him under a lease for lives, which he directed to be renewed, if those two children or either should be living at his death, and that their lives or that of the survivor should be inserted in the new lease, and the fine paid out of his personal estate. He gave part of his personal estate specifically, and directed the residue to be laid out in land to be settled to the same uses as his real estate; but afterwards by a testamentary paper unattested, he disposes of his personal estate otherwise. The heir contracted to sell the lease of the rectory, and upon a case directed to the court of K. B. on his bill for specific performance, the certificate was, that the lease did not pass by the will, but devolved on the heir as special occupant; but the 1d. Ch. considered that title too doubtful to be forced on a purchaser. An act of parliament was therefore obtained. *Sheffield v. Ld. Mulgrave*, 2 Ves. J. 525. VENDOR & P.; TITLE.

Testator devised freehold estate to his brother and his wife for their lives, remainder to A, his nephew, and the heirs male of his body; and for default of such issue to B in the same manner, remainder over; he gave so much of the same estate as was leasehold to his brother and his wife for so many years of the term as they or the survivor should live; and directed that after the decease of the survivor, the leasehold premises should, from time to time be held and enjoyed, and belong to the several persons in succession, who should for the time being, be entitled to the freehold as far as the rules of law would admit, and gave the same directions as to the furniture of the mansion-house. By codicil reciting that he had devised the freehold part after failure of issue male of A, to B in tail male, &c., he revoked those limitations, and after failure of issue male of A, devised to others, and repeated the disposition he had made of the leasehold and furniture. A takes the leasehold absolutely. *Fordyce v. Ford*, 2 Ves. J. 536.

Devise of lands, tenements, and hereditaments, subject to a term of eleven years, in trust, to receive the rents, issues, and profits, of the premises that from time to time should accrue and become due, and dispose, &c. An advowson in gross passes, and a sale of the next presentation within the term by direction, and for the benefit of the *cestui que trust*, was established. *El. Albemarle v. Rogers*, 2 Ves. J. 477. ADVOWSON.

Testatrix mortgagee of an estate, of which her brother was tenant for life, and having his bond for some arrears of interest, bequeathed to him the arrears of her mortgage on his estate; likewise a bond from him in her possession; half of the mortgage money was paid before the will; the principal mortgage money does not pass. *Hamilton v. Lloyd*, 2 Ves. J. 416.

Testator gave all his plate and linen in his house in S to his wife; he had but one set of plate and linen, which was usually removed with the family from house to house. The plate happened to be at B, the country house, at his death; yet it passed to the wife. *Laud v. Devaynes*, 4 Bro. C. C. 537. LEGACY, ADEMP-TION OF.

Goods removed for a necessary purpose, the legacy of them is not adeemed, as from fire; or sent to be repaired, &c. *Id. ib.*

Bequest of all my clothes and linen whatsoever, passes body linen only. *Hunt v. Hort*, 3 Bro. C. C. 311.

Testatrix directed all her estate to be turned into cash; if amounting to 20,000*l.* to go thus; if less, in similar proportions, then subject to some legacies, debts, &c.; the residue of her estate in sixteenths: Two to her mother for life, the others to different persons absolutely. She then made three residuary legatees.

Legacy decreed to fema covert: settlement directed. *Green v. Scott*, 1 Ves. J. 282.

Copyhold estate shall not pass by general description, where there is freehold to satisfy the words, though it had been supposed to be freehold; and the first devise was for payment of debts, and then given to a younger child, otherwise provided for. *Lindopp v. Thorall*, 3 Bro. C. C. 188. COPYHOLD.

"All my estates in law and equity" in a will, pass personal property to be laid out in land. *Rashleigh v. Master*, 1 Ves. J. 204. S. C. 3 Bro. C. C. 99. MONEY TO BE Laid OUT IN LAND.

Testator gave to his son "all sum and sums of money due to me, from him, on bond or bonds, or any other security." The son was indebted to testator by bond at the date of the will, and afterwards became indebted to him by another bond. The bequest does not include the subsequent bond. *Smallman v. Gooden*, 1 Cox, 329. DEBTOR & CREDITOR.

Testator gives a debt due from "I on bond, 300*l.* and upwards" to A, B, and C. The debt is 350*l.*, viz. 200*l.* by bond and 100*l.* by covenant, and 50*l.* held, that the three sums pass to A, B, and C. *Williams v. Williams*, 2 Bro. C. C. 87.

D, being possessed of 4000*l.* 4 per cent. bank annuities, by his will gave parts of it to a number of persons, he then made a codicil in which he said, "I find willed away only 5600*l.* 4 per cent. bank annuities, and I have there at present 6000*l.* I give the interest of the remaining 400*l.* to F." It appeared that he had disposed of only 3200*l.* of the stock by his will. F shall take the whole residue of the stock under the bequest in the codicil. *Dunvers v. Manning*, 1 Cox, 203. S. C. 2 Bro. C. C. 18.

Ornaments of the person do not pass by a bequest of a cabinet of curiosities, even though occasionally shown with it. *Cavendish v. Cavendish*, 1 Bro. C. C. 467.

Diamonds and pearls made up for wear, will not pass by a devise of a cabinet or collection of curiosities, consisting of coins, medals, gems, and oriental stones, and other valuable things; valuable things must mean things *ejusdem generis*. S. C. 1 Cox, 77.

Devise of a leasehold estate, held under a college; after the will made, the lease is renewed; this new lease does not pass by the will. *Hone v. Melerstaff*, 1 Bro. C. C. 261. LEASE, RENEWAL OF.

A will in those words, "I give all in S to R," does not pass a bond which happened to be at testator's house in S. *Moore v. Moore*, 1 Bro. C. C. 127.

Testator having tithes in fee, and likewise tithes by leases perpetually renewable, devised all his lands, tenements, and tithes to defendant; the leasehold tithes pass as well as the freehold. *Turner v. Hustler*, 1 Bro. C. C. 78.

Bequest of leasehold ground-rents passes not the reserved rent only, but the reversionary leasehold interest. *Kaye v. Laron*, 1 Bro. C. C. 76.

Devise of real estate and personal, to be laid out and settled, with directions to the trustees, out of the rents of residue of his personal estate to raise and pay any money they should think proper and convenient, not exceeding 3000*l.* for the advancement of the plaintiff in any business, art, or profession, or in any civil or military employment, held to be a gift of the money. *Metcalf v. Wilmot*, Amb. 704.

Bequest of all his pictures, &c. they being a good collection; after-purchased pictures shall pass. A bequest of any species of personal estate is considered as fluctuating till the death of testator, and the whole of that species he has at his death, passes. *Dean and Chapter of Christchurch v. Barrow*, Amb. 641.

Under a bequest of household furniture, plate in the house at testator's death, whether in common use or not, if suitable to the rank of the testator; pictures hung up, linen, and china, both useful and ornamental.

tal in the house, will pass; books in a library will not pass. *Kelly v. Powlet*, Amb. 605. S. C. 1 Dick. 559.

By devise of all testator's goods and chattels in and about his dwellinghouse and outhouses at A, at his death: Held that running horses passed. *Cs. Gover v. El. Gover*, 2 Eden, 201. S. C. Amb. 612.

Household furniture comprises every thing that contributes to the use or convenience of the householder, or ornament of the house. *Kelly v. Powlet*, Amb. 610. S. C. Dick. 559.

Devise of freehold and copyhold estate; part consisted of a brewhouse and malthouse, which was in lease, together with the plant and utensils. Held that the plant passed. *Wood v. Gaynon*, Amb. 395.

Devise of all testator's real estates wheresoever situate, lying, and being; held not to include leaseholds as well as freeholds. *Whitaker v. Ambler*, 1 Eden, 151.

One having freehold and leasehold estate in C, devises all his manors, lands, tenements, mines of coal and lead, to, &c. Held the leasehold as well as freehold passed. *Louchter v. Cucendish*, Amb. 356. S. C. 1 Eden, 99.

'Trust estate will pass by a general devise. *Hackins v. Oben*, 2 Ves. 559. TRUST.

Devise of surplus rents and profits carries a right of presentation. *Sheppard v. Harborough*, Amb. 167. ADVOWSON.

Arrears of annuity held to pass under a bequest of "all arrears of rent and interest due." *Hele v. Gilbert*, 2 Ves. 430.

China held to pass under a bequest of furniture. *Id. ib.*

Testator intending to dispose of all his personal estate, gives the residue in fifth shares, but appoints his brother "heir to whatever part of his estate should be unappropriated by his will;" one of the five shares lapsed in testator's lifetime: held, that the above was an ultimate general residuary clause, and comprized this as including not merely what was not mentioned, but every thing not effectually given. *Jackson v. Kelly*, 2 Ves. 285.

Plate passes under a bequest of "household goods." *Stapleton v. Conway*, 1 Ves. 427.

Devise of all lands and tenements in or near F, by a will attested by two witnesses, only where the testator had freehold, will not pass leasehold; contra, if he had only had leasehold. *Chapman v. Hart*, 1 Ves. 271. WILL, EXECUTION OF.

Bequest of goods on board a ship, is good, though they may have been afterwards removed, and were not on board at the testator's death. *Id. ib.* SPEC. LEGACY, ADEMPITION OF.

Neither choses in action or securities for money pass under a bequest of "goods and chattels." *Id. ib.*

What passes by devise of all goods and chattels in a house, not a bond or chose in action. *Id. ib.*

Bank notes pass as cash by bequest of "all that should be in his house at testator's death." *Popham v. Ly. Aylesbury*, Amb. 68. BANK NOTES.

Devise by an E. I. captain of all household furniture, linen, plate, and apparel whatsoever, includes only what is for domestic use, not what for trade or merchandize. *Le Forrant v. Spencer*, 1 Ves. 97.

Upon a bill filed to have an assignment of rents and profits of a leasehold estate vested in defendant, in trust for plaintiff, the court, under the circumstances, held, that a will in 1735, was sufficient to pass the trust of a lease in being, and the subsequent renewals in 1739. *Carte v. Carte*, Ridgw. 210. 3 Atk. 174. Amb. 28. LEASE, RENEWAL OF.

The word "advantages" is sufficient to take in all the benefits belonging to the trust of an estate for years, not the profits only, but the renewals, which

are consequential. *Id.* 3 Atk. 178. LEASE, RENEWAL OF.

A library of books will not pass as furniture. *Bridgman v. Dove*, 3 Atk. 202.

Where current coin is curious, and kept with medals it will pass as such. S. C.

A devise of a lease, and of the right of renewal, carries both the lease and the right. *Abney v. Miller*, 2 Atk. 598.

Where testator says, "I give all my estate, right, and interest I shall have to come in a college lease at the time of my death," though renewed after the will, it passes notwithstanding. S. C. *Id.* 599.

W devised all his household goods, cattle, corn, hay, and implements of husbandry, and stock belonging to his house, messuage, farm, and premises, held by him on lease, to his wife for life: held, that a malt-house being included in the lease, the stock of that as well as the stock in husbandry, will pass by this bequest. *Brooksbank v. Wentworth*, 3 Atk. 64.

A testatrix says, "I give to B, &c. all my goods, wearing apparel, of what nature and kind soever, except my gold watch:" held that all her wearing apparel and ornaments of her person passed to the legatee, and any other household goods and furniture, but no other part of her estate. So if a man gives a legacy and then says, "I give all my goods," it will pass the residue, though the word "goods," in common parlance, means "goods only," and not the whole personal estate. The words "all my goods, wearing apparel," shall not be confined to wearing apparel only, but shall be construed "goods and wearing apparel." *Crichton v. Symes*, 3 Atk. 61.

A devised all his estates to B, and had only leaseholds: held, they shall pass. So, where a man having lands in fee, and for years, devised all his lands, the fee-simple only shall pass; but where he had a lease for years, and no fee-simple, the lease for years shall pass, for otherwise the will would be void, and the court directed a trial at law upon this issue: Whether the testator had both freehold and leasehold, and in the same parish? *Knotsford v. Gardiner*, 2 Atk. 451.

Testator says, as to the rest and residue of his lands, &c, his will, is, that the annual profits should be equally divided between A & C, and said nothing about the personal estate. By all the rules of grammar as well as law, the words "rest and residue" must relate to something that went before; and, where testator calls it by the name of real estate, can never be said to affect his personal. *Beauclerk v. Mead*, 2 Atk. 168.

Money will not pass by a devise of all goods and things of every kind when the devise has a money legacy at the outset of the will. *Roberts v. Ruffin*, 2 Atk. 112. WILL, WHAT INTEREST.

Though a debt devised amounts to a less sum than is stated in the will, yet the wrong description and falling short will not defeat the legacy, but shall be applied as far as it goes in the same manner as if there had been the whole sum mentioned in the will. *Att. Gen. v. Pyle*, 1 Atk. 435.

An advowson does not pass by the word "tenement." *Kensley v. Langham*, Forres. 146. note (c). ADVOWSON.

One devises the sum of 6000*l.* S. S. stock to J S, and the testator has but 5360*l.* No more than the 5360*l.* shall pass, and the rest of the testator's personal estate not be obliged to make it up 6000*l.* But it might be otherwise if the testator had no stock at all. *Ashton v. Ashton*, 3 P. W. 384. Ca temp. Tal. 152.

One has no land in A, but has tithes there, and devises all his land in A; the tithes as they are issuing out of the land, and part of the land, and part of the profits thereof, shall pass. *Id.* 386.

Where a guardian by his will remits to his ward whatever is due to him for his maintenance, it will include all demands for his education. *Anstis v. Gaudy*, 4 Bro. P. C. 313.

One, by will, gives all his household goods and implements of household. The malt, hops, beer, ale and other victuals in the house do not pass; but the clock, if not fixed to the house, shall pass, but not the guns or pistols, if used as arms in riding or shooting game. *Slunning v. Style*, 3 P. W. 334.

Testator gave the residue of his estate to the poor of the parish of K in L, but that parish was in N. It was set up by the next of kin, that testator did not imagine his *residuum* would exceed 10*l.*, and had so declared, whereas it amounted to near 1000*l.* The court thought parol evidence should be admitted to help out the description of the parish, but not as to the quantity of the thing given. *Brown v. Langley*, 2 Barn. 1818. PR. EVID. PANOR.

Devise of all my household goods and other goods, plate, &c. to A; the residue of my personal estate to B. The ready money and bonds do not pass by the words "goods," for then the bequest of the residue would be void. *Woolcomb v. Woolcomb*, 3 P. W. 112.

Where arrears of a debt are bequeathed, they are confined to those due at time of making will. *Gen. v. Burg*, 1 Eq. Ab. 201.

Where testator devised all his goods, chattels, household furniture, stuff, and all other things which should be in his house at time of his death: Held, a sum of money there did not pass. *Trafford v. Bertrige*, 1 Eq. Ab. 201.

One seised in fee, and possessed by lease for twenty-one years of lands in D, devises all his lands in D, whereof he is seised, possessed, or any ways interested in, to A for life; remainder to B in tail; remainder to C, with power to make a jointure; remainder to trustees to preserve contingent remainders, &c.: Decreed, the leasehold should pass as well as the freehold. *Addis v. Clement*, 2 P. W. 456.

Plate in common use passes by the devise of household goods, notwithstanding any parol proof that it was not intended to pass. *Nicholls v. Osborn*, 2 P. W. 421.

A devised to her daughter F, "my strong box, and whatsoever is in it, and all my chests, and cabinets, and whatsoever is in them." This strong box was fixed upon a frame containing several drawers, and in these drawers were found Bank notes, and other things of value. Held, that the frame and drawers did not pass by the devise of the strong box: but on an appeal, this decree was reversed. *Id. Pagel v. Dk. Bridgewater*, 3 Bro. P. C. 79.

One makes his will and says, "as to such estate as God hath blessed me with, I devise in manner following;" after which he gives part to J S, and his heirs, &c., and devises the rest of his estate to his wife in fee; this passes a trust estate. *Marlow v. Smith*, 2 P. W. 198.

Bequest of household goods extends to all household goods purchased afterwards, and that are in the house at the testator's death. *Masters v. Masters*, 1 P. W. 424.

One devises lands to his younger sons at twenty-four, and in the mean time the rents and profits of the premises to his eldest son, and dies; and the eldest son devises all those rents and profits of the premises to his younger brothers, but not to be paid to them until twenty-four, and dies, leaving his younger brothers under twenty-four; only the rents and profits accruing from the death of the elder brother, the testator, shall pass. *Tissen v. Tissen*, 1 P. W. 500.

One possessed of a term for years, devises all the profits thereof to S; only the profits accruing from the death of the testator shall pass. *Id.* 503.

Plate in common use in a family shall pass as household goods. *Masters v. Masters*, 1 P. W. 425.

Where the will is writ blindly and hardly legible, and the legacies in figures; court referred it to a master to examine what those legacies were, and the master to be assisted with such as understood the art of writing. *Id. ib.* PR. REF. TO MASTER.

A, by will, taking notice that his natural son J had disobliged him, declared thus: "I do hereby resolve not to give him more than 20*l.* per ann. for life." And he gave his estate to his legitimate son. *Per cur.*, the words do not amount to a devise; and the bastard shall take nothing. *Holder v. Holder*, Vin. tit. Devise. (10 B.) pl. 8.

One devises to his son the furniture of his house at D., and orders goods to be carried from London to his house at D., and agrees with carriers for that purpose, but dies before the goods are removed to D. These goods shall not pass by the will as part of the furniture of the house at D. *Beaufort v. Dundonald*, 2 Vern. 739.

J, devises all his household goods and furniture which should be in his house at K. at his death to his wife, and afterwards going beyond sea, his steward gets the landlord of the house to accept a surrender of the house, and removes the goods to another house, and writes an account of this to J, who approves of it. The goods will not pass by the will to the wife; otherwise if they had been removed by fraud to defeat the legacy, or by any fortuitous act without the privity of the testator. *Shaftsbury v. Shaftsbury*, 2 Vern. 747.

One being on ship board, and entitled to part of a considerable leasehold estate by the death of his father, which he did not know he had a right to, makes his will at sea, and devises to his mother (if living) his rings, and makes A his executor, and devises to A his red box, and all things not before bequeathed. This shall not pass the leasehold interest, or what the testator did not know he was entitled to, but shall be restrained to things *ejusdem generis*. *Cook v. Oakley*, 1 P. W. 502.

Where 300*l.* or 400*l.* per ann. is directed to be purchased, the court will take it in the largest sense, and construe it to be 400*l.* per ann. *Saule v. Saule*, 1 P. W. 290. PR. CHAN. 421. GILB. REP. 105.

One devises all his freehold houses in A., and hath none but leasehold houses there; the leasehold shall pass. *Secus*, in a grant. *Day v. Trig*, 1 P. W. 286. WILL. MISTAKE IN.

Devise of all one's goods, passes a bond. *Anon.* 1 P. W. 267. BOND.

One devises to his wife all his personal estate at W. This is a specific legacy, and to be preferred to pecuniary legacies in case of deficiency of assets. All the testator's personal estate that was at W. at his death shall pass, though not there at the making of the will. *Sayer v. Sayer*, 2 Vern. 688. PREC. CH. 392. GILB. EQ. REP. 87. S. C. LEGACY, SPECIFIC.

What passes under words, "all his household goods." The words added thereto, "and whatever else legatee should think fit to accept of," were rejected in the construction of the will. *Anon.* 2 Eq. Ab. 322.

Plate shall pass by a devise of household goods. *Tillot v. Compton*, 2 Vern. 638.

A devises, that the furniture and pictures of his three houses in B., C., and D. should go along with the houses: adjudged the plate then at his three houses passed by this devise. *Franklyn v. C. Burlington*, 2 Vern. 512. PREC. CH. 251. S. C.

By a devise of all rings and household goods, plate used in the house does not pass. *Jesson v. Essington*, PREC. CHAN. 207.

A held a church lease, of which nine months had remained unexpired, &c. He made his will in sickness,

and devised all his interest in such lease to B. A, recovering, renewed his lease, and republished his will. Resolved, the renewed lease passed by the republication. *Ann. 2 Freem. 116. WILL, REPUBLICATION OF.*

A devises 100*l.* to B, and by will released to B all debts and demands, and afterwards A lends B 100*l.*: whether this 100*l.* is released by the will? *Bentham v. Alston, 2 Vern. 136. RELEASE.*

A devises 1200*l.* to his wife, and gives her all the goods and chattels, plate, jewels, household stuff, and stock belonging to his house at N.; 400*l.* which the testator has in the house will not pass by these words. *Ann. Prec. Chan. 8. S. C. nom. Saunders v. Earle, 2 Chan. Rep. 188.*

Whether a release by will, of all debts, accounts, and demands, will transfer the property of goods which defendant then had in his hands, belonging to plaintiff's testator. *Fish v. Jesson, 2 Vern. 111. RELEASE.*

One seised in fee of land, limits a term to trustees for one hundred years, upon such trust as he by deed or will should appoint, and for want of such appointment to attend the inheritance; and afterwards, by a nuncupative will, gives all to J. S., and being a bastard, dies without issue: this will not pass the trust of the term. *Thruston v. All. Gen., 1 Vern. 340. NUNCUPATIVE WILL.*

A man seised in fee of divers lands, and having also lands mortgaged to him, devises all his lands to A and his heirs; the mortgaged lands did not pass. *Wing v. Littleton, 1 Vern. 32. Vent. 351. 2 Cha. Ca. 51. S. C.*

A bequeathed 1200*l.* to S, and by general words all his goods, chattels, and house-stuff, in and about his house. Money in the house will not pass to S, he having a money legacy. *Sanders v. Earle, 2 Ch. Rep. 190.*

#### (c) *Property acquired after the Will.*

A B bequeathed dividends of property in funds to C D for life, and directed, that after C D's decease, principal should be divided amongst his children, in manner after mentioned; she then gave children certain sums of money which would have exhausted whole of funded property at date of will, between that time and A B's death, that property greatly increased: held, executors entitled to surplus as undisposed of. *Hynes v. Littleton, 1 S. & S. 496.*

Testator gave to wife ready money, &c. which he should have in house at time of death: he gave specifically to others his exchequer bills, stock, &c. Becoming insane, 3000*l.* paid into his house was laid out in stock and exchequer bills: specific legacies of exchequer bills, &c. entitled. *Brown v. Groombridge, 4 Mad. 498.*

Testator by his will devises all his freehold and copyhold manors, &c., and real estate whatever, upon certain trusts; and gives to the same trustees, a sum of 35,000*l.* to lay out in the purchase of lands, to be settled upon the same trusts. He afterwards contracts for the purchase of several estates; and by a codicil, specifying some of the estates which he had so contracted to purchase, devises them to the same trustees, upon the trusts of the will; and directs that the purchase monies shall be taken as part of the 35,000*l.*, confirming his will in all other respects. The codicil amounts to a republication of the will, so as to pass not only the estates therein specified, but all the estates contracted to be purchased between the dates of the will and codicil. *Hulme v. Hengate, 1 Mer. 285. WILL, REPUBLICATION OF.*

Codicil, with three witnesses, though relating only to personal estate, expressing no intention as to repub-

lication of will, is a republication; and therefore will containing a general devise, lands purchased in the interval, pass. *Pigott v. Waller, 7 Ves. 98.*

The rule, that after-purchased lands do not pass by a devise, does not arise from the word "having" in the statute of wills, but from the difference between the Roman testament or wills of personal estate, and a devise by the law of England, which is an appointment of the person to take the specific estate in nature of a conveyance, though fluctuating till death. *Brydges v. Dr. Chudor, 2 Ves. J. 427.*

Lands purchased after a general devise, pass under it, republication being implied from a codicil concerning personalty, referring to the will, directed to be taken as part of it, and attested by three witnesses. *Barnes v. Crowe, 1 Ves. J. 486. 4 Bro. C. C. 2.*

Devise of personal estate, and of rents and profits of real, in trust to accumulate, and to be laid out in land, and to be conveyed with the real to the youngest, or only son of the trustee at twenty-one: held, a vested interest by executory devise in an only surviving son, and not to wait till the death of the father, but liable to be divested by birth of another son. The trustee survived his son several years, and received the rent, and profits till his death, but never laid them out in land as directed; those accrued after the son made his will, held to be an equitable interest in land, and therefore to pass by it. *Perry v. Phillips, 1 Ves. J. 251. INTEREST, VESTED.*

One by will, reciting he was seised of a copyhold, devises all his real estate; not being seised of any copyholds, but being seised of freehold estates at the time, he afterwards bought a copyhold: held, it did not pass. *Warde v. Warde, Amb. 299.*

One articles to buy certain lands; he thereby becomes seised thereof in equity; but where A devised all his real and personal estate, and afterwards articulated to purchase lands and then died, the heir at law was held to be entitled to this estate, as not passing by the will; secus, had the articles for the purchase been before the will; for then the estate would have passed. *Langford v. Pitt, 2 P. W. 629. LAND ACQUIRED TO BE BUGHT.*

A devises his library of books, now in the custody of B, to a college, and afterwards buys more books, which he places in the same library, and gives 4000*l.* more to increase their library, after-bought books shall pass. *All. Souls' Coll. v. Coddington, 1 P. W. 597.*

A codicil, which concerns only personal legacies, will not amount to a republication of the will, so as to pass lands purchased after the making of the will. *Strode v. Russel, 2 Vern. 625. 3 Ch. Rep. 169. S. C. WILL, REPUBLICATION OF.*

B devised to his wife in these words:—"I do hereby give, devise, and bequeath unto my well-beloved wife Frances, all such sum and sums of money as now is, or hereafter shall grow due to me from their majesties, for my own and servant's service, either by sea or land; as also, all such sum and sums of money, lands, tenements, goods, chattels, and estate whatever, wherewith, at the time of my decease, I shall be possessed or invested, or which shall then, or of right doth appertain unto me. And I do hereby nominate and appoint her, the said Frances, to be the whole and sole executrix of this my last will and testament." The testator, had no real estate at the time of making this will; but having about nine years afterwards received part of his wife's fortune, he therewith purchased lands of about 200*l.* per annum. There having been no republication of the will after this purchase, held, that the lands did not pass, but descend to the testator's brother as heir at law. *Bunker v. Cook, 3 Bro. P. C. 19.*

A devises to B, all his goods and furniture in his

house, except his pictures, which he gives to C; pictures in boxes, as well as what were hung up in the house, will pass to C; and so will pictures bought after making the will. *Gaure v. Gaure*, 2 Vern. 538.

If A articles to purchase lands, but before the conveyance devises all his land to be sold to pay debts and legacies, the lands will pass, though he was not seised at the making of his will, neither did he republish it. So, if A devises all his lands for payment of his debts, and then purchases land, equity will decree a sale of that land, though there were no precedent articles. *Prideaux v. Gibbon*, 2 Ch. Ca. 144. So, if A buys copyhold lands, and dies before admittance, having first devised all his copyholds to T S, the copyhold lands contracted for will pass by the will, or in any case if there are articles for a purchase, and the purchaser makes his will and dies before conveyance, the lands shall pass in equity. *Davie v. Beulsham*, 1 Ch. Ca. 39.

##### 5. What Quantity and Quality of Interest.

Bequest of 40*l.* per annum to A for life, and after her decease to B, or his heirs: Held, that "or" must be construed distinctively, and that therefore B did not take an absolute interest in the annuity. *Clouston v. Doe*, 2 Sim. 225.

A feme covert having power to dispose by will of personal property, and of a real estate at N, by her will, after reciting the power, gave several pecuniary legacies, and then gave to her husband her fields and house at N., likewise the remainder of her personally, and all she might die possessed of, after payment of her debts, legacies, and funeral and testamentary expenses: Held, that the husband took a life estate only in the realty, notwithstanding the gift to him of all the testatrix might die possessed of. *Monk v. Mauley*, 1 Sim. 286.

A testator gave all his real and personal estate to trustees in trust, as to one moiety for A for life, remainder to her children, and as to the other moiety for B and her children, in like manner. By a codicil, he declared that his estates should not be divided equally between A and B, but in proportion to the number of their children, and he left A and B jointly his residuary legacies. By another codicil, in order to prevent disputes, he gave one of his estates to A and her heirs, and the other to B and her heirs; the number of their children nearly equalizing the value of the two estates. In a subsequent codicil, he mentioned that he had bequeathed the first estate to A and her children, and the second to B and her children: Held, that A and B were entitled to these estates for their lives only, with remainders to their children, and that they were not entitled to the personal estate absolutely, but for their lives only, with remainders to their children, and in shares proportioned to the number of their children. *Lushington v. Sewell*, 1 Sim. 435.

By a marriage settlement, a sum of 4000*l.* was to go after the decease of the husband and the wife, and the husband's father, and subject to the father's power of appointment to the children of the marriage equally, and the real estates of the wife were charged with a sum of 8000*l.*, which was to be divided among the children in such shares and manners as she should appoint. The wife, by her will, appointed 100*l.* to the eldest son of the marriage, and the remaining 7900*l.* to the other children of the marriage, directing the shares to vest in sons on their attaining twenty-one, and in daughters on their attaining that age or marriage with their father's consent; she likewise created a further charge, in order that such younger child's share of the 8000*l.* might be augmented to 5000*l.*, and by the same instrument, she in exercise of a power

of appointment, which she had under the will of C, appointed C's residuary property to the first and other sons of the marriage successively who should attain twenty-one, and if there were no such sons, to the daughters of the marriage who should attain twenty-one. Afterwards by a codicil, she directed that the same fortune should be given to any child or children of whom she might be delivered, as was given by her will to each of her daughters, and that if no son of the marriage should live to attain twenty-one, or be married, each of her daughters should be entitled to have for fortune 10,000*l.*, to be paid in the manner and at the times mentioned in her marriage settlement or will respecting the fortunes of her daughters. The wife died in the husband's lifetime, leaving a son and three daughters her surviving; and in the events which happened, two daughters, the only surviving children of the marriage, became entitled under the settlement to the 1000*l.* and under their mother's appointment to the residuary property of C: Held, that they were entitled to receive 10,000*l.* exclusive of, and in addition to their shares of the 1000*l.* and of the residuary property of C. *White v. Kearney*, 3 Russ. 208.

A testator beginning his will by expressing an intention to give the bulk of his property to two of his sisters, gave them only a life interest in the greater part of it, and after giving legacies to others of his sisters; he expressed his wish that A, and the testator's servant B should be his executors; and that B should live with his two sisters, and take care of them and their property; and by a codicil, he directed that the interest of 300*l.* should be paid to B half yearly, as wages for taking care of his two sisters, and that after the death of B and his two sisters, the 500*l.* should be paid to P: Held, that the legacy given to B by the codicil was not a legacy given for her care and trouble, so as to convert her into a trustee of the residue for the next of kin, but that A and B, in their character of executors, took the residue beneficially: that after the death of the two sisters, though the services for which the legacy was given as wages, would no longer be performed, B would still be entitled to the interest of the 300*l.* during her life. *Duncan v. Thorne*, 3 Russ. 235. **EXORS. BENEFICIALLY INTERESTED.**

Devise of a freehold estate to the testator's illegitimate son W, to have and to hold during the term of his natural life, and in case he have issue, then it is my will they should jointly inherit the same after his decease. In a subsequent part of the will, the testator devised and bequeathed the test and residue of his effects real and personal, not theretofore disposed of, to his said son, but in case my son W dies without issue, then it is my will that the whole of my property be ascertained, and after bequeathing certain legacies and annuities, the test and residue of my property, together with the before-mentioned annuities as they drop off, I give in equal proportions to A and B: Held, that the illegitimate son took an estate tail in the real estate, and an absolute interest in the personalty. *Ward v. Peril*, 1 Y. & J. 512.

A testator bequeaths a sum of stock to each of five nephews and nieces, or to their respective child or children; should any die without child, such share to revert to the residuary legatee; each of the nephews and nieces who survive, the testator takes his or her legacy of stock absolutely. *Montagu v. Nucella*, 1 Russ. 165.

The same testator appoints as a residuary legatee E P M, his child or children; in case of his death without any such, the residuary interest to vest in the other five nephews and nieces then alive, share and share alike, and as before to each of their respective child or children, and in case of either of their deaths without any such issue, then his or her share to be divided amongst the survivors; E P M, having survived, the testator takes the residue absolutely. *Id. ib.*

A testatrix devises leaseholds to A, subject to the yearly sum of 12*l.* for the sole use of Mrs. B, to be paid her half yearly; and this annuity was payable on the 27th of January and 27th of July; many years afterwards, A devises to R all his lands, (in which these leaseholds were included) paying Mrs. B 12*l.* per annum, by half yearly payments, to be made on the 27th of January and the 27th of July; Mrs. B is entitled under A's will to a second annuity, distinct from, and in addition to the annuity given her by the will of the testatrix. *Bartlett v. Gillard*, 3 Russ. 149.

Bequest of personal estate in trust to invest it in stock to accumulate, and to transfer the fund to A at twenty-one. Power for the trustees to lend 10,000*l.* to B, so long as he carried on the business of banker at H; B is not entitled to retain the 10,000*l.* after A attains twenty-one, though he continue banker at H. *Brown v. Sinsome*, 1 McClel. & Y. 427.

Testator gave son one-fourth of personal estate absolutely, but by codicil directed that son's share should be only for life of himself and wife, provided they had no issue, and that at their death it should fall into residue; held, son did not take absolutely, but subject to executory bequest over in case there was no issue of himself and wife living at death of survivor. *Rackstraw v. Fife*, 1 S. & S. 604. **EXECUTORY DEVISE; LIMITATION OR.**

Testator directed interest of sum of money to be paid to his sisters, during their lives, in equal proportions, and at their death, gave to their children the inheritance their mothers derived from his estate, and desired that his sisters should be residuary legatees in proportions already mentioned; held, that sisters were entitled absolutely to residue, and that their children took no interest. *Grassick v. Groomond*, 1 S. & S. 517.

A testator directs, that W F shall, with a capital taken out of his assets, continue his the testator's business; that he shall bind D G apprentice to himself; that he shall take D G into partnership at the end of his apprenticeship, or so soon after as he shall think him capable; and that D G shall have one-third of the profits of the business; D G is not entitled to claim any share of the profits which are made before he is admitted into partnership. *Gorden v. Rutheford*, 1 Turn. & R. 373.

Gift by will to A, to be paid to him at twenty-one, with a bequest over, in the event of dying under that age, or afterwards without heirs, and intestate; held an absolute interest in A, on his attaining twenty-one. *Cuthbert v. Purrier*, 1 Jac. 415.

Direction for payment of residue to E to be applied by her at her discretion, for or towards the education of her son, and that she should not be liable to account to him or any other person for the disposal or application of it; the residue being considerable, held, that E was entitled to it, subject to the application of so much as the court might think fit to the education of the son during his minority. *Hanley v. Gilbert*, 1 Jac. 364.

Bequest of household goods, &c. after payment of debts, &c. to testator's wife for her life or widowhood with power to her to sell same as she should think proper for her own benefit, and the maintenance of the testator's nephew, &c. during their minority, with a bequest over, upon the death or second marriage of the wife, of the same or so much as should then remain to such nephew, &c.; held, that widow was entitled to residue for her life or widowhood, with power to apply any part of the capital for her own benefit, proper maintenance of nephew, &c. during minorities, and that on death or marriage of widow, remainder of capital unapplied was well limited over. *Surman v. Surman*, 5 Mad. 123.

Legacies to A, and "to the heirs of his body;" to B, "to be secured to her and the heirs of her

body;" to T, and "to her issue," are absolute legacies; but legacies to T, and "to her heirs, (say children,)" give S only a life interest. *Crawford v. Trotter*, 4 Mad. 367.

Bequest of personal estate being in trust, to pay the interest to M, the testator's widow, during her life, and on her death "to pay and divide the trust-moneys unto and equally between his daughters H and A, for their own use and benefit absolutely, and in case of the death of them, H and A, or either of them, leaving a child or children living," to apply the interest for the maintenance of the children till twenty-one, then to divide the trust-money among them, expressing that the testator's intention was, that the children of his daughters should be entitled to the same shares to which their mother would be entitled if then living, with an ultimate trust in case of the death of H and A, without leaving issue living at their respective death, or of all their children dying minors; on surviving the tenant for life, H and A become entitled to the absolute interest. *Galland v. Leonard*, 1 Swan, 161.

A testator having brothers and sisters, and several nephews and nieces, and having given a legacy to one of his brothers, directed his residuary estate to be invested in government security, the interest to be paid for the maintenance of M, as long as she lived single and without a child; and at the death the money to come to his brother's and sister's children; M, although married, and having a child, is entitled to the interest for life, not to the principal. *Bird v. Hudson*, 2 Swan, 342.

Bequest of interest of residue of personal estate, after payment of debts, &c. to A for life, and after her decease to C; passes an absolute interest to C, subject to prior life interest of A. *Clough v. Wynne*, 2 Mad. 188.

Testator directs 20,000*l.* which he has in the three per cents. to be firmly fixed there, to remain during the life of his wife for her to receive the interest, and after her death, to be in the same manner firmly fixed on the infant W C, "to be so secured that he may only receive the interest during his life, and after his decease, to the heir male of his body, and so on in succession to the heir at law, male or female;" with a direction that the principal sum is never to be broken into, but the interest only to be received; "his intent being that there should always be the interest to support the name of Cobb as a private gentleman." Though the intention be manifest to give only a life interest to W C, yet there being nothing to shew that the word "heir male" was not used in a strict technical sense: Held, that W C took the absolute interest, the words being such as would create an estate tail of freehold property; secus, if the words "for life" had been added to the words "heir male," in which case the latter words might have been construed to be a mere designation personal: Held, the declaration that the principal stock should not be broken into, not sufficient to turn the heir into a tenant for life, being like an attempt at perpetual restraint of alienation, which in the case of land would not prevent the creation of an estate tail. *Britton v. Twining*, 3 Mer. 176.

Bequest of personal property in trust for A, (a married woman), for her separate use; with a power of disposing by will, (except to particular persons). "And in case she dies without a will, I give all that may remain at her decease to B," followed by a gift of "all the rest and residue" to A, who is appointed executrix. A takes the absolute interest in the property, not a power of disposing merely. And the gift to B, of "all that may remain at her decease," is void for uncertainty. *Bull v. Kingston*, 1 Mer. 314.

**WILL, UNCERTAINTY.**

Devise to devisor's wife of all his real and personal

estates for her life, "after her" to A and his male issue: "for want of male issue after him," to B and his male issue: "for want of male issue," to two others and their male issue. An absolute interest in A as to the personal estate. *Dunn v. Penny*, 19 Ves. 545. S. C. 1 Mer. 20.

Bequest of personal property to a man and his issue is an absolute interest, but a limitation over for want of issue living at his death is good. *Id.* 547.

Devise to A for life, remainder to trustees to preserve contingent remainders; remainder to the heirs of his body, with remainders over for life, and in tail male, declaring that the respective devises to A, &c., "and to their respective heirs male," are on condition of taking the testator's name; the residue of the personal property bequeathed to A, on attaining the age of twenty-four, to go over if he died under twenty-four, without leaving any child or children living at or born in due time after his death. Codicil giving an after purchased leasehold for years, for such estate and estates, and in such manner and form as the real estates are devised by the will, and with, under, and subject to the like limitations, trusts, conditions, &c. A takes an estate tail in the freehold, and the absolute interest in the leasehold estates. *Brouncker v. Bagot*, 19 Ves. 574. S. C. 1 Mer. 271. ESTATE TAIL.

Legacy in trust to be laid out in stock the dividends as they come due to A for life, and after his decease, to pay the principal according to her appointment by will or otherwise, with power to her to purchase with it an annuity, with the approbation of the trustees, but not to sell it. A has an absolute power of disposition, and her will was held a sufficient indication of her intention to take the whole, making a formal appointment or writing unnecessary. *Irwin v. Farrar*, 19 Ves. 86. POWER, EXECUTION OF.

Devise to the use of the testator's second son A for life, without impeachment of waste, and from and after his decease, to the heirs of his body, to take as tenants in common, and not as joint-tenants; and in case of his decease without issue, to the testator's eldest son B, his heirs, &c.; and in case both sons should die before twenty-one, over: Held, an estate tail in the land, and absolute interest in personally bequeathed with it. *Beunitt v. El. Tankerville*, 19 Ves. 170. ESTATE TAIL.

Residuary trust by will to apply the rents and profits for and during his life, and afterwards for the heirs of his body if any, and in default of such issue, over, is an estate tail in the real estate, and the absolute interest in the personal. *Elton v. Eason*, 19 Ves. 73. ESTATE TAIL.

Indefinite bequest of the dividends, gives the absolute property of stock. *Page v. Leapingwell*, 18 Ves. 463.

Testator gave legacies with maintenance to his two illegitimate children, naming them, by C B, and to all the other children he might have by her, 6000*l.* each, and after other bequests, the residue among his said children. By codicil he directed maintenance of another child born since, also interlining his name with those of the other children, in the first part of the will only. That child entitled only to maintenance and a share of the residue, not the legacy of 6000*l.* *Arnold v. Preston*, 18 Ves. 288. BASTARD.

Residuary bequest in trust for the use and benefit of A, and in case of her death, to be equally divided between the children of B. Payment decreed to the executor of A as having taken the absolute interest. *Ominanney v. Bevan*, 18 Ves. 291.

Under a devise of the entire residue, real and personal to A B and C, (children of the testator), and all their younger children, their heirs, executors, &c. for ever; A B and C to receive the yearly interest for their respective lives, of such part thereof as were intended for their respective younger children; and in

case of the death of A B and C, the share of any of them so dying, to go to his or her younger children, and in case of the death of A B and C, or any of them, without leaving younger children, the share of such child so dying, to go to the survivors and their younger children, with powers of appointment amongst their respective younger children, and in case of the death of any of the younger grand children before twenty-one, or days of marriage, the shares of such to go to the brethren of the child so dying. At the time of the will, and of the testator's death, A had one younger child, B several, C none; each had several since: on bill by after-born grandchildren, held: First, that the residue was divisible into three parts, the yearly interest of each to go to A B and C, for their respective lives. Second, that after-born grandchildren were entitled, subject to the power of appointment in their parents. Third, that the share of a younger child under twenty-one, and unmarried, goes over to the brothers and sisters of such child. Fourth, that the share of A B or C, dying without leaving younger children, goes over to the survivors for the same estate as their own original shares. *Crone v. Odell*, 1 Ball & B. 449. 450. 3 Dow. 61. WILL, CONSTRUCTION OF, WHO TAKE; INTEREST, VESTED.

Devise and bequest of real and personal estate in trust, to pay the rents, dividends, &c. to the separate use of a married woman for life, and after her decease to convey, &c., according to her appointment by deed or will, with a limitation over in case of her death; in the life of a testatrix or in default of appointment. Absolute property, notwithstanding the said indication of an intention, that the estate should remain in the trustee for her life, with powers inconsistent in a degree with the supposition of her having or being able to acquire the absolute interest. *Barford v. Street*, 16 Ves. 135.

Devise in strict settlement, with power to the tenants for life to jointure, on condition that two thirds of the portion should, upon such marriage, be settled; one third upon the eldest son of the marriage, and one other third upon the younger children. Upon the intention that the settlement should be conformable to the limitations of the real estate, a trust for the father for life was established, and the interest of the eldest son was not to be divested, except by his death under twenty-one, without issue male. *Buwell v. Crutchley*, 15 Ves. 544.

Trust by will as to the residue of real and personal estate, for a nephew and his heirs, to pay him the interest for life, with power to the trustees, in case they should see it would be for his benefit, to advance him, when it may be in their power, any part of the principal for his advancement in life, that they will not withhold such assistance as they may deem necessary; but, in case no part should be advanced, the residue to be divided among the nephew's issue; with a limitation over, if he should leave no issue. The nephew is entitled, not to the absolute property, but for life only; and no advancement having been made, an inquiry was directed, whether his circumstances required advancement. *Robinson v. Cleator*, 15 Ves. 526. ADVANCEMENT.

Legacy to A, but if the executor, after-named, shall think it more for his advantage to have it placed out, and to pay him the interest for life as they, in their discretion, shall think fit, empowering them accordingly, and directing that, after his decease, the said sum should be divided among his children, and for default of children, over. One of the executors being dead, and the other having renounced, the legacy was held to be absolute in the legatee, who had taken the benefit of an insolvent act. *Keeble v. Burton*, 14 Ves. 434.

Devise after limitation in strict settlement in default of such issue, then to the testator's next heir a

law, is a limitation of the reversion, not a contingent remainder to the heir at the time of failure of issue, as a purchaser. *O'Keefe v. Jones*, 13 Ves. 412. **HEIR AT LAW.**

Bequest of all money, stock, &c. and all other personal estate to the sole use of the testator's wife for life, to be at her full, free, and absolute disposal during her life, without being liable to any account, and after her decease certain articles specified, and 500*l.* according to her appointment by will, in default of appointment to fall into the residue which was disposed of. An interest for life only, with a limited power of disposition. *Bradly v. Westcott*, 13 Ves. 445. **ESTATE FOR LIFE.**

Bequest to A for such purposes as he shall think fit is for his own benefit. *Paice v. Archbp. of Canterbury*, 14 Ves. 370.

Bequest to the testator's wife of 60*l.* a year for life, and the sum of 300*l.* to be disposed of as she thinks proper, to be paid after her death, and a leasehold house and furniture for life; an absolute interest in the 300*l.* transmissible to the administrator; not a mere power of appointment. Will not construed by reference to a settlement, the provisions differing in some respect, though a substitution was intended. *Hixon v. Oliver*, 13 Ves. 108.

Bequest to the testator's wife of 200*l.* per year, being part of the monies I now have in bank security, entirely for her own use and disposal, together with all his household furniture and effects, interests for life being expressly given to other persons, an absolute interest to the wife in bank stock sufficient to produce 200*l.* a year, not a mere annuity for her life. *Rawlings v. Jennings*, 13 Ves. 39.

Legacy to A for life, then to her children for maintenance, and to be equally divided among them on their arriving at twenty-one, followed by a legacy to B, "on the same conditions on his attaining the age of twenty-one." The legacy to B construed in the same manner as the other, viz. for life only, &c. *Longdon v. Simson*, 12 Ves. 295. **ESTATE FOR LIFE.**

Testator devised a copyhold estate to his wife upon trust to sell and invest the money in the funds; and gave and bequeathed the interest and dividends to her use. He also gave and bequeathed to her all his effects whatsoever and wheresoever for her maintenance, upon full trust and confidence in her justice and equity, that at her decease she would make a proper distribution of what effects might be left in money, goods, or otherwise, to his children, accounting what they had already received in money or effects part of their shares. The widow's executrix held entitled to the produce of the copyhold estate for life only, with a resulting trust as to the capital for the heir. The widow entitled to the absolute interest in the personal estate. *Wilson v. Major*, 11 Ves. 205. **TRUST, RESULTING; HEIR AT LAW.**

Legacy of stock in trust for the use, exclusive right, and property of A, but should she happen to die, then in that case, among her children; another legacy of stock to A, to be paid her as soon as possible, or in the event of her death, among her children; another legacy of stock to B, and in case of her death, among her children; all these legacies held absolute in the respective mothers. *Webster v. Hall*, 8 Ves. 410.

Devise to A, an infant, for life, and his first and other sons in strict settlement, with remainders for similar estates; the will farther directed, "during the minority of the A family," an accumulation of the rents to be laid out in a purchase, until the minor arrives at the full age of twenty-five years," and then "the heir to take full possession of this estate." A being residuary legatee, is entitled absolutely to the accumulation. *Ringley v. Broadhead*, 8 Ves. 415.

Bequest to two persons or their children, held to

give children an interest by way of substitution only: not concurrent. *Crooke v. De l'andes*, 9 Ves. 197.

Investment of stock directed in trust to pay the dividends to testator's son for life, and after his death to transfer part of the capital according to his appointment, gives an interest for life only, with a power. *Nannock v. Horton*, 7 Ves. 391.

General residuary bequest, including a leasehold farm, with the stock, to be converted into money, as soon as conveniently, may be upon trust to pay the interest, &c. for life, and as to the capital for the children. The stock considerably increased between the death in April and the sale at Michaelmas, it was decreed that the conversion was in a reasonable time, and the party entitled for life should have interest from the conversion, and as to the premises, that from a defect of title could not be sold, that being for the interest of all that they should not be sold, a value should be set upon them, to carry interest at 4 per cent. from the death. *Gibson v. Bott*, 7 Ves. 89.

**ACCRETION OF FUND; INTEREST WHEN PAYABLE.**

Bequest of annuity of 200*l.* for use of A and her children, to be paid out of general effects, until it is convenient to executors to invest 5000*l.* in funds, in lieu thereof, for her and their use, and to longest liver, subject to an equal division of the interest while more than one alive: held an annuity, and not an absolute legacy. *Innes v. Mitchell*, 6 Ves. 464. *Aff'd* 9 Ves. 212.

Testator gave to his wife the third part of all his property, that should become due to him after his decease; then, after giving some legacies, he gave all the residue of his estate, in general words, subject to the payment of all his debts, funeral expences, and legacies, upon trust to collect the same. The wife entitled to a third of the personal estate, subject to the debts, but not to the legacies. *Reed v. Addington*, 4 Ves. 575. 576.

Testator gave certain leasehold houses in trust for A, absolutely for her separate use, and other leasehold houses in trust for B for her separate use, for her life, and after her decease for her children; if none, to fall into the residue, and he gave the residue in trust for A and B, to be divided between them, share and share alike, and to be paid and applied in like manner, for their use and benefit, as the rents and profits of the leasehold premises herein-before settled upon them, and their receipts to be a sufficient discharge; the reference in the residuary clause is not to the interests of A and B in the houses, but to the provision that they shall take for their separate use; therefore, they take the residue absolutely. *Stanley v. Baker*, 4 Ves. 732.

**RESIDUE.**

Testator gave the interest and produce of the residue to his two sisters, for their lives, and after their decease, the principal to be paid to their children, share and share alike, but whichever died before the other, then the share to be paid to her to be paid to her children in equal proportions; but if she should leave no children, then the interest and produce to be paid to the survivor for her life, as aforesaid; one sister died without leaving children, the survivor is entitled to the interest for life, and the principal is vested in all her children. *Taylor v. Langford*, 3 Ves. 117.

**INTEREST VESTED.**

A devised to his wife the dividends of 4000*l.* bank stock for life, and on her decease to be transferred, and the produce thereof, 500*l.* he gave to the plaintiff, the other to be divided among the defendants; the plaintiff is entitled only to 500*l.* not to 500*l.* stock. *Longdale v. Bovey*, 2 Anst. 570.

Testator devised a freehold estate to his wife for her life, and then directed that she should dispose of the same amongst the testator's children, by her at her decease as she should think proper. The wife made no disposition of the estate. The children took no in-



terest in the estate under the will. *Crossling v. Crossling*, 2 Cox. 396. POWER, EXECUTION OF.

Testator gave the interest of the four per cent. bank annuities then standing in his name, together with the interest of a sum of money, then at his banker's, which he directed to be invested in the same stock, to his wife, with a power of disposing of one-third thereof, after her decease, "And as to the rest and residue of his estate," after payment of the said bequest to his wife, viz. two-thirds of the property he should die possessed of, he gave the same as follows: First, to the children of A 60*l.* of the four per cent. consols, also to the eldest of such children 30*l.* per annum for life, and to his lawful heir payable out of the interest. He then made a similar bequest in favour of the children of B, and he appointed his second wife and C to be executors of his will, and declared his intention "if the residue of his said property after payment of the children of B was not sufficient to pay the specified annuities of 30*l.* the residue should be equally divided as above specified." The money at his banker's having been invested in the four per cents., the whole of that sum was 5306*l.* Held, first, that the children of A and B respectively were entitled only to 60*l.* stock, and that the residue of the fund after satisfying the two sums of 60*l.* and the two annuities of 30*l.* was undisposed of; 2dly, that the testator leaving by his will professed to dispose of the whole of the property, although (according to the aforesaid construction he had not in fact done so), yet this was not sufficient to exclude the executors from taking beneficially as such; and thirdly, that the interest given to the wife in one-third, or the residue, did not prevent her taking her share of the remaining two-thirds under the statute of distributions. *Oldham v. Carleton*, 2 Cox. 399.

Bequest to the use and behoof of A, and in case of her decease to the use and behoof of her children, share and share alike: Held, a life interest only in A. The capital to her children after her decease. *Ld. Douglas v. Chalmer*, 2 Ves. J. 509.

Bond to pay an annuity till a legacy recited to have been bequeathed by the last will of obligor to obligee, should be paid. By a previous will he had given a legacy; but that was revoked by a subsequent will, and a les legacy given, payable six months after testator's death, "over and above the annuity which I have secured to him for his life." The annuity and bond were assigned by the obligee as some provision for his mother "to be received by her during the life of the obligors fully and beneficially, as it could have been by the obligee." The bond and assignment were put into the possession of the testator, and continued so till his death. The legatee is entitled to the legacy with interest, if not paid at the time; and also to the annuity for his life in trust for his mother. *Crabbe v. Murray*, 1 Ves. J. 555.

Where money is given to be laid out in land for a place of retirement for testator's sister, to be for ever entailed on her issue, the husband of one of the daughter's of the sister entitled as tenant by the curtesy to one-third. *Dixon v. Hay*, 3 Bro. C. C. 404. HUSB. & WIFE; TENANT BY CURTESY.

Testator devised, that in case of failure of issue descending from himself and his wife, a trustee and his heirs should stand seized of freehold lands, for the use and benefit of W and his children, share and share alike, at his disposal. B W died in testator's lifetime: Held, that the children of B W took the entire interest in the lands as tenants in common. *Hayes v. Ward*, 2 Ridg. P. C. 85.

Interest of a son given to A for life at his death, to devolve to their of his body with remainder over, vests the principal sum absolutely in A. *Robinson v. Fitzherbert*, 2 B. C. C. 127. INTEREST VESTED.

Testator gave his whole property to his wife, making no express provision for his daughter; "but in case of death happening to his wife, desired his executors to take care of the whole for his daughter." The wife shall have the whole for life only, with remainder absolutely to his daughter. *Wall v. Bushby*, 1 Bro. C. C. 489.

Testator made his will, and gave to his daughter 100*l.* a year, long annuities; he then gave to the plaintiff 50*l.*, long annuities, and to J 50*l.*, long annuities. These legacies shall be 50*l.* a-year annuities. *Stafford v. Horton*, 1 Bro. C. C. 482.

S gave 5000*l.* to purchase stock, the interest to M for life; then to W for life; at his decease to testator's godson S; and at his death to be divided among his brothers equally. S was dead at the time of the will made. A son of W born after testator's death, who would have been a brother of S had he lived, shall take a share in the 5000*l.* The testator also by codicil gave 4000*l.* to L for life, and in case he had no children to revert to W's children. A daughter of W who was alive at the time of the codicil being made, but died before W was held to have a vested interest, transmissible to her representative. *Devisme v. Melo*, 1 Bro. C. C. 537. INTEREST VESTED.

A gift of personality to trustees to pay the interest to A, with a power to dispose of the fund by will as he pleased, and without any other words of limitations are absolute gift of the principal. *Elton v. Sheppard*, 1 Bro. C. C. 532.

Bequest of 3000*l.* to A to dispose of by will. Held an absolute interest in A. *Maskelyne v. Maskelyne*, Ambl. 750.

Legacy to trustees to be put out upon security, the interests to be paid to A, and in case she marry or die, the interest to be paid to B, in trust for her till she come to the age of twenty-one years: Held that B was absolutely entitled to the legacy. *Hale v. Beck*, 2 Eden, 229.

Bequest of personal to one for life, and if he has no heirs, over. Held, he took an absolute interest. *Boden v. Watson*, Ambl. 398. LIMITATION OF PERSONAL.

Testator having by his will made his daughter tenant for life of his general real estates, and of lands to be purchased, both with his personal estates, and with the profits arising from sale of timber, devises his collieries, &c. upon trust to dispose and convey the same in such manner as she, whether sole or covert should direct or appoint, and in default of appointment to apply the money produced by the collieries, after paying the expences, to the same uses as the residue of his personal estate; the testator then after declaring that, though his meaning was to give his daughter the absolute disposal of the said collieries, &c. to prevent the expence and trouble that must attend the management of affairs of such a nature, under the direction of the court of chancery, requested her to direct the money arising therefrom, to be applied in such manner as he had directed the same in default of appointment: Held, that from the general frame and intent of the will, the daughter had not the absolute disposal of this property, but that her interest was confined to a disposition by sale. *Fl. Bute v. Cartwright*, 2 Eden, 88.

Devise of real and personal estate in trust for A, for life, afterwards for B for life, and afterwards for the heirs of his body, afterwards for the other sons of A, successively in tail, taking testator's name then to the daughters in tail, for want of such issue to convey to C in fee; B is entitled to a conveyance in tail of the real, and to the absolute property of the personal; the intent being at least doubtful, the legal operation of the words cannot be taken away, and as to the personal, it vested absolutely by such limitation, whether so intended or not. *Carth v. Baldwin*, 2 Ves. 646.

B by the fourth clause of his will, says, "that my eldest son and his issue, &c. shall, after my death, have all my whole estate, real and personal, except still what I have given to my wife, and shall give by other dispositions to her," &c. : Held that the exception takes out of this residuary devise, only the interest given to the wife, and not the things themselves. The directing the trustees to dispose of all his real and personal estate, does not import to sell, but to manage it to the best advantage for the family. *Sheffield v. Ld. Orrery*, 3 Atk. 287.

T, by will, appointed the interest that should be made of his personal estate, to be paid to his father for life, then to his mother for life; and he gave the residue of his personal estate to his brother and sisters, and to A and B, sisters of his late wife, share and share alike; and then said, "in case of the death of any of them before me, or the survivor of my father and mother, then the share of the deceased to go among the survivors." The brother died in testator's life-time; but after the will was made, the sisters (in the life-time of testator's mother, who survived her husband, and then died) and A and B claimed the residue of the personal estate: Held that they were entitled, as the only surviving legatees, not only to their own original shares, but to all accumulations. *Pain v. Benson*, 3 C. C. 478. See *Wardle v. Churchill*, 3 Bro. C. C. 465.

A gave 1000*l.* among four persons, as tenants in common, and directed if one of them die before twenty-one or marriage, it shall survive to the other; if one dies, and three are living, the share of that one so dying will survive to the other three; but if a second dies, nothing will survive but his original share, for the accruing share was a new legacy, and there is no survivorship. *Id.* 80.

A devise to A, and to such uses as he should appoint, was good before the statute of uses, for when he appoints, the *cestui que trust* is in by the feoffor, and not by the appointor. *Cook v. Duckenfield*, 2 Atk. 568.

Testator devising an estate to persons whom he names trustees for such purposes, as they or the major part of them shall think fit, gives no benefit to them; but is an authority only by appointing a quorum out of them. *Id. ib.* TRUSTEES.

Where testator bequeathed to his wife, all his household goods, furniture, plate, linen, and china in his house at E., or to the said house belonging, and also the said house, gardens, field, and land thereto belonging, so long as she continued his widow and no longer; and he likewise gave her his jewels, &c. Held that the household, goods, furniture, plate, linen, and china, were put under the same restriction as the house itself; but that the jewels, &c. were the wife's absolute property. *Richards v. Baker*, 2 Atk. 321. S. C. 9 Mod. 325.

The putting limiting words in the first or last part of a sentence, makes no difference as to the construction. S. C. *Id.*

A testator may give one thing to a person for life, together with an absolute property in another, unless the latter should be appurtenant to the thing before given. S. C. *Id.*

If estate be given to father for the benefit of his children at twenty-one, and he has no children, the father takes absolutely. *Salt v. Chambers*, 9 Mod. 260.

A devise of 200*l.* on a mortgage passes the principal only. *Roberts v. Ruffin*, 3 Atk. 112.

A gift of 300*l.* upon a bond, does not carry the interest incurred in the testator's lifetime. *Id.* INTERESTING PROFITS.

A devise in express words is not extended by subsequent general ones. *Id.*

Money will not pass by a devise of all goods, and

things of every kind where the devisee has a money legacy at the outset of the will. *Id.* WILL, C. OF, WHAT PASSES.

F by will gave to R legacy of 1000*l.* to be put out at interest till twenty-one, and in case of death before then to go to M his daughter, but if R lived to attain the age of twenty-one, then 500*l.* part of 1000*l.* to go to M, and be paid her when R should arrive at that age. M died before that time. Held M took a vested interest. *Wingfield v. Newton*, 9 Mod. 428. VESTED INTEREST.

If legacy be given to B payable two years after death of testator. B takes a vested interest though he die before that time. *Sheldon v. Sheldon*, 9 Mod. 211. INTEREST, VESTED.

N devises to his wife all his estate, leases and interest in his house in A, and all the goods and furniture therein at the time of his death, and also all his plate, jewels, &c. but desired her at or before her death to give such leases, &c. unto such of his own relations as she should think most deserving. The wife did not give at or before her death the goods in the said house, or her husband's jewels to his relations. Held that the wife only took beneficially during her life, and that so much of the household goods in A, not disposed of by her according to the power given her by the will of N, in case the same remains in specie, or the value thereof, ought to be divided equally among such of the relations as were his next of kin at the time of his death. *Harding v. Glyn*, 1 Atk. 469.

A gives by a codicil to B during her natural life, his house in G with all the household goods found therein at the time of his decease. The word "with" so conjoins the house and goods that the devisee can have no larger interest in the one than in the other. *Lake v. Bennett*, 1 Atk. 470.

A devises several leasehold estates to two trustees in trust if his granddaughter married without their consent to convey the premises to two other trustees in trust for her separate use during her life, and after her death for the use and benefit of her issue. Though she has no children by the first husband whom she married without the consent of the first trustees, she has only a right for her life, for the issue of any husband are provided for by this settlement. *Champion v. Pickers*, 1 Atk. 472. CONDITION OR CONSENT.

A devise of the rents and profits of an estate to the husband for life, without impeachment of waste, shall not only be considered as annual profits, but will empower him to cut timber. *Parridge v. Pawlet*, 1 Atk. 467. WASTE.

I devise 100*l.* per annum to my son A and his wife for their respective lives, 60*l.* whereof is to be paid to the wife for the support of herself and daughter, the remaining 40*l.* to my son. If son dies, the wife shall have the whole 100*l.* per annum. *Cowper v. Scott*, 3 P. W. 121.

A devise that if *cestui que vie* of church lease which the testator had should die, the testator's executors should purchase the premises for the life of J, the testator's kinsman; but if such purchase could not be made, then the surplus of his personal estate, to go to another: whether J takes any interest by the will; *quare*? *Stephens v. Stephen* 2 P. W. 323.

If testator devise lands in trust to his nephew A and niece B, and the children of the said B by her husband, to receive the profits when they come of age, and also bequeaths them money at the age of twenty-one; B having but one child at that time and afterwards makes a codicil confirming those bequests, all the children of B take as tenant in common, and have an immediate vested right in the moiety. *Bateman v. Rouch*, 9 Mod. 104.

A, seised of an estate of 600*l.* per annum, devises 300*l.* per annum to an infant, whose father was his heir at law, and the other 300*l.* per annum he devises to the father for his care in looking after the son's estate till he should come to the age of twenty-one. The father dies, leaving the son six years of age, having, by his will, devised this 300*l.* to his wife, and desired her to save what she could out of it for a portion for his daughter, and appointed her guardian of his son. This 300*l.* per annum does not determine by the father's death, but the wife shall have it till the son arrives to the age of twenty-one. *Anon. Prec. Chan.* 597.

One, having a wife and three daughters, devises 900*l.* to his three daughters equally, payable at their respective ages of twenty-one or marriage, and if all die before their legacies were payable, then the whole to the mother. If two of the daughters die before their shares become due, the surviving daughter is entitled to the whole. *Scott v. Burgeinan*, 2 P. W. 68.

One devises personal estate to his son, and if his son died within age and without issue, then the personal estate to go to the testator's brother. The son shall have the produce of the personal estate, and only the capital, in case of the infant's death, &c., shall go to the brother. *Tissen v. Tissen*, 1 P. W. 50*u*.

F, having an estate which came to her *ex parte materna*, on her marriage conveyed the same to trustees to such uses as she should direct, with remainder to her own right heirs. By will, she directed the estate to be sold, the money to be laid out in the funds, and the trustees to permit the husband to receive the interest for life; then, after the deduction of 3500*l.* to uses which vested in the plaintiff A, and after payment of 1000*l.* to G to pay the residue of the purchase money to the three defendants, H; by codicil, he gave the plaintiff, her husband, a power of appointing the 3500*l.* in case A should marry without his consent. G died, living the testatrix before the codicil made, but F, in the codicil, took no notice thereof. 1st, The 1000*l.* is real, not personal, and shall not go to the executors of G, (though given to her executors), nor to the personal representative of the testatrix, nor yet to the residuary legatee of the purchase money, but to the heir at law *ex parte materna* (the side from which the estate came); 2d, the 3500*l.* is vested in A, and the trustees having laid out a larger sum by 17*l.*, with intent to appropriate, it is well appropriated; and A having married once with her father's consent, his power is gone, and he consenting to give up his life interest, it was decreed to be paid to the trustees on her marriage settlement. *Hillson v. Hammond*, 3 Bro. C. C. 128. WILL. C. OF, WHO TAKE.

A makes a lease to B (his wife's nephew) for twenty-one years, for payment of his debts and legacies, and at the same time by will, taking notice of the said lease, devises the lands, after the expiration of the said lease, to C, his nephew and heir, and makes B executor. A lives twelve years, and pays all his debts himself, and the personal estate was sufficient for the legacies. C brings his bill to have the lease delivered up, the trusts being performed; but dismissed, the reversion only after the expiration of the term being devised to him. *Bushnell v. Parsons*, *Prec. Chan.* 218.

A devised his estate to his wife, she maintaining his four younger children; but if she married, she was to enjoy but one half, and the younger children were to have the remainder. The wife did maintain the children, and did not marry. Held, that she was entitled to the whole estate so devised. *Scogrove v. Eustace*, 3 Bro. P. C. 11.

A devises to his nephew 5*l.* per annum, (without saying to his executors or administrators) to be paid him during his, the testator's, wife's life, whom he

made executrix, on condition that he demeaned himself civilly to her. By his death, the 5*l.* per annum is determined. *Neal v. Hanbury*, *Prec. Chan.* 173.

G devised several legacies, and charged them upon his lands, which he also charged with the payment of his debts, and made L executrix, but did not give her his personal estate in express words, though it was in proof he declared she should have it. *Per cur.* as the lands are expressly charged with the payment of the debts and legacies, L shall have the personal estate exempt, and if she should be sued for any debts, she may be reimbursed out of the lands. *Ly. Gainsborough's case*, 2 Freem. 188.

Devise of 100*l.* to A and B, viz., 50*l.* to A, and 50*l.* to B, payable at such a time, and if either die before the time, then the 100*l.* to the survivor. The whole 100*l.* decreed to the survivor, notwithstanding the severing clause, which holds only in case both live to the time of payment. *Sevelling v. Green*, *Prec. Chan.* 37.

One devises lands to trustees and their heirs, in trust to receive the rents until his son shall come to twenty-one, and to pay one-third thereof to the testator's wife in lieu of dower, and out of the other two-thirds to raise portions for his daughters, and devises all to his son William, when twenty-one, in tail, remainder to B and C. The wife dies. The son dies before twenty-one, and without issue. Resolved, the wife's interest determined by her death, and her third shall not go to the executors until her son would have attained twenty-one: resolved, the remainder over to A, B, and C, are good, though the son died before twenty-one. resolved, the daughter's portion being raised, the residue of the term shall go to the heir as an interest undisposed of by the will; but it will vest in the heir as a chattel, and, on his death, go to his executor until testator's son should have come to twenty-one. *Level v. Needham*, 2 Vern. 138.

One devises to two of his sisters 400*l.* a-piece, and to his third sister what his executors should think fit. The court decreed the third sister should have 400*l.* also, and be made equal to her two other sisters, if the estate would hold out. *Wareham v. Brown*, 2 Vern. 153.

Devise of land to A for sixty years, if he so long live, and, from and after the death of A, to his eldest son B in tail. Whether this be a vested or contingent remainder? *Beverley v. Beverley*, 2 Vern. 131.

Legacies given to A, B, and C, and the wife of C, equally to be divided amongst them. C and his wife shall have but one-third. *Bricker v. Whitley*, 1 Vern. 233.

A, having debts due to him by bond, and being possessed of a term for years, gave one moiety of his personal estate to his wife, and several legacies to other persons, and the residue to S. The wife shall have one complete moiety, if the other is sufficient to pay the debts, and she shall have a moiety of the lease. *Lee v. Hale*, 1 Ch. Ca. 16. 2 Freem. 157.

#### 6. Who take, and are capable of taking.

See also GRANDCHILDREN.—POSTHUMOUS CHILDREN.

See also, as to this subdivision, 34 and 35 Hen. 8. c. 5. s. 4. Chitt. Stat. 1122. and note (h) there.

Testator gave a copyhold estate to trustees for his wife, until the leases to which it was subject expired, and directed that then it should be sold, and the proceeds invested for the benefit of his children, but if his wife should die before the leases expired, that it should be immediately sold, and the proceeds disposed of as before. The wife survived the children,

but died before the leases expired. The surviving trustee, who claimed the estate for his own benefit, was decreed to surrender it to the administrator of the children, but without prejudice to the rights of the customary heirs of either the testator or the children, if any such heirs were in existence. *Burton v. Holtall*, 2 Sim. 24.

By Mr. and Mrs. P's marriage settlement, estates in K, and other counties, the lady's property, were settled on her for life, remainder to Mr. P for life, if he should so appoint, remainder to their children, remainder as Mrs. P, by deed, under her hand and seal attested, &c. or by her will signed and published, in the presence of three witnesses should appoint; remainder to Mrs. P in fee, with a power of sale, and directions for reinvesting the proceeds in other estates, and in the usual security in the interim, and that upon the reinvestment, the uses of the settlement should cease as to the sold estates. Mrs. P, by deed, not attested as to her signature (at the foot of which she had written without date, directions for her burial,) appointed the estates after her decease, to her husband for life, and in default of children, to him in fee, and she revoked a prior deed of appointment. The estates were afterwards sold and the proceeds invested in securities, but were never reinvested in lands, although their liability to be so was recognized by the parties. There was no issue of the marriage. Mrs. P survived her husband, and applied part of the proceeds to her own use. At her death she was seised (exclusive of the settled property,) of a mansion house, buildings, &c. opposite to it, let to tenants, and was possessed of some personal estate, no part of which was in the name of a trustee. She devised the mansion house, with its appurtenances, all other her real estates to C, and bequeathed all her personal estate, whether in the name of herself or of any trustee, subject expressly to her debts and legacies to other persons. After her death, the deed of appointment was found in her house, with the title deeds of the mansion house, but the revoked deeds could not be found. Her debts and legacies greatly exceeded her assets: held, that the former deed was not a testamentary instrument, and that Mrs. P's receiving part of the proceeds of the settled estate was not an entry or claim within the 54 G. 3. c. 168, but that the statute remedied the defects of attestation; that the remaining proceeds remained as real estate, but did not pass either to the devisee, or the residuary legatees in the will; that Mr. P's co-heirs in gavelkind were not entitled to any part, but that the whole belonged to his heir at law, under the appointment. *Hougham v. Sandys*, 2 Sim. 95. SETTLEMENT C. OF.

A testator directs the residue of his property to be divided into eight equal shares, and disposed of "as follows among the children of B;" he then gives two shares to each of the two daughters, and one share to each of the three sons of A B, making together only seven shares: held, that the whole residue is devisable amongst the children of A B, in seven parts, each daughter taking two of those seventh parts, and each son one. *Berkley v. Pulling*, 1 Russ. 496.

A testator bequeaths to "his only son, 60l. a year for ever, also to provide for the two daughters of H F, and the remainder of his property to the two children of S A:" held that under these words the two daughters of H F, do not take any benefit. *Abraham v. Alman*, 1 Russ. 509.

Under a bequest of a residuary fund to the testator's first and second cousins, and the children of his kinsman, George Charge, which children were first cousins of the testator, twice removed, all persons related to the testator in the degree of second cousins are entitled. *Charge v. Goodger*, 3 Russ. 140.

Bequest to the children of A, described spinster,

and nothing on the face of the will, shewing that illegitimate children were intended. Inquiry whether she left illegitimate children refused. *Osmond v. Tindall*, 5 Ves. 584. BASTARD; INQUIRY.

Legacy of 600l. to F, and at her death to two daughters in equal shares, and at their death to their children; one daughter having died without issue: held, that children of other, did not take her share. *Tuniere v. Pearkes*, 2 S. & S. 383.

Bequest to testatrix's daughter for life, and after her death as she should appoint, and in default of appointment to testatrix's next of kin, to be considered as a vested interest from testatrix's death, except as to any after-born child of daughter. The daughter having died without any child, and without executing any appointment; held that the persons who would be next of kin at testatrix's death, if her daughter had then been without children, were entitled. *Bird v. Wood*, 2 S. & S. 400.

Testator bequeathed to his wife the use of his furniture &c. which he desired might be distributed amongst his children, when the youngest attained twenty-one, at her and his executor's discretion, such part to be reserved for her use as might be deemed reasonable, and at her death to be distributed as above directed: held that those children who died before the youngest attained the age of twenty-one, did not take vested interest. *Ford v. Rawlins*, 1 S. & S. 328. VESTED INTERESTS.

A testator bequeaths the residuo of his property to his nephews and nieces on their respectively attaining twenty-five, with a direction that his trustees shall, in the mean time, apply the profits to their maintenance; but in case of the death of them unmarried, and without issue, he gives the shares of those so dying unto the survivors equally, to be paid at the same time with their original shares; first a nephew, and then a niece die, under twenty-five, unmarried, and without issue; the whole residuo is devisable among the survivors who attain the specified age, and the niece does not, upon the death of the nephew, acquire, under the clause of survivorship, a vested interest in her proportional part of his share. *Barker v. Lee*, 1 Turn. & R. 413.

Testatrix bequeathed one moiety of the residue of her personal estate to her daughter H for her separate use during the joint lives of her and her husband, and if she survived, to her absolutely; if not, to her children who should attain twenty-one; and she bequeathed the other moiety for the benefit of her daughter M and her children, with bequest over if she died without children, to H and her children in like manner as the first moiety. By codicil she bequeathed the whole residue, if both her daughters died without leaving a child who should attain twenty-one, to A. Both the daughters died without issue, but H survived her husband: held, nevertheless, that A was entitled to the residue. *Hopkins v. Towle*, 1 S. & S. 377.

A testator gives a sum of stock to trustees, which they are to stand possessed of upon trust for D G until he shall attain the age of twenty-five years, and are to transfer to him when they, in their discretion, shall think proper; he likewise directs that, if D G dies without lawful issue before receiving the bequest, the stock shall sink into the residue of his the testator's estate; and he bequeaths the residue to W F: while D G is under twenty-five years of age, and has not had the stock transferred to him, neither he nor W F is entitled to receive the accruing dividends; but these dividends must accumulate to accompany the capital in its final destination. *Gordon v. Rutherford*, 1 Turn. & R. 373. INTERMEDIATE PROFIT.

Legacy in trust for the children of A to be equally divided between them with benefit of survivorship, and a provision for maintenance out of the interest:

A having no children at the death of the testator, held, that afterborn children would take, and that the interest, till the birth of a child, fell into the residue. *Harris v. Lloyd*, 1 Turn. & R. 310. **POSTHUMOUS CHILD; INTERMEDIATE PROFITS.**

Illegitimate children not entitled under the description of children in a will, the intention not being sufficiently apparent upon the face of the will. *Id.* **BASTARD.**

Testator directed interest of sum of money to be paid to his sisters during their lives in equal proportions; and at their death gave to their children the inheritance their mothers derived from his estate, and desired that his sisters should be residuary legatees in proportions already mentioned: Held, that sisters were entitled absolutely to residue, and that their children took no interest. *Grassick v. Drummond*, 1 S. & S. 517.

Testator after giving some legacies, directs payment to be made to his devisees as under, and then mentions certain persons and the sums to be paid them, and gives residue to all his devisees above mentioned in proportion to their legacies. Every one of legatees is entitled to share of residue. *Cope v. Banning*, 1 S. & S. 534.

Gift to such of the children of A, B, and C as should be living at the testatrix's death, or the issue of such of them as should be married, in equal shares. The word "or" construed to mean "and," and the children and grandchildren held to be equally entitled. *Horridge v. Ferguson*, 1 Jac. 583.

Under an executory devise of a residue of real and personal estate, the intermediate rents and profits of the real estates pass as well as the interest of the personality. *Genery v. Fitzgerulld*, 1 Jac. 468. **EXECUTORY DEVISE; INTERMEDIATE PROFITS.**

After an annuity for life to father of part of dividends, and remainder as to whole dividends subject to father's annuity; gift to children when they attained twenty-one, is gift to all living when eldest attains twenty-one. *Curtis v. Curtis*, 6 Mad. 14.

Bequest to A for life, and after death to divide it in portions for children as she should please. And in case of A's death before testator, to be divided equally. Held, children living at A's death were only objects of power, and as such entitled to share lapsed by death of a child to whom it had been appointed. *Kennedy v. Kingston*, 2 J. & W. 431. **LAPSED LEGACY.**

An illegitimate child may take by particular description before its birth. *Darson v. Darson*, 6 Mad. 292. **BASTARD.**

Testator gives the residue, to be divided among his sister's death, amongst his nephews and nieces, and by a codicil gives to a great-niece, whom he calls his niece, 500*l.* over and above her share after the decease of his sister, in the body of his will treated of more at large: Held, that none of the great-nephews or nieces were entitled to share in the residue. *Shelley v. Bryer*, 1 Jac. 206.

Bequest to A for life, remainder to his children; but if he shall die without children living at his death, to B for life; remainder to her children; and if she shall die without children living at her death, then to her executors, administrators and assigns. By a codicil, the same is given over "after the decease of the before-mentioned persons in my will, A and his heirs for ever, and B and her heirs for ever." The meaning of the word "heirs" in the codicil not to be confined to children from comparison with the will, and the bequest over, therefore, too remote. *Griffiths v. Grieve*, 1 Jac. & W. 31. **LIMIT. OVER TOO REMOTE.**

Gift of real and personal estate, after a life interest to the testator's widow, to trustees, to be converted into money, and divided among several persons named, and the survivor or survivors of them. Those

only are entitled who survive the widow. *Haghton v. Whitgreave*, 1 Jac. & W. 146.

Devise of real estate, to be sold after the death of tenant for life, and bequest of specific sums out of the produce to several grandchildren and a child, and of the residue to other children, to be respectively paid at twenty-one or marriage. "But if any of my said children or grandchildren should happen to die before the time of such legacy becoming due and payable, then I give and bequeath the share or part of such child or children or grandchildren so dying, unto and among those that shall be then living, share and share alike. Two of the children died before the testator; their shares are to be divided among the other children and grandchildren equally. Another child and a grandchild having survived the testator and attained twenty-one, died before the tenant for life; their shares transmissible to their representatives: no implication that the survivorship was to take place amongst the children and grandchildren distinctly from the inequality of legacies, or from the bequest to each class being made by distinct clauses. *Walker v. Main*, 1 Jac. & W. 1. **SERVIVORSHIP.**

The word "relations," construed by reference to the statute of distribution. *Brandon v. Brandon*, 3 Swan. 319. **DISTRIBUTION.**

Bequest of 300*l.* stock to W, the testator's son by a first marriage (his second wife and a son by her being living), the interest to be appropriated to his maintenance, under the direction of trustees, till he attained twenty-four, and of the residue of the testator's personal estate (the interest being given to his wife during her widowhood), after her decease or marriage, "unto any child or children I may have by my wife, to be equally divided between them that attain the age of twenty-one years, the survivor of my children to possess what is here bequeathed to the other, but should not either of my children attain the age of twenty-one years, or live to possess what is here bequeathed to them, I then bequeath to the children of the testator's sister the 300*l.* stock;" the son by the second marriage dying in the life of the testator, and there being no other issue of that marriage, W is entitled to the stock and to the residue. *Hill v. Smith*, 1 Swan. 195.

Devise of estate to A, subject to payment of 500*l.* to M, with interest on her marriage or attaining twenty-one; but if she dies before twenty-one or marriage, and there be no children born of B, then the 500*l.* to revert to A: M died before twenty-one, unmarried: held, that children borne of B, after death of M, entitled. *Hutchinson v. Jones*, 2 Mad. 124.

Legacy "to the children of the late C K who shall be living at the testator's decease; C K being dead at the date of the will, leaving illegitimate children (of whom three were living at the death of the testator), and not having, at the date of the will, nor having ever had, any legitimate children, the three illegitimate children were held to be entitled. *Id.* *Woodhouselee v. Dalrymple*, 2 Mer. 419. **BASTARDS.**

Children, by implication from will and codicil, the latter saying, that in case tenant for life had no children, gift over, held entitled to legacy. *Exp. Rogers*, 2 Mad. 449.

Bequest to executors of 4000*l.* in trust to pay one half of the interest to A, and the other half to B, during their lives; "and as their lives drop and expire, I direct that the principal and interest be reserved and equally divided among their children, when they shall severally attain twenty-one." A died without issue; the entire principal vests in the children of B, on their severally attaining twenty-one. *Smith v. Streetfield*, 1 Mer. 358.

Under a bequest by unmarried man "to my children, &c. each;" parol evidence allowed to show

who testator considered in character of children, and they having obtained a name by reputation admitted to take as a class, though illegitimate and not named in will. *Beachcroft v. Beachcroft*, 1 Mad. 430. **BASTARD**; **EVID.**

Bequest "to each and every the child and children of my brother and sisters which shall be living at the time of my death; but, if any child or children of my said brother and sisters shall happen to die in my lifetime, and leave issue, then the legacy or legacies hereby intended for such child or children so dying, shall be for his, her, or their issue." The issue take only by substitution; therefore, only the issue of such children as were living at the date of the will, are entitled in the event of the death of their respective parents during the testator's lifetime. *Christopherson v. Naylor*, 1 Mer. 320.

Gift of residue "to be divided among legatees in proportion to the legacies bequeathed by this my will;" restricted, upon construction of the whole will, to general pecuniary legatees, in exclusion of legacies payable out of a specific fund *in futuro*, and of legacies given by codicil. *Henwood v. Overend*, 1 Mer. 23.

The word "relations or near relations," from their indefinite extent confined to the next of kin under the statute of distributions. *Smith v. Campbell*, 19 Ves. 403.

Testator devised freehold fee-simple estates in possession to all and every the child and children of his daughter, S M, for life: and after the decease of such child and children, to the lawful issue of such child and children to hold to such issue, his, her, and their heirs, as tenants in common; and in default of such issue, over to other persons; S M had nine children, four born in the testator's life, and five after his decease: held, that all the nine took under this devise as tenants in common in tail, with cross remainders. *Mogg v. Mogg*, 1 Mer. 651.

Testator devised freehold fee-simple estates to trustees during the life of his son, J, upon certain trusts, remainder to his son's children and their issue, in the same words as in the above devise to his daughter's children, and in default of such issues, to all and every the child and children of his daughter S, &c. (in the same words as before): Held that only six of the nine children of S, took under this devise: namely, five who were born, and one who was *en ventre* at the death of J. *Id.* 655. **INFANT EN VENTRE SA MERE.**

Testator devised freehold fee-simple estates to his widow for life, and after her decease, to the same uses as in the devise last stated: Held that all the nine children of S took under this devise, all being born in the widow's life. *Id. ib.*

Legacy "to my namesake Thomas, the second son of my brother John," there being no son named Thomas, established in the favour of the second son William, as an erroneous description, not a condition. *Stockdale v. Bushby*, 19 Ves. 381. S. C. Coop. 229. **MISTAKE.**

Under a devise in trust to settle on the devisors' children in equal shares and proportions undivided for and during their respective lives, with remainder to their issue, severally and respectively in tail general, with cross remainders over, there being two daughters, cross remainders, not only among the several children of each, but also as between the two families. *Horne v. Barton*, 19 Ves. 398. S. C. Coop. 257.

Implication of cross-remainders under a direction in default of such issue to go over. *Id. ib.*

Upon the construction of a will, the gift of the residue after a life interest to the testator's next of kin, held to mean next of kin at the death of the wife, and not those living at the testator's death, they hav-

ing express bequests under the will. *Miller v. Eaton*, Coop. 272.

Bequest by a testator in India "to my nearest surviving relations in my native country, Ireland," confined to brothers and sisters living in Ireland or elsewhere: the addition of a mistaken description, viz. of the place of residence, not vitiating a gift to persons otherwise sufficiently described. Nephews and nieces included. *Smith v. Campbell*, 19 Ves. 400.

Residuary disposition to the children of the testator's brothers and sisters as aforesaid, (named previously as legatees) who shall be living at his decease, at twenty-five, equally; but in case of the decease of any of the aforesaid brothers and sisters having issue, then the child or children to have the same share as if the parent had been living at his decease, with maintenance and survivorship in case of the death of any unmarried and without issue. The first clear designation of nephews and nieces, living at his death, as the sole objects of his bounty, not altered or controuled by the subsequent designation of the brothers and sisters, admitting questions of doubtful construction, as to after-born children. *Barker v. Lea*, 3 V. & B. 113.

Devise of estate to A for life, then to testator's nephews, &c. and to the children of them that should be then dead. Issue of nephews who died in testator's lifetime, not entitled. *Thornhill v. Thornhill*, 4 Mad. 377.

Where a testator interlined his will to except the plaintiff, who was named a legatee under it with others, and also made a codicil expressly excluding him, but afterwards obliterated the codicil without doing the same with the interlineation of the will, the court admitted the plaintiff to an equal interest with the other parties taking under the will, considering the inference as certain that the testator so intended. *Uttersen v. Uttersen*, Coop. 60. S. C. 3 Ves. & B. 122. **WILL, REVOC. OF.**

Construction of a will and settlement, as not comprehending great grandchildren under the description of children and grandchildren. *El. Orford v. Churchill*, 3 V. & B. 50.

Under a devise by a married man, having no legitimate children, "to the children which I may have by A, and living at my decease;" natural children, who had acquired the reputation of being his children by her before the date of the will, entitled, as upon the whole will intended, and sufficiently described; rejecting as a description of the devisees, passages in a written book, unattested, of which probate was admitted under a reference in the will to "the observations and directions," which "I shall leave in a written book;" whether, if there were also legitimate children by the same mother, they could take together under the same description, and whether future illegitimate children can take under any description in a will, *qu?* *Wilkinson v. Adam*, 1 V. & B. 422. Affd. 12 Pri. 470. **BASTARD.**

Illegitimate child cannot take by the description of child of his reputed father, until he has acquired the reputation of being such child. *Id.* 452. *Id.*

"Child," &c. *prima facie*, means legitimate. *Id.* 462.

Although the operation of a bequest of a residue by a father to his two children, to be equally divided between them, and if they should die without issue, or before twenty-one, to go over, would be to give vested legacies to be devolved only on the deaths of both children under twenty-one, and without issue; and the representative of one of the children dying under twenty-one, and without issue, would be entitled, till the happening of that event; yet the intention that the surviving child should take the whole, sufficiently appearing on the will, controls the effect

of the bequest to the deceased child, and the survivor held to be entitled to the residue, subject to the event on which the whole was given over. *Beauman v. Stock; Blake v. Foster*, 2 Ball & B. 406.

Legacy to the three children of A, the sum of 600*l.* each; four children, all born before the date of the will, entitled to 600*l.* *Carvey v. Hibbert*, 19 Ves. 125.

Under a devise of the entire residue, real and personal to A, B, and C, (children of the testator,) and all their younger children, their heirs, executor, &c. for ever; A, B, and C to receive the yearly interest for their respective lives of such part thereof as were intended for their respective younger children; and in case of the death of A, B, and C, the share of any of them so dying, to go to his or her younger children; and in case of the death of A, B, and C, or any of them, without leaving younger children, the share of such child so dying, to go to the survivor and their younger children, with power of appointment amongst their respective younger children; and in case of the death of any of the younger grand-children before twenty-one or days of marriage, the shares of such to go to the brethren of the child so dying. At the time of the will, and of the testator's death, A had one younger child; B, several; C, none; each had several since: on bill by after-born grand-children, held, 1st. That the residue was divisible into three parts, the yearly interest of each to go to A, B, and C, for their respective lives; 2dly. That after-born grand-children were entitled subject to the power of appointment to their parents; 3dly. That the share of a younger child dying under twenty-one and unmarried, goes over to the brothers and sisters of such child; 4thly. That the share of A, B, and C, dying without leaving younger children, goes over to the survivors for the same estate as their own original shares; 5thly. That a younger grand-child dying in the lifetime of its parent, under twenty-one and unmarried, had not a vested interest in its share, transmissible to its representatives. *Croft v. Odell*, 1 Ball & B. 449, 450. Affd. 3 Dow, 61. WILL., C. OF, WHAT INTEREST; INTEREST VESTED.

Proviso that if any of the tenants for life, in a devise and executory trust to convey in strict settlement, shall become possessed of the family estate, the devise or limitation directed, shall thereupon cease and become void and not take effect; and the persons next in remainder under the said limitations or directions, thereupon become entitled to the possession. *Stanley v. Stanley*, 16 Ves. 491.

Devise in remainder to the said T B for life, and after his decease to the said T B, the son of my nephew S, and his heirs; a nephew of the same name T B, not being before mentioned, and in every other instance the devisee being pointed out by reference and particular description of the degree of relationship, the great nephew held to be intended in both limitations. *Chambers v. Brailsford*, 18 Ves. 368. Affd. 19 Ves. 652.

Bequest of accumulated fund from real and personal estate, when the legatee attains twenty-one, upon his death, under that age a resulting trust for the respective representatives. *Id. ib.*

Rents and profits under a trust to accumulate, being in the event not disposed of, belong to the heir at law. *Stanley v. Stanley*, 16 Ves. 491. INTERMEDIATE PROFITS; HEIR AT LAW.

Residuary bequest cancelled by striking through with a pencil all the general description, with notes in pencil in the margin, indicating alteration, and a different disposition of certain articles, a resulting trust for the next of kin. *Mence v. Mence*, 18 Ves. 348. NEXT OF KIN; TRUST RESULTING.

Word "relations" in a will, means "next of kin." Bequest of residue to testator's wife for life, with a

direction to dispose of the residue amongst his relations, in such manner as she should think fit; appointment to relations, not being next of kin, void, and the residue decreed to be distributed amongst those who were next of kin to the testator at the time of his death. *Pope v. Whitcombe*, 3 Mer. 689. RE-LATIONS.

A bequest to Roman Catholic bishops and their successors, is void, no such characters being known to the laws of Ireland; but where they are particularly named, though so described, the bequest is good, for their joint lives, subject to the controul of the court of chancery. *Att. Gen. v. Power*, 1 Ball & B. 145. ROMAN CATHOLIC BISHOP.

Trust by will to pay the income to the testator's wife for life, enjoining her to co-operate with his trustees in carrying his wishes into execution, and directing her, with the advice and assistance of his trustees, to lay out one moiety in promoting charitable purposes, as well of a public as a private nature, and more especially in relieving such distressed persons, either the widow or children of poor clergymen or otherwise, as his wife shall judge most worthy and deserving objects, giving a preference always to poor relations. The object is, charity in general with a preference, but not confined to poor relations; the distribution to be at the discretion of the wife, with the advice and assistance, not subject to the controul of, the trustees. *Waldo v. Caley*, 16 Ves. 206.

Testator gave all his estate and effects to two persons, their heirs, executors, &c. upon trust in the first place to pay, and charged and chargeable with, all his debts and funeral expences, and the legacies after given. Those persons, whether they could claim in their individual characters or not, being afterwards appointed executors held entitled to the residue undisposed of, (including a legacy to a charity, void by the stat. 9 G. 2. c. 36.), for their own benefit, against the claim of the next of kin; the whole property being personal. *Dawson v. Clark*, 15 Ves. 409. Affd. 18 Ves. 247. RESIDUE; EXORS. BENEFICIALLY INTERESTED.

Devise to the devisor's sister A then unmarried, for life, with remainder to her first and other sons in tail male; to her daughters in tail, as tenants in common; to his sister B then married, for life, and to her first and other sons in tail; remainder to the first and nearest of his kindred, being male and of his name and blood, that shall be living at the determination of the estates before devised, and to the heirs of his body: A person claiming under the last limitation must be of the name, as well as the blood; and the qualification as to the name, is not satisfied by having the name, taken by the King's licence, previous to the determination of the preceding estates. *Leigh v. Leigh*, 15 Ves. 92.

Trust of real and personal estate by will, to apply rents and dividends for maintenance of all and every the children of the testator's daughters (except the eldest son), share and share alike; until the youngest of his said grandchildren should attain twenty-one; and in case of the death of any of his said grandchildren, before the youngest shall be twenty-one, having a child or children, such child, &c. to receive the parent's share; and when the youngest of his said grandchildren living shall have attained twenty-one, one equal share of the capital, real and personal, to the use of such of his said grandchildren as shall then be living, and the children of his said grandchildren in case of the death of any, leaving such issue, to have the share the parent would have been entitled to, if living at the time of distribution; and to the heirs, executors, &c. of such his said grandchildren and great grandchildren. The division is to be among all the grandchildren living, when the youngest attains twenty-one, including those born since the testator's death,

and the children of those deceased; but the representatives of grandchildren dead, not leaving children, are not entitled. *Hughes v. Hughes*, 14 Ves. 286. S. C. 3 Bro. C. C. 352. 434.

Bequest to the children of A who should be living at the testator's decease, equally with survivorship in case of death without leaving issue; if leaving issue, the issue to have the parent's share. The survivorship cannot be restrained to the period of the testator's death, as upon the construction the clause would be repugnant. *Shergold v. Bome*, 13 Ves. 370. SURVIVORSHIP.

Bequest of the dividends of stock, in trust for the testator's nephew, son of his youngest brother B for life; unless under will he should become entitled to the testator's real estate in America, devised to B and his first and other sons in strict settlement, in remainder after similar estates to the testator's next brother A, and his issue male; and in that event, and so from time to time afterwards, or if any future possessor should bar the entail by recovery or other means, as to the capital for such person as shall be heir apparent, or expectant next to the person then in possession, or if he should have joined in barring the entail, for the person next in succession to him. After the death of A, the title of his eldest son to the estate, being in consequence of the American revolution confiscated in 1779, upon the death of the son of B, the second son of A, his eldest son having no issue, was held entitled to the dividends of the stock, while his elder brother should have no issue male. *Penn v. Barclay*, 14 Ves. 122.

Under a general bequest to servants, a coachman (provided with the carriage and horses by a job-master, according to the usual course of that business,) not entitled. *Chilcot v. Bromley*, 12 Ves. 114.

Under a residuary bequest to the next of kin in equal degree, brothers entitled, excluding nephews and nieces. *Wimbles v. Pitcher*, 12 Ves. 433.

Construction of a will, giving the real and personal estate to the testator's son, his heirs, executors, &c., when he shall attain twenty-one, or marry before that age with consent; in case of his marriage under that age without consent, the real estate to be conveyed to him and his children in strict settlement; remainder to the daughters, and a subsequent limitation of the personal estate to the daughters, in case the son should not attain twenty-one, or marry before that age with consent: Held, that the son having married under twenty-one without consent, attaining that age became absolutely entitled to the personal estate. *Austen v. Hulsey*, 1 Ves. 125.

Construction of an obscure will; first, that the income only, not the capital, was disposed of; secondly, that the disposition was in favour of the younger children, excluding the eldest. A legacy, not as an independent bequest, with a time for payment or distribution, appointed afterwards, but the time annexed to the substance of the bequest, the interests do not vest before that period. *Sansbury v. Read*, 12 Ves. 75. WILL, C. OF, WHAT PARTS; INTEREST, VESTED.

The word "issue" unconfined by indication of intention, includes all descendants. Intention necessary to restrain it to children; grandchildren therefore entitled with children, *per capita*. *Legh v. Norbury*, 13 Ves. 340.

Legacy to A, "and failing him by decease before me, to his heirs." A dies before the testator, having made a will containing a residuary bequest: the legacy belongs to the next of kin of A living at the time of the testator's death. *Vaux v. Henderson*, 1 Jac. & W. 308.

Devise, in default of issue male of A, to the first daughter living at the death of the testator who should attain twenty-five for life, with remainder to her first and other sons in tail male; remainders over, subject

to a trust for debts and accumulation of the surplus rents and profits, until a son or daughter should first come to the actual possession of the estates, or receipt of the rents after that period, such person to take the surplus rents, and the surplus of the accumulation, after payment of the debts, to be paid to such person or persons who by the limitation should first come to the actual possession of the estates or receipt of the rents and profits. A daughter living at the death of the testator, and having attained twenty-five, entitled to possession of the estate and to the accumulated fund. *Barker v. Barker*, 12 Ves. 409.

Portions by settlements, for the children living at the death of the survivor of the parents, with a proviso that advancements should be in satisfaction, unless the contrary is declared; the father by will, desiring the settlement may be punctually complied with, made a residuary disposition of real and personal estates among the younger children, directing, that what they may have received in his life shall be brought into the account, so as to make them all equal. Construction upon the whole, that advancement in marriage or otherwise, though not the grammatical construction, is within the proviso; and equality being the object, an arrangement was made upon that principle. One of the younger children having become the eldest, and therefore owner of the estate between the death of parents, after advances received in satisfaction of the portion in the former character, is to be considered a younger child in the account. *Leake v. Leake*, 10 Ves. 477. YOUNGER CHILDREN.

Trust by will as to a moiety of the share of the testator's married daughter A, for her separate use, to the end, and that it may not be subject to the controul, &c. of B, her present husband, or any other husband, remainder to her husband B for life, remainder for all the children of A, and in case there shall not be any children of A, or all shall die before twenty-one, for the survivor of B and A his wife, his or her executors, &c. and as to a moiety of each of the shares of each of his two unmarried daughters, upon the like trusts, and under the like restrictions as described concerning the share of A so, and in such manner as that the same may be secured for the benefit of his said daughters and their children, and not to be subject or liable to the controul of any husband they may happen to marry; one of the unmarried daughters having married, and died without issue, her husband surviving is not entitled to any interest in the moiety, of the subject of the trust created by the will. *Judd v. Wyatt*, 11 Ves. 483.

Residue bequeathed to A and all the other children hereafter to be born of B, at their respective ages of twenty-one; those born after one attains that age are excluded. *Gilbert v. Boorman*, 11 Ves. 238.

Bequest of stock, &c. and interest and dividends to accrue to testator's two great nieces, equally to be divided and to be assigned, transferred, &c. to them, when and as they should respectively attain twenty-one, with limitations of their respective shares on the event of death under twenty-one, to their respective children; survivorship in case of no children, and a direction that the executors should, during the respective minorities of the legatees, receive the dividends, interest, &c. and that so much as should be necessary should be applied for maintenance, &c. and the residue accumulate for their benefits respectively, until they should respectively become entitled to their respective parts. The surplus interest held to go with the principal upon the death of one under twenty-one without children. *Sison v. Shaw*, 9 Ves. 285.

Testatrix bequeathed to her sister B for life, declaring that it was her absolute desire that B bequeathed to those of her own family what she has power to dispose of, provided they behave well to her; B, by her will, declared she meant to make no dispo-



sition of her sister's property; it was held a trust for next of kin of B. *Cruwys v. Colman*, 9 Ves. 319.

Bequest to "relations," confined to next of kin according to statute of distributions. *Id.* 323. **RELATIONS.**

Though upon bequests to "relations," with a power of selection, the party may go beyond those included in statute of distributions; the contrary is adhered to whenever the execution devolves on the court. *Id.* 324. **RELATIONS.**

Bequest to testator's relations, with power of selection is, if that power is not exercised, a trust for next of kin at death of party who had the power. *Id.* 325.

Bequest of one-fourth to the children of A, and one other fourth among children of B: held distributable *per capita*. *Ly. Lincoln v. Pellam*, 10 Ves. 167. **DISTRIBUTION.**

Bequest to children of A, born or to be born, as many as there might be, at twenty-one or marriage, with survivorship, and a limitation over on death of all, &c.: held vested in those living when one is entitled to the exclusion of those born afterwards. *Whitbread v. Ld. St. John*, 10 Ves. 152. **INTEREST VESTED.**

Construction of will, that under bequest to the children of A, a second son of three at the death of testator and the tenant for life, who became the eldest before the age of twenty-one, till which he was subject to survivorship, was upon his will, not entitled. *Bowles v. Bowles*, 10 Ves. 177.

Under a disposition by will to A's and B's families, the children are entitled, exclusive of their parents, and *per capita*. *Barnes v. Patch*, 8 Ves. 604.

Legacy to executor to be distributed amongst the poor relations of testator. A relation who was poor at the time of testator's death, but became rich before distribution, not entitled. Poor relation dying before distribution, his claim not transmissible to his personal representative. Where a person has a power of distribution among poor relations, he may distribute amongst all poor relations, however remote; but where the court is called on to distribute, in failure of the person so empowered, it will confine itself to relations within the statute of distributions. *Mahon v. Savage*, 1 Scho. & L. 111. **POOR RELATIVES.**

Bequest to such of the children of A, as B shall by will direct, and in default of such direction, among the children, share and share alike; B's disposition by will in favour of the children living at her death, established against the claim of one born afterwards under the general words. *Paul v. Compton*, 8 Ves. 375. **POWER, EXECUTION OF.**

Bequest to the children of A, vested at the age of twenty-one, therefore those born after one has attained that age are excluded. *Id.* 380.

Bequest to A for his second daughter, that he shall have born, for her education, till she shall attain the age of twenty-one, and after she shall attain the age of twenty-one to her and her heirs, she being christened Z; and in default of such issue over, another bequest to A till the said second daughter shall attain twenty-one, and after she shall attain twenty-one to her heirs. Both held vested in second daughter; the third child, christened Z, though she died under twenty-one. *Lane v. Goudge*, 9 Ves. 225. **INTEREST VESTED.**

Bequest to testator's wife, if living at his decease, provided she continued his widow; but if she should die before his decease, or afterwards marry, then and in either case to his father, "if he shall be living at the time of my decease, or of such marriage as aforesaid, and in case he shall not be then living, I give and bequeath the same to my brother." The father survived the testator, but died before marriage of widow; upon marriage the brother was entitled. *Pyle v. Price*, 6 Ves. 779. **LEGACY, CONDITIONAL.**

Residuary bequest to the testator's daughter for life, and to her children at their ages of twenty-one, and after the decease of his daughter and of her children under that age, to go and be distributed among his relations in due course of administration. Great-nephews and great-nieces, the next of kin of the testator, at the death of the daughter, entitled against the claim of the personal representatives of the daughter the sole next of kin, at the death of the testator, and of the representatives of nephews and nieces, who died in her life, insisting that she was excluded by the will. *Jones v. Colebeck*, 8 Ves. 38.

Though the word "issue" will comprehend all descendants, upon construction of this will it was confined to "children." *Sibley v. Perry*, 7 Ves. 522.

Under residuary bequest to legatees, in proportion to their legacies, all legatees, pecuniary and specific, even of things, &c. not expressly or by implication excluded, were held entitled; so annuitants, if they had not been excluded, on construction of whole will. *Nannock v. Horton*, 7 Ves. 391. **LEGACIES, SPECIFIC.**

Bequest to executors in trust, that they shall pay, &c. unto and amongst the testator's two brothers and his sisters, or their children, in such shares, &c. as the trustees or the major part of them, or the survivor, his executors, &c. shall think fit. All the children living at the death of the testator held entitled with the parents, *per capita*, the court not having a discretion. *Langmore v. Broom*, 7 Ves. 124.

Bequest to particular description of persons at a particular time, vests in persons answering the description at that time exclusively. *Godfrey v. Davis*, 6 Ves. 43.

A bequest to all and every the child and children of A, includes every child born before the period of distribution; which in this case was the attainment of twenty-one by the eldest, the marriage of daughter, or death of child under twenty-one, leaving issue. Upon the general rule, a child by subsequent marriage was included, notwithstanding strong implication in favour of children of prior marriage. *Barrington v. Tristram*, 6 Ves. 345.

Devise in trust to dispose of the premises unto and amongst the devisee's four children in such manner, shares, &c. as he shall by deed or will appoint; one dying in the life of his father before appointment, was held entitled to a fourth, the father after that child's death having appointed three-fourths to his three surviving children respectively. *Reade v. Reade*, 5 Ves. 744. This decision, as far as it leaves one-fourth to the deceased child, is questioned by Lord Eldon. *Butcher v. Butcher*, 1 Ves. & B. 192. **POWER.**

The testator having given his wife the option to occupy his house at a certain rent, and if she should choose to do so, declared she should have the use of the furniture; by codicil revoking the bequest of an annuity to her, gave her a legacy to provide furniture in case she should not choose to occupy his house, or for any other purpose she should think proper. She occupied the house and furniture till her death, and her executor was held entitled to her legacy. *Isherwood v. Payne*, 5 Ves. 677.

Devise of real estate with the residue of the personal estate upon long limitations in strict settlement, including persons unborn, a subsequent direction that none of the devisees shall take or come into possession before the age of twenty-five, was held confined to the actual possession, and not to operate by way of revocation; and therefore upon the death of the first tenant for life under twenty-five, the accumulation belonged to his personal representative. *Montgomery v. Woodley*, 5 Ves. 522. **INTERMEDIATE PROFITS.**

The testator bequeathed a legacy to his daughter to be paid within twelve months after his decease; but

if she should marry A, then he revoked the legacy. She remained unmarried, till about fourteen months after the testator's death, and then married A. They obtained a decree for the legacy. *Osborn v. Brown*, 5 Ves. 527. CONDON., BREACH OF.

Legacy for a mourning ring to each of the testator's relations, by blood or marriage, confined to the statute of distributions, and those who have married persons entitled under it. *Devisme v. Mellish*, 5 Ves. 529.

An illegitimate child not entitled to share under a devise to children generally, notwithstanding a strong implication upon the will in favour of that child. *Cartwright v. Faudry*, 5 Ves. 530. BASTARD.

Under a disposition by will to the children of A & B, payable at twenty-one or marriage, with a limitation over; upon failure of issue in the lives of A & B, it was held, that all the children without restriction were entitled; and an appointment being directed and the interest ordered to be paid to those who had attained twenty-one; children born afterwards, though entitled to a share of the capital, were not allowed to claim the by-gone interest. *Mills v. Norris*, 5 Ves. 335.

Testator bequeathed 5000*l.* in trust for his daughter A for life, and after her decease for such child or children as she shall leave at her decease, in such shares as she should think proper; and in case she shall die leaving no child, which was the event, then as to 1000*l.* for her executors, administrators, or assigns; and as to the remaining 4000*l.* in trust for such person or persons "as shall be my heir or heirs at law." The 4000*l.* vested in A, and the other two daughters of the testator, being his co-heiresses at law, and next of kin at his death. If that union of characters had not occurred; *quare*, Whether the next of kin could not claim; and supposing the heirs intended, what description of heirs? *Holloway v. Holloway*, 5 Ves. 395.

Devise of real estates to trustees and their heirs, upon trust to convey upon certain trusts, and subject thereto to several natural sons successively in strict settlement. The testator also gave the residue of his personal estate upon trust to be laid out in land to be settled to the same uses, &c. A codicil, revoking so much of the will as directed the settlement of his said estate upon his sons, and varying the order of limitations to his heirs, was considered as confined to that object, operating by way of substitution only, not as a revocation of the devise, and therefore extending to the estates to be purchased with the personal estate. *Ld. Carrington v. Payne*, 5 Ves. 404.

Under a residuary disposition to the testator's right heirs, on the part of his mother, his sister, and a nephew by a deceased sister, where held entitled against remoter relations, claiming on the ground of an express provision, by an annuity for the separate use of the sister. *Forster v. Sierra*, 4 Ves. 766. RESIDUE.

Testator bequeathed a leasehold estate after an estate for life to his nephew, A, and the heirs male of his body, lawfully begotten, and in default of such heirs to one of the sons of his nephew, B, as A shall direct by a conveyance in his life, or by his last will. Another leasehold estate he bequeathed to A upon trust, subject to certain charges, to employ the remainder of the rent to such children of B as A shall think most deserving, and that will make the best use of it; or to the children of his nephew C, if any such there are or shall be. A dying in the testator's life, the bequest of the latter estate was established in favour of all the children; *quare* as to the former? *Brown v. Higgs*, 4 Ves. 708. Affd. 5 Ves. 495.

Testator by a will unattested, after, among others,

charitable legacies to be distributed by his executor, gave the remainder and residue of his estate, if any, and effects of what nature soever and wheresoever, which he should be seized or possessed of, &c. to next of kin or heir at law, whom I appoint my executor, after debts, &c. paid. He left one brother, and by deceased brother's a niece and several nephews, one of whom was heir at law; distribution decreed according to the statute. *Lowndes v. Stone*, 4 Ves. 649. DISTRIBUTION.

Trust by will for all the children of A, when and as they shall severally attain sixteen, with a direction for a maintenance of those who, after the eldest attain sixteen, were excluded; maintenance was directed without regard to the father's ability. *Hoste v. Pratt*, 3 Ves. 730. MAINTENANCE; POSTHUMOUS CHILD.

Under devise of personal residue to relations in such proportion as testator had given other part of his fortune, pecuniary legatees only are entitled, and not a devisee of real estate. *Adair v. Maitland*, 7 Bro. P.C. 587. S.C. 3 Ves. 231.

Bequest to relations does not include those by marriage. *Id. ib.*

Bequest to the youngest child of A, if she should have any child or children within a certain period; if no child or children within that period, over: her eldest child being the only one within that period, is entitled. *Emery v. Maitland*, 3 Ves. 232.

Money bequeathed to be laid out in land to be settled upon the testator's nephew A, for life, remainder to the wife of A for life, with remainders in tail to the sons and daughters of A, by such wife. A was not married till after the death of the testator; held to extend to a second wife. *Peppin v. Beckford*, 3 Ves. 570.

Testatrix by codicil gave to A, the legacy given by her will to the children of B, "as I know not whether any of them are alive, and if they are well provided for, though they are living." B is entitled; the construction being that if they are living, they are well provided for. *Att. Gen. v. Ward*, 3 Ves. 327.

Devise to A and his wife for life, and after the death of the survivor, upon trust to sell and apply the produce to and among all and every the same child or children of A by his said wife, and their representatives equally; the fund belongs to the children surviving the testator, but the issue of a daughter who died in the life of A are entitled as representatives against the claim of their father as administrator. *Horsepool v. Watson*, 3 Ves. 383.

Upon a legacy to the issue of A, all descendants are entitled, and take *per capita* as joint tenants. *Devenport v. Hanbury*, 3 Ves. 257. DISTRIBUTION.

A testator gave a legacy to "every of the sons and daughters of his late cousin." His cousin left one legitimate daughter, and one son and one daughter illegitimate; the latter are not entitled under the will, nor is evidence admissible of the intention of the testator. *Hart v. Durand*, 3 Anst. 684. BASTARD.

Legacy to A for life, and to her children at her decease, vests in all the children as they come *in esse*; but upon the circumstances of this case it vested in those living at the death of the mother only. *Spencer v. Bullock*, 2 Ves. J. 687.

Three annuities for a term of years bequeathed in trust for three children, A, B, and C, respectively for life; in case of the death of either leaving any child or children, his or her annuity to be equally divided between such child or children, share and share alike; in case of the death of either without issue, his or her annuity to go to the survivor or survivors of them equally, share and share alike, with a limitation over in case of the deaths of all without issue as aforesaid; A died without issue; A's annuity went to B and C,

subject to the contingent limitation over; and upon B's death, leaving children, belongs in moieties absolutely to his administrator and *C. Vanderghucht v. Blake*, 2 Ves. J. 533.

Devise to the heir at law and his issue male in strict settlement, remainder in trust to be sold, and the money to be distributed among certain persons, or the survivors or survivor of them, and that the share of one should, previous to her marriage, be settled upon her for life, and after her death, upon her issue, in default of issue upon her right heirs; the produce of the sale is to be considered as personal estate, and vests in the survivors at the death of the tenant for life, without issue male. A settlement in trust for the husband for life, then for the wife for life, then for the children as they should appoint; in default of appointment equally; if no children according to their joint appointment; in default thereof, to the husband, his executors, &c. is a sufficient execution of the direction in the will. *Brograve v. Winder*, 2 Ves. J. 634. **LANDS DEVISED TO BE SOLD.**

Devise subject to a term of 100 years to A, in strict settlement, remainder to B in strict settlement, and after other limitations in tail, remainder upon trust to be sold, the trust of the term was to raise 4000*l.* to be applied, first, to debts, legacies, &c. The rents, profits, and emoluments arising, growing, or received, from the estate, real and personal, to be applied to debts and legacies, and afterwards to be an aggregate fund, and attend the inheritance; the interest of the 4000*l.* to be paid out of the rents and profits of the estates in the term; the rents and profits to accumulate till one of the devisees should attain twenty-one, then to be paid to him. By codicil, the testator reciting the trust to sell, bequeathed part of the produce, and gave all the residue, and all the residue of his personal estate not disposed of by his will, to his legatees; the residue of the money raised under the term, and of the personal estate, is to attend the inheritance, and the interest is payable to the tenant for life, the principal to the first tenant in tail. *Sheldon v. Burnes*, 2 Ves. 444.

Lands devised to be sold, the produce to be applied as after-mentioned; if no disposition is made, the heir shall take. *Id.* 447. **RESIDUARY TRUST; HEIR AT LAW; LAND DEVISED FOR SALE.**

E compounded with his creditors; his widow, by her will, left a fund to pay the residue of the debts to the compounding creditors, "or their personal representatives;" the administratrix of a deceased creditor is entitled beneficially to his bequest, and not the next of kin, nor residuary legatee of the creditor. *Evans v. Charles*, 1 Anst. 128. **ADMON. OF ASSETS.**

Legacy to A and B, the children of C equally; they take *per capita*; legacy to the descendants of A and B equally; all descendants (children and grandchildren) take *per capita*. *Butler v. Stratton*, 3 Bro. C. C. 367. **DISTRIBUTION.**

Testator gave his estate to trustees, to apply the profits for the use of the child with which his wife was then pregnant, during infancy, and at twenty-five to the child in fee; but in case the child should die before twenty-five, without issue, remainder over; the child was stillborn. Afterwards testator made a codicil affirming his will, and died without issue. Forty-three weeks after his death, his widow was brought to bed of a son; this son cannot take the estate, though found to be legitimate, but it shall go to the devisees over. *Foster v. Cook*, 3 Bro. C. C. 347.

Legacies in trust for grandchildren then in existence by name, to sons at twenty-three, daughters at twenty-one; mesne interest for education; surplus to accumulate with survivorship; residue for all the grandchildren generally for their benefit "as aforesaid." By codicil a fund set apart to pay life annuities: grandchildren born after testator's death, not entitled

to a share of the residue into which the fund under the codicil falls, after the purpose answered. *Hill v. Chapman*, 1 Ves. J. 405. **RESIDUE.**

Testator bequeathed to his wife the lease of his house and all the furniture, &c. therein for life, the interest of all money he should die possessed of, then half of the debts due to him at his death, one excepted, which he directed debtor to retain as long as he pleased, paying the interest to her, to be disposed of as she thought fit; in case the interest of the money he should die worth, should not be sufficient for her maintenance, executors to allow part of principal out of the debts, except that before excepted, to make her life easy and comfortable; after her death, the interest of all money remaining to his sister; after her death to her daughter, all sums remaining for ever; if they die before his wife, one half of all sums remaining to be disposed of as his wife should think fit, the other to A. Upon bill by testator's niece against executors of the wife, the niece held entitled to all beyond the debts, and a moiety of all debts but that excepted; the other moiety to wife's executors, who being also executors of testator, were decreed to take out of wife's share, a sum advanced under their power. *Collett v. Lawrence*, 1 Ves. J. 268.

Some effect must be given to every part of the will. *Id. ib.*

A legacy of a sum to be divided among children. All those born before the time of division take. *Pulford v. Hunter*, 3 Bro. C. C. 416.

Annuity bequeathed to testator's brother for life, remainder to his children by his present wife; at the date of the will E and his wife were dead, and their children had other legacies under it, and testator had only one brother having a wife and children, whom he had been in the habit of calling his children. Held, to be entitled upon these circumstances. *Parsons v. Parsons*, 1 Ves. J. 266. **MISTAKE.**

Bequest of a residue to all the children of A, the daughter's shares to be paid at twenty-one, or marriage; the sons at twenty-one, or to be sooner advanced for their benefit, with survivorship and interest for maintenance. The fund shall be devisable, when the eldest attains twenty-one, and the division shall be among those then in esse. *Andrews v. Partington*, 3 Bro. C. C. 401.

Testator gave a residue to trustees to pay the interest to four persons for life, and after decease of the survivors then to divide the principal among their children; two died; the interest shall be paid to the other two. Though the words "share and share alike" in a will, generally create a tenancy in common; they cannot do so where there is an express joint-tenancy. *Armstrong v. Eldridge*, 3 Bro. C. C. 215.

The testator gave the residue to his relations named in the will. He made a codicil which he directed to be taken as part of his will, and a second, by which he gave legacies, but gave no such direction in this codicil; there were legacies given to two of his relations, they shall take shares of the residue. *Sherer v. Bishop*, 4 Bro. C. C. 55.

Bequest of residue to certain persons, and if they should die in the lifetime of the testatrix to their legal representatives. One died; his next of kin shall take the share of the residue; not his executor beneficially, or his residuary legatees. *Bridge v. Abbott*, 3 Bro. C. C. 224.

Gift of a residue to be divided among persons related to the testator; confined to relations within the statute of distributions. *Rayner v. Mowbray*, 3 Bro. C. C. 234.

Testator ordered the interest of the residue to be paid to his sisters for life, and in case any of them should die leaving issue, then to transfer the principal of the residuum to the children of the sister so dying at twenty-one; one of the sisters died in the life of the

testator; her children shall take her share. *Rheeder v. Ower*, 3 Bro. C. C. 240.

Testator ordered real estate to be sold, and the residue to be laid out in the funds, to remain for ten years, and at the end thereof, gave the same to his next of kin. Although the expression "next of kin" means generally those who are so at a testator's death, yet here, upon the intention, the period of vesting was held to be at the expiration of the ten years. The testator therefore, having but one brother who was next of kin, (at his death) but who died within the ten years; so much as was produced by the real estate, was held to belong to the heir at law of the testator, so much as was personal going to the representatives of the brother. *Spink v. Lewis*, 3 Bro. C. C. 355.

Bequest of stock to trustees in trust after the death of A, to transfer the same to and amongst all and every the nephews and nieces that should be then living; to wit, the said J B or her children, and the said P B or his children, and D L or his children, and P L or his children; under this bequest a nephew not expressly named, is not entitled to any share; and the fund is equally divisible amongst such nephews and nieces, and their children, as were living at the time of the death of A. *Eggar v. Brooke*, 2 Cox, 213.

Gift to A and his issue, to be divided among them as he thinks fit; the issue have an interest in all events, and A has no authority but as to the proportions. If no appointment, equally. Where to be divided among issue, the proportions must not be illusory. Issue will extend to any remote degree, as a description of objects of the power of A, to distribute among them as he thinks fit; but they must all be in existence during her life. *Hockley v. Maubly*, 1 Ves. J. 150. POWER OF APPOINTMENT, EXECUTION OF.

Legacy to the seventh or youngest child of A. A had six children at the testator's death, and had another who died at the age of two months; afterwards the plaintiff was born, and was the seventh child living, but the eighth in order of birth; other children were born afterwards. Under these circumstances the youngest child is entitled to the legacy, and not the plaintiff. *West v. Lal. Primate of Ireland*, 2 Cox, 258. S. C. 3 Bro. C. C. 148.

Gift by will to the children of a deceased sister, is a gift to those who were living at the death of the testator. *Finer v. Francis*, 2 Cox, 190. S. C. 2 Bro. C. C. 658.

Gift of residue to be divided amongst next of kin share and share alike, shall be divided among surviving brothers nephews and nieces, (representing deceased brothers and sisters) *per capita*, not *per stirpes*, *sed qu.* *Phillips v. Garth*, 3 Bro. C. C. 64. DISTRIBUTION.

F having an estate which came to her *ex parte materna*, on her marriage conveyed the same to trustees to such uses as she should direct, with remainder to her own right heirs by will; she directed the estate to be sold, the money to be laid out in the funds, and the trustees to permit the husband to receive the interest for life, then after the deduction of 3500*l.* to uses, which vested in the plaintiff A, and after payment of 1000*l.* to G, to pay the residue of the purchase money to the defendant H; by codicil, she gave the plaintiff, her husband, a power of appointing the 3500*l.* in case A should marry without his consent; G died, living the testatrix, before the codicil made, but F in the codicil took no notice thereof. First, the 1000*l.* is real, not personal, and shall not go to the executors of G, (though given to her executors); nor to the personal representative of the testatrix, nor yet to the residuary legatee of the purchase money, but to the heir at law, *ex parte materna*, the side from which the estate came. Second, the 3500*l.* is vested in A, and the trustees having laid out a large sum by 17*l.* with intent to ap-

propriate; it is well appropriated, and A having married once with her father's consent, his power is gone, and he consenting to give up his life interest, it was decreed to be paid to the trustees in her marriage settlement. *Hutcheson v. Hammond*, 3 Bro. C. C. 128. WILL, C. OF WHAT INTEREST.

Testator bequeathed the residue of his personal estate as follows: "As to the residue of my fortune, I will and desire that the descendants or representatives of each of my first cousins deceased, partake in equal shares and proportions with my first cousins now alive: the residue is devisable *per stirpes* amongst the first cousins who were living at the testator's death, and such of the descendants of his first cousins who died before him, as where next of kin of the deceased first cousins, and living at the time of the death of the testator. *Humphreys v. Humphreys*, 2 Cox, 187.

A devised to B for life, remainder to his first and other sons in tail male, remainder over, in trust to convey the premises, or any part thereof, to such child or children of testator's daughter, and her then husband, other than and except their eldest son for the time being, and the issue male or female of such child or children (except as before excepted), for such estates, and in such shares, and subject to such limitations as she, by deed or will, should appoint; and for want of appointment by her, or for so much as shall not have been appointed by her, then, as her husband should, by deed or will appoint; and for want of such appointment, or for so much, &c. then as their eldest son for the time being shall appoint. The husband by his will (his wife having died without appointing) appointed to his younger sons, by name in tail, with cross remainders in tail; and if all his said younger sons should die without issue, then to his daughters. He died, leaving his sons the appointees, still younger sons; afterwards one of them became the only surviving son, the rest being dead without issue; and then the trust estate vested in possession by the death of B, without issue male. The daughters of the appointor claimed the estate, considering the appointment to their surviving brother as defeated, by his being, as they said, an eldest son for the time being, and so excluded by the will of A, and the other brothers, the appointees, being dead without issue. But it was decreed by Lifford, C. that the appointment to him continued undisturbed, that "time being" meant the time of the appointment being made; that the appointees were as if named in the will of A, and that the daughters could only claim under the appointment of their father, who limited it to them in the event of all his sons, the appointees, dying without issue, which did not happen. *Jones v. Cope*, Vern. & Scriv. 29. POWER, EXECUTION OF.

E by deed conveyed several sums of money secured by mortgages amounting to 60,000*l.* to trustees in trust to be laid out in the purchase of lands to the use of himself for life, remainder as to sums to the amount of 28,000*l.* to his wife for life, remainder to his son R for life, with several remainders over, remainder to J in fee; and as to sums amounting to 23,000*l.* to R for life, with several intermediate remainders, remainder to J in fee; and as to one particular mortgage of 8500*l.* and some leasehold estates to secure annuities, the surplus to R with power of revocation. By his will he gave these leasehold estates and the mortgage for 8500*l.* together with another mortgage of 6700*l.* in trust to secure the annuities, the surplus, interest or rents of the lands purchased to be paid to R for life, and to be settled in the same manner as his other estates: 1st, These mortgages are to be considered as real estate: 2ndly, It being uncertain which of the limitations they were to follow, they are disposed of and passed to R as heir at law, and from him to his general devisee, F,

who having died intestate as to the real estate, they go to the heir at law, *D. Leslie v. Dk. Devonshire*, 2 Bro. C. C. 189.

Testator directed the residue of his estate to be parted to "his next relations as sisters, nephews, and nieces." Testator left his three sisters, A, B, and C, and D the only child of a deceased sister, and L, the only child of a deceased brother, his next of kin; but at the time of his death his sister A had two children living. The residue must go according to the statute of distribution. *Stamp v. Cooke*, 1 Cox, 234.

A bequest of a residue to be divided equally "amongst all the children of my late cousin E, and my cousin P and their lawful representatives," is a bequest to the children of E and to P himself, and not to the children of P. *Lugar v. Harman*, 1 Cox, 250. S. C. 2 Bro. C. C. 85.

A, by will gave to the two daughters of S the sum of 10*l.* each. B by will gave 82*l.* short annuities, in trust to pay the same to and between the two daughters of S in equal shares and proportions; and if either of them should die before the expiration of the term for which the annuities were to run, then to pay the whole to the survivor; but if both should die before that time, then the same was to fall into the residue of the personal estate. At the time when both these wills were made, S had three daughters. Under the first will the three daughters all take 10*l.* each, and under the second the three shall take the short annuities equally, with survivorship amongst them all. *Stebbing v. Walkey*, 1 Cox, 250. S. C. 2 Bro. C. C. 85.

The description of children of A does not extend to a child *in ventre sa mere*. *Pearson v. Carnet*, 2 Bro. C. C. 38. S. C. Prec. Chan. 201. S. C. id. 226. INFANT IN VENTRE SA MERE.

Legacies to first and second cousin includes first cousins once removed, and a grand-niece being more distant. *Mayott v. Mayott*, 2 Bro. C. C. 125.

Infant *en ventre* shall not take under a bequest to the children of A living at the death of testator. *Cooper v. Forbes*, 2 Bro. C. C. 63. sed quare. INFANT EN VENTRE.

Testator gave 1000*l.* to D; but if D should not be alive, and there be certain intelligence thereof, the testator willed that the same should be divided between A and B. D appeared to have been alive at the time of the will, but died in the lifetime of the testator. A and B are entitled to the 1000*l.* *Perry v. Boodle*, 1 Cox, 183. Lapsed Legacy.

Testator bequeathed 500*l.* to each of the daughters of C, if both or either of them should survive D. At the date of the will, and the death of the testator, C had three daughters, all of whom survived D, the three daughters are entitled to 500*l.* each. *Scott v. Fenwick*, 1 Cox, 79.

Devise to trustees to invest in stock and pay dividends to testator's son for life; and after his decease, to his eldest son and his heirs for ever; and in case of their death without issue, to his (testator's) nearest relation, and the nearest relations of such nearest relation for ever: 1st, This is a double contingency, and the event of the son dying without issue is good; 2nd, it goes to the person who was nearest relation at the time, the half-sister: though there was living representatives of a person as near, viz. a half-brother. *Marsh v. Marsh*, 1 Bro. C. C. 293. LIMITATION.

Inter alia, five sixteenth parts of residue were bequeathed to trustees to pay the same to testator's daughter R at twenty-eight, or marriage with consent; and in case any of the children should die before their shares became due, the share to go to the rest of the testator's children and their issue *per stirpes*. The testator left five children. R married without consent, had one child, since dead, and another who was

before the court, and died under twenty-eight: Held, the portion never vested in her, that four parts of it belonged to the testator's surviving children, and that one moiety of the remaining part belonged to the surviving child of R, the other belonging to the father of the deceased child of R as its representative. *Hemmings v. Munkley*, 1 Bro. C. C. 304.

A devised the whole of his fortune equally to be divided between any second or younger sons of his brother S, and his sister T. The sister has one younger son, but the brother has none: Held, that the younger son of the sister was entitled to the whole. *Wicker v. Mitford*, 3 Bro. P. C. 442.

Bequest to two daughters; if one should die without issue, to the survivor and her issue; the married daughter died leaving issue; then the unmarried daughter died; it shall go to the issue of the married daughters. *Harman v. Dickenson*, 1 Bro. C. C. 91.

Where a testator manifests a clear intention to give a benefit to certain objects in an event which happens, the legatees shall not be deprived of it, although a circumstance inadvertently coupled with it in the language used does not literally take place. Therefore, under a bequest of equal sums for the benefit of each of two grand-daughters, A and B, for life, and their children respectively; but if either died without issue, her share to go to the children of the surviving grand-daughter. A marries and dies leaving children in the lifetime of B. Then B dies unmarried: Held, that A's children took each of their shares, though their mother did not actually survive B. *Id. ib.*

Bequest of stock to executors for the use of F and A, or the longer liver, the dividends to be paid to their order during the lives of either of them, and then to the issue of A, if any; if not, the stock to be transferred in trust for J till he comes of age. J attained twenty-one, and died; then E; and last A, without issue: the representative of J held entitled to the fund, and that the trust, during minority, was only a mode of convenience. *Atkinson v. Parr*, 1 Bro. C. C. 92.

A legacy of personal estate to testator's wife for life, and after her decease to the testator's relations who shall be then alive, confined to relations within the statute of distribution. *Green v. Howard*, 1 Bro. C. C. 31.

Bequest of residue to a brother in trust to dispose of among such of testator's relations, and in such manner, &c. as he shall think fit, without regard to the legacies before given: Held, the power extended to the relations at large, and not confined to next of kin. *Supple v. Lawson*, Amb. 729.

A bequeathed to four nieces, C, D, E, and F; and on death of any, the whole bequest should go to survivor or survivors; but if any died having child, then her share should go to such child; if all died without issue, then to B. C married, and had issue G and H, who died in life of mother, H having issue L and M; C, D, E and F die in succession. F being last surviving: Held, that L and M were entitled to the whole bequest. *Pitt v. Harbin*, Loff. 19.

Where a man gives, his estate to his wife so long as she shall remain unmarried, but if she marries, then to his daughter; and in case the daughter should die without leaving issue, then to J. The daughter died without issue in the mother's lifetime, who still remained a widow: Held, that the testator's interest belonged to J upon the death of the daughter without issue then living. *Gordon v. Adolphus*, 3 Bro. P. C. 306.

One gave legacies to each of his younger children, payable at twenty-one, and the residue of his personal estate to his eldest son at twenty-one; and if he die before twenty-one, then to his younger children in succession; and if any of his younger children should die before twenty-one, their respective legacies to go

equally to all the survivors; and if all his children should die before twenty-one, then the whole to go to a charity. One of the younger sons died under twenty-one; the other children attained twenty-one: Held, the eldest son should take his legacy equally with the other younger children. *Hiern v. Ley*, Ambl. 669.

A gives all his personal estate to trustees in trust, to pay interest to wife during widowhood, but on her second marriage to pay her an annuity of 110*l.* for life, and in that case he gave residue to P, but made no disposition of it in case wife remained a widow; wife remained widow. Representatives of son who died after twenty-one, in mother's life-time: held entitled to residue. *Jeffreys v. Reynolds*, 6 Bro. P.C. 398. Affirming 2 Eden, 365. **RESIDUE.**

Bequest to his mother's "poor relations," construed relations who are poor and objects of charity. *Brunsdon v. Woolredge*, Ambl. 507. S. C. Dick. 380.

Bequest to the most necessitous of my relations shall go according to the statute of distributions. *Widmore v. Woodruffe*, Ambl. 636. S. C. 1 Bro. C. C. 13.

A, by his will, gives the residue of his estate to three of his children, share and share alike, as tenants in common, and not as joint-tenants. But by a codicil, he revoked his daughter N from being one of his residuary legatees, and in lieu thereof, gave her a pecuniary legacy. This third shall go to the testator's next of kin, and does not belong to the two other residuary legatees, as such. *Chestyn v. Cresswell*, 3 Bro. P. C. 246. **RESIDUE; ADMINISTRATION OF ASSETS.**

Legacy to children of A, lawfully begotten, or to be begotten, extends only to those born in testator's life-time. *Sprackling v. Rainer*, Dick. 344.

Under a devise to the descendants of F T, in a certain district, grandchildren and great grandchildren take *per capita*. *Crosley v. Clare*, 3 Swan. 320. **DISTRIBUTION.**

The word "heirs," in a will, construed "children" to take a legacy. *Loveday v. Hopkins*, Ambl. 273.

Where the word "relations" is used, the court has no other rule to go by but the statute of distributions. *Crosley v. Clare*, Ambl. 397.

Where devise is to the stock or family, the court confines it to the head of the family. *Id. ib.*

One devises to his son, J, in tail, remainder to his daughter, P, in tail, remainder to his daughter, E, in tail, remainder to her son, N, and his heirs, on condition that he pay 100*l.* to the eldest sister, the plaintiff's mother, at or soon after his being in possession; and for non-payment, the estate should be to the plaintiff's mother: J, P, and E are dead; the plaintiff's mother died, and afterwards the remainder in fee came to N: held, the representative of the mother was entitled to the 100*l.* *Embrey v. Martin*, Ambl. 230. S. C. 1 Ken. 77.

Bequest to the two servants that should live with testatrix at her death; she had three at that time, and all of them were held entitled. *Sleece v. Therington*, 2 Ves. 560.

Bequest to "near relations," means those within the statute of distributions. *Whithorne v. Harris*, 2 Ves. 527.

Bequest to his wife for life, and after her death to his and her poorest relations: held only those who were nearest of kin were entitled. *Isaac v. Defries*, Ambl. 595.

J, seized in fee of land, devised the same to his wife for life, and after her decease, to R and the heirs of his body, and for want of such issue, to be sold, and divided among his relations according to the statute of distributions: held, that the wife being no re-

lation, the next of kin shall take the whole in exclusion of her, both by the words of the will, and the intent of the testator. So where A gave the residue of his personal estate to trustees to permit his wife to receive the produce for her life, and after her decease, to such of his relations as would have been entitled under the statute of distributions in case he had died intestate, the wife is not to be considered as a relation. *Worsley v. Johnson*, 3 Atk. 768. **ILLEGITIMACY.**

Relation, in dictionaries, signifies *consanguineus* and *affinis*, but a wife is no relation either by blood or by affinity; and of a wife, Calvin, in his Lexicon, says, *non affinis est, sed causa affinitatis; affinis est ab eodem stipite*. The statute of distributions means kindred by blood only; but the stat. 21 H. 8. c. 5. s. 3. distinguishes more clearly between a wife and the next of kin than the statute of distributions; the word "my" relations, means exactly the same as "my own" relations. *Id.* 761.

Testator reciting his intention to dispose of all his property, and that his daughter was likely to die (of a violent distemper), left his wife, if she died, the revenue and dividends of such property; but if his daughter lived, directed that his wife should only have her dower, giving the residue and dividends to that daughter: if she died without children, testator gave his brother "all that should be left;" the daughter survived the testator, but died of the same illness without issue: held, that the mother was still entitled for life, and that the words "what should be left," constituted a good residuary bequest to the brother. *Duhamel v. Ardoin*, 2 Ves. 162.

Testatrix gives, by her will, legacies to all her nephews and nieces, except those thereinafter named; she desires her executors to look upon all incumbrances, &c. in her own hand as parts or a codicil to her will, and bequeaths by will her residue to the children of her sisters, E, J, &c. By a codicil she gives legacies to some other nephews and nieces: held, that the children of E, J, &c., the residuary legatees under the will, were excluded from the legacies, but that the legatees under the codicil were not, and were entitled to both. *Fuller v. Hooper*, 2 Ves. 242.

A bequeaths 1000*l.* to such children as his daughter should leave at her death; B, her husband, receives it, and by his will reciting that A had promised to give it rather differently, but that he, B, was, nevertheless, desirous to make good A's intent and will, bequeaths it equally between his sons, C & D; D alone survives his mother: held, that C's representatives were not entitled, and that A's will would have prevailed even if B had intended to make a variation. *East v. Cook*, 2 Ves. 30.

Question as to whether a bastard could take under the denomination in a will of "eldest son" by way of *descriptio personae*, the testatrix knowing of his existence, and believing that there was no lawful issue. *Baker v. Baker*, 2 Ves. 167. **BASTARD.**

Bequest to younger children of testator's son, to be paid at twenty-one: Held vested in those born at the time the testator's death. *Morsey v. Chaloner*, 2 Ves. 83. **INTEREST VESTED.**

Devise on condition that the land should go over to another if he did not give a release in three months after testator's death, dying in the testator's lifetime, the devisee over shall take instead of heir at law; this being a conditional limitation, and not a strict condition. *Avelyn v. Ward*, 1 Ves. 420. **LIMITATION CONDITIONAL.**

"Such of my nearest relations as my executors shall think the greatest objects of charity:" Held to extend only to such as would take under the statute of distributions. *Edge v. Salisbury*, Ambl. 70. S. C. 1 Ves. 230.

Devise of real and personal estate in trust for the nearest relation "of the Pyots," the latter held to be "*nomen collectivum*," and descriptive of that particular stock, and that this mixed fund should not go to the heir at law of that name. A change of the name of Pyot by marriage, held not to exclude. *Pyot v. Pyot*, 1 Ves. 335.

Bequest to such of nearest relations as A should think poor and objects of charity, confined to those within the statute of distributions under A's advice. *Goodinge v. Goodinge*, 2 Ves. 231.

Devise to his nearest poor relations; parol evidence admitted to shew that testator knew he had such in S, but no farther; not to prove declarations or instructions whom he meant by written words of the will. *Id. ib.* PR. EVIDENCE, PAROL.

Grandchildren and great grandchildren included by the term "issue," and the words "children" following it, explained as meaning issue, likewise. *Wyth v. Blackman*, 1 Ves. 196.

Furniture, &c. at H, bequeathed for the use of those who should enjoy the estate, to be taken care of, and delivered by executors, and to remain at H as if in his own possession, vests in the first tenant for life. *Id.* 197. LIMIT OF PERSONAL.

Devise that the household stuff at H should remain there for use of those who should enjoy the estate by a settlement, to be taken care of and delivered by executor, &c.; they go to the representative of the first taker who was tenant for life, and were not to be sold as heirlooms with the house, although no tenancy in tail vested. *Id.* 202. LIMIT OF PERSONAL.

Bequest of 3000*l.* to Jane, the wife of C, for the use of her younger children, to be distributed as she should appoint; in default equally. All Jane's children by C being born at the time of the will and death of the testator, it was held vested as a present legacy to them, subject to variation as between them, but not to extend to her children by a future marriage. The period of vesting being as above; one who was a younger child at the testator's death, and became an elder afterwards, was held entitled. *Coleman v. Seymour*, 1 Ves. 209. INTEREST VESTED; YOUNGER CHILDREN.

Legacy of 300*l.* to Elizabeth, to be paid at twenty-one or marriage; but if she died before, then to the younger children of Francis; F having died unmarried, under twenty-one: Held to vest in such of the younger children as were living at that time. *Ellison v. Airey*, 1 Ves. 111.

Where in a will a wife not included in the word relations, according to the statute of distribution. *Davies v. Baile*, 1 Ves. 84.

Bequest of 5000*l.* out of an estate, equally to testator's children, with remainder in the same estate to his first and other sons: the eldest son shall have a share. *Inledon v. Northcote*, 3 Atk. 438.

H, by a French will, as to the rest of his goods whether in France or in England, named for his only and universal heiresses, S, his sister, for one-third; and M, his sister, for another third; and as to the remaining third, he willed S should enjoy the interest thereof for her life, and after death, the capital should be inherited by the children of I, his brother; and that his testament may be well executed, he appointed L, of London, merchant, his executor, giving him, in that quality, as full power as could be given to a testamentary executor. S dying in the testator's lifetime, his surviving sisters and next of kin brought their bill to have what was devised to her, distributed. L C. quasi executor insisted he was entitled to it, (S being dead in the testator's lifetime) as a lapsed legacy: Held, that the executor being a trustee only, it must be divided according to the statute of distributions, viz. two-thirds to testator's two sisters, and the remaining third of this third to S, the only child of testator's bro-

ther. *Androuin v. Poilbanc*, 3 Atk. 299. LEGACY LAPSED.

W, devised his lands to his wife for life, and after her decease to D, his wife's niece, and then said "Item, I give the use of 500*l.* stock for her natural life, but after her decease I give the 500*l.* among my wife's brothers and sisters;" held the wife and not the niece is entitled to the 500*l.* stock for life, for it is not necessary the word *Item* should be construed as, independent of the preceding clause, and the wife is the person the testator naturally meant by the word "her," and is also the person the testator was principally taking care of. *Castledon v. Turner*, 3 Atk. 257. *Tomkins v. Tomkins*, cited 2 Ves. 564. *Sleech v. Thornington*, 2 Ves. 564. *Stebbing v. Watkey*, 2 Bro. C. C. 85.

A gave B his brother, the interest of 1500*l.* for life, and the principal, after his decease, among the younger sons and daughters of B, but if he should leave daughters only, then to be paid to them at twenty-one. B, had two daughters, one of whom married, and died in B's lifetime: held, that her husband is not entitled to her share as her administrator. *Billingsley v. Wills*, 3 Atk. 219.

Undisposed residue shall go to executors, though they are legatees, where testatrix has always declared next of kin shall have nothing. *Brasbridge v. Woodruffe*, 2 Atk. 69. EXECUTORS BENEFICIALLY INTERESTED.

R L, devises to R M, eldest son of his nephew, R M, and the first heirs male of his body, and the heirs male of his body, and in default of such issue to the second son of the said R M, and the heirs male of his body and their issues, remainder over, &c. These words, "the second son of the said R M," do not mean the second son of the devisee, but John, the second son of the testator's nephew R M. *Minshull v. Minshull*, 1 Atk. 411.

A devises to his grandchildren, B, C, and D, 1000*l.* each, the interest to their use, and if any dies, to the survivors or survivor, share and share alike, the interest to be paid to their father, to their use. B dies an infant; then C dies. The share which C took by the death of B shall not survive to D, but go to the father, administrator of C. *Rudge v. Barker*, Forres. 124.

J S gave "all his real and personal estate" to trustees on certain trusts, remainder "to such of his relations on his mother's side who were most deserving, and in such manner as they should think fit," and for such charitable uses and purposes as they should also think most proper and convenient: held, per M R, that the limitation over of the personal estate was good, and his honour (deciding by the known rule of equity) directed that one half of the said estates should go to the testator's relations on his mother's side, and the other half to charitable uses; his honour could not judge of the merits of the testator's relations, nor prefer the one to the other, but he should exclude those beyond the third degree: held also, that the representatives of those relations who died in testator's life-time, could have no claim. *Doyley v. Att. Gen.* 4 Vin. 485, pl. 16.

H, devises three fourths of his personal estate to his three sons, equally to be divided between them; and the other fourth to them, in trust for his two daughters; the interest to be paid them respectively, during their natural lives, and afterwards to their, or either of their child, or children; and for default of such issue, to his three sons, equally to be divided between them; one of his daughters leaves a son, under whom the plaintiff claims, and the other dies without issue. The moiety of the sister who died without issue, shall not go to the three brothers, but to the representative of the nephew. *Stephens v. Ilide*, Forres. 27.

A devise to relations is to be confined to such as would take by the statute of distributions, but their shares may not be the same as under that statute. *Thomas v. Hale, Forbes, 251.*

A, by will, declares his intention to dispose of his household goods by his codicil; &c. and devises the residue of his personal estate not disposed of nor reserved to be disposed of, by his codicil to his wife. Afterwards the testator makes a codicil, and does not dispose of his household goods thereby; the household goods shall not go to the residuary legatee, but according to the statute of distributions. *Davers v. Dawes, 3 P. W. 40.*

Testator having real estates in A and B, and a mortgage in C, and a statute extended in D, devises all his credits and mortgages to his executors, and then devises all his real estate whatsoever, in A B C and D, to S for life, and after his decease to his heirs and their heirs for ever: held, that mortgage in C, and extent in D, went to executors. *Davis v. Gibbs, Fitzgib. 116. S. C. 3 P. W. 26. Mos. 269.*

Lands were devised in trust, to maintain an infant till twenty-three, and then to convey them to him, and if he die before, to convey them to another. The infant is not entitled till twenty-three, and as the estate is not devised over, if he dies under, the surplus profits will go to testator's heir. *Tilly v. Simpson, Mos. 241. INTERMEDIATE PROFIT.*

One has two sons A and B, and three daughters, and devises his lands to be sold, to pay his debts, and as to the monies arising by sale after debts paid, he gives 200*l.* thereout, to his eldest son A, at twenty-one, the residue to his four younger children equally. A, the eldest dies before twenty-one, this 200*l.* shall go to the heir of the testator. *Cruse v. Barley, 3 P. W. 19.*

One having had five children A, B, C, D, and E; B is dead, leaving several children, and by will the testator devises the residue of his personal estate to his son A, and to B's children, and to his daughter C, and D's children, and to his daughter E; D is living and has children. Decreed, the children of B, and the children of D, shall take *per capita*, and not *per stirpes*, as if all named. *Blackler v. Webb, 2 P. W. 383. DISTRIBUTION.*

One seised in fee, as heir of the mother's mother, devises the land to trustees in fee, in trust to pay several annuities, and the residue to go to the testator's right heirs on his mother's side for ever; the heirs of the mother's mother's side, entitled to the estate and surplus of the profits, after the annuities paid. *Harris v. Bp. Lincoln, 2 P. W. 135.*

Two schools in the same town, one a free school, and the other a charity school for boys and girls; A devises 500*l.* to the charity school; though both be charity schools, yet only the charity school for boys and girls shall take. *Att. Gen. v. Wyllson, 1 P. W. 674.*

One devises his freehold estate to trustees and their heirs, in trust to convey the premises to A for life, remainder to his first, &c. son in tail male successively, remainder to his daughters in tail general; and if A should die without issue, then the premises to be settled on B, C, D, and E, to each one-fourth in fee; and in case any of the four remaining persons die without issue, the trustees to convey such fourth part in fee to the respective heirs of the persons so dying; one of the persons so dying without issue, her fourth in equity belongs to her brother as her heir. *Blackborne v. Edglen, 1 P. W. 606.*

Devise of a trust to all his daughters or their children, living at the testator's son's death; some of the daughters were living at the son's death, and had children, and others of the daughters were dead, leaving children. Decreed, all the children as well of the living daughters as of the dead should take. *Richardson v. Sprung, 1 P. W. 434.*

One devises 3000*l.* to all the natural children of his son by J S; the bastards born after making the will shall not take; nay the child in *ventre sa mere* shall not take; and, though in the principal case the money was paid by the executors, as the testator by deed should appoint, and the testator afterwards made the deed of appointment; the deed of appointment referring to the will, was held as part of the will. *Metham v. Deron, 1 P. W. 529. See 8 Price, 22. BASTARD IN VENTRE SA MERE.*

Legatee's name very falsely spelt, referred to a master to see who was intended. *Masters v. Masters, 1 P. W. 425. PR. REFERENCE TO MASTER.*

Devise to A and his issue, remainder to B and his issue, remainder to the heirs of A; A dies without issue in the life of the testator; B dies in the life of the testator, leaving issue, who is also the heir of A. The issue shall not take an estate tail as issue of B, nor the remainder in fee as heir of A. *Goodright v. Wright, 1 P. W. 397. Lapsed Devise.*

Devise to A for life, remainder to B for life, remainder to the right heirs of A, and A dies in the testator's life-time, his right heirs shall never take. *Id. ib.*

A devises lands, in trust, after debts paid, to convey the premises to the heirs male of the body of B; the testator's great-grandfather C, is the heir male of the body of B; but not heir general, there being a daughter of an elder brother who is heir general; decreed trustees to convey to C. *Neurcomen v. Barkham, 2 Vern. 729. Prec. Chan. 442. 461. S. C. Gilb. Eq. Rep. 116.*

One devises the surplus of his estate to his children and grandchildren; a grandchild in *ventre sa mere*, at the testator's death shall not take; secus, had it been to the children and grandchildren living at his death. *Northey v. Stranger, 1 P. W. 342. Pre. Cha. 470. Gilb. Eq. Rep. 136. S. C. INFANT IN VENTRE.*

One devises the surplus of his personal estate to the children, of A and B; neither of them has a child at the making of the will, or the death of testator; the devise is executory, and shall extend to any children that A and B shall afterwards have; and the children of each shall take *per capita*, and not *per stirpes*. *Weld v. Badbury, 2 Vern. 705. POSTUMOUS CHILD; DISTRIBUTION.*

Devise to the heirs male of S begotten; S having a son, and the testator taking notice that S was then living, a sufficient description of the testator's meaning, and such son shall take, though strictly speaking he be not heir. *Darbishon v. Beaumont, 1 P. W. 229. Fortesc. 18.*

A devises in trust for his daughter for life, remainder to the second son of her body in tail male, and so to every younger son, with remainders over. There were two sons, B and C; B died, and, after his death, C was born. C, though an only son, shall take, he being the second son in order of birth, and, as the will is worded, not to be excluded. *Trafford v. Ash-ton, 2 Vern. 660.*

A devise of a year's wages to such of his servants as shall be living with him at his death, does not include stewards of courts, or such as are not obliged to spend their whole time with their master; but it shall not be restrained to such servants only as lived in the testator's house, or had diet from him. *Townshend v. Windham, 2 Vern. 546.*

Parol evidence admitted to ascertain the person the testator intended should take a legacy. *Hodgson v. Hitch, Prec. Chan. 229. PR. EVID. PAROL.*

A, by will, gives 300*l.* to B, and declares her will and desire that he give the 300*l.* to his daughter at his death, or sooner if there be occasion for her advancement. B dies eight days before A; and the daughter dies at sixteen, unmarried. The 300*l.* decreed to the administrator of the daughter. *Eales v. England, 2 Vern. 466. Pre. Ch. 200. S. C.*



A devises to B and C, his wife's children, as he called them, (not owning them to be his) ten shillings a-piece, and no more, and gave the children that he owned considerable legacies. B and C shall come in for a share of the undisposed surplus, for the words of exclusion must be taken strictly. *Vachell v. Jefferys*, Pre. Ch. 170. DISTRIBUTION.

A, by deed on his marriage, settled his estate upon the issue of the marriage, remainder to his own right heirs, and if he should die without issue male, and leave one daughter, then the lands to be charged with 3000*l.* for her at twenty-one, and 150*l.* yearly maintenance in the mean time. A, having then no issue, by his will devised thus: "And whereas, by the settlement made on my wife, I have reserved the inheritance of my lands in myself after the estate tail therein is spent, now in case I die without issue, or that such issue shall die without issue of his, her, or their body, or that the estate tail limited by that settlement shall determine, I give all my said manors to my kinsman B, and to his first and other sons in tail male; remainder to C in fee." A had afterwards a daughter. Held, that this daughter was entitled under the will to the whole estate as tenant in tail, and that B took nothing. *Cornwall v. Williams*, Colles' P. C. 117. WILL, C. OF, WHAT ESTATE.

One devises, if his son die before twenty-one, or without issue, that the land shall go to the son dies before twenty-one, but he has issue. J shall have the land. *Bp. of Oxon v. Lighton*, 2 Vern. 377.

One devises to A 500*l.*, and to S 500*l.*, and so to five others the like sum; "and if any to whom I have given any money legacy happen to die, then his or her legacy, and also the residue of my personal estate, to go to such of them as shall be then living." Decreed, it should be taken to be living at the death of the testator, and not at any time after, so that the death of any of the legatees after would not carry it to the survivors. *Trotter v. Williams*, Pre. Cha. 78.

Where a person may take by the name of heir, though not heir-general. *Starling v. Etrick*, Pre. Ch. 54. WORDS OF PURCHASE, HEIR.

A devised an estate to J and his heirs, upon trust that he should convey it to such of the relations of the testator as he should think best, and most reputable for his family. A died without issue, and the heir at law, testator's brother, preferred a bill against defendant, praying to have the estate conveyed to him. Evidence was admitted of testator's dislike to plaintiff; but if the trustee would give him the estate, plaintiff was not disabled to take it. *Clarke v. Turner*, 2 Freem. 198.

A, by will, gives his daughter 400*l.*, and devises lands to her until his son B should pay her this 400*l.* She marries C, whose father covenants to settle lands of 100*l.* per annum, and B, her brother, covenants to pay the 400*l.* to the husband; and upon payment, the lands devised to the daughter were to be discharged of this 400*l.* The husband dies. Decreed, the 400*l.* belongs to the wife, and not to the executor of the husband. *Howman v. Corie*, 2 Vern. 190. HUSB. & WIFE; CHOOSE IN ACTION.

Devises a legacy of 1500*l.* to A, payable at his age of twenty-one, and if A die before, then to B. A dies in the lifetime of the testator, yet B shall have the legacy. *Miller v. Warren*, 2 Vern. 207. *Sed quere* note there, *id.*

A devises 20*l.* a-piece to all the children of his sister B. A child born after making of will, and before testator's death, shall take. *Garbrand v. Mayot*, 2 Vern. 105. 2 Freem. 105. S. C.

Money bequeathed to A for life, and if she died in the life of her husband, to go to the children of her sister B, in such shares as A should advise. Some of the children of B died, leaving issue, and then A dies

in the life of her husband, making no appointment. Decreed, the money to be distributed among the children of B, and their representatives *per stirpes*, and not *per capita*. *Crook v. Brunking*, 2 Vern. 50. DISTRIBUTION.

Lands are limited to the second son in fee, provided that, if the eldest son die without issue, the second son should, within six months after such death of the eldest son, pay 1500*l.* to the sister, or in default thereof, the lands should go to the sister and her heirs. The eldest son dies without issue: the sister dies within the six months; her heir, and not her executor, shall have the benefit of this devise over. *Winchelsea v. Wentworth*, 1 Vern. 402.

A devises the surplus of his estate to his two nephews, equally to be divided between them, and appoints his executors to lay out for their benefit. One of them died in the testator's lifetime. The whole decreed to the survivor, not to the executors, the testator not intending them any benefit. *Cock v. Hurrish*, 1 Vern. 425. SURVIVORSHIP.

A gives 800*l.* to his executors, on trust to pay annuities to B and C for their lives, exceeding the interest of the 800*l.*, and gives the surplus of his estate to D and E. The annuitants being dead, the 800*l.* shall go to the residuary legatees, and not to the executors. *Id. ib.*

A, a copyholder, devised his lands to S, (a stranger) for twenty years after the death of his wife, to raise portions for his younger children. *Per Id. Ch.* where such a devise is made to the heir, there an estate shall arise to the wife by implication; but where it is devised to a stranger, (as in this case,) there in the meantime it shall descend to the heir. *Faulkner v. Faulkner*, 1 Vern. 22. A stranger is but *fidei commissarius*, *quoad* the profits of that part of the real estate which are devised from him. *Gilb. Ch. Rep.* 270. INTERMEDIATE PROFITS.

A man makes his brother executor, and gives him all his real and personal estate, and afterwards marrying, by a codicil makes his wife executrix: she shall have the personal estate, and not the brother. *Wilkinson v. Wilkinson*, 1 Vern. 23.

A, by will, directs 1000*l.* to be laid out in her funeral, and raised out of her plate and jewels, and then gives the rest of her goods and chattels to her executors; and in another clause, gives her executors 1000*l.* a-piece for their trouble; and after debts and legacies paid, gives all the rest of her personal estate to the children of B: decreed, the whole surplus to the children. *Fane v. Fane*, 1 Vern. 30. EXORS. BENEFICIALLY INTERESTED.

Legacy to A at twenty-one, and if he die before twenty-one, to B; B dies, then A dies before twenty-one. The administrator of B takes. *Anon.* 2 Vent. 347. INTEREST VESTED.

An infant in *ventre sa mere*, under a devise to heirs of the body of the devisor, begotten, and to be begotten, cannot take by purchase the legal fee, the terms of description not amounting to a legal designation of him; but is entitled in equity, by virtue of the apparent intention, to the trust of a term attendant on the inheritance, though merged at law. *Nurse v. Yerrworth*, 3 Swan. 608. MERGER OF TERM; INFANT IN VENTRE SA MERE.

If A gives 40*l.* to his cousin S, to be disposed of as testator should by a private note against him, and dies without making any appointment, this is a good bequest to S. *Lambert v. Bainton*, 1 Ch. Ca. 198.

A devised 600*l.* a-piece to his two daughters, and the residue of his personal estate to his son, and if either of his children died during their minority, the survivors to be heirs to the deceased by equal portions; the son died, and one sister brought a bill against the executors and the other sister, to have her own 600*l.* and one half of her brother's personal estate, which

was decreed, upon her giving security to pay back her own 600*l.* in case she died during her minority. *Pate v. Hutton*, 1 Ch. Ca. 199. LEGACY; CONTINGENT; SECURITY.

If A gives 40*l.* to S, to be disposed of as A, by private note should acquaint him, and A dies without making any appointment; this is a good bequest to S. *Martin v. Clark*, 2 Ch. Ca. 198.

If money is bequeathed to younger children, where there are several daughters, and a son, who by birth is the youngest, but heir to a fair inheritance, he shall not be considered as a younger child to take the legacy. *Bretton v. Bretton*, 3 Ch. Rep. 1. S. P. *Mead v. Cave*, 1 Ch. Rep. 224. YOUNGER CHILDREN.

### 7. Words Precatory, &c.

A testator having given an annuity to one of his next of kin, and expressed a reason for giving nothing to the others, gave the residuo of his property to his wife, recommending to her, and not doubting that she would consider his near relations, as he would have done if he had survived her: held, that there was no trust for the next of kin, but that the wife took the residuo absolutely. *Salé v. Moore*, 1 Sim. 534. TRUST.

Testator, after giving his real and personal estates to his wife in fee, said, that he had so given the same to her unfettered and unlimited, in full confidence that in her future disposition thereof, she would distinguish the heirs of his late father, by devising the whole of his estate, together and entire, to such of his father's heirs as she might think best deserved her preference: held, that no trust was created. *Meredith v. Heneage*, 1 Sim. 542. TRUST.

Testator gave to his wife all his personal estate, relying, that if she should marry again, she would secure whatever she should possess under his will, for her separate use; and he recommended her to give by her will, what he should die possessed of under his will, to certain persons named: held, that wife's executor was trustee for whole property possessed by her under the will for those persons named. *Horwood v. West*, 1 N. & S. 387. TRUST.

A recommendation by a testator to his son, to continue his nephews in the occupation of their farms, as heretofore, and so long as they continue to manage the same in a good and husband-like manner, and to duly pay their rents, is imperative. *Tibbits v. Tibbits*, 1 Jac. 317. TRUST.

A testator leaving to his son and heir his real estates, and the residuo of his personality, with a recommendation to continue his nephews as tenants on an estate settled on the son; the latter decreed to elect, either to continue them as tenants or to make them a compensation for the value of the tenancy out of the property given him by the testator. *Id. ib.* ELECTION.

Bequest to A B, "trusting she would use it," to indefinite purposes, creates no trust for those purposes. *Curtis v. Rippon*, 5 Mad. 434. TRUST.

Bequest in will, will raise a trust, if the objects and property are described with such certainty that the court can execute it; but otherwise the devise takes absolutely. *Eade v. Eade*, 5 Mad. 119. TRUST.

Gift of residuo of testator's personal estate, to trustees for perpetual endowment and maintenance of school, would be valid; but if testator goes on to "recommend" trustees to collect residuo, and purchase freehold lands, &c., it comes within the stat. 9 G. 2. c. 36. *Kirkbank v. Hudson*, 7 Price, 212. CHARITABLE USES; MORTMAIN.

"I give to A 500*l.*, and it is my will and desire, that A may dispose of the same amongst her relations, as she by will may think proper." Held, a trust for the relations of A, and the 500*l.* well bequeathed by

the will of A to her sister and her sister's children, though made without reference to the will of the first testator. *Forbes v. Ball*, 3 Mer. 437. TRUST; PERFORMANCE OF.

Devising to a son, recommending him to continue his cousins, A and B, in the occupation of their respective farms in the county of W, as heretofore, and so long as they continue to manage the same in a good and husband-like manner, and to duly pay their rents. A trust for the cousins, who had been tenants at will, and the son being the heir was put to his election. As to the effect of election against the will, whether compensation or forfeiture; *Qu.?* *Tibbits v. Tibbits*, 19 Ves. 656. TRUST; ELECTION; HEIR AT LAW.

Recommendation in a will, where the object and subject are certain, amounts to trust. *Id.* 664. TRUST.

No trust under words of recommendation and confidence applied to an uncertain subject; as what shall be left after the death of a person to whom the property is given in the first instance. *Id. ib.*

Words of entreaty in will, held to raise a trust on construction. *Prevost v. Clarke*, 2 Mad. 458. TRUST.

Codicil requiring and entreating the executor, who was also the residuary legatee, by will or deed, to settle and secure 500*l.*, to be paid at his decease; the testator declaring, that he had omitted to express it in his will, not doubting that the executor will readily comply with the bequest; a trust, by way of legacy out of the assets; not a condition imposed independent of them. *Taylor v. George*, 2 V. & B. 378.

Devise to A, and her heirs for ever, "in the fullest confidence that after her decease she will devise the property to my family," being restrained to an estate for life by decree at the Rolls, the devisee was enjoined from cutting timber pending an appeal. *Wright v. Atkins*, 1 V. & B. 313. See also 19 Ves. 299. 17 Ves. 255. Cooper, 111. 1 Turn. & R. 143. INJUNCTION AGAINST WASTE; TENANT FOR LIFE.

Devise to a nephew in fee, not doubting, in case he should have no child, but that he will dispose and give my said real estate to the female descendants of my sister, in such part or parts and manner as he shall think fit, in preference to any descendant on his own female line. A trust in the event described for the sister's children. *Parsons v. Barker*, 18 Ves. 476. TRUST.

Precatory words held imperative where the object and subject are certain. *Dashwood v. Peyton*, 18 Ves. 41. TRUST.

Devise and bequest of real and leasehold estates to the devisor's widow and her heirs for ever, in fullest confidence that after her decease she will devise the property to my family. Held, an estate for life only, with remainder in trust for the devisor's heir, as *persona designata*. *Wright v. Atkins*, 17 Ves. 255; affirmed, 19 Ves. 299. See also Cooper, 111. 1 Ves. & B. 313. 1 Turn. & R. 143. TRUST.

No trust arises on words of bequest or recommendation, unless the objects and subjects are certain. *Morice v. Bp. Durham*, 10 Ves. 536. TRUST.

When a testator expresses a desire as to the disposition of property, and the objects to which he refers are certain, the desire so expressed amounts to a command. *Cary v. Cary*, 2 Scho. & L. 189. TRUST.

Words of recommendation or precatory, or expressing hope, &c. if the objects and subject are certain, are imperative and create a trust. *Paul v. Compton*, 8 Ves. 380. TRUST.

Bequest to A for life, with power on her marriage to appoint the interest to her husband for life, and a recommendation to dispose of the principal after her own death, and the determination of the preceding trusts, among the children of A; the recommendation

being held an absolute trust, it is a vested interest in all the children; subject to be divested by appointment, and there being no appointment, children born after the death of the testator and those who died in the life of A, are entitled, with the interest. *Malim v. Barker*, 3 Ves. 150. TRUST; INTEREST VESTED.

Trust raised under a recommendation by will to a legatee to dispose of her legacy among certain persons after her death. *Malim v. Keighley*, 2 Ves. J. 529. TRUST.

Testator shewing his desire, creates a trust, unless plain words or necessary implication that there is to be a discretion to defeat it. *Id.* 335. TRUST.

Trust raised under a recommendation by will to a legatee to dispose of her legacy among certain persons after her death. *Id.* 333. TRUST.

Words of desire will raise a trust where the property and object are certain. *Pierson v. Garnet*, 2 Bro. C. C. 38. S. C. Prec. Chan. 201, &c. See S. C. *id.* 226. TRUST.

F having two sons, and being engaged in the sugar trade, devised his sugar houses, &c. to his eldest son; nevertheless in case his eldest son should die without a son or sons of his body, then to be recommended to him to give and devise the sugar houses, &c. to his brother, the testator's second son. The eldest son died without issue male, leaving a daughter, and without devising to his brother: Held not a trust for the brother, but a mere recommendation. *Cunliffe v. Cunliffe*, Ambl. 586. TRUST.

Whether a testator uses terms expressive of his desire, hope, request, &c. or words of command, direction, &c. it is the same thing; in either case he intimates or expresses what his will is, and that ought to be observed, and to prevail. *El. Bute v. Stuart*, 1 Bro. P. C. 485.

Devise to L in consideration of her promise to give, &c. is a trust. *Clyton v. Lumbe*, Ambl. 519. TRUST.

Devise not doubting, but she will give, &c. is a trust. *Massey v. Shearman*, Ambl. 520. TRUST.

A devise of lands for ever, conveys an estate in fee, and is not affected by subsequent words requesting the devisee, "in case of failure of issue of his said body," to give the estate to another. *Bland v. Bland*, 9 Mod. 478.

It seems that any words of a testator intimating a request, wish, desire, recommendation, &c. are sufficient to create a trust; provided there be certainty of the gift and of the object to be benefited thereby. *Harding v. Glyn*, 1 Atk. 469. n. 1.

If A devise all her personal estate to B, to be disposed of as B shall think fit, and add by parol, "you may if you please, give 100l. to my niece;" B, on a bill, in the answer to which the parol declaration is admitted, shall be decreed to pay the 100l. to the niece. *Nab v. Nab*, 10 Mod. 404. TRUST.

The words "I desire" or "I will," in a will, amount to an express devise. If a devise is to A for life, directing him at his death to give it to B, that amounts to a devise of the use of it only to A for life, remainder to B. *Eeles v. England*, 2 Vern. 467. Pre. Ch. 200. S. C.

Devise to wife "in confidence" that she will leave, &c. to his son, not relievable. *Cary*, 22.

It seems that any words of a testator intimating a request, wish, desire, recommendation, &c. are sufficient to create a trust, provided there be certainty of the gift and of the object to be benefited thereby. *Brat v. Offley*, 1 Ch. Rep. 246. *Parry v. Juxon*, 3 Ch. Rep. 35. TRUST.

## XVI. CODICIL.

## See also VIII. 3.

Testator devised his estates at S and H to trustees in trust, if there should be only one son of D, who should attain twenty-one, for that son, and in case there should be two or more such sons, interest for the second of them, and gave all the residue of his estates to trustees in trust to sell. He afterwards erased, and by codicil declared that he intended to erase the direction to sell only. He then gave all his estates to the son of D, who should first attain twenty-one, and change his name to E. D, at death of testator had a son, who was still an infant, and afterwards had another son: held, that codicil revoked the devise of the S and H estates, and also the devise of the residue of the estates to the trustees, and that D's eldest son took under this codicil an immediate vested interest, both in the estates of which the testator was seized at the date of his will, and those he afterwards purchased, and consequently was entitled to the rents during his infancy. *Duffield v. Elwes*, 2 S & S. 544. WILL, REVOCATION OF; WILL, CONSTRUCTION OF; VESTED INTEREST.

Codicil ratifying the will, does not set up an adeemed legacy. *Monck v. Id. Monck*, 1 Ball & B. 298. LEGACY, ADEMPTION OF.

All codicils are part of the will; therefore a codicil merely for a particular purpose, as to change an executor, and confirming the will in all other respects, does not revive a part of the will revoked by a former codicil. *Crosbie v. Macdonald*, 4 Ves. 610. WILL.

Two inconsistent wills; a codicil referring to the first by date as the last will, cancels the intermediate will, and evidence of mistake cannot be admitted. *Id. ib.*

Testator devised all his real estate to his sister for life, remainder to her children, as she should appoint, for want of appointment to all her children, and their heirs as tenants in common. His sister having two daughters, by codicil, declared to be a codicil to his will not then at hand, he gave one of them an annuity; and directing his annuities to be paid out of his three per cent. stock, he charged them on his real estate, in case of a deficiency, and directing the residue of his personal estate to be invested in freehold lands and hereditaments, he recommended to his sister to settle and convey, or join with her husband in settling and conveying all his estates and property which she might derive from him after his decease, to the use of her two daughters for life in such parts, shares, and proportions as she should approve, with remainder to their respective issue, and cross remainders, and the usual powers and clauses in strict settlement. The testator's sister died in his life; and her two daughters were his co-heiresses. Some real estates were purchased between the executing of the will and codicil. As to the real estate the will is not revoked, but is republished by the codicil; and the two nieces are entitled to all the real estates and to those directed to be purchased, as tenants in common in fee. *Maggison v. Mann*, 2 Ves. J. 630. WILL, C. OF; WILL, REVOC. OF; WILL, REPUBLICATION OF.

Where testator by will devised residue to daughters as tenants in common, and afterwards made a codicil for an express purpose, but referring the residue to daughters, omitting words of confidence, the codicil was construed by will, and they take as tenants in common. *Matheus v. Bowman*, 3 Anst. 727. WILL, C. OF.

Codicil considered as part of the will, and intent drawn from the whole. *Hill v. Chapman*, 1 Ves. J. 407. WILL, C. OF.

A gives by will to B, 500l. and by codicil, an an-

nity, and by another codicil in these words, "I add this codicil to my will, I give to B. 1000*l.*," held B. was entitled to both sums. *Hodson v. Hallett*, 10ff. 122. WILL, C. OF; LEGACY, ACCUMULATIVE.

Codicil does not operate as a republication of a will unless it is annexed to it, of the contents shew the intention. *Att. Gen. v. Downing*, Ambl. 573. WILL, REPUBLICATION OF.

Bequest of personality by will dated prior to 9 G. 2. c. 36, to be laid out in lands for a charity. It is afterwards confirmed by a codicil dated after the statute; the codicil operates as a new will and the devise is void. *Att. Gen. v. Hewitwell*, Ambl. 451. MORTMAIN.

Every codicil properly attested, is a republication of the will. *Gibson v. Rogers*, Ambl. 97. S. C. 1 Ves. 485. 4 Ves. 288. WILL, REPUBLICATION OF.

A devise of lands to trustees, who are afterwards changed by a codicil, is not revoked by the codicil; but the new trustees shall stand seised upon the trusts of the will, although the word "heirs" is made use of in the codicil. *Acherly v. Vernon*, 3 Bro. P. C. 85. S. C. 9 Mod. 68. 1 P. W. 783. Comyn, 381. 2 Eq. Ab. 269. WILL, REVOCATION OF.

A codicil attested by three witnesses, and ratifying a will, amounts to a republication of that will, and both ought to be considered together as one will. *Id.* 91. WILL, PUBLICATION OF.

#### WITNESS.

See BANKCY., VII. 2. (a).—PL. PARTIES, 19.—PR. EVID. 27.—STAT. C. OF, II. 45.

#### WITNESS ATTESTING.

See PR. EVID. 27. (c).—WILL, XV. 7.

#### WORDS PRECATORY.

See WILL, XV. 7.

#### WORDS CONSTRUCTION OF.

See also AGREEMENT, III.—BOND, II.—COVENANT, IX.—DEED, II.—DISTRIBUTION, IV.—GENERAL ORDERS.—POWER, V.—XII.—PR. DECREE, 2.—SETTLEMENT, I.—STATUTES.—TAUER, IX.—WILL, XI.

The term "rent," used in a decree under 37 H. 8. c. 12, relating to tithes in London, means rent actually and *bond fide* reserved without fraud, or covin, and not the annual value of the premises let. Fines, to whatever amount, paid on the renewal of leases of dwelling houses, are not to be considered as increase of rent, or to be taken into calculation in estimating the amount of tithes due, provided the rent reserved is equal to that at which the houses have been at any time before let. *Minor Canons of St. Paul's v. Crickett*, 5 Price, 14. RENT; DECREE.

Interpretation of the term "execution," as applied to a commission of bankruptcy, that it is a process for all creditors, legal and equitable. *Exp. Storks*, 3 V. & B. 107. BANKCY.

"Testament," includes a will, codicils, &c. "Instrument," signifies the will alone. *Fuller v. Hooper*, 2 Ves. 242.

The words "in case of the death," construed to refer to death in the life of the tenant for life. *Gal-land v. Leonard*, 1 Swan. 161.

Words importing contingency applied to an inevitable event, construed to refer to the occurrence of the event under particular circumstances. *Id.* 164.

A rent is a tenement; and therefore cannot pass by will without three witnesses, if out of freehold; the word "tenement" being in the statute of frauds. *Hubbergham v. Vincent*, 2 Ves. J. 231. 4 Bro. C. C. 353. STAT. OF FRAUDS.

The word "heirs," is not necessary to give an inheritance to trustees if a less estate would not answer the purposes of the trust. *Gibson v. Rogers*, Ambl. 95. 1 Ves. 485. 4 Ves. 288. n. TRUST.

#### WRIT.

See PR. WRIT.

#### YORK.

See CUSTOM, III.

#### YOUNGER CHILDREN.

A son who, when he attained twenty-one, was a younger child, but by the subsequent death of his elder brother, in the lifetime of his parents, becomes an eldest son before the time fixed for the payment of the younger children's portions, is entitled to his share of portions which would otherwise vest in the younger sons at twenty-one, and is not payable till after the death of the parents, unless there is enough in the settlements by which the portions were provided, to shew that the character of younger child was to be ascertained by reference to the time when the portions vested, and not to the time when they became payable. *Windham v. Graham*, Russ. 331. SETTLEMENT, C. OF.

A, being possessed of freehold and copyhold estate, the latter of which could not be devised, but by conveyance to a trustee and declaring uses, by will devised to his younger son, all his messuages, lands, and tenements at A, and also all that his messuage and tenement at S, in the occupation and tenure of J, as farmer thereof, &c. Held that the copyhold lands did not pass by the devise, the testator not having observed the formalities necessary for the passing thereof, and that the court would not supply a surrender or put the heir to election, though the devise was to a younger child. *Hodgson v. Morent*, 9 Price, 556. WILL, C. OF; COPYHOLD, DEFECTIVE SURRENDER OF; HEIR AT LAW; ELECTION.

Under a will directing the transfer of stock among all the children of the testatrix's daughter, except an eldest son, younger son having become the eldest living by the death of his elder brother, who survived the testatrix, is not entitled to a share, although an estate limited to his elder brother did not descend to him. *Mutheys v. Paul*, 3 Swan. 328. WILL, C. OF.

Every one but the heir is a younger child in equity. Younger children are those who do not take the estate. The character of younger child must continue until the time of payment. *Savage v. Carroll*, 1 Ball & B. 278.

Surrender supplied for younger children; the heir having a provision under the will, without regard to the amount. *Garn v. Garn*, 16 Ves. 268. COPYHOLD, DEFECTIVE SURRENDER OF.

Portions by settlements for younger children living at the death of the survivor of the parents, with a proviso that advancements should be in satisfaction, unless the contrary is declared. The father by will desiring the settlement may be punctually complied with, made a residuary disposition of real and personal estates, among the younger children, directing that what they may have received in his life shall be brought into the account so as to make them all equal; construction upon the whole, that advancement in marriage or otherwise, though not the grammatical construction, is within the proviso; and equality being the object, an arrangement was made upon that principle; one of the younger children having become the eldest, and therefore owner of the estate, between the death of the parents, after advances received in satisfaction of the portion in the former character, is to be considered a younger child in the account. *Leake v. Leake*, 10 Ves. 477. WILL, C. OF.

On construction of will, held that under a bequest to the younger children of A, an only surviving younger child was upon the whole will entitled; and the second having become the eldest, was excluded. *Iy. Lincoln v. Pelham*, 10 Ves. 166. WILL, C. OF.

A daughter, though eldest, held a younger child to take a legacy by description. *Pearson v. Garnet*, 2 Bro. C. C. 38. S. C. Prec. Chan. 201. See S. C. id. 226.

Under a power to appoint a sum of money among children, but that the eldest son, or the son possessing the estate, shall have no part of the money, a younger son becoming an eldest, is excluded, though mentioned by name in the execution of the power whilst he was a younger son. *Broadmead v. Wood*, 1 Bro. C. C. 77. SETTLE. C. OF.

Younger child is never considered as an eldest, but between parent and children, or one in loco parentis, not in the case of a provision by a stranger. *Hall v. Hewer*, Ambli. 203.

Grandmother, under a power, creates by deed a term, to commence after her death, for raising money for younger children, as their father should appoint; if no appointment, equally; if but one besides the eldest, then to that one; if none, except the eldest, then to him; if no eldest son, then to her own executors. At the date of the deed there was one grandson and one grand-daughter. The father afterwards had another son, and died without appointment; the eldest son having died under age: held, that the whole sum belonged to the daughter, and that the younger son having thus become an eldest son, was excluded; eldest son unprovided for, considered as a younger. *Ld. Teynham v. Webb*, 2 Ves. 198. DEED, C. OF; INTEREST, VESTED.

Younger son becoming an eldest, entitled to take eo nomine. *Bridgewater v. Egerton*, 2 Ves. 122.

Second born son may take under a limitation "to the first son," he being so at the time. *Lomax v. Hobnden*, 1 Ves. 290.

Bequest of 3000*l.* to Jane, the wife of C, for the use of her younger children, to be distributed as she should appoint, in default, equally. All Jane's children by C, being born at the time of the will, and

death of the testator, it was held vested as a present legacy to them; subject to variation as between them, but not to extend to the children by a future marriage. The period of vesting being at the death of one who was a younger child at the testator's death, and became an eldest afterwards, was held entitled. *Coleman v. Seymour*, 1 Ves. 209. WILL, C. OF, WHO TAKE; INTEREST, VESTED.

An elder daughter, where there is a son, is accounted a younger child in a court of equity. *Hewage v. Hunloke*, 2 Atk. 456. SETTLE.; MISTAKE.

A voluntary deed executed in favour of children, without a power of revocation, is not revoked by a subsequent will. *Batton v. Bolton*, 3 Swan. 414. VOLUNTARY DEED, REVOCATION OF.

A voluntary deed in favour of younger children, though retained in the possession of the grantor, and afterwards destroyed by him, established against legatees. *Sear v. Ashwell*, 3 Swan. 411. Id.

Where there is a sum of money provided for younger children, one of the younger becomes eldest, he shall have no part of this money; but where the money was, by a private act of parliament, to be appointed among A, B, and C, (naming them,) and A afterwards becomes eldest, he is capable of an appointment in his favour. *Jermyn v. Fellows*, Forres. 93.

Where, by mistake, term to raise portions for younger children; was created in deed after limitation in tail to first son, court rectified it in favour of the younger children. *Halfpenny v. Udale*, 9 Mod. 56. MISTAKE; SETTLEMENT.

The eldest daughter, where there is a son, or where the estate by a settlement goes all to a remainder-man, is a younger child in equity. *Beale v. Beale*, 1 P. W. 244.

A made a voluntary settlement of lands, (subject to an annuity of 100*l.* to his youngest son) in trust for his eldest son and his heirs, which settlement did not contain any power of revocation; the eldest son being dead, the father made another voluntary settlement of the same lands to the use of himself for life, remainder to his youngest son for life, remainder to trustees to preserve, &c. remainder to first and other sons of youngest son in tail. The first deed came into the hands of the eldest son's heir, and the other to the second son, who brought a bill to set aside the first. Both sons having been otherwise provided for, it was held, that though both deeds were voluntary, yet the consideration of being a younger child, was not sufficient to set aside the first deed. *Claverling v. Claverling*, 7 Bro. P. C. 410. VOLUNTARY CONVEYANCE.

A B, a widower, settles lands to raise 100*l.* a year for his eldest son, and 100*l.* a piece for his younger children, and afterwards he marries again and has children by his second wife: decreed, the children by the second wife, were equally entitled with the other younger children: though the portions of the younger children were by the settlement, to be paid according to their seniority, yet in case of a deficiency, they shall be paid in average. The portions of the younger children, who died in the life of their father, not to be raised in favour of the administrators; otherwise, if any of the daughters had married in the lifetime of their father and afterwards died. *Brathwaite v. Brathwaite*, 1 Vern. 334. SETTLE. C. OF, WHO TAKE.

If money is bequeathed to younger children, where there are several daughters, and a son, who by birth is the youngest, but he is not in his inheritance, he shall not be considered as a younger child to take the legacy. *Bratton v. Bratton*, 3 Ch. Rep. 1, S. P. Mead v. Case, 1 Ch. Rep. 224. WILL, C. OF, WHO TAKE.



# ADDENDA.

The principal Titles in this part correspond with those in the main body of the work; but owing to the brevity of most of them, the subdivisions are omitted, except in tith. Pleading, Practice, and Will.

## ACCIDENT.

If, after a contract for sale of an estate, before the title is accepted, the title deeds be destroyed by fire, this court will not compel the specific performance of the contract, unless the vendor can furnish the purchaser with the means of showing what were the contents of the destroyed deeds, and of proving that such deeds were duly executed and delivered. *Bryant v. Busk*, 4 Russ. 1. VEND. & PURCH., TITLE.

## ACCOUNT.

If letters of administration are granted to an infant, under which he receives and disposes of the assets of the intestate, an account cannot be directed in respect of his receipts during infancy. *Hindmarsh v. Southgate*, 3 Russ. 324. INFANT; EXOR.

When, in consequence of a mistaken construction of a doubtful instrument, the rents of a charity estate have been for a series of years applied by a corporation to public purposes not warranted by the nature of the charity, the corporation will not be charged for such misapplication. The court will not compel a corporation to produce their title deeds, and will not direct an inquiry as to the property which they possess applicable to general corporate purposes, in order to ascertain whether there is any fund which can be applied in making good a breach of trust committed by them in the management of charity funds. *Att. Gen. v. Corp. of Exeter*, 3 Russ. 395. CORPORATION; CHARITY.

A had long employed B as his steward, professional advisor, and general confidential agent: disputes having arisen between them, an agreement was entered into between B and a clergyman acting on behalf of A, by which a gross sum was to be paid to B in lieu of all his claims, but no accounts or vouchers were rendered or produced by A, nor any bill of costs delivered. That agreement will not protect B from rendering an account to his principal. *Jenkins v. Gould*, 3 Russ. 385.

Disputes existing between A and his solicitor, receiver, and confidential agent, B, which involved long and intricate matters of account; an authority was given by A to a third person to settle any account in

which he (A) had an interest, and to compromise any claims which he might have. Such an authority will not empower that third person to make an agreement, without the production or examination of any account, that a gross sum shall be paid to B in lieu of all his demands on it. *Id. ib.*

A, a second incumbrancer on an estate in Jamaica, filed a bill to have the produce of the estate applied in satisfaction of the incumbrance. A receiver was appointed, who was ordered to pay to B, the first incumbrancer, the interest on her charge out of the first proceeds, and to consign the produce to R for sale. On making a consignment, the bill of lading was sent to be delivered to R, on his paying B's interest. Afterwards, by order of R, the consignments were made to other merchants, who paid B her interest for several years, but then ceased to do so. Upon a bill by her for an account of the consignments, and payment of her interest, charging collusion between the receiver and consignees, a demurrer for want of equity was overruled. *Fitzgerald v. Stewart*, 2 Sim. 333.

A plaintiff who complains of a piracy of his work, has no remedy in equity, unless he establish a title to an injunction, and then the account will follow. *Baily v. Taylor*, 1 Russ. & M. 73. COPYRIGHT; PR. INJUNC.

A decree on a bill for an account was made in 1720. The account before the master was referred to arbitration, 1734. In 1738, 5,369l. 16s. 1d. was awarded to A, the plaintiff, and the award made a decree of the court, which was affirmed upon appeal in 1739. In 1741, A filed a bill in the nature of a bill of amendment and revivor, against the representative of the defendant in the former suit; and in 1747, he filed an amended bill, praying, in default of personal estate, a foreclosure of a mortgage admitted to be in existence, and the application of the principal and interest due thereon in satisfaction of his demands. In 1771 (after various amendments and bills of revivor) the representatives of A filed a bill against the representative of the original defendant, stating causes for the delay in the prosecution of the suit, praying an account of the rents of the mortgaged premises: the defendant put in two answers, which were reported insufficient, refusing the discovery. In 1785, a bill of revivor and amended bill was filed, stating that a deed had been made by collusion between the representative of

the mortgagee and J B, the heir of the mortgagor, charging that the deed was a fraud upon the plaintiff, and a devastavit of the assets: and praying that the estates of the first representative of the mortgagee devised by him for the payment of his debts might be sold; and praying also an account of the real and personal estate. The defendant admitted the fraud charged as to the deed, and contended that the plaintiff must first have recourse to the mortgaged lands. Nine bills were filed between 1795 and 1804. In 1808 a decree was pronounced, directing accounts of the real and personal assets of the original defendant and his first representative. In 1810, the sum of 28,657l. was reported due to the plaintiffs, and that the personal estate consisted partly of a mortgage, which came into the hands of the representative, who had received of the rents and profits sufficient to answer the demand. To this report exceptions were filed. In 1811, the cause came on to be heard upon the report, exceptions, and merits; when it was referred to the master to enquire under what title the representative of the original defendant entered into the lands in question; and he reported that he entered as mortgagee. Exceptions were filed to this report, principally on the ground that the deeds of supposed mortgage were in fact deeds of trust, executed to secure the lands against the claims of adverse creditors; and also that there were unsatisfied judgments prior to the plaintiff's claim. By a decree upon further directions the exceptions were allowed, and the account directed to be taken excluding the alleged mortgage; and as against J B, the bill was dismissed. Upon appeal, this judgment was affirmed. *Quære*, whether J B, against whom the bill was dismissed, ought not to have been brought before the house as a party to the appeal? *Kelly v. Bateman*, 1 Bligh, N. S. 237.

By statute 59 Geo. 3. c. 3. navy agents are entitled to make the usual charge for passing accounts before that act; and to charge commission on the full amount of pay, without being limited to the money passing through their hands: the defendants having received a sum as returned premiums, without bringing it to account for many years, alleging, that they waited the final adjustment of average; it was referred to the master to enquire whether they were entitled to retain it, according to the custom of merchants. *Drury v. Atkins*, 1 Tam. 75. PRIN. & AGENT.

The court sitting in bankruptcy, has no jurisdiction to order the personal representative of a deceased assignee to account for the personal estate of the bankrupt in his hands. *Exp. Crowe*, 1 Mont. & M. 281. The Ld. Ch. thought, that an admission of assets on the part of the representative would make no difference. *EXORS. ADMISSION OF ASSETS.*

Demurrer to a bill for a general account, and for an injunction to restrain the defendant from taking out execution on a judgment recovered by him in an action at law, was allowed, because the bill did not establish a case of account on its own statement, and it was too late for the plaintiff to set up the interference of the court, after having suffered the action to be tried at nisi prius. *Moss v. Lane*, 10 Price, 502. PR. DEMURRER.

Where an estate has been devised to a person, who has since died, the executor is not to be taken of the personal estate of the deceased, but the vendor shall have a bill to compel him to account for the personal estate well and exactly. *Topham v. Constantine*, 1 Tam. 135. PRIN. & AGENT; FIDUCIARY; LIEN.

Accounts may be ordered on an acquiescence of five years, if circumstances pointing to show fraud are then discovered. *President, &c. of Orphan Board v. Renen*, 1 Knapp, 100.

The master of a vessel in the South Sea whale fishery agrees on behalf of the owners, that each of

the crew shall have a specified share of the profits of the voyage. Before the return of the vessel, the owners sell a quarter of the cargo. The custom of the trade is for the cooper to estimate the quantity of oil; this was done, and the plaintiff settled accordingly: Held that the owners had no right to sell part of the cargo; but the plaintiff having settled could not then come for relief to equity. *Cockle v. Whiting*, 1 Tam. 55. ACQUIESCENCE.

Accounts having been settled, and a release executed, in order to avoid the latter, and obtain an account in this court, the plaintiff must establish either fraud or surprise. In order to induce the court to give a decree to surcharge and falsify, some one mistake must be shewn. If an error is detected, and settled before the institution of a suit, it is not a foundation for a decree to surcharge and falsify. *Davies v. Spurling*, 1 Tam. 199 S. C. 1 Russ. & M. 64.

An executor or trustee, is not to be allowed, without question, the amount of bills of costs which he has paid *bond fide* to the solicitor to the trust; and the master, without regularly taxing the bills, will moderate their amount. *Johnson v. Telford*, 3 Russ. 477. PR. COSTS; EXECUTOR, LIABILITY OF.

A mortgagee is entitled to be allowed, in account against the mortgagor, all expences properly incurred for the recovery of the mortgage money. *Ellison v. Wright*, 3 Russ. 458. MORTGAGOR AND MORTGAGEE.

An agent named executor, is not entitled to charge commission on business done subsequently to the testator's death. *Sheriff v. Aze*, 4 Russ. 33. PRINCIPAL AND AGENT; EXECUTOR, ALLOWANCE TO.

The masters make it a rule not to take an account of a partnership, unless specially directed, although the order be to take all accounts. *Woolly v. Gordon*, 1 Tam. 11. PARTNERSHIP.

## ACQUIESCENCE.

Consent of counsel is to be given upon their own conception of the authenticity of their instructions, and if given is binding on the clients. *Mole v. Smith*, 1 J. & W. 673. BARRISTER.

F C tenant for life, with a power of leasing for thirty-one years, demises, in 1749, for three lives to his attorney; M C, his son tenant in tail, four years afterwards, in consideration of 20l. executes an agreement, which was endorsed on the part of the lease in the attorney's hands, to confirm the demise, and renew for a further term of three lives. Eleven years after this, M C dies, and the articles are then registered. The last of the three lives died in 1817, and the representative of the attorney, files a bill for the specific performance of the son's agreement. Held that the case was too suspicious to come within the principle of specific performance, and the length of time elapsed under circumstances which did not imply acquiescence. *Blakeney v. Baggott*, 1 Dow, N. S. 405. LENGTH OF TIME; AGREEMENT, SPEC. PERF.

Master of vessel in South Sea whale fishery, agrees on behalf of owners, that each of crew shall have a specified share of profits of voyage, before return of vessel; owners sell a quarter of cargo. The custom of trade is for cooper to estimate quantity of oil; this was done, and plaintiff settled accordingly: Held that owners had no right to sell part of cargo; but the plaintiff having settled, could not then come for relief to equity. *Cockle v. Whiting*, 1 Tam. 55. ACCOUNT.

A agreed to lend B 600l. navy stock: he sold the



stock for 522l. which was paid to B; a bond was drawn to repay "the sum of 522l., (being the produce of 600l. navy five per cents., or such other sum as would replace the stock) with lawful interest." B, on discharging the bond, refused to replace stock; A received the money and gave up the bond: Held that after having received the money, he could not come into equity for relief. *Barnham v. Munn*, 1 Taml. 86. **BOND.**

A party is bound by the consent of his counsel given in court, though they had no instructions to consent, if they were at the time apprised of all those facts of which the knowledge was essential to the proper exercise of their discretion; but he will be released from an order made by such consent, if they gave that consent in ignorance of material circumstances. *Furnival v. Bogle*, 4 Russ. 142. **BARRETER; SOLICITOR AND CLIENT.**

How far a party will be affected by the remissness of his solicitor, in not immediately objecting to an order made by the consent of counsel in court, when neither the party nor solicitor was present, and instructions to consent had not been given by either. *Id. ib.*

### ACTION AT LAW.

To an action of debt or covenant, heir may plead *riens per descent*. 1 W. 4. c. 47. s. 7.

Action of debt or covenant may lie against heir, in respect of land descended, though he sells estate before action brought. *Id.* s. 6. And it may be maintained against devisee, where no heir. *Id.* s. 4. **HEIR AT LAW; DEVISEE.**

### ADMINISTRATION PENDENTE LITE.

Decree of foreclosure against an administrator *pendente lite*, plaintiff knowing limited character in which administrator represented mortgagor, and that there were persons claiming the beneficial title to estate, not parties to suit, merely forecloses administrator *pendente lite*. Sale directed by decree of foreclosure to be made in a month, on the consent of administrator *pendente lite*, not binding on persons beneficially entitled to the estate, not parties in the suit. *Ellis v. Deane*, 1 Beat. 5. **PR. DECREE.**

See as to administrator *pendente lite* generally. *Id. ib.*

### ADMISSIONS.

A plaintiff is not entitled to the production of a letter admitted by the defendant to be in his possession, but which the defendant states was written by him to his solicitor, and directed the solicitor to take the opinion of counsel upon the question in dispute between the parties. *Vent v. Pacey*, 4 Russ. 193. **PROFESSIONAL CONFIDENCE; PR. PRODUCTION OF DEEDS.**

### AGREEMENT.

Agreements may be made by guardian of infants, or committees of lunatic, with approbation of court, signified on the petition. 1 W. 4. c. 65. s. 26. **GUARD. & WARD; LUNATIC.**

Where a feme covert, having separate property, joins in a security for money advanced to her husband the court acts upon it, not as an agreement to charge

her separate property, but as an equitable appointment under the settlement, to be satisfied from the rents and profits of that property, and not by sale or mortgage. *Field v. Sowley*, 4 Russ. 112. **POWER, EXECUTION OF.**

The court will not interfere to set aside an agreement, merely on the ground of inadequacy of consideration, nor on account of the distress of the plaintiff, where no advantage had been taken of his situation. *Purdie v. Millett*, 1 Taml. 31.

If an agreement be in part unperformed, the principle of a court of equity, is in compensation, not forfeiture. *Page v. Brown*, 4 Russ. 6.

F C, tenant for life, with a power of leasing for thirty-one years, demises in 1749, for three lives to his attorney. M C, his son tenant in tail, four years afterwards, in consideration of 20l. executes an agreement, which was endorsed on the part of the lease in the attorney's hands, to confirm the demise, and renew for a further term of three lives. Eleven years after this F C dies, and the articles are then registered. The last of the three lives died in 1817, and the representative of the attorney files a bill for a specific performance of the son's agreement. Held, that the case was too suspicious to come within the principle of specific performance, and the length of time elapsed under circumstances which did not imply acquiescence. *Blakeney v. Baggott*, 1 Dow, N. S. 405. **ACQUISITION; LENGTH OF TIME.**

A person who had entered into an agreement for the purchase of land, which was formerly part of the glebe of a rectory, and had been before sold for the redemption of the land-tax, is not bound to complete the purchase, when it appears that, upon the prior sale for the redemption of the land tax, the rector was himself the actual purchaser in the name of his curate. *Grover v. Hagell*, 3 Russ. 428. **VENDOR & PURCH.; LAND TAX, REDEMP. OF.**

An infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual. *Flight v. Holland*, 4 Russ. 298. **INFANT.**

Where an agreement expressly refers to a plan, as an existing document forming a term in the contract, parol evidence is admissible for the purpose of identifying the plan; but unless the evidence of identity is clear and satisfactory, specific performance of such an agreement will be enforced. *Hodges v. Horsfall*, 1 Russ. & M. 116.

*Fellotes v. Ld. Gwydir*, 1 Sim. 63. affd. 1 Russ. & M. 83.

A court of equity will not entertain a bill for the specific performance of an agreement, to pay in a certain event, which has happened, an annual sum by quarterly instalments. *Brough v. Oddy*, 1 Russ. & M. 65.

If A, for valuable consideration, undertakes to surrender a copyhold to B, and B, on borrowing money from C, enters into a written agreement with C, that he, B, will surrender the same copyhold to C, by way of mortgage security. A is not justified in refusing to surrender the copyhold to B, because he, A, has received notice from C of the agreement between him and B. The surrender by A, does not prejudice, but promotes the agreement. *Walford*, 4 Russ. 372.

Where A agrees to mortgage of leaseholds, and not to mortgage of freehold, and afterwards called for a bill for specific performance, or a bill for specific performance was denied, as to the defendant. *Bass v. Choleys*, 1 Russ. & M. 116.

A, having purchased land, in the title to the investigation of C and D, solicitors, in partnership, upon whose advice the purchase was completed. D was a trustee to invest her dowry in the conveyance. A died, and his devisee sold the property to D. On a

bill for specific performance by the vendor, it was held that a solicitor who has been employed to advise on a title, could not, on purchasing the property himself, set up an objection which he did not think important when advising his principal. *Rever v. Simpson*, 1 Tam. 69. VENDOR & PURCHASER; SOLICITOR & CLIENT.

A husband having been found guilty for an assault upon his wife, the court recommended an accommodation: the counsel of the parties thereupon signed a memorandum of an agreement that the husband would allow the wife 50*l.* a year, and the court, referring to the agreement, imposed merely a nominal fine. Upon a bill for a specific performance, it was decided that the defendant must disprove that his counsel had authority to sign the agreement, and that in the absence of evidence to the contrary, the court will presume that he had such authority, and, therefore decreed a performance. *Elworthy v. Bird*, 1 Tam. 40. BARRISTER; PRINCIPAL & AGENT.

The agent of the Albion insurance company had an office in Glasgow, at which J. P. and others the owners of a steam-vessel effected an insurance, receiving from the company's agent a contract, importing generally that a policy corresponding with the memorandum would be prepared at the office in London, and delivered to the assured of their order "on the third Monday in the ensuing month or on any subsequent day." The policy that was sent down, and which was never shewn to or demanded by the assured, contained a clause that it "should be suspended and remain out of force during the time the steamboat might be at sea." At the end of the year, the policy was renewed through the agent at Glasgow, who delivered to the assured a memorandum, signed by the company's secretary in London, signifying that the above policy had been renewed, but no notice of the exception was ever communicated to the assured. The vessel was shortly afterwards destroyed by fire on her passage from Liverpool to Dublin. Held, that the memorandum was the contract of the party, which had not been fulfilled by the company, who were therefore liable for damages; that the act 6 Geo. 1. c. 18. (repealed, see 6 Geo. 4. c. 91.) so far as it declares all policies executed by six persons, other than the London insurance and Royal Exchange assurances, to be absolutely void, does not extend to Scotland; that a contract so entered into was a Scotch and not an English contract. *Pattison v. Mills*, 2 Bl. N. S. 519. INSURANCE; SCOTLAND.

Two parties treating for a lease, agreed that the amount of rent should be fixed by two arbitrators, with power to call in an umpire, whose decision, with that of one of the arbitrators, should determine the rent. The umpire being chosen, he and the arbitrator for the lessee fixed the rent. The former stating as the ground of his decision, that the lessee had agreed with the arbitrators to lay out a large sum upon the premises, but which agreement the lessor had no power to enforce. The arbitrator made his valuation at the instigation of the lessee's wife. Held, reversing a decision of the court of chancery in Ireland, that under these circumstances a specific performance ought not to be granted. *Sir Arthur Chichester v. McIntyre*, 1 Dow. N. S. 460. AWARD.

#### AGREEMENT.

A testator gave his property after the death of his wife to trustees in trust to pay the interest and profits to his two daughters J. & E. to their separate use, with a direction to pay to and apply for the benefit of A, the son of E, 200*l.* annually, when he attained the age of twenty-one years, and before that period such part of the 200*l.* bequeathed to him

as might be judged proper. He then gave his daughters power to dispose of the principal by will to their children or grandchildren respectively, except that proportion of the principal given to E, and from which the interest is to arise to my grandson, viz. "4000*l.*, which sum shall be my grandson's property;" and in case either of the daughters died without issue, he limited her share of the fund over to the other daughter, her children or grandchildren. A having attained twenty-one and died in his mother's life-time: Held that the annuity ceased upon his death, and that the 4000*l.* never vested in him. *Livesey v. Livesey*, 3 Russ. 287. S. C. in part reversed. *Id.* 542. WILL. C. OF; INTEREST VESTED.

It was not necessary under the 17 Geo. 3. c. 36. that the memorial of an annuity should contain the christian names of the attesting witnesses at full length; and the memorial is sufficient if it states them as they appear signed to the attestation of the deed. *Philippis v. Const*, 3 Russ. 267.

Where an annuity is granted for a term of years to be paid half-yearly, and at the same time promissory notes are given by the grantee for the payment of each half-year's annuity when it becomes due, and it appears that the several half-yearly payments will repay the purchase money with interest, exceeding the rate of five per cent., the transaction is usurious. *Fereday v. Wightwick*, 1 Russ. & M. 45. USURY.

Annuity for years originating in an agreement for a loan, and producing more than a return of the principal and five per cent. interest, is usurious. *Fereday v. Wightwick*, 1829. 1 Tam. 250. USURY.

#### ARBITRATOR, &c.

In a suit instituted to enforce a pecuniary demand against the real and personal estate of testator, an order was made by consent, referring all matters in difference between the parties in the cause to arbitration, and the arbitrators made an award ordering the executors to pay a certain sum to the complainants, in full satisfaction of all their demands on him and his testator, but directing that certain other defendants, who under the testator's will took interest in his real estate, should be at liberty to prosecute their claims against the testator's estate, in like manner as if no order of reference had been made; the award was held not to be final, and was therefore set aside. *Turner v. Turner*, 3 Russ. 494.

An award is invalid if one of the parties to the reference dies before it is made, unless the representatives of the parties are included in the submission.—*President and Members of the Orphan Board v. Van Reenen*, 1 Knapp. 100.

Two parties treating for a lease, agreed that the amount of rent should be fixed by two arbitrators, with power to call in an umpire, whose decision, with that of one of the arbitrators, should determine the rent. The umpire being chosen, he and the arbitrator for the lessee fixed the rent. The former stating as the ground of his decision, that the lessee had agreed with the arbitrators to lay out a large sum upon the premises, but which agreement the lessor had no power to enforce. The arbitrator too made his valuation at the instigation of the lessee's wife. Held, reversing a decision of the court of chancery in Ireland, that under these circumstances, a specific performance ought not to be granted. *Chichester v. McIntyre*, 1 Dow. N. S. 460. AGREEMENT, SPEC. PERF.

#### ATTAINDER.

In the policies effected by the Amicable Society,

there is no exception as to death by the hands of justic person insuring his life in that office, afterwards suffered death for a criminal offence the policy

was not thereby avoided. *Bolland v Disney*, 3 Russ. 351, DROPS C OI, FORFEITURE, POLICY OF INSURANCE

BAILLÉ.

Warehousemen being private agents, and not holding goods as the possessors of a public bonded warehouse, cannot maintain a bill of interpleader, but where goods are deposited in a public bonded warehouse, a bill of interpleader may be maintained against contending claimants. *Cooper v. De Fastet*, 11 *Iml.* 177. PR INTERPLEADER.

BANK OF ENGLAND

Where transfers directed to be made, who to be named. 1 *W* 4 c 60. s. 32 STOCK, TRANSFER OF, PR. ORDER.

BANKRUPTCY

A commission issued under the stat. 6 *G* 4 c 16, was ordered to be superseded on the ground that no trading, subsequently to the 1st of September 1825 on which day that act came into operation, had been proved. *1 ip Bitten*, 1 *Mont* & *M.* 287

Fixed costs upon a judgment as in case of a non suit under a rule of court, do not constitute a good petitioning creditor's debt such costs not being recoverable by action at law, but only by attachment, in the nature of an execution. *1 ip Stevenson*, 1 *Mont* & *M.* 262

Where a commission had issued against three persons, and it was afterwards discovered that one of them was an uncertificated bankrupt, the commission was ordered to be wholly superseded. *Quere* whether a joint commission, in which its execution can be rendered valid as to the remaining partners, after a supersederas as to the partner against whom it is invalid. *1 ip Wray*, 1 *Mont* & *M.* 195.

Where bankrupts were described as 'late of Kent Road, in the county of Surrey, merchants, dealers and chapmen,' and it appeared that they had withdrawn from that business some time previously, and had subsequently engaged in farming, upon distinct farms, and each on his separate account, the description was considered insufficient, and the commission superseded. *1 ip Day*, 1 *Mont* & *M.* 208

A commission sealed, but not opened, was superseded at the instance of the petitioning creditor without serving the bankrupt, or shewing that he could not be found all his rights whether by action or petition being reserved in the order. *1 ip Patten*, 1 *Mont* & *M.* 211

The *Ld. Ch.* said he thought it proper to vary the rule laid down in *Exp. Lorth*, 1 *Mont* & *M.* 10

Where after a commission had been opened, the clerk of the solicitor, supposing the name of the bankrupt to have been spelt wrong, altered it, the *Ld. Ch.* refused to allow the commission to be amended, but directed it to be superseded. *Exp. Stammeis*, 1 *Mont* & *M.* 290.

Where a commission issued on the petition of four partners, and one of them died before the date of the fiat and of the commission, it was superseded, with liberty to the surviving partners to lodge new docket

papers, and issue another commission. *Exp Wakefield*, 1 *Mont* & *M.* 291

A commission was issued against two partners, subsequently a commission was issued against one of them, and three other persons, this latter commission was then superseded as to the partner who was included in the first commission without prejudice as to the other three bankrupts. The assignees under the second commission sold an estate belonging to one of the three partners, the purchaser objected, that the second commission was altogether void, but the court held otherwise, and made a decree for specific performance. *Burt v. v. Carl* 11 *Iml.* 113

A creditor is not a competent witness to support a commission of bankrupt, but where the witness has been asked whether he was a creditor, and replied that he was not, and did not intend to prefer any claim, it was held, that the subsequent discovery of his being in fact a creditor, was not sufficient ground for a supersederas. *Semble*, that all objections to the competency of a witness must be taken before the commissioners. *1 ip Hills*, 1 *Mont* & *M.* 272.

The court will not assume that commissioners are likely to exceed their authority, or fail in the discharge of their duty. Where a mortgagee of the bankrupt's property who was summoned to attend and produce to the commissioners the mortgage deed petitioned that they might be restrained from requiring the production of the security the petition was dismissed with costs, as being premature. *1 ip Beeton*, 1 *Mont* & *M.* 244

All documents required to be produced, should be described in the body of the summons, previously to its being signed by the commissioners. *1 ip Lloyd*, 1 *Mont* & *M.* 270

A solicitor summoned as a witness under the stat. 6 *G* 4 c 16 s. 33, 34 to produce a mortgage deed of the bankrupt's property deposited with him by his client, the mortgagee refused to produce the deed, and was committed by them for not answering satisfactorily held, that the warrant was defective in form as it appeared that the summons was to produce and not to answer. *Id.* 269.

A bankrupt, under examination, being asked whether the statements contained in a paper produced and shewn to him were true statements, demurred to the question, on the ground that an answer to it might subject him to a criminal prosecution, and was committed for not answering held, that in absence of authority to show that commissioners may dispense with the general rule of law, that no person can be compelled to criminate himself, the bankrupt was entitled to demur, and was accordingly discharged. *1 ip Auby*, 1 *Mont* & *M.* 212.

A bankrupt cannot claim an allowance before a final dividend has been made. *Exp. Surridge*, 1 *Mont* & *M.* 287.

Where an equitable mortgagee applies for leave to bid at the sale of the mortgaged premises, the practice is for him to pay the costs of the application. *1 ip Robinson*, 1 *Mont* & *M.* 261. MORTGAGE, & MORTGAGE, LEVYING MORTGAGES, PR. COSTS.

To a bill by the assignee of a bankrupt, against a removed assignee for an account, a plea that the suit was not instituted with the consent of the creditors, at a meeting pursuant to the 11 & 12 *Geo.* 3. c. 8 s. 58.

was allowed. *Stokes v. Dery*, 1 Beat. 152. PL. PLA.

There may be a distinction between an assignee commencing an original suit, and continuing one commenced by the bankrupt. *Id.* 166.

Where at the election of assignees, the major part of the creditors, in value, were excluded from voting by a vast crowd in the room, and without any blame being imputable to any one, a new choice was directed to be made. *Exp. Dechapeaurouge*, 1 Mont. & M. 174.

The assignees, after the trial of an action brought by them, in which they failed to prove a sufficient trading to support the commission, and after various other acts by them, presented a petition, praying that the commission might be superseded, and that the costs and expences incurred might be paid by the petitioning creditors: Held, that the petitioning creditors could not then be held responsible. *Exp. Paul*, 1 Mont. & M. 185.

The rejection by the commissioners of an assignee is not final: an appeal lies from their decision to the chancellor. *Exp. Candy*, 1 Mont. & M. 197.

A, the proprietor of several shares in a mine, having been declared a bankrupt, B, (a solicitor) and C were chosen assignees, and immediately relinquished all interest of the bankrupt. A new company was subsequently formed, and B became a shareholder. The lord chancellor held, that assignees may be justified in declining to continue works in a mine which do not appear likely to prove immediately beneficial to the bankrupt's estates, but that, however pure their motives, they cannot be permitted, either directly or indirectly, to become the purchasers of any part of the property; and that an assignee is not entitled to act as solicitor to the commission, it being contrary to reason and principle that the same person should fill two offices, one of which is in its nature responsible to the other. He directed a renewed commission to issue; the discharge of B & C; a choice of new assignees, at which B & C should be restrained from voting; and that B should be considered as a trustee for the benefit of the creditors. *Exp. Badcock*, 1 Mont. & M. 231.

That an assignee may, under some circumstances, be permitted to bid at the sale of the bankrupt's estate. See *Exp. Morland*, 1 Mont. & M. 76.

Under the stat. 6 Geo. 4. c. 16. s. 79. estates of which a bankrupt is seised as a mere trustee, do not become vested in his assignees. A petition to compel them to join in a conveyance of part of the trust property was dismissed with costs. *Exp. Gennys*, 1 Mont. & M. 258.

Creditors are not entitled to apply in the first instance to the court for a copy of the assignees' accounts. They are entitled under 6 Geo. 4. c. 16. s. 101. to inspect the accounts, and for that purpose, application should be made to the commissioners. *Exp. Granger*, 1 Mont. & M. 289.

A demurrer to a bill by the assignees of a bankrupt, because it did not state that it had been filed with consent of the creditors as required by the stat. 6 Geo. 4. c. 16, was overruled; the act merely intended to make assignees responsible as trustees, and the creditors, if they institute any suit, must obtain the consent directed by the act. *James v. Yates*, 1 Mt. & J. 373. STAT. C. OF PL. & EQUITY.

A business, the property of which was carried on with his capital, and for his profit, by B his agent, in the name of the latter, at A's salary. A having become bankrupt, B filed his bill stating that by reason of the use of his name, he had become liable to a heavy amount for the concern, which was insolvent; notwithstanding the bankruptcy of A, and praying for an injunction to restrain the assignees from in any way intermeddling with the concern: Held, that B had a lien on the business, to the extent of his liabili-

ties, and an injunction was granted. *Farrcroft v. Wood*, 4 Russ. 487. LIEN; PRINCIPAL & AGENT.

A bankrupt, after the issuing of the commission and appointment of assignees, transferred French stock, his property, to his wife, who afterwards transferred it to her three sisters. Under a settlement, the wife had a power of appointment over a sum of money in the funds in England, which she exercised by will in favour of one of the sisters, and died in her husband's lifetime. The sister, who resided in France, took out administration with the will annexed. An injunction was granted to restrain the trustees, in whom this fund was vested, from transferring it, on the ground that if the French stock should be proved to have been the property of the bankrupt, the assignees would have a claim upon the assets of the wife. *Stead v. Clay*, 4 Russ. 550. HUSB. & WIFE; PR. INJUNC. AGAINST TRANSFER OF SECURITIES.

A man, whose wife was entitled to a sum of money after the death of A, becomes bankrupt and obtains his certificate. A dies, and soon afterwards his wife, to whom the husband takes out administration: Held that the husband had, by the marriage, an incipient right to the chose in action, which would become vested in the wife, if she survived A. This she did, and the husband had therefore a right at the time of his bankruptcy, and his assignees were entitled. *Ripley v. Woods*, 2 Sim. 165.

The husband of a woman having a vested interest in possession in a legacy, becomes bankrupt, a bill is filed by his assignees for payment of the legacy: the bankrupt soon after dies, and that fact is pleaded. Held that the widow was entitled to the legacy, the assignment of the husband being subject to the wife's right of survivorship. The fact of the bill having been filed before the husband's death, did not affect the question. *Pierce v. Thornley*, 2 Sim. 167. HUSB. & WIFE; CHOSE IN ACTION.

Husband and wife made a post-nuptial settlement of monies due to the wife, which, when paid, were invested in the names of trustees. The husband, having committed an act of bankruptcy prior to the settlement, was afterwards declared a bankrupt, and the bargain and sale was executed previously to the new bankrupt act, 6 G. 4. c. 16. coming into operation. Held, that the 73d section of that act (which, to enable the voluntary deed of a bankrupt to be set aside, requires, that at the time of his conveying he should have been insolvent) had no retrospect to this case; but that the law in force, at the time of the bargain and sale should regulate its operations; and, therefore, that the assignees were entitled to the fund. *Wombwell v. Laver*, 2 Sim. 360. STAT. C. OF PL. & EQUITY.

The wife of a bankrupt was entitled, under the will of her grandmother, to a moiety of certain public funds, on the death of her mother. Her husband became bankrupt, then the wife died, then the mother died. On a bill filed by the assignees of the bankrupt against the executrix of the grandmother, and the administrator of the wife of the bankrupt: Held, that the bankrupt having survived his wife, the assignees became beneficially entitled. *Harper v. Ravenhill*, 1 Tam. 144. HUSB. & WIFE; CHOSE IN ACTION.

The assignment of a policy of insurance upon a life does not take it out of the controul of the assignor if the insurers have no notice of the assignment. *Williams v. Thorpe*, 2 Sim. 257.

A assigned a leasehold messuage and furniture to B upon trust for his own use during life, and after his decease for the use of C, his wife for life, and after the death of the survivor for the use of D, their daughter. After the death of A, C married E, who took possession of the property and held it until his bankruptcy; some time previous to which, he had procured B to assign to him the house and furniture,

by a deed containing false recitals, and which proved to be a breach of trust, E during his possession, had sold part of the furniture, and replaced it by purchasing new, and at the time of his bankruptcy about one moiety of the original furniture of A, remained in the house: Held, upon the petition of C and D, that the furniture was not in the disposition of the bankrupt E, and that his assignees must be restrained from selling the same, reserving the question, whether the right of the petitioners extended to the furniture purchased since the original settlement. *Exp. Horwood*, 1 Mont. & M. 169.

By the terms of an agreement between F and Co. and S and Co., their bankers, the latter were at liberty to discount so many of the indorsed bills of exchange remaining in their hands as should be necessary to meet such acceptances of F and Co. as were in the course of immediate payment at the house of S and Co. To cover some such, F and Co. remitted an indorsed bill of exchange; the acceptances were however dishonoured by S and Co., who soon afterwards stopped payment. They then procured the bill to be accepted, and made an entry in their books of having discounted it. A commission of bankrupt having issued against S and Co.: Held, that by the terms of the agreement, the permission to discount being limited to the purpose for which the bill was remitted, S and Co. ought not to have received or discounted the bill without executing the trust reposed in them; and it must, therefore, be delivered up to F and Co. by the assignees. *Exp. Frere*, 1 Mont. & M. 263.

A person engaged upon an annual salary, as traveller, is within the meaning of the statute 6 G. 4. c. 16. s. 48. which authorizes the commissioners to award to "any servant or clerk," six months' wages, if due to him from the bankrupt. *Exp. Neal*, 1 Mont. & M. 194.

A employed B and C as his stock-brokers, and, for the purpose of more convenient transfer, allowed certain stock belonging to him to stand in the name of B alone; B sold it without the consent of A, and paid the produce into the partnership funds of B and C, who afterwards became bankrupts. The commissioners refused to allow proof to be made against the separate estate of B, but the Vice Chancellor held, that A was entitled to prove against the joint or separate estate as he might think fit. *Exp. Turner*, 1 Mont. & M. 255.

A covenanted in 1772, by his marriage settlement, for the payment of 2000*l.* in case his wife or any issue of the marriage survived him. In 1803, a commission of bankrupt issued against A, under which dividends had been paid, and under a renewed commission, which issued in 1828, a final dividend was advertised: Held by the Ld. Ch. reversing the decision of the Vice Ch. that the 6 G. 4. c. 16. s. 56. is retrospective in its operation; and that, although the contingency upon which the debt attached, happened before the 1st of September, 1825, when the act came into operation, yet the 56th section applies to commissions then in existence, as well as to those which have issued subsequently; and therefore the 2000*l.* was proveable under the commission. *Exp. Grundy*, 1 Mont. & M. 293.

A surety under an annuity deed, redeeming the annuity subsequent to the legacy of the grantor of the annuity, is entitled to the benefit of the grantee's proof under the grantor's commission, and to proceed by action against the grantor, who had obtained his certificate, for the arrears of the annuity, subsequent to the commission. *Watkins v. Flannagan*, 3 Russ. 421. PRINC. & AGENT.

Where a party has presented a petition seeking relief and benefit under a commission, in respect of a particular transaction, he will be restrained from

putting in issue the validity of the commission in an action brought against him by the assignees, in respect of the same transaction. *Exp. Anderton*, 1 Mont. & M. 177.

A proved a debt of 424*l.* against the separate estate of B, and died before B had obtained his certificate, having bequeathed to him 200*l.* A's executor afterwards received a dividend under the commission upon the whole sum proved. Ordered, that the proof of A be reduced to 224*l.* and that his executor refund the excess of dividend. *Exp. Man*, 1 Mont. & M. 210.

Under a commission a dividend was declared, and repeatedly advertised to be paid to the creditors. The payments were made by checks drawn upon the bankers duly appointed under the commission. Subsequently to the appointed day, the bankers, in whose hands a sum remained applicable to the payment of the dividends of creditors who had neglected to apply, stopped payment, and afterwards became bankrupt: Held, that an order of dividend is a separation from the bulk of the estate of the sum to be divided, and that the unpaid dividends were lying at the bankers, at the risk of the creditors entitled to divide it. *Exp. Powell*, 1 Mont. & M. 283. LACIES; INVESTMENT.

A certificate of conformity obtained under a commission of bankrupt in England, is a bar to an action by a creditor at Calcutta, for a debt contracted by the bankrupt there, before his bankruptcy, although the creditor had no notice of the commission in England, and was resident at Calcutta. *Edwards v. Ronalds*, 1 Knapp. 259. FOREIGN MATTERS, &c.

The right to refer a petition for impertinence is not waived, by the circumstance of the respondent having on a former occasion taken and succeeded in a formal objection. *Exp. Cunningham*, 1 Mont. & M. 193.

Under the statute 6 G. 4. c. 16. s. 14., a creditor who has proved to the amount of 20*l.*, if dissatisfied with the taxation of the commissioner, "may have the costs and bills settled by a master in chancery:" held, that a petition to the court for an order of reference is necessary, and that without it the masters have no authority to retax. *Exp. Hickman*, 1 Mont. & M. 282.

A petition to compel the payment of costs previously ordered, which stated at considerable length the original petition, and various additional allegations, and was supported by three affidavits in the same words, was held irrelevant. *Exp. Hinton*, 1 Mont. & M. 207.

A joint petition by three creditors for an order to prove three distinct debts, was held to be multifarious. The claims of the different persons cannot be united in one petition. *Exp. Sayers*, 1 Mont. & M. 280.

A petition presented by the bankrupt in person, and which he appears in person to support, is not within the order of the 12th August, 1809. *In mre. Bruce*, 4 Russ. 223. GENERAL ORDER, C. OF.

The court, sitting in bankruptcy, has no jurisdiction to order the personal representative of a deceased assignee to account for the personal estate of the bankrupt in his hands. *Exp. Crane*, 1 Mont. & M. 281. The Vice Chancellor thought, that an admission of assets on the part of the representative, would make no difference. EXORS; ADMINSN. OF ASSETS; ACCOUNT.

#### TESTER.

Personal estate not disposed of by a will drawn by the confidential counsel, (the sole executor), without informing the testator of the legal effect of the will; held to be a trust for the next of kin. *Segrave v. Kirwan*, 1 Beat. 157. ERROR. BENEFICIALLY INTERESTED; FRAUD. CONFESSION; PRINC. & AGENT.

Consent of counsel is to be given upon their own

conception of the authenticity of their instructions, and, if given, is binding on the client. *Mole v. Smith*, 1 Jac. & W. 673. **ACQUITTANCE**

Two counsel appearing for the same party by different attorneys, petition to stand over to signify the return of the attorney by affidavit. *Butt v. Smith v. Clapam*, cited 1 Vic. & W. 673 (a). **SOL. & CLIENT.**

The probable absence of counsel is a sufficient ground for postponing the trial of an issue. *Dean v. Lyle*, 1 Jac. & W. 225. **PR. POSTPONING TRIAL**

A party is bound by the consent of his counsel given in court though they had no instructions to consent, if they were at the time apprised of all those facts of which the knowledge was essential to the proper exercise of their discretion but he will be relieved from an order made by such consent, if they give that consent in ignorance of material circumstances. How far a party will be affected by the omission of his solicitor, in not immediately objecting to an order made by consent of counsel in court, when neither the party nor his solicitor was present, and instructions to consent had not been given by either. *Turner v. B.*, 4 Russ. 112. **CONSENT SOL. & CLIENT**

A husband having been found guilty for an assault upon his wife, the court recommended an accommodation the counsel of the parties thereupon signed a memorandum of an agreement that the husband would allow the wife 50*l.* a year, and the court according to the agreement, imposed merely a nominal fine. Upon a bill for a specific performance it was decided that the defendant must disprove that his counsel had authority to sign the agreement, and that in the absence of evidence to the contrary the court will presume that he had such authority and therefore decreed specific performance. *Ilumth v. Bird*, 11 Muir. 40. **PRINC. & AGENT, SPEC. PERFORM.**

Contract for sale of an existing, and a reversion in land not specifically performed without a production of the titles of the lessors. The objection not waived by a premature conditional approbation of the title, by the purchaser's counsel but the expense incurred in making out the title before this objection was taken, repaid. *Devell v. Ed Bilton*, 18 Ves. 505. **SOL. PRINC. & WARR.**

Approbation of counsel not a waiver of all reasonable objections to the title. *Id* 514. **WARR.**

A cross bill will be taken off the file, if filed with out a certificate by counsel. If the certificate of counsel has been subpoenaed, but the plaintiff has not filed the necessary affidavit, no subpoena to answer can issue. The same engrossment may be replied on the file, when the certificate of counsel has been subpoenaed. *Fillett v. Millett*, 1 Hog. 125. **PR. CROSS BILL, PR. SIGN. OF COUNSEL.**

## BASTARD.

A testator devised his real and personal property to trustees, upon trust for his children of M D, whom he described by their respective names, together with every other child of the body of M D alive at my decease, or born within nine months afterwards, share and share alike. M D had two other children born after the date of the will, but before the date of a codicil to it, and these as well as the four previously born were all illegitimate. The children born after the date of the will are not entitled to any share of the property. *Mortimer v. West*, 3 Russ. 370. **WILL, C. OF, WHO ENTITLED, POSTHUMOUS CHILDREN.**

A testator devised certain property to his wife for life, and after her death to A L who then lived with him, for life, provided she so long continued single

and unmarried. Then he devised part of his estate (except what he had given to his wife and A L) to trustees for thirty one years, upon certain trusts, and after the expiration of such term, to the children which he might have by A L, and living at his death, or born six months after, and in default of such children, to his nephew. The wife died, and the testator published his will after her death. Held, by the judges and house of lords, that the children of A L who had previously acquired the character of reputed children of the testator by A L, took an estate in the lands devised. *William v. Adams*, 12 Price, 478. **WILL, C. OF, WHO ENTIT.**

## BILL OF EXCHANGE.

Seemle where the parties intended that a promissory note should be joint and several, but through ignorance, it is expressed to be joint only, a court of equity will relieve as well against the surety as the principal. But where a joint promissory note, signed "J & J. J P, surety" was given to a creditor of the firm of J & J, and J P died J and J E being both alive, one of whom afterwards became bankrupt, and the other in solvent. Held, that the promissory note could not be considered as several against J P, the surety. *Rauston v. Parr*, 3 Russ. 424. But reversed id. 539. **MISPR.**

A bequest of a cabinet with whatever it contains, "except money," will pass a promissory note payable to the testatrix, of a date anterior to the will, and which, at her death, was found in the cabinet. *Reed v. Stenut*, 4 Russ. 69. **WILL, C. OF WHAT PASSIBLE**

## BOND.

A agreed to lend B 600*l.* navy stock, he sold the stock for 522*l.* which he paid to B, a bond was drawn to repay the sum of 522*l.* (being the produce of 600*l.* navy 5 per cents, or such other sum as would replace the stock) with lawful interest. B, on discharging, the bond refused to replace the stock, A received the money, and gave up the bond. Held, that after having received the money, he could not come to equity for relief. *Barrham v. Munro*, 1 Lam. 86.

In a court of equity a debt secured by bond may be carried beyond the penalty of the bond, if the debtor has, by injunction, restrained the creditor from proceeding at law, and there has been no misconduct on the part of the creditor. *Grant v. Grant*, 3 Russ. 598. **INJUNCTION BOND PENALTY, EQUITABLE REMEDY ENTAILED BY ACT OF COURT.**

A bond was given by the father of an illegitimate child to her intended husband, in contemplation of their intended marriage, in the penal sum of 2000*l.* and interest. It was recited in the condition, that, in consideration of the intended marriage, the obligor had proposed to the obligee to surrender certain copyhold property, then let on lease at a rent of 50*l.* per annum, to the uses thereinafter mentioned and if such surrender should not be so made within eighteen months after the marriage, the husband and wife, or the survivor, should receive, after the death of the obligor, 1000*l.*; and he was, in the meantime, to pay the husband and wife, 50*l.* a year for the interest thereof, until the said principal sum should be fully discharged, the condition was to the effect of the recital, and that if the estate should be so settled in substance, to the use of the husband and wife for life, remainder to the survivor, remainder to their issue, and if the 1000*l.* and interest should be paid, or if the obligor should make such surrender in his lifetime, and pay the arrears

of interest up to the time of the surrender, the obligation to be void. The obligor died without making the surrender, having regularly paid the 50/ per annum, and by his will, he devised the copyhold estate to his daughter, the wife of the obligee. Held, that the bond was not forfeited by reason of the breach of the condition, that it, was merely an agreement to settle the land, and as such satisfied by the devise, although ab-

solute, to the wife, and that it was an agreement of which equity would enforce the specific performance, the penalty being only meant to secure the settlement according to the condition. Time for the performance of the condition is not of the essence of the contract. The obligor held to have no power to elect either to pay the money, or settle the land. *Reper v. Batholomew*, 12 Price, 756.

### CHARITY.

Act, 1 W. 4. c. 60 as to transfer of estates, &c extends to petitions in charity. 1 W. 4. c. 60 s. 21

New trustees, when to be appointed in cases of charities. 1 W. 4. c. 60. s. 22. TRUSTEES.

A Scotchman, by a will in the English form, made in England, gave residue of his personal estate to trustees of whom some, but not all, were resident in Scotland, upon trust to lay out the same in the purchase of lands or rents of inheritance sufficient for the intent expressed in an instrument in that date with his will, and by that instrument he directed the trustees of his will to pay the same annually to certain other trustees who at all times were to be persons residing within twenty miles of Montrose, to be by them applied to the relief of indigent ladies in Montrose, or within twenty miles of that town. Held that the bequest was void, under the mortmain act. *Mt. Gen. v. Mill*, 3 Russ. 328. *LORDS: MACKENZIE, & SCOTLAND.*

A schoolhouse, built prior to the 9 G. 2. c. 50. on waste of a minor, given by the lord for that purpose, and paid for by subscriptions, from the lord of the manor and other parishioners, and never subsequently used other than as a public schoolhouse, is so dedicated to charity and in mortmain, that a bequest for the purpose of repairing and enlarging it, and of providing a salary for a schoolmaster is a valid legacy. *Deane v. Deane*, 4 Russ. 342.

Deeds, trust a corporation to grant a new lease according to a covenant for perpetual renewal, though the whole of the reserved rent had been for many years applied uniformly to one charitable purpose. *Goss v. The Aldermen of Grantham*, 3 Russ. 261. CHARITIES.

Provision for giving instruction in writing and arithmetic, introduced into a scheme for the administration and management of a free grammar school. *Mt. Gen. v. Habeshaw's Corp.*, 3 Russ. 330. S. P. *Mt. Gen. v. Drue*, id. 534. note.

When a testator directs a sum to be laid out in building a church, the bequest is void, the rule of construction being that a direction to build, includes a direction to purchase land for the purpose of building, unless the testator distinctly refers to land already in mortmain. *Pitchard v. Ashburn*, 3 Russ. 456. WILL, C. OR.

Upon an information to set aside a lease for ninety-nine years of a charity lands, the defendants the lessors set up a title adverse to the lease, upon the merits, it was held there was no ground for the defence, but the court was of opinion, that if the merits had been otherwise, the defendants were estopped, and could not dispute the title while they retained the possession. A husbandry lease of charity lands for ninety-nine years at an uniform rent, cannot be supported. *Mt. Gen. v. Hotham*, 3 Russ. 415.

When, in consequence of a mistaken construction of a doubtful instrument the rents of a charity estate have been for a series of years applied by a cor-

poration to public purposes, not warranted by the nature of the charity the corporation will not be charged for such misapplication. The court will not compel a corporation to produce their title deeds, and will not direct an inquiry as to the party which the rents are applicable to, general corporate purposes, in order to ascertain whether the estate is any fund which can be applied in making good a breach of trust committed by them in the management of charity funds.

" *Corp of Luton*, 3 Russ. 395. CORPORA-TION. ACCOUNT.

In the reign of Hen. 7. lands were given to the corporation of Exeter and their successors, for the relief and relief of the poor citizens and inhabitants of Exeter, who are heavily burthened by fees farm rents of that city, and other impositions and tallages, the rents ought to be applied for the relief of the poor inhabitants of Exeter not receiving parish relief. It is no excuse administration of such a charity to apply the rents to the payment of fees farm rents due from the city regarding the fee farm, maintaining the prisoners, and other similar public purposes. *Mt. Gen. v. Corp. of Luton*, 3 Russ. 395.

Where a testator, who has given his personal estate to charitable uses, contracts to sell real estates, but the sale is not completed in his life time, his lien upon the estate for the amount of the purchase money is an interest in land within the statute of mortmain, and the purchase money will not pass by his will to a charity. *Harrison v. Harrison*, 1 Russ. & M. 71.

A. by deed in 1616, conveyed to certain persons certain premises, which were then let for 150/ per annum. By another deed of the same date, reciting a devise to relieve the mystery of mercers it was declared, that the grant of the premises, and the rent of 150/ was made as to the premises, and the rent reserved, and all future rents and profits that the grantees should receive and pay the monies arising therefrom to the warden of the mystery of mercers and their successors, who should dispose of the monies to the uses therein mentioned. The schedule annexed, enumerated various charitable donations, amounting to 149/ 11s. The estate subsequently produced 1000/ per annum, of which the company applied 521/ according to the trusts, and the remainder to their own use. Held by the court below, and upon appeal, that the company were trustees of the rents and augmented rents, and that the surplus was applicable to the same purposes as directed by the deed, without prejudice to the question, how far they were entitled to share in the other rents, with reference to their share of the original rent of 150/. *The Mystery of Mercers v. Atk.*, 2 Bliq. N. S. 165.

Whenever a charitable object fails, from whatever cause, the crown has a right to interfere, and signify to what charitable purpose the fund shall be applied. *Simon v. Bailor*, 1 Fam. 14. S. P. *Danger v. Drue*, id. 32.

The court will not administer the funds of a foreign charity. Charitable funds in Ireland are adminis-

tered by certain commissioners, appointed by the Irish act, 40 G. 3. c. 75. *Collyer v. Burnett*, 1 Taml. 79.

The mayor, bailiffs, and burgesses of Berwick-upon-Tweed, in consideration of 50*l.* left by will, for the erecting and maintaining of a house of correction there, by feoffment, dated 20th May, 1653, conveyed the moiety of a property there to the churchwardens and overseers for the erecting and maintaining of a house of correction within the borough, and for maintaining and ordering the poor therein for ever, and all other sturdy and idle persons coming and being therein, and for the getting them and every of them to work. By another feoffment of the same date, in consideration of 350*l.* owing by them to the poor, the mayor, &c. conveyed the other moiety and some other lands, for the like purposes: held, that this town never having at this time raised poor rates, under the act of Elizabeth; these were gifts in aid of the poor-rates. As to a part of the land, the rents of which had been duly applied down to the eighteenth century, when their application ceased for the use of the poor, and was wholly carried to the corporate chest. The court being satisfied upon the evidence, it was intended to be comprised in the second feoffment; the court declared it to be a fund of the charity, and that the rents should be accounted for from 1823, when the same were claimed for the use of the poor, and the rents thereof were also declared to be applicable in aid of the poor-rates. The costs of the relators to be taxed as between party and party, and paid by the mayor, bailiffs, and burgesses. The extra costs of the relators to come out of the fund. *All. Gen. v. Corp. of Berwick-upon-Tweed*, 1 Taml. 239.

#### COMPENSATION.

Compensation claimed by the person disappointed by the devise, refused by the court; but they ordered a competent part of the fund in court to be retained, and set apart to answer the eventual claim of the parties. *Bartholomew v. Bartholomew, and Butler v. Bartholomew*, 12 Price, 833.

#### CONDITION.

A testator gave to his daughter a legacy of 10,000*l.*, payable, and to be paid unto her in manner following, viz.: a sum of 5000*l.* upon her marriage under twenty-one with the consent of his trustees, and the sum of 5000*l.* within two years afterwards. The daughter married under twenty-one, without consent of the trustees, and her first husband dying, she married a second husband at the distance of thirty years from her first marriage. *Quia*, on such second marriage, she became entitled to the 10,000*l.* *Chafford v. Beaumont*, 4 Russ. 325. *Will. C. or.*

#### CONVEYANCE.

A merchant being advised, by certain persons in this country, to secure money, to adjust claims, and do some other business, money being wanted by the firm here, of which he was partner, their attorneys deposit the deeds with the Life Insurance Company, to secure 12000*l.*, and covenant that he shall execute the mortgage; this 12000*l.* was also secured by the bonds of sureties, in sums corresponding to the shares of the partners. The power of attorney was not a sufficient authority; but the merchant, on his return to this country, having written a letter to the Life Insurance Company, requesting the loan of 6000*l.* "to be se-

cured on his Essex property, which you now hold, in addition to the 12000*l.* already advanced," and professing his readiness to execute the mortgage deed; held, that this was a confirmation of the security. *Manning v. Bury*, 1 Taml. 147.

#### CONTRIBUTION.

Testatrix contracted with A for the sale of an estate for 1000*l.* She, by will, directed the executor to complete it, and pay plaintiff the 1000*l.*, and devised other estates to A and her executor, who compromised, for 500*l.* each, a claim set up after her death, impeaching the title to her estates, the executor becoming, by the compromise, owner of the contracted estate, and A owner of the other estates. Held, that the plaintiff was entitled to the 1000*l.* from the executor without contributing to the payment of the 500*l.* for the compromise, which must fall on the residuary estate devised to the executor, the compromise being a device between A and the executor to avoid the consequence of A becoming owner of the contracted estate. *Mark v. Willington*, 1 Beat. 128.

#### COPYHOLD.

Admittance to copyhold by infants, femes covert, and lunatics, how to be taken. 1 W. 4. c. 65. s. 3.

A testator, being absolute owner of some copyholds of which he had been admitted tenant, and having the legal fee of other copyholds holden of the same manor to which he had not been admitted, but subject to trusts under which he was in equity only tenant for life, with remainder to his son in tail, remainder to himself in fee, surrendered, to the use of his will, all his copyholds holden of that manor, or which he was seised of, or entitled to, in possession, reversion, remainder, or expectancy: he was subsequently admitted tenant of all the copyholds which were subject to the trust, except the moiety of one tenement, and afterwards made a will, devising all his hereditaments, freehold and copyhold, in possession, reversion, remainder, or expectancy, to trustees and their heirs, upon trust for his son for life, with remainder over. Held, that the surrender and the will passed both the legal and beneficial interest in all the copyholds upon which the surrender operated, including those of which the deviser was in equity only tenant for life, and that the son was bound to elect whether he would give effect to this general devise, or would insist upon the benefit of the equitable estate tail, which he took under the old trusts to which some of the copyholds were subject. *Abdy v. Gordon*, 3 Russ. 278. *Will. C. or, WHAT PASSES; HEIR AT LAW; ELECTION.*

Where a customary tenement is freehold, and the lord, being only tenant for life of the manor, purchases the fee of the customary tenement, the seignory is suspended during the life of the lord, but revives at his death, and the customary tenement descends to his heir. Where the custom of a manor requires a bargain and sale, as well as a surrender and admittance, to pass the customary tenement, the freehold is in the tenant, and not in the lord. *Bingham v. Woodgate*, 1 Russ. & M. 32.

A lord of a customary manor for life only, purchased a tenement in the manor in fee, by conveyance and surrender; the mode of transmission of lands in the manor, was by conveyance and surrender. The lord died, leaving only a daughter. The manor, by the settlement under which he held it for life, was limited, in default of sons, in remainder to his brother, and the manor went over to the brother. Held, that the usual mode of passing estates being by common law



conveyance, the freehold was in the tenant. Held, that on the death of the lord, the tenement descended to his daughter, his heiress at law. *S. C. 1 Taml. 183.*

### COPYRIGHT.

A plaintiff who complains of a piracy of his work, has no remedy in equity, unless he establish a title to an injunction, and then the account will follow. *Baily v. Taylor*, 1 Russ. & M. 73. PR. INJUNC.; ACCOUNT.

### CORPORATION.

When, in consequence of a mistaken construction of a doubtful instrument, the rents of a charity estate have been for a series of years applied by a corporation to public purposes not warranted by the nature of the charity, the corporation will not be charged for such misapplication. The court will not compel a corporation to produce their title deeds, and will not direct an inquiry as to the property which they possess applicable to general corporate purposes, in order to ascertain whether there is any fund which can be applied in making good a breach of trust committed by them in the management of charity funds. *Att. Gen. v. Corp. of Exeter*, 3 Russ. 395. ACCOUNT; CHARITY.

At a meeting held to appoint a successor to an office in a charity, after a candidate has been elected, and a minute of his election has been entered by the clerk, it is competent for the majority of the electors, before the meeting is dissolved, to reverse their vote, rescind the minute of election, and postpone the election to a subsequent day, provided, in so doing, they

act *bona fide*, and with a view to the welfare of the charity. *Att. Gen. v. Matthew*, 3 Russ. 500.

### COVENANTS.

As to frauds committed on covenants by wills. 1 W. 4. c. 47. s. 2.

A, being tenant for life of certain premises, with a power of limiting a jointure to his wife, a settlement is executed on his marriage, by which he devises the lands, of which he was tenant for life, to trustees for a term of ninety-nine years, on trust to secure the payment of a yearly sum to his wife, as pin-money, during the coverture, and he limits a jointure to her after his death; the same parties on the same day execute another instrument by which A covenants not to sell or incumber the lands comprised in the term, and it is declared that if he shall at any time sell or incumber them, or attempt so to do, the trustees of the term shall receive the rents and profits, and apply them as they may think fit for the maintenance and support of A, or his wife, or children, or issue; the covenant and this proviso are fraudulent, and void as against a subsequent incumbrancer of A's life estate. *Phipps v. Ennismore*, 4 Russ. 131. DEBTOR & CRED., FRAUD ON; ESTATE FOR LIFE.

The assignee of a lease for lives, which contained a covenant for renewal upon the dropping of any life, provided application were made within six months, having omitted, upon the death of one of the *cetui que vie*, to apply for a renewal within the six months, filed his bill praying relief, upon the ground that he did not within the six months know that the person was dead, or that the deceased person was one of the *cetui que vie* named in the lease. The bill was dismissed with costs, because the plaintiff might have known the facts if he had used reasonable diligence and acted with ordinary prudence. *Harries v. Bryant*, 4 Russ. 89. LACHES; PERF. CY PRES.

### DEATH.

Where there was a decree with costs against three persons, and during the progress of the taxation one of them died, it was held the master was regular in proceeding with the taxation, and making his certificate, notwithstanding the two survivors objected that the suit was abated. *Meredith v. Hughes*, 3 Y. & J. 188. PR. COSTS, TAXATION.

### DEBT.

In taking an account of the pecuniary transactions between an attorney and his client, the production of a bond entered into by the latter is not sufficient evidence of a debt to that amount, and actual payment must be proved. *Leues v. Morgan*, 3 Y. & J. 230. SOLICITOR & CLIENT; PR. EVID. WHAT SUFFICIENT.

### DEBTOR AND CREDITOR.

See as to traders, 1 W. 4. c. 47.

A, being tenant for life of certain premises, with a power of limiting a jointure to his wife, a settlement, is executed on his marriage, by which he devises the

lands of which he was tenant for life, to trustees, for a term of ninety-nine years, on trust to secure the payment of a yearly sum to his wife as pin-money, during the coverture, and he limits a jointure to her after his death, the same parties, on the same day, execute another instrument by which A covenants not to sell or incumber the lands comprised in the term, and it is declared that if he shall at any time sell or incumber them, or attempt so to do, the trustees of the term shall receive the rents and profits and apply them as they may think fit for the maintenance and support of A or his wife, or children or issue; the covenant and this proviso are fraudulent; and void as against a subsequent incumbrancer of A's life estate. *Phipps v. Ennismore*, 4 Russ. 131. COVENANT, VALIDITY OF; ESTATE FOR LIFE.

The plaintiff joined the testator as surety in a bond, which he paid after the death of the testator, taking an assignment of the bond; he was only a simple contract creditor of the testator. *David*, 4 Russ. 277. PRIN. & SURETY.

The rules of court do not require a creditor in all cases to institute suits against third persons, not connected with his demand, to oblige them to concur in making a good title. *Fisher v. Barry*, 1 Beat. 143.

An application by creditors whose debts, secured by a trust deed, had been established by decree of the court of chancery in England, to appoint a re-

ceiver over the trust estates in possession of defendant the debtor, refused; it being doubtful as the record was framed, whether at the hearing of the cause, the plaintiffs would be entitled to a decree. For the record to carry the English decree into execution, was so imperfectly framed, that the defendant, by joining issue on the original record, would be at liberty to impeach the securities so established, which he could not do on a bill filed solely and exclusively to aid the execution of the English decree. *Houlditch v. Ld. Donegal*, 1 Beat. 146. PR. DECREE; PR. RECEIVER.

### DECISIONS OVERRULED, &c.

*Willis v. Evans*, 2 Ball & B. 225. is not to be followed. *Fitzpatrick v. Power*, 1 Hlg. 24.

### DEEDS.

Defendant refusing to execute deed, court may do it for him. 1 W. 4. c. 36. rule 15.

An instrument executed by foreigners in a foreign country, must on a demurrer be construed according to the obvious imports of its terms, unless there are allegations in the bill that according to the law of the country, in which it was executed, the true construction of it is different. *The King of Spain v. Machado*, 4 Russ. 225. FOREIGN MATTERS.

In the policies effected by the Amicable Society, there is no exception as to death by the hands of justice; a person insuring his life in that office, afterwards suffered death for a criminal offence: the policy was not thereby avoided. *Bolland v. Disney*, 3 Russ. 351. ATTAINDER; FORFEITURE; POLICY OF INSURANCE.

A grant of a fair or market, with an express grant of toll, passes reasonable toll, though no amount be specified. *Corp. of Romford v. Pawlett*, 1 Crompt. & J. 57. TOLL.

Cross remainders cannot be implied in a deed, and are not created as to accruing shares by a limitation of the entire estate, to an only surviving child and his issue, or by a gift over of the entire estate in remainder after the failure of all issue, or by an express creation of cross remainders, as to the original shares. *Edwards v. Alliston*, 4 Russ. 78. REMAINDERS, CROSS.

Where the answer of a defendant insists that a covenant was inserted without his knowledge or consent in a deed executed by him, and that the deed was not read over to him, and that the covenant is a fraud upon him, such deed cannot be proved *in voce* against him as an executor, but it may be so proved as against another defendant whose answer does not impeach the validity of the covenant. *Barfield v. Kelly*, 4 Russ. 355. EXECUTOR; EXHIBIT.

The court refused to set aside a voluntary deed, executed by an old man in his own favour of a person who had attended him as a surgeon, and had been occasionally assisted by him respecting the management of his property, and received the dividends of some stock for him, it appearing that there was no undue influence, and that the deed was explained to the grantor by his solicitor. *Pratt v. Barker*, 4 Russ. 507.

A recovery by A, tenant for life, and B, remainderman in tail; afterwards, by deeds of lease and release, the uses declared to A for life, remainder to B for life, remainder to his first and other sons in tail

male; the deeds not registered for several years afterwards, in the interval, judgments recovered against B. Held, that the non-registry of the deeds was immaterial, and that the persons who so recovered judgments against B, did not thereby acquire a lien or charge on the settled estate against the issue, deriving under the settlement. *Burke v. O'Malley*, 1 Beat. 96. LIEN.

### DEVISEE.

To an action of debt or covenant, heir may plead *riens per descent*. 1 W. 4. c. 47. s. 7.

An action of debt or covenant may be against heir in respect of land, descended, though he sells estate before action brought, id. s. 6. And it may be maintained against devisee when no heir, id. s. 4. ACTION AT LAW; HEIR AT LAW.

If the vendor of an estate, the contract for which was not complete in the lifetime of the testator, who was the purchaser, is afterwards paid the purchase money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor with respect to his lien on the estate. *Qu?* if a pecuniary legatee would be entitled to the same benefit against the devisee. *Selby v. Selby*, 4 Russ. 336. EXORS.; ASSETS, MARSHALLING; VENDOR & PURCH.; LEGATEES.

### DISCLAIMER.

In order to get rid of the effect of a disclaimer, a distinct application supported by affidavit establishing a special case is necessary. *Sidden v. Lediard*, 1 Russ. & M. 110.

### DONATIO MORTIS CAUSA.

*Quere* whether a *donatio mortis causa* is avoided by the fact that a will or codicil is subsequently made? Whether a remainder may be limited in a *donatio mortis causa*? Whether, the *donatio mortis causa* being of a mortgage debt, a gift of the same sum with the same remainder over in a subsequent codicil, is to be considered a satisfaction? *Hambrooke v. Simmons*, 4 Russ. 25.

### DOWER.

An injunction to restrain a widow from proceeding at law to enforce her dower out of lands of inheritance, purchased from her husband during marriage, refused; the purchaser having "through negligence, neither insisted on having a fine, nor used common diligence to ascertain and preserve evidence that a jointure had been settled on her; but the widow having in her answer to the original bill, admitted that her husband, previous to marriage, had executed an instrument settling an annuity of 150*l.* on her, in case she survived him, together with a bond collateral, but of which she knew not the contents, restrained from proceeding to execute her writ of dower, till after she had answered the amended bill." She is not, as a condition connected with the order, entitled to a receiver, which would be an equitable execution; neither is she entitled to her costs at law. *Power v. Sheil*, 1 Beat. 48. VENDOR AND PURCH.

The claim to dower is extinct on the death of the widow *White v. Panther*, 1 Knapp, 276.

### INDIA COMPANY.

Security for costs will be required from an officer in the service of the East India Company *Pull v. Bernard*, 1 Hog 144 PUBLIC OFFICERS PR COSTS, SECURITY

### ECCLESIASTICAL PERSONS &c.

I conveys by bargain and sale the advowson of a rectory to J F, the incumbent being then to the knowledge of both parties at the point of death, but it did not appear that either party had any particular clerk in view for the next presentation or that the clerk afterwards presented knew any thing of the transaction. Held (reversing decisions of the court of great sessions of Chester in 1 of the court of K B) that this was not simony, so as to nullify the bishop's rejection of the clerk *Lee v. R. of Chester* 1 Dow, N S 416

### INJUNCTION.

A party who had commenced proceedings by ejectment, before he got notice of the appointment of a receiver over the land, need not make any application to the court until he is ready to execute his habeas corpus *Unwin v. Smeeth* 1 Hor 99.

### RELIEF.

A, being tenant for life of a leasehold for years, with remainder to B after devising one estate to B in fee bequeathed to him the leasehold in his life with remainder over and gave him all the residue of his real and personal property, B took possession of the residuary estate suffered a recovery of the lands devised to him in fee, acted as the absolute owner of the leasehold estate and outlived the term which the lease was granted, having previously acquired new interest in the devised premises. Held that B elected to take under the will, and was bound to give effect to the devise of the leasehold in favour of the remainder man *Giddings v. Giddings*, 3 Russ. 241. IRIST

### WILL.

D having an estate for life in lands, assigned them, together with certain furniture to trustees for ninety nine years in trust to pay to the appellant 5000l a year, and to his creditors, parties to the assignment, five per cent. upon their respective debts the creditors generally executed the assignment, by which they covenanted not to sue the appellant, but P and B having obtained judgment, sued out a writ of *habeas corpus* under which the sheriff seized the goods of D, but refused to sell in consequence of a claim by the trustees, P and B then filed a creditor's bill in chancery in Ireland, stating these facts, and setting forth in part, the deed of trust and assignment as it appeared in the registry, but alleging that they were ignorant of the trusts, prayed that the defendants might set forth the deed, and that the creditors might have power to elect, to take the benefit of the deed, or otherwise that it might be declared fraudulent and

void as to them, and that a receiver might be appointed. After the bill was filed, two of the trustees died and new ones were appointed. D and the surviving trustee put in their answers. In 1824, P and B filed a supplemental bill, setting forth the deed, and stating that under it, D was entitled to a rent charge, issuing out of the lands, and that they had sued out an elegit against D for 1000l directed to the sheriff of R who returned that D and his trustee was seized of a freehold rent, issuing out of lands in the county of R, one moiety of which he had delivered to P and B to hold till they had levied the damages maked upon the writ they claimed by this bill to be entitled either to a moiety of the lands, or of the rent charge, or to have satisfaction of their judgment out of the amount payable to D under the trusts of the deed. The lords held (confirming the judgment of the master of the rolls the lords commissioners and the lord chancellor) that certain orders appointing a receiver and restoring the surviving trustee from paying the annuities to D, were properly made also that the defects in the sheriff's return to the elegit were immaterial as no return was necessary, and that the serving out of the writ was sufficient ground for the equity and further that one elegit is sufficient although the rent be payable out of lands in three counties *Id. Dill v. Haslett*, 2 Bligh, N S 241 IRIST

### INDEMNITY PROVIDED BY ACT OF COURT.

In a court of equity a debt secured by bond may be carried beyond the penalty of the bond if the debtor has by injunction restrained the creditor from proceeding at law, and there has been misconduct on the part of the creditor *Cum v. C. et Russ*. 598 BOND PENALTY, INTEREST BEYOND PENALTY.

Equity will in some cases carry a debt beyond the penalty as where a man is kept out of his money by an injunction or is prevented from going on at law. *Dual v. Lewis* Show P C 15 S P 2 Ch Ca. 182 186 *Hale v. Hearn* 1 Vern. 350 and see note there BOND PENALTY

A creditor having been restrained from proceeding at law on a count of decree obtained, allowed to prosecute suit where proceeding on decree delayed for some years *Puella v. Wallworth*, 2 Mad 183 CREDITOR'S SUIT, PR JUDICIAL

Where the statute of limitations attaches a demand pending the retention of a bill in equity, the validity of the debt being directed to be tried at law, the court restrained the debtor from insisting at law on the benefit of the statute. *Sudgfield v. Price*, 21 & J. 73. S P. App. 1 Vern 74. EQUITY

It is a general rule that when a party is prevented by act of court from proceeding to establish his right at law, it is the duty of the court to see no injury arise to him in consequence of its interference. *O Donel v. Browne*, 1 Ball & B. 264. S. P. 6 Ves. 93.

Creditor prevented from obtaining judgment by act of court of equity, put in same situation as though he had *Pakeney v. Warren*, 5 Ves 93. See also *O Donel v. Browne*, 1 Ball & B. 263. MAXIM, JUDICIAL.

### ESTATE.

Where a testator directs his just debts and funeral expenses to be fully paid and satisfied by his executor

thereinafter named, it is a condition imposed upon the executor to satisfy the testator's debts and funeral expences, as far as all the property which he derives under the testamentary disposition will extend, whether real or personal. *Hennelly v. Whitaker*, 3 Russ. 348. *S. P. Finch v. Hattersby*, id. 345. note. *Prigden v. Jander*, id. 346. note. WILL, C. OF; EXORS. DUTIES, &c. OF.

A demise of lands to A for paying his son 50*l*. when of the age of twenty-one years, gives A the fee beneficially charged with the payment of 50*l*. *Abrams v. Windhup*, 3 Russ. 350. WILL, C. OF, WHAT ESTATE.

The statute of 25 Geo. 2. c. 6. does not extend to wills of personal estate only, and a legacy to a person who is an attesting witness to such a will is not void. *Emanuel v. Constable*, 3 Russ. 436. WILL, C. OF, WHO MAY MAKE; PR. EVID. WITNESS, COMPETENCY; LEGACY; STAT. C. OF.

A gift of real estate to A for life, with remainder to her children as tenants in common; and in case A should die without leaving lawful issue, then with remainder over, is a gift to A for life, with remainder to her children for life, with remainder to A in tail. *Parr v. Swindels*, 4 Russ. 283. WILL, C. OF.

A gift of personal estate to the wife for life, with a direction that after her death one moiety thereof shall be at her entire disposal, either by will or otherwise, amounts only to an estate for life in the wife, with a power of appointment. The sale by the widow of a sum of three per cent. stock which constituted nearly the whole of the residue, and the investment of the proceeds in the purchase of long annuities in her own name, does not amount to an exercise of her power. *Reith v. Seymour*, 4 Russ. 262. WILL, C. OF, WHAT ESTATE; POWER TO APPOINT; POWER, EXECUTION OF.

A, being tenant for life of certain premises, with a power of limiting a jointure to his wife, a settlement is executed on his marriage by which he demises the lands of which he was tenant for life to trustees for a term of ninety-nine years, on trust to secure the payment of a yearly sum to his wife as pin money during the coverture, and he limits a jointure to her after his death. The same parties on the same day executed another instrument, by which A covenants not to sell or incumber the lands comprised in the term, and it is declared that if he shall at any time sell or incumber them, or attempt so to do, the trustees of the term shall receive the rents and profits, and apply them as they may think fit for the maintenance and support of A, or his wife or children, or issue: the covenant and this provision are fraudulent and void as against a subsequent incumbrancer of A's estate. *Phipps v. Ennismore*, 4 Russ. 131. COVENANT, VALIDITY OF; DEBtor & CREDitor. FRAUD ON.

Lessee for lives renewable for ever, will be enjoined from committing waste by cutting timber, if he allows a large arrear of rent to become due. *White v. Noulton*, 1 Hog. 21. WASTE.

A tenant for life of a leasehold estate, which is held with a tenant-right of renewal, is not bound to renew. *Capel v. West*, 5 Russ. 500. LEASE, RENEWAL OF.

A testator gives an annuity and pecuniary legacies, and then devises the real, residue and remainder of his freehold, copyhold and leasehold estates to trustees for the use and benefit of his children. The annuity and pecuniary legacies given prior to the devise are well charged upon the freehold and copyhold, and leasehold estates. *Cole v. Turner*, 4 Russ. 376. WILL, C. OF.

A gift to A and B, "whom I appoint my executors, of all that I possess in any way belonging to me, by them freely to be possessed of or enjoyed,

whatever nature or manner it may be," will pass the fee simple of real estate. *Thomas v. Phelps*, 4 Russ. 348. WILL, C. OF, WHAT ESTATE.

Devise of the residue of realty and personally to testator's two sons as joint tenants. They for twenty years after the father's death carried on the business of farmers with such estates, and kept the monies arising therefrom in one common stock, and with part of such monies purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting such farming business, or ever accounted with each other: Held, that as to the leasehold and personal estate, which passed by the will of the father, the two sons remained joint tenants; but that as to all the after-purchased estates, they were tenants in common. *Morris v. Barrett*, 3 Y. & J. 384. ESTATE, JOINT TENANCY; WILL, C. OF, WHAT ESTATE.

Persons having only estate for life, enabled to convey the fee when estate ordered to be sold. 1 W. 4. c. 47. s. 12. TRADER.

Charge on estate in settlement must be so raised as not to fall unequally on tenant for life to benefit of remainder-man. Devise to trustees to sell for payment of testator's debts, and subject thereto to A for life, *sans* waste, remainder to his first and other sons in tail. The trustees sold timber on the estates, and applied the proceeds in payment of the debts: Held, that A was entitled to have the amount raised by sale of part of the estate, and paid to him. *Davies v. Westcomb*, 2 Sim. 425. TENANT FOR LIFE & REMAINDER-MAN.

Devise of lands, subject to 1000*l*. to be raised for the testator's daughters, to an annuity of 37*l*. 10*s*. to his widow, and to all such incumbrances as might happen to be thereon, does not exempt the personal estate from the payment of a mortgage thereon. *Phillips v. Parker*, 1 Tam. 136. WILL, C. OF.

## EXECUTORS.

One of several executors receiving part of the personal estate, which he hands to his co-executor, who wastes the estate, still remains personally liable; but because he happens to be executor he is not liable for monies which he received for the purchase of a freehold estate of the testator, and which he received as the agent of another person empowered by the will to sell it, to whom he had paid over the amount; but is perfectly justified in so paying it over. *Davies v. Spurling*, 1 Tam. 199.

Devise to trustees and their heirs during the life of A in trust for A, and after his decease, to B in fee. The trustees recover, in his life-time, damages for breach of covenants in a lease granted by the testatrix, and still subsisting. A dies. The damages belong to her estate. *Noble v. Cass*, 2 Sim. 343.

By sec. 19. where feme covert is executrix, husband shall be deemed a trustee within 1 W. 4. c. 60. HUSB. & WIFE; TRUSTEE.

Stock standing in name of lunatic executor or his testator, committee to transfer the same. 1 W. 4. c. 60. s. 4. LUNATIC.

Executor's rights not affected where there is no person to take undisposed residue. 1 W. 4. c. 40. s. 2. RESIDUE.

Executors to be deemed trustee for persons entitled to residue of personal estate. 1 W. 4. c. 40. s. 1. RESIDUE.

Personal estate not disposed of by a will drawn by the confidential counsel (the sole executor), without informing the testator of the legal effect of the will: Held to be a trust for the next of kin. *Segrave v.*

*Kirran*, 1 Beat. 157. PRINC. & AGENT; BARRISTER; FRAUD, CONCEALMENT.

Debt to the crown, levied out of lands mortgaged by debtor subsequent to becoming indebted to the crown. Held, that all the estates of which he was seised whilst a crown officer, must, according to their rateable value be contributory with the mortgaged premises to pay the debt; excepting, however, lands purchased under degree of foreclosure against debtor, the purchaser not having notice of the crown debt, and having got in an old judgment against the ancestor of the debtor. The court would itself be the agent of a fraud, if it displaced a title given by itself, where the proceedings were in all respects conformable to the rules and established law of the court, the purchaser paying his money into court, and the conveyance made under its sanction, and every thing transacted, not only with regularity, but *optima fide* by the purchaser. But although all the estates are thus contributory, in case of the mortgagee, yet, as between the debtor's eldest son deriving under settlement, and purchasers from the son, the contributory fund must be so marshalled, as to make the son's remaining property first applicable, and if that be insufficient, the portion of the last purchaser must be applied, before that of any prior purchaser. *Hartly v. O'Callaghan*, 1 Beat. 61. EXTENT.

Whether fines on renewal of leases on death of tenant are to be considered real or personal estate. 1 W. 4. c. 65. s. 21.

The court sitting in bankruptcy, has no jurisdiction to order the personal representative of a deceased assignee to account for the personal estate of the bankrupt in his hands. *Esp. Crowe*, 1 Mont. & M. 281. The L. C. thought that an admission of assets on the part of the representative would make no difference. ACCOUNT; JURISDICTION.

If the vendor of an estate, the contract for which was not completed in the lifetime of the testator, who was the purchaser, is afterwards paid the purchase money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor with respect to his lien on the estate; *Quare*? If a pecuniary legatee would be entitled to the same benefit against the devisee. *Selby v. Selby*, 4 Russ. 336. VEND. & PURCH.; LEGATEES; DEVISEE.

An executor who is employed by his co-executor as his agent, to sell an estate, which, under the will of the testator the co-executor alone had power to sell, and who hands over the price of the estate to his co-executor, is not accountable for the misapplication of that price by the executor, because he had no legal right to retain it, although by the will of the testator the price of the estate, when sold, was to be considered as part of his personal estate. *Davies v. Spurling*, 1 Russ. & M. 64.

A testatrix appointed A B to be her executor, to see that her will was put in force. The executor is a trustee for the next of kin. *Craddon v. Fairand*, 4 Russ. 87.

An agent named executor, is not entitled to charge commission on business done subsequently to the testator's death. *Sheriff v. Aze*, 4 Russ. 33. PRINC. & AGENT; ACCOUNT, ALLOWANCES.

By a marriage settlement, stock, the property of the husband, was settled in trust for the separate use of the wife during her life, and after her death, for the husband if he survived her, but if he died in her lifetime, then for such persons as he should by deed or will appoint, and in default of appointment, for his executors and administrators; the husband died in the wife's lifetime, having appointed an executrix, but without exercising his power: Held, that the executrix was not entitled to the stock beneficially, but that it was to be

administered by her as part of his general personal estate. *Collier v. Squire*, 3 Russ. 467. WILL; C. OF.

The husband by his will bequeathed as follows:—"And unto my wife (who I make full and wholly executrix) I give my house, with all my household furniture, as also all my plate, linen, china, books, linen and every other article belonging to me both in and out of my house, and which may not be herein mentioned, she being subject to the payment of all my just debts, funeral and testamentary expences:" Held, that the beneficial interest in the settled stock did not pass to the wife. *Collier v. Squire*, 3 Russ. 467. WILL, C. OF.

An executor or trustee is not to be allowed, without question, the amount of bills of costs, which he has paid *bond fide* to the solicitor to the trust; and the master, without regularly taxing the bills, will moderate their amount. *Johnson v. Telford*, 3 Russ. 477. ACCOUNT, ALLOWANCE; PR. COSTS.

If an executor acting *bond fide*, and under a conviction, that the assets are amply sufficient for the payment of the testator's debts, permits specific legatees to retain or possess themselves of the articles bequeathed to them; he will be answerable for the value of those articles with interest at four per cent. if there should ultimately be a deficiency of assets, although the deficiency should be occasioned by subsequent events which he had no reason to anticipate, and the court will direct an account to be taken of the value of the property, so possessed by the legatees, and interest to be computed, unless it is certain that the assets will ultimately be sufficient to pay all the creditors. *Spode v. Smith*, 3 Russ. 511.

Where a bill was filed against the devisee of the lease, praying that the lease might be declared void, and the defendant insisted that if the lease was set aside, the plaintiffs ought to repay the monies expended by his deviser, in the improvement of the premises; the executor of the deviser who had assented to the devise of the lease, was not a necessary party to the suit. *Malpas v. Ackland*, 3 Russ. 273. PL. PARTIES.

A testator gave his property after the death of his wife to trustees on trust to pay the interest and profits to his two daughters J and E to their separate use, with a direction to pay to and apply for the benefit of A, the son of F, 200*l.* annually, when he attained the age of twenty-one years, and before that period, such part of the 200*l.* bequeathed to him as might be judged proper; he then gave his daughters power to dispose of the principal by will, to their children or grandchildren respectively, "except that proportion of principal given to E, and from which the interest is to arise to my grandson, namely, 4000*l.* which sum shall be my grandson's property;" and in case either of the daughters died without issue, he limited her share of the fund over to the other daughter, her children, or grandchildren. The executrix having in mistake made payment to A, in respect of his annuity, for two years before he attained twenty-one, was entitled to retain them out of the future payments of the annuity. An order authorizing her to retain them, and made upon petition after the decree had been passed and entered as regular. *Livesey v. Livesey*, 3 Russ. 287. S. C. in part reversed, id. 542. REIMBURSEMENT; PR. PARTIES; PR. DECREE; PR. ORDER.

If letters of administration is granted to an infant under which he receives and disposes of the assets of the intestate, an account cannot be directed in respect of his receipts during infancy. *Hemmings v. Southgate*, 3 Russ. 324. INFANT; ACCOUNT.

Where a testator directs his just debts and funerals

expences to be fully paid and satisfied, by his executor thereafter named, it is a condition imposed upon the executor to satisfy the testator's debts and funeral expences, as far as all the property which he derives under the testamentary disposition will extend, whether real or personal. *Henwell v. Whitaker*, 2 Russ. 343. *S. P. Finch v. Hattersley*, id. 345. note. *Brigden v. Lander*, id. 346. note. WILL, C. OF; ESTATE REAL.

### EXECUTORY DEVISE.

Devise to A and B and their heirs, to sell and dispose at their discretion of all the testator's right in S, belonging to the manor of M, and all his right in M, if an act should pass for inclosing the same within twenty years, to pay the proceeds to the several persons therein mentioned. An inclosure act passed within the twenty years, and various allotments were made in respect of the testator's estates: Held, that the devise was in the nature of an executory devise to take effect on the passing of the act. And the decree declared the parties claiming under the devise, to be entitled to one-fourth part of the monies produced from the sale of the allotments in S, in respect of the testator's messuage and lands in S, and to the whole of the monies produced by the sale of the allotments in respect

of the land in M. *Gardner v. Lyddon*, 3 Y. & J. 389. WILL, C. OF, WHAT INTEREST.

### EXTENT.

Debt to the crown, levied out of lands mortgaged by debtor subsequent to becoming indebted to the crown: Held, that all the estates of which he was seized whilst a crown officer, must, according to their rateable value, be contributory with the mortgaged premises, to pay the debt; excepting, however, lands purchased under decree of foreclosure against debtor; the purchaser not having notice of the crown debt, and having got in an old judgment against the ancestor of the debtor: the court would itself be the agent of a fraud, if it displaced a title given by itself, where the proceedings were in all respects conformable to the rules and established law of the court: the purchaser paying his money into court, and the conveyance made under its sanction, and every thing transacted, not only with regularity, but *optima fide* by the purchaser. But although all the estates are thus contributory, in ease of the mortgages, yet, as between the debtor's eldest son deriving under settlement, and purchasers from the son, the contributory fund must be so marshalled, as to make the son's remaining property first applicable, and if that be insufficient, the portion of the last purchaser must be applied, before that of any prior purchaser. *Harley v. O'Flaherty*, 1 Beat. 61. EXORS. ASSETS, MARSHALLING.

### FINE AND RECOVERY.

What persons may appoint attorney to surrender lands for purpose of suffering common recovery. 1 W. 4. c. 65. s. 11.

### FOREIGN MATTERS.

An instrument executed by foreigners in a foreign country, must, on a demurrer, be construed according to the obvious imports of its terms, unless there are allegations in the bill, that according to the law of the country in which it was executed, the true construction of it is different. *The King of Spain v. Machado*, 4 Russ. 226. DEEDS, C. OF.

A bankrupt assigning his property to his assignees under a French commission, cannot afterwards be sued in a British court by a creditor for a debt he has proved under it. *Quelin v. Moisson*, 1 Knapp. 266.

Seemle, that after the issuing of a French commission of bankruptcy, the creditor could sue in a British court for a debt contracted in France, even though he had not proved it under that commission. *Id. ib.*

A Scotchman, who in the English form made in England, gave the rents of his personal estate to trustees, of whom some, but not all, were resident in Scotland, upon trust to lay out the same in the purchase of lands or rents of inheritance in fee simple, for the intent expressed in an instrument of even date with his will; and by that instrument, he directed the trustees of his will to pay the rents annually to certain other trustees, who at all times were to be persons residing within twenty miles of Montrose, to be by them applied to the relief of indigent ladies in Montrose, or within twenty miles of that town. Held, that the

bequest was void under the mortmain act. *Att. Gen. v. Mill*, 3 Russ. 328. CHARITY, MORTMAIN; SCOTLAND.

### FORFEITURE.

Forfeiture of copyhold not incurred by infants, femes covert and lunatics refusing to pay fines on renewing, or to appear. 1 W. 4. c. 65. s. 9.

In the policies affected by the Amicable Society, there is no exception as to death by the hands of justice; a person insuring his life in that office, afterwards suffered death for a criminal offence, the policy was not thereby avoided. *Bolland v. Disney*, 3 Russ. 351. DEEDS, C. OF; ATTAINDER; POLICY OF INSURANCE.

### FRAUD.

Where land, generally reputed to be water meadow, although there was not always the uncontrolled use of the water, was sold by the assignees of a bankrupt, by the description of uncommonly rich water meadow, this was held not to be such a misrepresentation as would avoid the sale. *Scott v. Hanson*, 1 Russ. & M. 128. VEND. & PURCH.

A transaction cannot be considered as a family arrangement, where the doubts existing as to the rights alleged to be compromised, are not presented to the mind of the party interested. *Harvey v. Cooke*, 4 Russ. 34. SETTLEMENT OF FAMILY DISPUTES.

If an agent employed to purchase an estate becomes the purchaser for himself, he is to be considered as a trustee for his principal. *Lees v. Nuttall*, 1 Russ. & M. 53. PAIN. & AGENT.

Where a feme covert having separate property joins

in a security for money advanced to her husband, the court acts upon it, not as in agreement to charge her separate property, but as in equitable appointment under the settlement, to be satisfied from the rents and profits of that property, and not by sale or mortgage. If the feme covert inists upon the exercise of undue influence by the husband she must prove it, and it is for the plaintiff to prove a negative. *Field v. Soule*, 4 Russ. 112. *Husb. & Wife*, PR. LVID ON A SUBJUDICI

The holders of shares in a joint stock company purchased immediately from the company, are entitled to relief in equity against the fraudulent conduct of the directors. *Blain v. Ayr*, 2 Sim 289. JOINT STOCK COMPANY PARTNERSHIP.

Personal estate not disposed of by a will, drawn by the confidential counsel, (the sole executor,) without informing the testator of the legal effect of the will, held, to be a trust for the next of kin. *Wray v. Kinnin*, 11 East 157. *Next of Kin*, BREVES INTERESTED, PRINC & ACT R. BARRISTER.

## 1 RAJDULFNT CONVEYANCES, &c.

Limitations and devises of portions for children are not affected by 1 W. 4 c. 47 as to traders. 1 W. 4. c. 47 s. 5. PORTIONS.

The court will not assist a party in recovering an estate conveyed by him for an illegal purpose, such as to enable the grantee to vote at an election, or sit in parliament. *Gomes v. Gomes*, 3 Y. & J. 163. PUBLIC POLICY.

## 1 RINDY SOCIETIES.

Act 1 W. 4 c. 60 in relation to conveyances, &c., of estate &c., vested in trustees &c., extends to petitions in case of friendly societies. 1 W. 4. c. 60. s. 21.

## GRABTING

The court will not restrain commissioners in their examination upon an allegation that the object of the examination is to procure evidence against the parties examined is to punish a criminal by undue. *11 Bell v. 1 G & J 30*. BANKERS' COMMISSIONERS EXAMINATION OF PR LVID DEMURRER TO INTERROGATORIES.

## GINRAL ORDER, C. OF

By the thirty seventh of the new orders, every application for a new trial must be made to the judge who directed the issue the same jurisdiction is meant although the judge may have retired. *11 Bell v. 1 G & J 319*. PR NEW TRIAL.

The twentieth order does not apply to the case of an answer filed before the first day of October term, 1828. *Harris v. Harris*, 2 Sim 431. PR BILL AMENDMENT OF

When bill is filed, a second amendment cannot take place, without a special motion, under the General Order, April 3 1828. *Larson v. Dye*. *Barnes v. Wilson*, 1 Russ & M 1. PR AMENDMENT

The sixteenth of the new orders extends to the production of books and papers under orders or decrees

made before the date of the new orders. The master is to exercise the discretion given him by the sixteenth order, to determine what books or papers shall be produced though the order or decree under which he is proceeding requires the parties to produce on oath all books and papers. *In re of Parry of Unionsant*, 1 Russ & M 25. PR PRODUCTION OF DEEDS.

Under the eighteenth of the new orders publication may be enforced on affidavit, without notice. *Brown v. 1 Russ & M 77*. PR LVID ENLARGING PUBLICATION

A petition presented by the bankrupt in person, and which he appears in person to support, is not within the order of the 12th August 1809. *In re Bruce*, 4 Russ. 223. BANKRUPT PETITION, SIGNATURE OF.

## GUARDIAN AND WARD

Agreement may be made by guardian of infants, or committees of lunatic, with approbation of court, signified by the petition. 1 W. 4 c. 65 s. 26. LUNATIC AGREEMENT

Where prisoner is lunatic, &c., though no commission has issued, court may appoint a guardian to answer, and discharge defendant from his contempt. 1 W. 4. c. 36 rule 9. PR PRISONER.

## HILIR AT LAW.

To an action of debt or covenant, heir may plead *non per decept*. 1 W. 4. c. 47 s. 7.

Action of debt or covenant may be against heir in respect of lands descended, though he sells estate before action brought. *Id.* s. 6. And it may be maintained against devisee where no heir. *Id.* s. 4. ACTION AT LAW, DEVISEE.

Where heir of surviving trustee of real estate not known, or refusing to act, a person appointed to convey. 1 W. 4. c. 60. s. 8. TRUSTEE.

Heir of vendor or nominal purchaser, where to be

deemed trustee after decree for specific performance. 1 W. 4. c. 60. s. 16. *Ward v. 1 Russ & M 25*. TRUSTEE.

Where heiress to convey is feme covert, her husband deemed a trustee. 1 W. 4. c. 60. s. 19. *Husb. & Wife*, TRUSTEE.

A testator being absolute owner of some copyholds, of which he had been admitted tenant, and having the legal fee of other copyholds holden of the same manor, to which he had not been admitted, but subject to trusts under which he was, in equity only, tenant for life, with remainder to his son in tail, remainder to himself in fee, surrendered to the use of his will all his copyholds holden of that manor, or which he

was seized of, or entitled to, in possession, reversion, remainder, or expectancy; he was subsequently admitted tenant of all the copyhold which were subject to the trust, except the moiety of one tenement, and afterwards made a will devising all his hereditaments, freehold and copyhold, in possession, reversion, remainder, or expectancy, to trustees and their heirs, upon trust for his son for life, with remainder over. Held that the surrender and the will passed both the legal and beneficial interest in all the copyholds upon which the surrender operated, including those of which the deviser was in equity only tenant for life, and that the son was bound to elect whether he would give effect to this general devise, or would insist upon the benefit of the equitable estate tail, which he took under the old trusts, to which some of the copyholds were subject. *Abdy v. Gordon*, 3 Russ. 278. WILL, C. OF, WHAT PASSES; COPYHOLD, SURRENDER OF.

The heir of the mortgagee to whom the legal estate in the mortgaged premises had descended, is a necessary party to a bill of foreclosure, filed by the executor of the mortgagee. *Scott v. Nicoll*, 3 Russ. 476. MORTGAGE, FORECLOSURE OF; PL. PARTY; MORTGAGOR. & MORTGEE.

The rule that the purchaser of a reversion must prove that he gave a full price, has so long been considered settled that it can be altered only by the court of appeal. *Hinckman v. Smith*, 3 Russ. 433. PR. EVID. ONUS PROBANDI.

If an heir at law, alleging insanity in a deviser, file his bill against the devisee, and he fail in the issue *devisavit vel non*, he shall pay the costs of the issue, but not the costs of the suit, unless he might have asserted his claim by ejectment, and then his suit will be deemed vexatious, and he will be ordered to pay the costs of it. *Scarfe v. Scarfe*, 4 Russ. 309. PR. COSTS; PR. ISSUE DEVISAVIT VEL NON.

Heir at law, on being served with subpoena *sci. fa.* may show cause by motion why decree in original cause should not be revived against him. *Cox v. Macnamara*, 1 Hog. 12. PR. MOTION.

Where a pecuniary legacy is given by a testator to his heir, the word is to be understood in its legal and ordinary sense, unless controuled by the context of the will, and the heir at law will take the legacy, and not the next of kin. In such a case it makes no difference that there are three co-heirs. *Mounsey v. Blamires*, 4 Russ. 384. WILL, C. OF, WHO TAKE; NEXT OF KIN.

A Scotch heritable bond, though containing a personal obligation, carries with it the personal right, as being *jus nobilitatis*, and descends to the heir, and will not pass by an English will. *Jerningham v. Herbert*, 1 Taml. 103. WILL, C. OF, WHAT PASSES.

An heir at law questioning the sanity of his ancestor, is entitled to an issue *devisavit vel non*, and if he fails, will not be compelled to pay costs, if the incumbances justified him in trying the issue; but costs will not be allowed him. *Smith v. Dearmer*, 3 Y. & J. 278. PR. COSTS; PR. ISSUE DEVISAVIT VEL NON.

In a creditor's suit for the sale of the real estate, where there was no personalty, and the executors refused to prove the will, it was decided that the heir at law must be a party to the administration, with the will annexed, obtained in order to show a deficiency of assets. *Fordham v. Fordham*, 1 Taml. 1. PL. PARTY.

If an estate be conveyed away in the lifetime of the party to whom it belonged, and he dies within forty days from the execution of the conveyance, his heir may recover it from the purchaser. Under such circumstances he cannot have the estate restored without refunding the price paid for it. But where the price has been paid to other persons, the purchaser cannot call upon the heir to repay it, but must recover it as he can from those to whom it has been given by the

deceased. *Marett v. Jones*, 1 Knapp, 663. VEND. & PURCH.

The infant heir and only son of an intestate, was joined with his infant sisters in a bill against the widow and administratrix of the intestate for an account of his real and personal estate, and for a guardian and maintenance: held, that the interests in the real and personal estate were distinct from each other, and a demurrer for multifariousness allowed. *Dunn v. Dunn*, 2 Sim. 329. S. P. *Maud v. Arklow*, 2 Sim. 331. PL. BILL, MULTIFARIOUSNESS; LEGATEE; PL. PARTIES.

## HOUSEHOLD FURNITURE.

A bequest of household furniture and other household effects, in a dwelling house and premises, comprises all the property placed there, either for ornament or for use, or consumption in it. *Cole v. Fitzgerald*, 3 Russ. 301. WILL, C. OF, WHAT PASSES.

## HUSBAND AND WIFE.

By sect. 19, where feme covert is executrix, husband shall be deemed a trustee within 1 W. 4. c. 60. TRUSTEE; EXECUTOR.

Wife may be admitted to copyhold by attorney, 1 W. 4. c. 65. s. 3.; and may apply by petition on order to surrender and renew leases. *Id.* s. 12. Where she is trustee or mortgagee within 1 W. 4. c. 60. husband shall be deemed mortgagor or trustee, 1 W. 4. c. 60. s. 19.

Where heiress to convey is feme covert, her husband deemed a trustee. 1 W. 4. c. 60. s. 19. TRUSTEE; HEIR.

Deeds of separation, in 1817, between husband and wife, who were to continue to live together, on condition that if dispute arose again, a separation should take place. Disputes continuing, a deed in 1818 is executed, providing for an immediate separation, the husband continuing to live in the wife's house, dining and visiting with her, but without cohabitation as man and wife. The husband files a bill in the chancery of Ireland to set aside the deeds, chiefly on the ground that they were against public policy, and the deed of 1817 is declared null and void, but without prejudice to the claims of a child of the marriage, thereunder. As to the deed of 1818, the bill was retained for twelve months, with liberty for the parties to proceed at law, of which no advantage was taken. The husband appeals against this decree to the house of lords. The judgment below was affirmed, and an order made for enlarging the time for retaining the bill, so as to enable the parties still to proceed at law if they thought fit. Lord Eldon considered the question of public policy, and as such, resting on the same grounds both at law and in equity; but that the opinion of a court of law ought to be taken in the first instance, and the case be put into such a shape and form that it might be brought before the house by writ of error. That the deed of 1817 (against the decree declaring which void, there was no appeal) could not be for a moment sustained. That the circumstances under which the parties lived together, after the execution of the deed of 1818, put an end to it also; but still that the question ought to be tried at law. The lord chancellor was decidedly against both deeds. *Marq. Westmeath v. March. Westmeath*, 1 Dow, N. S. 519. PUBLIC POLICY.

The wife of a bankrupt was entitled under the will of his grandmother, to a moiety of certain public funds, on the death of her mother. Her husband became bankrupt; then the wife died; then the mother died.



On a bill filed by the assignees of the bankrupt against the executrix of the grandmother, and the administrator of the wife of the bankrupt held, that the bankrupt having survived his wife, the assignees became beneficially entitled. *Haiper v. Ratenhill*, 1 Lam. 144. **BANKRUPT. ASSIGNING WHAT PASSES.**

A bankrupt, after the issuing of the commission and appointment of the assignees, transferred French stock, his property, to his wife, who afterwards transferred it to her three sisters. Under a settlement, the wife had a power of appointment over a sum of money in the funds in England, which she exercised by will in favour of one of the sisters, and died in her husband's lifetime. The sister, who resided in France, took out administration with the will annexed. An injunction was granted to restrain the trustees, in whom this fund was vested, from transferring it, on the ground, that if the French stock should be proved to have been the property of the bankrupt, the assignees would have a claim upon the assets of the wife. *Stead v. Clay*, 4 Russ. 550.

A man whose wife was entitled to a sum of money after the death of A, becomes bankrupt and obtains his certificate. A, dies, and soon afterwards his wife, to whom the husband takes out administration, is held, that the husband had, by the marriage, the beneficial right to the chose in action which had become vested in the wife, if she died before he did, and the husband had therefore the right at the time of his bankruptcy and his assignees were entitled. *Ryle v. H. ds*, 2 Sim. 165.

The husband of a woman having a vested interest in possession in a legacy, becomes bankrupt and a bill is filed by his assignees for payment of the legacy. The bankrupt soon after dies, and that fact is pleaded and held, that the widow was entitled to the legacy, the assignment of the husband being subject to the wife's right of survivorship. The fact of the bill having been filed before the husband's death, did not affect the question. *Purice v. Thonell*, 2 Sim. 167. **BANKRUPT. ASSIGNMENT.**

A feme covert, described as such in the will of the testator, may, during the coverture, execute by deed a power of disposition given her by the will over real and personal estate. *Douglas v. Limpron*, 4 Russ. 334. **POWER, EXECUTION OF.**

Money in court belonging to a married woman, if less than 200*l* will be paid to the husband, although she has been deserted by him, and she opposes the application. *Foden v. Linney*, 4 Russ. 428. **PR. PAYING OUT OF COURT.**

The husband's costs of making a settlement on a female ward, who had been married without consent, were allowed, he having no property, and there being no circumstances of aggravated misconduct on his part. *Anon* 4 Russ. 473. **PR. LEND IN COURT, MARRIAGE OF WARD OF COURT, PR. COSTS, WHAT FUND.**

When motion is made on behalf of married woman, and no person is named in notice as her next friend, her solicitor will be responsible for costs if awarded against her. *Coz v. M. Namara*, 1 Hog. 78. **PR. COSTS, SOLICITOR AND CLIENT, PR. PROCHAIN AMT.**

Where a feme covert having separate property, joins in a security for money advanced to her husband the court acts upon it, not as in respect to charge her separate property, but as an equitable appointment it under the settlement, to be satisfied from the rents and profits of that property, and not by sale or mortgage. The death of the husband after the filing of the bill, and before the hearing, makes no difference. If the feme covert insist upon the exercise of undue influence by the husband she must prove it, and it is not for the plaintiff to prove a negative. *Fild v. Selt* 4 Russ. 112. **PR. SETTLEMENT AND REVIVAL, ONUS PROBANDI, UNDER INFLUENCE.**

Where the husband incurs a liability under 1 G. 4 c. 76 s. 23 the court has no discretion to mitigate the penalty, but is bound to settle and secure all property present and future of the wife, for the benefit of herself or the issue of the marriage. *Att. Gen. v. Mullay*, 4 Russ. 329. **STAT. OF SETTLEMENT.**

A feme covert tenant in tail in remainder of money to be laid out in land by agreement with the tenant for life, and on a private examination under the 7 G. 4. c. 45 consented to the payment of a proportion of the money to her husband, and the order was made accordingly. *In re Sillit*, 3 Russ. 369. **MONEY TO BE Laid OUT IN LAND, STAT., C. 45.**

### INDICTMENT.

A defendant's answer will be taken off the file for the purposes of an indictment for perjury, when the preparatory steps have been taken, and the time of trial is near at hand. *Curtis v. —*, 1 Hog. 132. **PR. TAKING PLEADINGS OFF FILE.**

An affidavit will be taken off the file for the purposes of an indictment for perjury when the preparatory steps have been taken, and the time of trial is near at hand. The affidavit to support the motion should not enter into the merits of the indictment. *Swift v. Quinlan*, 1 Hog. 132. **PR. TAKING PLEADINGS OFF THE FILE.**

### INFANT.

Parol shall not demur by or against infants 1 W. 4. c. 47. s. 10.

Dividend of stocks belonging to infants may be applied for maintenance of infants. 1 W. 4. c. 65. s. 32.

Money belonging to infant mortgagee to be paid into bank 1 W. 4 c. 60 s. 14. **INVESTMENT.**  
See as to infant trustees and mortgagees, 1 W. 4. c. 47.

If letters of administration be granted to an infant under which he receives and disposes of the assets of the intestate, an account cannot be directed in respect of his receipts during infancy. *Hindmarsh v. Southgate*, 3 Russ. 324. **PR. ACCOUNT; EXAMINATION.**

If an appeal is disallowed on account of the neglect of the guardians of an infant to bring it to a decision, the infant is entitled to recover the amount he attains his majority. *Prindley, &c. v. Van Rensen*, 1 Knapp. 85. **PR. APPEAL, &c.**

A testator devises the residue of his real and personal estate to such of his children as shall attain twenty one, or marry under that age, with consent, all the children are entitled, although their interests are contingent, to have allowance out of the residue for their maintenance during their minorities. *Brown v. Temperley*, 3 Russ. 263. **WILL, C. OR.**

An allowance out of a residue which was directed to be accumulated, made for the support of a legatee,

in the interval between the time when the legatee attained his full age, and the time fixed for the distribution of the accumulated fund. *M'Dermott v. Kealy*, 3 Russ. 264. WILL, C. OF.

The court will make an order for appointing a guardian, and allowing maintenance upon petition without bill, where the infant's income does not exceed 100*l.* a year. *Exp. Lukin*, 4 Russ. 307. PR. PETITION; PR. BILL.

Maintenance will not be allowed without a bill filed, to an infant entitled to real estate, which is of a yearly value exceeding 100*l.* a year. *In mrs. Molesworth*, 4 Russ. 308. (n). PR. PETITION; PR. BILL.

An infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual. *Flight v. Bolland*, 4 Russ. 298. AGREEMENT; SPEC. PERF.

The husband's costs of making a settlement on a female ward, who had been married without consent, were allowed, he having no property, and there being no circumstances of aggravated misconduct on his part. *Anon.* 4 Russ. 473. PR. FUND IN COURT; HUSB. & WIFE; PR. COSTS, WHAT FUND.

T B, entitled under one will to an estate tail, expectant on the death of two elder brothers without issue or recovery suffered, and entitled under another will to an estate for life, with a remote remainder in tail, proposes to covenant that on his marriage with L C a ward of court, in case either of the limitations in his favour in the wills shall take effect, he will charge the estate to which he shall become entitled with an addition of 8000*l.* to the fortune of the younger children. The master to whom the proposal is submitted settles the covenant in the marriage articles with words of inheritance not occurring in the proposal, viz.: "that in case he shall become seised of, or entitled to all or any of the manors, hereditaments, or estates devised by such wills, or by either of them, or of any other lands, &c., for any estate of inheritance in possession or otherwise, capable of being settled or bound in law or equity," he will charge the estate as aforesaid; and this is approved by the court. T B becomes entitled in possession to the life estate only, and on claim by a younger child that the 8000*l.* should be declared to be a charge on the life estate, and reference to a master, he reports that the limitations under which T B covenanted to charge the estates with the 8000*l.* never took place. The report confirmed by decretal order of the court below, and the judgment affirmed by the lords. *Willis v. Robertson*, 1 Dow, N. S. 469.

The testamentary guardian of an infant sold part of his estates for the redemption of the land tax: the vendee paid the purchase money to the agent of the vendor, who was also agent for the vendee, and the conveyance was executed; but the agent did not pay the money into the bank, as required by the act 38 G. 3. c. 60. The purchaser entered and continued in possession for many years, paying the land-tax. Nearly twenty years after, attaining his age, the heir-at-law brought an ejectment against the purchaser, to restrain which, and obtain a confirmation of the contract, the purchaser filed his bill. The court dismissed the bill without costs. *Hicks v. Morant*, 3 Y. & J. 200. LAND TAX.

A contracted to sell a freehold estate to B, and by will gave the purchase money to trustees for certain purposes; and if the contract should not be completed, he devised the estate to the trustees for the same purpose. A died, leaving a son, who died leaving an only daughter, an infant. Held, that she was not a trustee within the stat. 6 G. 4. c. 74. *In mrs. Moody*, 1 Taml. 4. STAT. C. OF.

The court will not usually make a reference with respect to the maintenance of an infant retrospectively.

*Simon v. Barber*, 1 Taml. 22. PR. REFERENCE TO MASTER.

The fortune of an infant ward, a married woman, taken out of court under an order obtained on an affidavit that she was adult: ordered, on summary application by petition, to be replaced by the person who made the affidavit, and also by the solicitor concerned in the application, who had in his possession proceedings which showed the infancy, and might have guarded the court against the surprise. *Barrington v. Grogan*, 1 Beat. 199.

## INVESTMENT.

Money belonging to infant mortgagee, to be paid into bank. 1 W. 4. c. 60. s. 14. INFANT.

Under a commission, a dividend was declared, and repeatedly advertised to be paid to the creditors; the payments were made by checks, drawn upon the bankers duly appointed under the commission. Subsequently to the appointed day, the bankers, in whose hands a sum remained applicable to the payment of the dividends of creditors who had neglected to apply, stopped payment, and afterwards became bankrupt: held, that an order of dividend is a separation from the bulk of the estate of the sum to be divided, and that the unpaid dividends were lying at the bankers at the risk of the creditors entitled to divide it. *Exp. Powell*, 1 Mont. & M. 283. LACHES; DIVIDENDS.

A testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in government or real security, of which they were to stand possessed, upon trust for A during her life, and after her death for B. The trustees permitted a share which the testator had in an Indian loan, bearing interest at 10*l.* per cent. to remain for several years on that security, during which time they paid to A the interest at 10*l.* per cent. which it yielded annually, and the loan being afterwards paid off, they invested the money in the 3 per cents. at a time when the funds were so low, that the amount of stock purchased was considerably greater than if the conversion had taken place at the end of a year from the testator's death: held, that the tenant for life was not entitled to the actual interest which the money yielded, while it remained on the Indian security, but only to the dividends of so much 3 per cent. stock as would have been purchased with it at the end of a year from the testator's death. That the trustees ought to be charged with the whole of the stock actually purchased, and all the sums actually received in respect of the Indian rate of interest, and that they ought to be allowed, in their discharge as payments to the tenant for life, not the sums which they had, in fact, paid her, but only a sum equal to what she would have received for dividends, if the money had been transferred from the Indian security, and invested in the 5 per cent. stock, at the end of a year from the testator's death. *Dimes v. Scott*, 4 Russ. 195. WILL, C. OF; TRUSTEES, LIABILITY OF; INTEREST, RATE OF.

A receiver, appointed by the court, is not answerable for a loss of monies by the failure of a banker, if they are not mixed with his own monies, and are *bona fide* deposited for security only, under circumstances in which they could not have been properly paid into court. *Salway v. Salway*, 4 Russ. 60. PR. RECEIVER, LIABILITY OF.

The money belonging to a minor will not be allowed to remain out at interest on the security of a judgment. *Knox v. Knox*, 1 Hog. 117.

Trustees having contracted to purchase land, sell out stock, and deposit the produce at a banker's.

when the purchase seems to be near completion; they are not liable to make good the money if the bankers fail. *France v. Woods*, 1 Tam. 172. TRUSTEES, LIABILITY.

### INSOLVENTS.

Costs of contempt are within provision of insolvent acts, 1 W. 4. c. 36. rule 1. PR. CONTEMPT; PR. COSTS.

An application by the plaintiff at the hearing, to dismiss the bill without costs, the defendant having become insolvent after the bill filed, refused. As the plaintiff, when he discovered the insolvency, instead of applying to dismiss the bill without costs, filed a supplemental bill, still seeking relief against the defendant personally, thereby adopting and continuing the original suit. Such an application at the hearing was quite irregular: it ought to have been the subject of special application on notice. *Draught v. Robinson*, 1 Beat. 87. PR. BILL; DISMISSAL.

Where, on marriage, interest of a sum secured by mortgage is settled on husband for life, remainder to wife for life, and he is afterwards discharged as an insolvent, it is competent for him, notwithstanding his insolvency, to file a bill with his wife to foreclose mortgage, in order to have the trust and secured. *Horan v. Wooloughan*, 1 Beat. 1. PR. PARTIES.

Where, after bill of foreclosure, plaintiff became insolvent, the costs of assignee afterwards made defendant, must be paid by plaintiff; he cannot throw costs on mortgagee. *Id. ib.*

The equity of redemption of a leasehold for years, with a covenant for perpetual renewal, is not an interest in real estate within the meaning of the 53 G. 3. c. 102. s. 19. The trustee of an insolvent is not bound under that section to dispose of such an equity of redemption by public auction. In a suit by the assignee of an insolvent, to impeach a sale which a former assignee had made of an equity of redemption; the insolvent is not rendered a competent witness for the plaintiff, by releasing his interest in the residue of his estate. *Waldron v. Howell*, 3 Russ. 376. STAT., C. OF.

### INSURANCE.

The agent of the Albion Insurance Company had an office in Glasgow, at which J P and others, the owners of a steam vessel, effected an insurance, receiving from the company's agent a contract, importing generally that a policy, corresponding with the memorandum, would be prepared at the office in London, and delivered to the assured, or their order, "on the third Monday in the ensuing month, or on any subsequent day." The policy that was sent down, and which was never shewn to or demanded by the assured, contained a clause that it "should be suspended, and remain out of force, during the time the steam-boat might be at sea." At the end of the year the policy was renewed through the agent at Glasgow, who delivered to the assured a memorandum, signed by the company's secretary in London, signifying that the above policy had been renewed, but no notice of the exception was ever communicated to the assured. The vessel was shortly afterwards destroyed by fire on her passage from Liverpool to Dublin: held, that the memorandum was the contract of the parties, which had not been fulfilled by the company, who were therefore liable for damages; that the act 6 G. 1. c. 18., repealed, see 6 Geo. 4. c. 91. so far as it declares all policies executed by six persons, other than the London Insurance and Royal Exchange Assurances, to be absolutely void, does not extend to Scotland: that a contract so entered into was a Scotch, and not an

English contract. *Pattison v. Mills*, 2 Bligh, N. S. 519.; SCOTLAND; AGREEMENT, SPEC. PER.

In the policies effected by the Amicable Society, there is no exception as to death by the hands of justice; a person insuring his life in that office, afterwards suffered death for a criminal offence, the policy was not thereby avoided. *Bolland v. Disney*, 3 Russ. 351. DEEDS, C. OF; FORTUITURE; AT-TAINER.

### INTEREST, PECUNIARY.

A claim made in Demerara, for a sum of money. Holland currency held to mean the currency of the colony, which is generally called Holland currency. *Hugenholz v. Watson*, 1 Knapp, 170.

No larger sum can be recovered by way of interest on a mortgage in one of our colonies where the Dutch law is retained (Demerara) than a sum equal to the principal. *Shand v. Brereton*, 1 Knapp, 162.

A purchaser of a reversion must pay interest on his purchase-money from the time of his purchase. *Tre-Jasie v. Lt. Clinton*, 2 Sim. 359. VEND. & PURCH.

Interest is not allowed on a judgment, except under special circumstances, and where there is no imputation on the creditor; where, therefore, the propriety of the conduct of the latter throughout the transactions between the parties was questionable: interest was refused. *Leaves v. Morgan*, 3 Y. & J. 394. JUDGM.

In a court of equity, a debt secured by bond may be carried beyond the penalty of the bond, if the debtor has by injunction restrained the creditor from proceeding at law; and there has been no misconduct on the part of the creditor. *Grant v. Grant*, 3 Russ. 698. BOND, PENALTY; EQUITABLE RELIEF PREVENTED BY ACT OF COURT.

A purchaser who has not been in possession, is bound to pay interest on the purchase money, and take the rents and profits only from the time when a good title was first shown; and not from the time fixed by the agreement for the completion of the purchase. *Jones v. Mudd*, 4 Russ. 118. VEND. & PURCH.

A contract of purchase contained a stipulation, that if, by reason of any unforeseen or unavoidable obstacles, the conveyance could not be perfected for execution before the day fixed for the completion of the purchase, the purchaser should, from that day, pay interest at 5 per cent. on his purchase money, and be entitled to the rents and profits of the premises; the vendor did not show a good title till long after the specified day: held, that he was not entitled to interest, except from the time when a good title was first shown. *Monk v. Huskisson*, 4 Russ. 121. (n.) *Id.*

A testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in government or real security, of which they were to stand possessed, upon trust for A, during her life, and after her death for B. The trustees permitted a share, which the testator had in an Indian loan, bearing interest at 101. per cent., to remain for several years before the death of A, during which time they paid to A the interest at 101. per cent., which it yielded annually; B, however, being afterwards paid off, they invested the money in the 3 per cents. at a time when the funds were so low, that the amount of stock purchased was considerably greater than if the conversion had taken place at the end of a year from the testator's death: held, that the tenant for life was not entitled to the actual interest which the money yielded, while it remained on the Indian security; but only to the dividends of so much 3 per cent. stock as would have been purchased with it, at the end of a year from the testator's death. That the

trustees ought to be charged with the whole of the stock actually purchased, and all the sums actually received in respect of the Indian rate of interest, and that they ought to be allowed in their discharge as payments to the tenant for life, not the sums which they had in fact paid her, but only a sum equal to what she would have received for dividends if the money had been transferred from the Indian security, and invested in the 5 per cent. stock at the end of a year from the testator's death. *Dimes v. Scott*, 4 Russ. 195. WILL., C. OF; TRUSTEES, LIABILITY OF; INVESTMENT.

### INTERESTS IN PROPERTY.

A testator gave his property, after the death of his wife, to trustees, on trust to pay the interests and profits to his two daughters, J. and E., to their separate use, with a direction to pay to, and apply for the benefit of A, the son of E, 200*l.* annually, when he attained the age of twenty-one years; and before that period, such part of the 200*l.* bequeathed to him as might be judged proper; he then gave his daughters power to dispose of the principal by will to their children or grand-children respectively, "except that proportion of the principal given to E, and from which the interest is to arise to my grand-son on 4000*l.*, which sum shall be my grandson's property;" and in case either of the daughters died without issue, he limited her share of the fund over to the other daughter, her

children, or grand-children. A, having attained twenty-one, and died in his mother's lifetime, held, that the annuities ceased upon his death, and that the 4000*l.* never vested in him. *Livesey v. Lirsey*, 3 Russ. 287. S. C. in part reversed, *id.* 542. WILL., C. OF; ANNUITY.

A testator gave to his wife an annuity, and 100*l.* a year for each of his three children during their minority, and from and after the decease or marriage of his wife, then the 300*l.* to be divided amongst his said children; and subject thereto he bequeathed his leasehold and personalty unto three children, and the survivors and survivor of them. One died under twenty-one: held, that he took a vested interest at the death of the testator. *Buss v. Russell*, 1 Taml. 18. WILL., C. OF, WHAT INTEREST.

### IRELAND.

Inquisitions on commissions of lunacy executed in Great Britain, are to be transmitted to Ireland, and acted upon there, and so *vice versa*. 1 W. 4. c. 65. s. 41. LUNATIC COMMISSION AND INQUISITION.

Power given to courts of chancery and exchequer in Ireland, by 1 W. 4. c. 60. Powers in lunacy given to Ld. Ch. of Great Britain not to extend to Ireland. *Id.* Powers given to Ld. Ch. of Ireland in matters of lunacy, over property in Ireland. *Id. ib.* JURISDICTION.

### JUDGMENT.

Judgment not docketed, having no preference against heirs, executors, or administrators. *London v. Ferguson*, 3 Russ. 349. PRIORITY OF SECURITY.

Interest is not allowed on a judgment, except under special circumstances, and where there is no imputation on the creditor; where, therefore, the propriety of the conduct of the latter throughout the transactions between the parties was questionable, interest was refused. *Lewis v. Morgan*, 3 Y. & J. 394. INTEREST, WHEN.

Lands are liable to judgments, notwithstanding the court of chancery has appointed a receiver to receive the rents and keep down the incumbrances, and to pay the surplus to the owner. *Lewis v. Ld. Zouche*, 2 Sim. 389. PR. RECEIVER.

### JURISDICTION.

Court of Chancery may appoint persons to convey real estate where trustees are out of jurisdiction, &c. 1 W. 4. c. 60. s. 8; and to assign and surrender leases where trustees are out of jurisdiction, &c., *id.* s. 9. When bill to be previously filed to establish right, *id.* s. 12. TRUSTEES.

Power given to courts of chancery and exchequer in Ireland by 1 W. 4. c. 60. Powers in lunacy given to Ld. Ch. of Great Britain, not to extend to Ireland, *id.* Powers given to Ld. Ch. of Ireland in matters of lunacy over property in Ireland. *Id. ib.* IRELAND.

The Irish courts may be ancillary to the court of chancery in England, in carrying into execution its decree; but it must be so on a bill properly constructed, so as to shew that the justice of the decree in the other juris-

diction, has been eluded by the defendants. A bill may be so framed, as to require that this court should appoint a receiver over estates, which the English decree charged; but the order must be founded on that decree, and very specially framed, and the appointment must direct the receiver to account before the master in England, the original jurisdiction. *Houlditch v. Ld. Donagall*, 1 Beat. 151.

See generally, as to the jurisdiction of Master of Rolls in England and Ireland, *Exp. Frederick Shaw*, 1 Beat. 24.

As to the right of the Master of the Rolls to appoint a secretary. *Id. ib.*

On an application to the Ld. Ch. to rehear a petition of appeal from the Vice Chancellor, which petition had been previously heard by Lord Eldon, and the order of the Vice Chancellor reversed; the Ld. Ch. considered such applications to be objectionable, and the practice to require regulation; but held, that he could not, consistently with the course pursued by his predecessors, now refuse to rehear the case. *Exp. Baker*, 1 Mont. & M. 279. VICE CHANCELLOR; REHEARING.

The court will not allow a person to bring an action at law for damage for an improper arrest under an attachment, but will refer it to the master to inquire what compensation he ought to receive. *Batchelor v. Blake*, 1 Hog. 98. PR. INJURY.

If court has once acquired jurisdiction over party in cause, he may be served effectually with any order, &c. in cause, in any part of the world. *Anon.* 1 Hog. 1.

Service of subpoena to appear and answer, made out of jurisdiction is a nullity, and proceedings founded thereon will be set aside. *Creede v. Byrne*, 1 Hog. 79. PR. SUBPENA, SERVICE OF.

The court will protect the property of a supposed lunatic, in the interval between the presenting of a petition for a commission of lunacy and the finding of the jury; but it will at the same time take care, that ample means for resisting the commission be furnished to those who act in the inquiry on the alleged lunatic's

behalf. *In re. Holmes*, 4 Russ. 186. LUNATIC'S ESTATE.

Where a tribunal determines in a matter not within its jurisdiction, the decision is a nullity. *Att. Gen. v. Hotham*, 3 Russ. 415.

### LACHES.

Under a commission a dividend was declared, and repeatedly advertised to be paid to the creditors. The payments were made by checks drawn upon the bankers duly appointed under the commission. Subsequently to the appointed day, the bankers, in whose hands a sum remained applicable to the payment of the dividends of creditors who had neglected to apply, stopped payment, and afterwards became bankrupt. Held, that an order of dividend is a separation from the bulk of the estate of the sum to be divided, and that the unpaid dividends were lying at the bankers at the risk of the creditors entitled to divide. *Exp. Powell*, 1 Mont. & M. 283. INDEMNITY; DIVIDEND.

The assignee of a lease for lives, which contained a covenant for renewal upon the dropping of any life, provided application were made within six months, having omitted upon the death of one of the *cestuique vie* to apply for a renewal within the six months, filed his bill praying for relief upon the ground, that he did not within the six months know that the person was dead, or that the deceased person was one of the *cestuique vie* named in the lease. The bill was dismissed with costs, because the plaintiff might have known the facts if he had used reasonable diligence, and acted with ordinary prudence. *Harries v. Bryant*, 4 Russ. 89. COVNT., BREACH OF, RELIEF AGAINST; PERF. CY PRES.

### LAND TAX.

Testamentary guardian of infant sold part of his estates for redemption of land-tax. Vendee paid purchase-money to agent of vendor, who was also agent for vendee, and conveyance was executed; but agent did not pay money into bank as required by 38 G. 3. c. 60. Purchaser entered and continued in possession for many years paying land-tax. Nearly twenty years after, attaining his age, heir at law brought ejectment against purchaser. Bill by purchaser to restrain which and obtain confirmation of contract, was dismissed without costs. *Hicks v. Morant*, 3 Y. & J. 286. INFANT.

A person who had entered into an agreement for the purchase of land, which was formerly part of the glebe of a rectory, and had been before sold for the redemption of the land-tax, is not bound to complete his purchase, where it appears that upon the prior sale for the redemption of the land-tax, the rector was himself the actual purchaser in the name of his curate. *Grover v. Hugell*, 3 Russ. 428. VEND. & PURCH.; AGREEMENT, SPEC. PERF.

### LANDLORD AND TENANT.

Irish tenantry act, 11 Anne 3. unaltered by 1 W. 4. c. 65. See i. s. 22. LEASE, RENEWAL OF.

Equity does not connect the tenant's right under the statute, to redeem premises evicted for non-payment of rent, with any extrinsic matter, so as to make the tenant pay compensation, as a condition connected

with his relief; therefore on a bill by a tenant to redeem premises evicted for non-payment of rent, relief granted, although he had committed breaches of covenant. *Swanton v. Biggs*, 1 Beat. 170.

A tenant will not be allowed to break up ancient meadow or pasture, though the land is mossy and requires tillage. *Martin v. Coggan*, 1 Hlog. 120. WASTE.

There cannot be a reletting of lands by the master, until the person declared tenant at the original letting is attached for not taking out his lease, and the letting set aside. *Cole v. Moncks*, and *Moncks v. Moncks*, 1 Hlog. 128. PR. REVOG. BEFORE MASTER.

This court will not make any abatement of rent of tenant of minor who holds for lives renewable for ever. *Hamilton v. Hamilton*, 1 Hlog. 71.

If receiver or those concerned for minor, offer any reasonable opposition to tenant who applies for an abatement of rent, they will be compelled to answer petition of tenant, and court will judge of abatement of rent. *Anon.* 1 Hlog. 68.

By an indenture a farm was demised at a yearly rent, with a covenant by the tenant, that if, during the last three years of the term, he should sow more than seventy acres of clover in one year, he should pay an additional rent of 10*l.* a year for every acre above seventy for the remainder of the term: Held, that the additional rent was in the nature of stipulated damages, entitling the plaintiff to a discovery in aid of an action at law; and a plea that the discovery would subject the defendant to penalties, was overruled. *Jones v. Green*, 3 Y. & J. 298. PR. DISCOVERY TENDING TO CRIMINATE; STIPULATED DAMAGES.

In a lease the lessor covenanted, at any time, upon request of the lessee, to cause any quantity of square oak wood to be set out within some part of the lands, that should be wanted for the benefit of the lessee, and to be used in the buildings intended to be made on the demised premises. And the lessee covenanted to pay and allow to the lessor interest for the total amount or value thereof, after the rate of 4*l.* for the value of every 100*l.* and so in proportion for a greater or less quantity. On a bill by the assignees of the lease, for an account of what was due to the defendant in respect of the breach of that covenant, and for an injunction to restrain proceedings in ejectment for the recovery of the premises, on the ground of a breach of covenant; a general demurrer for want of equity was overruled. *Pearson v. Haghton*, 3 Y. & J. 413.

A mortgagee has no right to the rents of the mortgaged premises which have been paid into court by a receiver appointed in a suit for establishing the will of the mortgagor, notwithstanding that after the appointment of a receiver he gave notice to the tenants to pay the rents to him. He ought to have followed up that notice by moving to discharge the receiver. *Thomas v. Brigstocke*, 4 Russ. 65. PR. RECEIVER; LIEN ON FUND IN COURT; MORTGAGOR & MORTGEE.

Upon an information to set aside a lease for ninety-nine years of charity lands, the defendants the lessees set up a title adverse to the lease; upon the merits it was held that there was no ground for the defence; but the court was of opinion that if the merits had

been otherwise, the defendants were estopped and could not dispute the title, while they retained the possession. *Att. Gen. v. Iotham*, 3 Russ. 415.

Payments agreed to be made by the actual occupier of the soil, under a licence to dig earth and make bricks, are in the nature of rent; and as such, a mortgagee of the premises is entitled, after notice, to all rent in arrear at the time of such notice, as well as all that may afterwards become due. *Exp. Hankey*, 1 Mont. & M. 247. MORTGAGE & MORTGEE.

### LEASE.

Fines on renewal of leases by infants, feme covert, and lunatic's committees, how to be paid and applied. 1 W. 4. c. 65. s. 21.

How such fines to be raised and reimbursed. *Id.* ss. 8, 14.

Refusal by such persons to pay, no forfeiture of estate. *Id.* s. 9.

Irish tenancy act, 11 Anne c. 3, unaltered by 1 W. 4. c. 65. See *id.* s. 22. IRISH TENANCY ACT.

T H by his will devised certain freehold and leasehold property to a trustee upon trust to permit his son T E H to receive the rents during his life, subject to the payment of rents and performance of the covenants reserved and contained by and in the present and future leases whereby the leasehold premises were and should be held, and also all taxes, fines and expenses attending the same; remainder upon trust for the sons of T E H in fee, as tenants in common. The tenant for life became bankrupt, and afterwards died. His assignees received a sum of 2000*l.* subsequent to the bankruptcy for rents. Held, that these rents were liable to the fines for renewal. *Hutkes v. Burrow*, 1 Tamil. 264.

A tenant for life of a leasehold estate, which is held with a tenant-right of renewal, is not bound to renew. *Capel v. Wood*, 4 Russ. 500. ESTATE; TENANCY FOR LIFE.

Every presumption is to be made to support a right of renewal, where from leases for twenty-one years at a small rent and fine, certain of the tithes of a parish had been regularly granted by the respective bishops of Ely, who were impropriate rectors of the parish, to the vicars for the time being. *Att. Gen. v. Bp. Ely*, 4 Russ. 102.

If a tenant for life of an under-lease for eighteen years, granted by a person who himself holds the premises so under-let along with other property under a lease for twenty-one years, purchases the interest of his immediate lessor, and obtains from the superior lessor a renewal of the lease thus purchased; the renewed lease is subject, so far as regards the premises which were comprised in the under-lease, to the same trusts as would have affected the under-lease if it had not been merged or had not expired by the effluxion of time. The same rule holds, though the lease at the time of the purchase was vested in a trustee upon trusts, under which he could not have granted a renewal of the under-lease, and though the tenant for life outlived by twenty-five years the time at which the under-lease would have expired by effluxion of time. *Giddings v. Giddings*, 3 Russ. 241. TRUST; MERGER.

Decree against a corporation to grant a new lease according to a covenant for perpetual renewal, though the whole of the reserved rent had been for many years applied uniformly to one charitable purpose. *Gosna v. Alderman of Grantham*, 3 Russ. 261. CHARITY.

### LEGACY.

A testatrix, by her will, gave to A 50*l.* a month or life, "in lieu of him giving up all the other notes

and claims;" and, by a codicil, she gave him "3*l.* a month" for life; and directed all other things to be paid and done as the will ordered. Held, that A was entitled to both the monthly payments for his life. *Lord v. Sutcliffe*, 2 Sim. 278. EXONS.

A testator bequeathed the lease and good-will of a public-house, with the stock therein, to J M, in consideration of his paying all the testator's debts, and appointed him residuary legatee and executor. J M proved the will, and entered and carried on business in the house. He afterwards filed a bill, praying, as the debts far exceeded the value of the personal assets, that the deficiency might be raised rateably out of the different freeholds devised: but held, that he having accepted the bequest, must be bound by the condition annexed, and pay the debts. *Messenger v. Andrews*, 4 Russ. 478. WILL, C. OF.

A codicil does not revoke or alter a will to a greater extent than was intended. A testator, by his will, gave certain legacies, exclusively charged on real estate. By a codicil, after reciting so much of the will as related to those legacies, he revoked that part of his will, and in lieu of the legacies therein given, gave smaller ones. The object of the codicil being only to alter the amount of the legacies, held, that it could not extend to charge the personal estate, and not being attested by three witnesses, could not alter the legacies charged on the real estate. *Kirke v. Kirke*, 4 Russ. 435. WILL, C. OF.

Equal sums given to the same person by a will and codicil, held, from the character and objects of the latter, to be substitutional, and not accumulative, although the legacy given by the codicil was only conditional. *Fraser v. Byng*, 1 Russ. & M. 90.

The intention of a testator that his gift should not vest in the legatee until it should be actually remitted to him, will prevail when clearly expressed, provided the remittance be not delayed by negligence or inevitable accident. *Law v. Thompson*, 4 Russ. 92.

Whether the *donatio mortis causa* being of a mortgage debt, a gift of the same sum, with the same remainder over in a subsequent codicil, is to be considered a satisfaction? *Hambrooke v. Simmonds*, 4 Russ. 25.

The statute of the 25th G. 2. c. 6. does not extend to wills of personal estate only; and a legacy to a person who is an attesting witness to such a will, is not void. *Emanuel v. Constable*, 3 Russ. 436. WILL, C. OF, WHO MAY TAKE; PR. EVID. WITNESS ATTESTING; ESTATE, PERSONAL; STAT. C. OF.

Construction of a will; as to the question whether the proceeds of real estate were made the pecuniary fund for the payment of certain legacies. *Rickets v. Ladley*, 3 Russ. 418. WILL, C. OF.

A testator gave his property, after the death of his wife, to trustees, on trust to pay the interest and profits to his two daughters, J and E, to their separate use, with a direction to pay to, and apply for the benefit of A, the son of E, 200*l.* annually, when he attained the age of twenty-one years, and before that period, such part of the 200*l.* bequeathed to him as might be judged proper: he then gave his daughters power to dispose of the principal by will to their children or grandchildren respectively, "except that proportion of principal given to E, and from which the interest is to arise, to my grandson, viz., 4000*l.*, which sum shall be my grandson's property:" and in case either of the daughters died without issue, he limited her share of the fund over to the other daughter, her children, or grandchildren. Held, that A was not entitled to the annuity till he attained twenty-one, nor to the 4000*l.* till the death of his mother. *Livesey v. Livesey*, 3 Russ. 287. S. C. in part reversed, *id.* 542. WILL, C. OF.

A legacy was given to the separate use of a married woman during the joint lives of her and her husband,

and in case she survived him, to her absolutely; but if she did not survive him, to such persons as she should by will appoint, and in default of appointment, to her next of kin exclusive of her husband. She died in the lifetime of her husband and the testator. Held, that the legacy lapsed. *Baker v. Hanbury*, 3 Russ. 340. WILL, C. OF.

### LEGACY DUTY.

When a legacy is not paid at the time appointed by the testator, legacy duty is payable not merely on the capital sum bequeathed, but on the aggregate amount of capital and interest which is ultimately received by the legatee. *Thomas v. Montgomery*, 3 Russ. 502.

Where a testator gives annuities, and directs them to be paid without any deduction whatsoever, and where from the nature of the property out of which the annuities are to be paid, there could be no deduction except in respect of the legacy duty, there the annuities shall be paid clear of legacy duty. *Smith v. Anderson*, 4 Russ. 352. WILL, C. OF.

### LEGATEE.

The infant heir and only son of an intestate was joined with his infant sisters, in a bill against the widow and administratrix of the intestate, for an account of his real and personal estate, and for a guardian and maintenance: Held, that the interests in the real and personal estate were distinct from each other, and a demurrer for multifariousness allowed. *Dunn v. Dunn*, 2 Sim. 329. S. P. *Maud v. Acklom*, 2 Sim. 331. PL. BILL, MULTIFARIOUSNESS; PL. PARTIES; HEIR AT LAW.

If the vendor of an estate, the contract for which was not completed in the lifetime of the testator, who was the purchaser, is afterwards paid the purchase money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor, with respect to his lien on the estate. *Qu.* if a pecuniary legatee would be entitled to the same benefit against the devisee? *Selby v. Selby*, 4 Russ. 336. EXORS.; ASSETS, MARSHALLING; VEND. & PURCH.; DEVISEE.

### LENGTH OF TIME.

F C tenant for life, with a power of leasing for thirty-one years, demises, in 1749, for three lives to his attorney. M C his son, tenant in tail four years, afterwards, in consideration of 20l. executes an agreement, which was endorsed on the part of the lease in the attorney's hands, to confirm the demise, and renew for a further term of three lives; eleven years after this, F C dies, and the articles are then registered. The last of the three lives died in 1817, and the representative of the attorney filed a bill for a specific performance of the son's agreement: Held that the case was too suspicious to come within the principle of specific performance, and the length of time elapsed under circumstances which did not imply acquiescence. *Blakeway v. Baggett*, 1 Dow, N. S. 405. ACQUIESCENCE; AGREEMENT, SPEC. PERF.

Although it is a settled rule that a court of equity will not compel a defendant to make a discovery which will subject him to pains and penalties, yet if between the filing and hearing of the plea, the time for suing for the penalties expires, the plea will be overruled. *Corp. of Trinity House v. Burge*, 2 Sim. 411. PENALTIES; PL. ANSWER; DISCOVERY TENDING TO CRIMINATE.

### LIEN.

A recovery by A, tenant for life, and B, remainderman in tail; afterwards, by deeds of lease and release, the uses declared to A for life, remainder to B for life, remainder to his first and other sons in tail male; the deeds not registered for several years afterwards; in the interval, judgments recovered against B: Held, that the non-registry of the deeds was immaterial, and that the persons who so recovered judgments against B, did not thereby acquire a lien or charge on the settled estate against the issue, deriving under the settlement. *Burke v. O'Malley*, 1 Beat. 96. DEEDS, REGISTRY OF.

Where a lease of mines is taken by six persons for the purpose of working them in partnership, and the managing partner becomes in the course of such management, indebted to the concern, his interest in the partnership is in the first place applicable to satisfy his debt to the concern. *Fereday v. Wightwick*, 1 Russ. & M. 45. PARTNERSHIP.

A mortgagee has no title to the rents of the mortgaged premises, which have been paid into court by a receiver appointed in a suit for establishing the will of the mortgagor, notwithstanding that after the appointment of a receiver, he gave notice to the tenants to pay the rents to him. He ought to have followed up that notice by moving to discharge the receiver. *Thomas v. Brigstocke*, 4 Russ. 65. MORTGOR. & MORTGEE; PR. RECEIVER; LANDLORD & TEN.; ATTORNEY OF RENT.

A business, the property of A, was carried on with his capital and for his profit, and by B his agent in the name of the latter, at a fixed salary. A having become bankrupt, B filed his bill, stating that by reason of the use of his name, he had become liable to a heavy amount for the concern, which was insolvent notwithstanding the bankruptcy of A, and praying for injunction to restrain the assignees from in any way intermeddling with the concern: Held, that B had a lien on the business to the extent of his liabilities, and an injunction was granted. *Fovercroft v. Wood*, 4 Russ. 467. BANKCY. ASSIGNMENT, WHAT PASSES; PRIN. & AGENT.

### LIMITATIONS.

A testator having bequeathed a yearly sum to a person for life, gave the annuity upon the death of the annuitant, to the eldest surviving son of A, and failing the male issue of A, to the daughters of A living at the demise of such male issue: at the death of the annuitant, A had no son living, but had two daughters: Held that the gift to the daughters of A was not too remote, and that they were entitled to the annuity. The same testator gave the residue to his widow during her life, and at her demise to the eldest surviving son of A, upon his attaining twenty-five, (the trustees being directed to apply the interest to his use till he attained that age) or failing such male issue, to the daughters of A living at the demise of the last of such male issue, the only son of A died under twenty-five in the lifetime of the widow, leaving two daughters of A him surviving: Held that if there had been any son of A living at the death of the widow, he would have taken a vested interest in the residue, though he had not then attained the age of twenty-five. That the gift over of the residue to the daughters of A, was not too remote, and that in the events which happened, they, upon the death of the widow, became entitled to the residue. *Murray v. Addenbrook*, 4 Russ. 407.

If the interest of an unborn child of a person in being, does not vest when such unborn child attains twenty-one, the gift is too remote and void, and the limitations over are void also. *Palmer v. Holford*, 4 Russ. 403.

A limitation to an unborn child for life is not good, unless the remainder vests in interest at the same time. A testatrix after expressing her desire that certain stock should remain in the three per cent. for ever, bequeathed the dividends to her seven children for their lives, with survivorship among them, and directed that after the decease of all of them, their children should succeed to the annuity of their deceased parent, and that after the decease of the seven children's children, the dividends of the stock should devolve in annuities upon the lawful heirs of the testatrix: Held that all the gifts were void except the life interest given to the seven children. *Hayes v. Hayes*, 4 Russ. 311.

### LIS PENDENS.

Pendency of creditor's suit, in which a receiver has been appointed, is cause against allowing a puisne judgment creditor to proceed at law after death of co-nuzor. *Anon.* 1 Hog. 69. **PR. CREDITOR'S SUIT; PR. INJUNCTION.**

### LUNATIC.

Agreements may be made by guardian of infants or committees of lunatic, with approbation of court, signified by the petition. 1 W. 4. c. 65. s. 26. **AGREEMENT; GUARD. & WARD.**

Committee to transfer stock as l.d. Ch. shall direct, and receive and pay over dividends. 1 W. 4. c. 60. s. 4. And shall convey. *Id.* s. 3.

Committee having a limited interest, where he may lease land. 1 W. 4. c. 65. s. 23. Committee may convey lands in performance of contract. *Id.* s. 27; and may apply by petition on motion to surrender or renew leases. *Id.* s. 13.

Lunatic's estates may be sold or mortgaged for payment of debts. 1 W. 4. c. 60. s. 28.

Stock standing in name of lunatic, executor, or his testator, committee to transfer the same. 1 W. 4. c. 60. s. 4. **EXORS.**

Inquisitions on commissions of lunacy executed in Great Britain, are to be transmitted to Ireland, and acted upon there, and so *vice versa*. 1 W. 4. c. 65. s. 41. **IRELAND.**

The court will protect the property of a supposed lunatic, in the interval between the presenting of a petition for a commission of lunacy, and the finding of the jury, but it will at the same time take care that ample means for resisting the commission be furnished to those who act in the inquiry in the alleged lunatic's behalf. *In re Holmes*, 4 Russ. 186. **JURISDICTION, LUNACY.**

A degree of imbecility, below what would be sufficient to justify a finding of lunacy under a commission, *de lunatico*, &c., will be sufficient to enable a court of equity to set aside a deed, if it appears that undue advantage has been taken of that weakness, such as it is, to obtain the execution of the deed. *Blachford v. Christian*, 1 Knapp, 73.

A committee should have the previous sanction of the court for not passing his accounts annually. *Anon.* 1 Russ. & M. 113.

A committee of the person and estate of a lunatic appointed without a reference, where the property was small. *Exp. Farrow*, 1 Russ. & M. 112.

Under a commission of lunacy, the jury found "that the party is not a lunatic, but that partly from paralysis, and partly from old age, his memory is so much impaired, as to render him incompetent to the management of his affairs, and consequently of unsound mind, and that he has been so for the term of two years last passed." The inquisition was quashed, and a new commission was ordered to issue. *In re Holmes*, 4 Russ. 182.

### MARRIAGE.

In May, 1816, a marriage was performed between M and G, by a minister in Scotland, upon production of a certificate of a proclamation of banns, which proclamation, it turned out, could not have been made; but it was proved, that according to the practice in Scotland at the time, banns were scarcely ever proclaimed when such certificates were given. A book, kept by the minister who performed the ceremony (he having afterwards become an incompetent witness), in which the marriage was entered, was proved by his wife and daughter, who also proved the performance of the ceremony. M, who afterwards married another husband, upon a suit to establish the first marriage, admitted the ceremony, but denied consummation. It was in evidence that she acknowledged herself married subsequent to the ceremony. It was also proved, that G was in the habit of recognizing M as the wife of J (the second husband.) Two years after the marriage of J and M, and their cohabitation, G raised an action in the commissaries' court, against the declaration of marriage and adherence. There was issue of the marriage between M and J, but neither the children nor J were made parties. Held, (reversing the judgment below) that if a celebration took place between M and G, it was to be presumed, under the

circumstances stated, that there was no real consent to marry. Whether the second husband and children should be parties; *Quære?* Assuming the marriage to be regular, previous and subsequent conduct of the parties is admissible evidence upon the question of consent. *Macneill v. Macgregor*, 1 Bligh, N. S. 293.

### MEMBERS OF PARLIAMENT.

Bill to be taken *pro confesso* against persons with privilege of parliament, in default of answer, 1 W. 4. c. 36. rule 13. **PR. BILL PRO CONFESSO.**

### MERGER.

If a tenant for life of an under lease for eighteen years, granted by a person, who himself holds the premises so underlet along with other property, under a lease for twenty-one years, purchases the interest of his immediate lessor, and obtains from the superior lessor, a renewal of the lease thus purchased, the renewed lease is subject, so far as regards the premises which were comprised in the under-lease, to the same trusts as would have affected the under-lease, if it had



not been merged, or had not expired by the effluxion of time. The same rule holds, though the lease at the time of the purchase was vested in a trustee upon trusts, under which he could not have granted a renewal of the under-lease, and though the tenant for life outlived, by twenty-six years, the time at which the under-lease would have expired by effluxion of time. *Giddings v. Giddings*, 3 Russ. 241. LEASE, RENEWAL OF TRUST.

### MINES.

Where a lease of mines is taken by six persons, for the purpose of working them in partnership, and the managing partner becomes in the course of such management indebted to the concern; his interest in the partnership is in the first place applicable to satisfy his debt to the concern. *Fereday v. Wightwick*, 1 Russ. & M. 145.

Mines are, for many purposes, partnership property; they are liable to the debts of the partnership, and debts to the co-partnership; and notwithstanding the bankruptcy of a partner indebted to the co-partnership, the accounts are to be taken beyond the time of the bankruptcy, and up to the time of the sale of the debts of the partnership are first to be satisfied, and out of the bankrupt's share, repayment is to be made to the co-partnership of what is due to it from him. S. C. 1 Taml. 250. PARTNERSHIP.

### MISTAKE.

Semble, where the parties intended that a promissory note should be joint and several, but through ignorance it is expressed to be joint only, a court of equity will relieve as well against the surety as the principal; but where a joint promissory note signed, "J and J E: J P surety," was given to a creditor of the firm of J E; and J P, died, J and J E being both alive, one of whom afterwards became bankrupt, and the other insolvent: Held that the promissory note could not be considered as several against J P the surety. *Rawstone v. Parr*, 3 Russ. 424; but reversed, id. 539. BILL OF EXCHANGE.

In contemplation of marriage between A and B, settlements were made of real estate belonging to B, the intended wife, and of personality belonging to A, the intended husband, upon uses and trusts, which after the solemnization of the marriage were to arise for the benefit of the husband and wife, and their issue; the marriage ceremony was performed, and the parties lived together as husband and wife; but after the lapse of more than a year, and before the parties had any children, the marriage was discovered to be void, and they executed deeds purporting to revoke the former settlement: some time afterwards a new settlement in contemplation of marriage was made, including the same property as the former, but different from the former in the interest given to the issue, as well as in other provisions; the parties then intermarried, and there was issue of the marriage. Held that the first settlement being founded on mistake and misapprehension, was not binding on the parties, and that the rights of the issue, both as to the real estate and the personality, were regulated by the second settlement. *Robinson v. Dickenson*, 3 Russ. 399. SETTLEMENT, MARRIAGE.

### MONEY APPOINTED TO BE LAID OUT IN LANDS.

A feme covert, tenant in tail in remainder of money to be laid out in lands, by arrangement with the ten-

ant for life, and on a private examination under the 7 G. 4. c. 45. consented to the payment of a proportion of the money to her husband, and the order was made accordingly. *In re Silcocks*, 3 Russ. 369. HUSBAND AND WIFE, CONSENT TO BAR; STAT. C. OF. Semble, an order of reference to the master on a petition presented under Lord Eldon's act, ought not to be made, except on a hearing in court; and on the appearance of counsel. *Hinde v. Metcalfe*, 3 Russ. 416. PR. PETITION; STAT.; C. OF.

### MORTGAGE.

The course of proceedings in foreclosure causes in Ireland and in England, is materially different. In England, it is merely a suit between mortgagor and mortgagee, to bar the equity of redemption of the former; but no sale is directed, and no provision made for creditors, as under similar decrees in this court. *Steele v. Phillips*, 1 Beat. 192.

The rules of court allow mortgagor in foreclosure suit so much time as may be occupied in procuring report of principal and interest, and costs, and three months from date of that report. *Ellis v. Deane*, 1 Beat. 16.

On a reference in a foreclosure suit to ascertain what is due to the plaintiff for principal, interest and costs, the plaintiff must ascertain his rights, and have his costs taxed, or the defendant may apply to have the proceedings in the cause staid. *Creed v. Byrne*, 1 Hog. 108.

The mortgagor or his heirs only can sue the mortgagees for an account and redemption, unless it is shewn that there is collusion between them and the mortgagees. *White v. Vanther*, 1 Knapp, 179.

The widow of a mortgagor who had joined with him in the mortgage for the purpose of barring her dower, and to whom he subsequently left an annuity in lieu of dower, not charged, however, on his real estate, has no equity as a *bona fide* purchaser of the annuity, to have it paid out of the mortgaged estate, and her representatives cannot file a bill for the purpose of redeeming it. *Id. ib.*

No larger sum can be recovered by way of interest on a mortgage in one of our colonies where the Dutch law is retained (Demerara) than a sum equal to the principal. *Shand v. Brereton*, 1 Knapp, 162.

Payments agreed to be made by the actual occupier of the soil, under a licence to dig earth and make bricks, are in the nature of rent, and as such, a mortgagor of the premises is entitled, after notice, to all rent in arrear at the time of such notice, as well as all that may afterwards become due. *Exp. Hankey*, 1 Mont. & M. 247. RENT.

Where an equitable mortgagee applies for leave to bid at the sale of the mortgaged premises, the price is for him to pay the costs of the application. *Exp. Robinson*, 1 Mont. & M. 261. EQUITABLE MORTGAGES; PR. COSTS; BANKCY. SALE.

A covenant in a mortgage of property in the West Indies, on the part of the mortgagor, to consign the produce of the estate to the mortgagee, to be sold on commission for the mortgagor; and to take all such plantation stores as may be wanted for the use of the estate from the mortgagee, is not usurious. A mortgagee is entitled to the benefit of such a covenant, and to charge a commission on the sale of the produce consigned to him. On the assignment by a mortgagee, the cost of support and contingencies furnished to the plantation previous to the assignment, but paid for subsequently, by the assignee, may be added to the mortgage debt, and charged against the estate. *Sayers v. Whitfield*, 1 Knapp, 133. USURY.

A, being entitled to certain lands as issue in tail,

conveyed them in fee in 1794 to secure 800*l.*, and levied a fine. In 1762, he borrowed 450*l.*, and charged it upon the same lands by deed poll. He died in 1764, leaving the charge of the aggregate sum of 1250*l.* upon the lands, with an arrear of interest, and devised all his lands to his wife. Two years afterwards, the wife married B, and they, after reciting the mortgage, and that B had paid the interest, granted and confirmed the mortgaged lands to the mortgagee, reserving the equity of redemption to B and his heirs, &c. By deed in 1789, 300*l.* arrear of interest was added to the principal, and the aggregate sum of 1550*l.* charged on the lands, subject to redemption as before. The wife died in 1794, leaving C, her son by A, her heir at law. In 1797, B sold part of the mortgaged lands, and in consideration of 2000*l.* principal and interest paid to the mortgagee, and 600*l.* to B, he and the mortgagee conveyed such part to D. The rest of the lands were conveyed by the mortgagee to B, who died in 1799. On a bill by C to redeem, the court of exchequer decreed that he was entitled to redeem, on payment of the principal money due upon the mortgage, and interest from the death of B. On appeal to the lords, it was declared that C was entitled, notwithstanding the proviso of redemption reserved to B, to redeem the lands on payment of the principal and interest due at the death of the wife on the aggregate sum of 1250*l.*, such interest to be computed according to the proviso in the indenture of release and mortgage. Upon reference to the master to take the accounts, it appeared that B and his wife during her life paid to the mortgagee 1500*l.*; that the master in his report did not include this sum, but reported that there was due upon this account for principal 1250*l.*, and for interest at the death of the wife 286*l.* On this ground

exceptions were taken to the report, which being in this respect confirmed, and a decree made upon further directions accordingly, a further appeal was presented to the lords, who affirmed the decree, they considering that the former order directing an account of interest due on the mortgage, meant interest actually due. *Ruscombe v. Hare*, 2 Bligh, N. S. 192.

A first application by a mortgagor to change the time for the payment of mortgage money refused, *Nanny v. Edwards*, 4 Russ. 124.

A mortgagee has no title to the rents of the mortgaged premises which have been paid into court by a receiver appointed in a suit for establishing the will of the mortgagor, notwithstanding that after the appointment of a receiver he gave notice to the tenants to pay the rents to him. He ought to have followed up that notice by moving to discharge the receiver. *Thomas v. Brigstocke*, 4 Russ. 65. LIEN ON FUND IN COURT; PR. RECEIVER; LANDL. & TENANT, ATTORNEMENT OF.

A mortgagee is entitled to be allowed in account against the mortgagor, all expences properly incurred for the recovery of the mortgage money. *Ellison v. Wright*, 3 Russ. 458. ACCOUNT, ALLOWANCES.

Where, upon a bill of redemption and foreclosure, the mortgagee assigns his mortgage after a decree for the usual accounts, the mortgagor is not to pay the costs of the supplemental bill which is necessary to bring the assignee of the mortgage before the court. *Barrey v. Wrey*, 3 Russ. 465. PR. COSTS.

The heir of the mortgagee to whom the legal estate in the mortgaged premises had descended, is a necessary party to a bill of foreclosure filed by the executor of the mortgagee. *Scott v. Nicoll*, 3 Russ. 476. HEIR AT LAW; PL. PARTY; MORTGAGOR. & MORTGEE.

#### NEXT OF KIN.

Where a pecuniary legacy is given by a testator to his heir, the word is to be understood in its legal and ordinary sense, unless controuled by the context of the will, and the heir at law will take the legacy, and not the next of kin. In such a case it makes no difference that there are three co-heirs. *Mounsey v. Blamire*, 4 Russ. 384. WILL, C. OF, WHO TAKE; HEIR AT LAW.

#### NOTICE.

Trustees not affected by notice to their agent, which he did not receive in that character. *France v. Woods*, 1 Taml. 172. PRINC. & AGENT.

A made a voluntary surrender of copyholds to a trustee, upon trust for F during her life; and if at her death she left children who attained twenty-one, upon trust to sell and divide the money among them; but if that event did not take place, upon trust for A in fee. Afterwards, by a deed reciting that the trustee was seised of the premises, upon trust for F and her husband and A the trustee, and F and her husband and A concurred in demising the premises for a valuable consideration to G for a long term of years: Held, that the lessee was to be considered as having notice of the trust for the benefit of the children of F, and that the lease was void as against them. *Malpas v. Ackland*, 3 Russ. 273. TRUST.

#### OFFICERS, PUBLIC.

The right of appointment to the office of clerk of the peace is, by law, in the *custos rotulorum* of the county, and not in the crown. *Harding v. Pollock*, 1 Dow, N. S. 454.

Plaintiff who resides as judge in one of the colo-

nies will not be compelled to give security for costs. *Stanley v. Hume*; 1 Hog. 12. PR. SECURITY, FOR COSTS.

Security for costs will be required from an officer in the service of the East India Company. *Powell v. Bernard*, 1 Hog. 144. E. I. COMP.; PR. COSTS, SECURITY.

## PARENT AND CHILD.

A son conveys an estate to his father nominally, as purchaser, but really as a trustee, and in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage, for the use of the son; the father died shortly afterwards, and before any money was raised, having by a will subsequent to the conveyance, made a general devise of all his real estates; the case is within the statute of frauds, and parol evidence is not admissible to prove the trust, but the son has a lien on the estate as vendor, for the apparent consideration, no part of which was paid. *Leman v. Whitley*, 4 Russ. 422. TRUST; PR. EVID. PAROL; VENDOR & PURCH; LIEN.

## PARTNERSHIP.

Where a lease of mines is taken by six persons, for the purpose of working them in partnership, and the managing partner becomes in the course of such management indebted to the concern; his interest in the partnership is in the first place applicable to satisfy his debt to the concern. *Fereday v. Wightwick*, 1 Russ. & M. 45.

Mines are, for many purposes, partnership property; they are liable to the debts of the partnership and debts to the co-partnership; and notwithstanding the bankruptcy of a partner indebted to the co-partnership, the accounts are to be taken beyond the time of the bankruptcy, and up to the time of the sale; the debts of the partnership are first to be satisfied, and out of the bankrupt's share repayment is to be made to the co-partnership of what is due to it from him. S. C. 1 Tam. 250. MINES.

Some members of a partnership cannot file a bill for a dissolution, without making all the partners, however numerous, parties. *Long v. Yonge*, 2 Sim. 369. PL. PARTIES.

The holders of shares in a joint stock company, purchased immediately from the company, are entitled to relief in equity, against the fraudulent conduct of the directors. *Blain v. Agar*, 2 Sim. 289. FRAUD; JOINT STOCK COMPANY.

Bills drawn by one partner for a separate debt in the partnership name, do not render the firm liable, unless the person suing on them can either prove a direct assent from the other partners to their formation or circumstances from which such an assent might be reasonably presumed. *Frankland v. McGusty*, 1 Knapp, 274.

The masters make it a rule not to take an account of a partnership, unless specially directed, although the order be to take all accounts. *Woolly v. Gordon*, 1 Tam. 11. ACCOUNT.

A general dissolution of partnership does not operate to discharge the members of it from the subsequent acts of one of them in respect of the engagements of the partnership, with third persons, entered into prior to the dissolution. *Ault v. Goodrich*, 4 Russ. 430. PARTNERSHIP, DISSOLUTION OF.

Subpartners are liable to the partners for the acts of each other. Thus, if a firm consisting of A and B engage in a speculation with C, A is answerable to C for the acts of B. S. C. *Id.*

A person employed on behalf of himself and his co-partners in negotiating the term of a lease, is not entitled to stipulate clandestinely with the lessors for any private advantage to himself. Where therefore, a sum of 12,000*l.* was paid in pursuance of such a stipulation, the party receiving it was declared to hold it in trust for the partnership. Before the transaction was discovered, one of the partners withdrew, and subsequently another partner assigned a share in the stock, and in his proportion of this claim to persons

then admitted into the concern: Held, that the retired, the continuing, and the new partners were properly joined as co-plaintiffs in a suit to have the trust declared. *Fawcett v. Whitehouse*, 1 Russ. & M. 132. TRUST; PRIN. & AGENT; PL. PARTIES, PARTNERS.

A, by his will, (after declaring his intention to assign the lease of a hotel in which he carried on business, and the effects therein and the business thereof, in trust for his son and daughter, in consideration of an annuity to be paid to him for life), bequeathed the residue of his personal estate and effects to his son and daughter in equal shares. The testator died without having effected the purpose declared in his will. The daughter, being executrix, carried on the business until 1810, when she purchased a freehold house, (chiefly by means of the assets of the testator) where she carried on the business until she married in 1819. Previous to her marriage, the freehold house was conveyed to trustees for her and her husband and their children in the ordinary way. In the following year, the son filed a bill praying that the settlement might be set aside, the freehold house declared part of the assets, and an account taken of the profits of the business from the death of the testator until 1819, and that half the profits and half the assets might be paid to him as residuary legatee and partner. The V. Chancellor decided that a partnership existed from the death of the testator to the marriage of the daughter, and that the freehold house was part of the assets. Against this decree the defendants appealed to the Chancellor, who affirmed it with a slight variation. They then appealed to the house of lords, and insisted that an issue should be directed to try whether a partnership existed. The house affirmed the decree, on the ground that it was then too late to ask for such an issue. *Burnard v. Norot*, 2 Bligh, N. S. 215. S. C. 4 Russ. 247.

A, B, and C carrying on business in co-partnership for a term which would expire on the 19th Feb. 1807, under articles which empowered A, in case of his death during the term, to bequeath his share of the trade in favour of his wife or children. S, a customer of the bank and a surety, covenanted that they, or one of them, would pay to A, B, and C, the survivors or survivor of them, &c. all sums which, on, before or until the 19th Feb. 1807, should become due from the customer to A, B and C, the survivors or survivor of them, &c. A died, having bequeathed his share of the concern to his executors, in trust for his children. The business continued to be carried on under the same firm as before, and his executors interfered in the management and shared in the profits. At the time of A's death, the balance due from S to the bank was upwards of 14,000*l.*; after that time S continued his dealings with the bank in the same manner as previously, paying in more than 14,000*l.* within a few weeks after A's death, but drawing out during the same period a larger sum, and these subsequent dealings were continued in the same account current with the preceding dealings. Some years afterwards S became insolvent, being indebted to the bank in a balance of 19,000*l.* and upwards: Held, that the partnership which carried on the business after the death of A was a new partnership; that the surety's covenant did not extend to cover sums advanced to the customer by the bank after A's death; that the balance due at A's death from the customer was to be considered as discharged by the payments subsequently made by him to the bank. *Femberton v. Oakes*, 4 Russ. 154. PRINC. & SURETY.

## PENALTIES.

Although it is a settled rule that a court of equity will not compel defendant to make a discovery which will

subject him to pains and penalties; yet if between the filing and hearing of the plea, the time for suing for the penalties expires, the plea will be overruled. *Corp. of Trinity House v. Burge*, 2 Sim. 411. LENGTH OF TIME; PL. ANSWER TENDING TO CRIMINATE.

## PLEADING.

### I. ANSWER.

Defendant by answer cannot decline answering, further, though discovery would tend to criminate; he must plead or demur. *Stanbury v. Gordon*, V. C. 1830.

Statements in an answer are impertinent if they are neither called for by the bill nor material to the defence with reference to the order or decree which may be made on the bill. Statements in an answer to a bill of revivor which merely shew irregularity and misconduct in the former proceedings in the suit are impertinent. *Wagstaff v. Bryun*, 1 Russ. & M. 28.

By indenture a farm was demised at yearly rent, with a covenant by tenant, that if during the last three years of the term, he should sow more than seventy acres of clover in one year, he should pay an additional rent of 10*l.* a year for every acre above seventy, for the remainder of the term: Held, that the additional rent was in the nature of stipulated damages, entitling plaintiff to a discovery in aid of an action at law, and a plea that the discovery would subject defendant to penalties, was overruled. *Jones v. Green*, 3 Y. & J. 298. LANDLORD & TEN.; STIPULATED DAMAGES.

Where a bill for discovery and relief is demurrable for want of equity as to the relief, discovery cannot be granted. *Mellish v. Richardson*, 12 Price, 530. PL. DEMURRER.

Although it is a settled rule that a court of equity will not compel a defendant to make a discovery which will subject him to pains and penalties; yet, if between the filing and hearing of the plea, the time for suing for the penalties expires, the plea will be overruled. *Corp. of Trinity House v. Burge*, 2 Sim. 411. LENGTH OF TIME; PENALTIES.

### II. BILL.

The court will make an order for appointing a guardian and allowing maintenance, upon petition without bill where the infant's income does not exceed 300*l.* a year. *Exp. Lukin*, 4 Russ. 307. INFANT; MAINTENANCE; PL. PLA.

Maintenance will not be allowed without a bill filed to an infant, entitled to real estate which is of a yearly value exceeding 100*l.* a year. *In mre. Molesworth*, 4 Russ. 308. *Id.*

The plaintiff is entitled, under a prayer for general relief, to such remedy as the statement of his case entitles him to. *Popham v. Constantine*, 1 Tam. 135.

The infant heir and only son of an intestate, was joined with his infant sisters, in a bill against the widow and administratrix of the intestate for an account of his real and personal estate, and for a guardian and maintenance: Held, that the interests in the real and personal estate were distinct from each other, and a demurrer for multifariousness was allowed. *Dunn v. Dunn*, 2 Sim. 329. S.P. MAUD V. AETKIN, 2 Sim. 331. HEIR AT LAW; LEGATEE; PL. PARTIES.

The stating part of bill must contain all necessary

allegations to sustain plaintiff's right to relief. *Macnamara v. Sweetman*, 1 Hog. 29.

The amended bill is not prolix if it is a complete record, and contains all the charges in the original bill. *Fitzpatrick v. Power*, 1 Hog. 24.

A demurrer to a bill by the assignees of a bankrupt, because it did not state that it had been filed with consent of the creditors as required by the stat. 6 G. 4. c. 16, was overruled, the act merely intended to make assignees responsible, as between them and the creditors, if they instituted any suit without the consent directed by the act. *Jones v. Yates*, 3 Y. & J. 373. STAT. C. OF; PL. PARTIES; BANKCY. ASSIGNEES.

A joint petition by three creditors for an order to prove three distinct debts, was held to be multifarious. The claims of different persons cannot be united in one petition. *Exp. Sayer*, 1 Mont. & M. 280. PL. PARTIES; PL. PETITION; PL. MULTIFARIOUSNESS.

A plaintiff must establish at the hearing that he had a title to relief at the time of filing his bill, or if he relies on matter subsequent, he must file a supplemental bill. *Barfield v. Kelly*, 4 Russ. 355. PL. HEARING.

### III. DEMURRER.

Where a bill for discovery and relief is demurrable for want of equity as to the relief, discovery cannot be granted. *Mellish v. Richardson*, 12 Price, 530. PL. DISCOVERY. So settled by Lords Thurlow, Alvanley, and Eldon, in a variety of decisions. See also the Treatises of Lord Redesdale, and Cooper.

Demurrer to a bill for a general account, and for an injunction to restrain the defendant from taking out execution on a judgment recovered by him in an action at law, was allowed; because the bill did not establish a case of account on its own statement, and it was too late for the plaintiff to ask the interference of the court, after having suffered the action to be tried at *nisi prius*. *Moses v. Lewes*, 12 Price, 502. ACCOUNT.

A general demurrer for want of equity allowed, where it appeared on the face of the bill, that of two co-plaintiffs, one had not any interest in the matter of the suit. *Cuff v. Platell*, 4 Russ. 242. PL. PARTIES.

If of several plaintiffs, some have an interest in the matter of the suit, and others have no interest in it, but are merely the agents of their co-plaintiffs, a general demurrer to the whole bill is a good defence. *King of Spain v. Machado*, 4 Russ. 225. PL. PARTIES; PRIN. & AGENT.

### V. PARTIES.

Where on marriage, interest of a sum secured by mortgage is settled on husband for life, remainder to wife for life, and he is afterwards discharged as an insolvent, it is competent for him notwithstanding, to file bill with wife for foreclosure of mortgage, in order to have the trust fund secured. *Horan v. Wooloughan*, 1 Beat. 1. INSOLVENCY.

Where, after bill to foreclose, plaintiff became insolvent, the costs of assignee afterwards made defendant, must be paid by plaintiff; he cannot throw costs on mortgagor. *Id. ib.*

On a bill by a trustee, to raise the arrears of an annuity, the *cestui que* trusts are not necessary parties; it appearing on the face of the contract, that it was the intention of the parties to exclude the *cestui que*

trusts from the necessity of taking any part in the transactions relating to the management of the trusts. *Bijfield v. Taylor*, 1 Beat. 91.

A prior incumbrancer may insist, that he will not be made a party to a suit by a puisne creditor, for any purpose but that of being redeemed; if he should do so, the estate must be sold, subject to his prior incumbrance. *Fisher v. Barry*, 1 Beat. 143.

To a bill by a vicar against occupiers for certain tithes, impropiators ought to be omitted as parties, although the defendants allege that it is uncertain, whether these lands are or are not within the parish; and that the impropriate rectors had always received or demanded the tithes; occupiers only are necessary parties. *Cooke v. Blunt*, 2 Sim. 417. IMPROPRIATOR OF TITHES.

Some members of a partnership cannot file a bill for a dissolution, without making all the partners, however numerous, parties. *Long v. Yonge*, 2 Sim. 369. PARTNERS.

The infant heir and only son of an intestate, was joined with his infant sisters, in a bill against the widow and administratrix of the intestate for an account of his real and personal estate, and for a guardian and maintenance: held, that the interests in the real and personal estate were distinct from each other, and a demurrer for multifariousness allowed. *Dunn v. Dunn*, 2 Sim. 329. S. P. *Maud v. Acklom*, 2 Sim. 331. PL. BILL, MULTIFARIOUSNESS; HEIR AT LAW; LEGATEE.

Some of the shareholders in a joint-stock company may file a bill to have their deposits repaid, without making all the other shareholders parties, if they are ignorant of their names. *Blain v. Agor*, 2 Sim. 289.

Prior incumbrancers are not necessary parties to a bill by an *elegit* creditor. *Rundell v. Marq. Donegal*, 1 Hog. 122.

Plea for want of parties must be to the entire bill. *Parke v. Black*, 1 Hog. 70. PL. PLEA.

A demurrer to a bill by the assignees of a bankrupt, because it did not state that it had been filed with consent of the creditors, as required by the statute 6 G. 4. c. 16. was overruled; the act merely intended to make assignees responsible as between them and the creditors, if they instituted any suit without the consent directed by the act. *Jones v. Yates*, 3 Y. & J. 373. STAT. C. OF; PL. BILL; BANKCY. ASSIGNEES.

Some shareholders in a joint stock company may institute proceedings on behalf of themselves and others who may come in and take the benefit of the suit, for the purpose of compelling directors to refund monies fraudulently withdrawn from the funds of the company and applied to their own use. To compel all the shareholders to be made parties to the suit would be to deny justice. *Hitchens v. Congreve*, 4 Russ. 576.

In a creditor's suit for the sale of the real estate; where there was no personality, and the executors refused to prove the will, it was decided that the heir at law must be a party, and administration with the will annexed obtained, in order to show a deficiency of assets. *Fordham v. Ruff*, 1 Tam. 1.

A joint petition by three creditors, for an order to prove three distinct debts, was held to be multifarious. The claims of different persons cannot be united in one petition. *Eap. Sayer*, 1 Mont. & M. 280. PL. PETITION; PL. MULTIFARIOUSNESS; PL. BILL.

T G, having instituted a suit, dies, leaving two wills, of which the second was eventually established; but not having been discovered immediately, the devisees and executors under the first, revive the suit; a private agreement is afterwards entered into between the plaintiffs in the revived suit and R G, entitled under the second will, that the benefit should belong to the parties beneficially interested, whichever of the

wills should be established. A decree was made for the plaintiffs in the revived suit, and an order made under it, from which R G, and M R, (daughter of T G,) beneficially entitled under the first will, appeal. The lords declared that R G ought to have been a party to the suit below, and adjourned the hearing *sine die*, with liberty for the parties to take such steps below as they should be advised. A bill was then filed by R G, adding other parties, and praying to have the benefit of the revived suit, which was decreed; but the lords still refused to hear the appeal for want of proper parties, with liberty as before. R G then files another bill to have the benefit of the revived suit, adding other parties, and setting up a new case; the facts of which being denied by the defendants, and not established in evidence, the court below dismissed the bill; whereupon the plaintiffs appealed, but the lords dismissed the appeal, and confirmed the decree dismissing the bill. *Gough v. Latouche*, 1 Dow, N. S. 485.

A person employed on behalf of himself and his co-partners in negotiating the term of a lease, is not entitled to stipulate clandestinely with the lessors for any private advantage to himself; where, therefore, a sum of 12,000*l.* was paid in pursuance of such a stipulation, the party receiving it was declared to hold it in trust for the partnership. Before the transaction was discovered, one of the partners withdrew; and subsequently, another partner assigned a share in the stock, and in his proportion of this claim to persons then admitted into the concern: held, that the retired, the continuing, and the new partners, were properly joined as co-plaintiffs in a suit, to have the trust declared. *Fawcett v. Whitehouse*, 1 Russ. & M. 132. PARTNERSHIP; TRUST; PRIN. & AGENT.

A plea, showing that one of two plaintiffs had no interest in the matters of the suit, is a good defence to the whole bill. *Makepeace v. Haythorne*, 4 Russ. 244. PL. PLEA.

A general demurrer for want of equity allowed, where it appeared on the face of the bill, that of two co-plaintiffs, one had not any interest in the matters of the suit. *Cuff v. Platell*, 4 Russ. 242. PL. DEMURRER.

If, of several plaintiffs, some have an interest in the matter of the suit, and others have no interest in it, but are merely the agents of their co-plaintiffs, a general demurrer to the whole bill is a good defence. *King of Spain v. Machado*, 4 Russ. 225. PL. DEMURRER, WHERE; PRIN. & AGENT.

A defect of parties may be cured at the hearing, by the undertaking of the plaintiff, to give full effect to the utmost rights, which the absent party could have claimed; those rights being such as do not affect the rights of defendants. *Harvey v. Cooke*, 4 Russ. 34.

The heir of the mortgagee, to whom the legal estate in the mortgaged premises has descended, is a necessary party to a bill of foreclosure filed by the executor of the mortgagee. *Scott v. Nicoll*, 3 Russ. 476. MORTGAGE, FORECLOSURE OF; HEIR AT LAW; MORTGAGE; MORTGEE.

Seemle, where the *cestui que* trusts convey their beneficial interest in a portion of the property to a purchaser, the purchaser may file a bill against the trustee for a conveyance of the legal estate, without making the *cestui que* trust, who sold to him, parties to the suit. *Goodson v. Ellison*, 3 Russ. 583. TRUSTEE, AND CESTUI QUE TRUST.

Where a bill was filed against the devisee of the lease, praying that the lease might be declared void, and the defendant insisted, that if the lease was set aside, the plaintiffs ought to repay the monies expended by his deviser in the improvement of the premises; the executor of the deviser, who had assented to the devise of the lease, was not a necessary party to

the suit. *Melpas v. Ackland*, 3 Russ. 273. **EX-CUTOR.**

A *pauis* creditor, who obtained possession under an ecclesiastical sequestration since the bill was filed, and before receiver was appointed, is a necessary party in the cause. *Robinson v. Grady*, 1 Hog. 147.

#### VI. PETITION.

A joint petition by three creditors for an order to prove three distinct debts, was held to be multifarious. The claims of different persons cannot be united in one petition. *Exp. Sayer*, 1 Mont. & M. 280. **PL. PARTIES; PL. MULTIFARIOUSNESS.**

Petition of re-hearing dismissed, because it suggested as the grounds of re-hearing facts not alleged in the pleadings. *Newton v. Stables*, 4 Russ. 210. **PR. RE-HEARING.**

In a suit instituted for the administration of the assets of a testator, who in his will described himself as "of Halifax, in Nova Scotia," certain lapsed shares of the residue, were at the hearing, on further directions ordered to be distributed, according to the statute of distribution, there being no suggestion on the record, that the administration ought not to be according to the law of England; afterwards a petition of re-hearing was presented, stating that the testator died domiciled in Nova Scotia, and praying that the distribution might be according to the law of that country; but the petition was dismissed. *Id. ib.*

#### VII. PLEA.

Plea for want of parties must be to the entire bill. *Parke v. Black*, 1 Hog. 70. **PL. PARTIES.**

To a bill stating a settlement, under which certain hereditaments were limited to A for life, with remainder to the plaintiff, and praying a delivery of the title deeds; the defendant put in a plea of purchase for valuable consideration without notice, averring that "A, before the execution of the conveyance, alleged that she was seised," and was in possession. The court held that such a plea must aver that the vendor was seised, or pretended to be seised, and was in possession at the time when the conveyance was executed. *Jackson v. Rowe*, 4 Russ. 514.

*Quarre*, whether such a plea not averring a title prior to, and independent of, the settlement, is a good defence to such a bill. **S. C.**

A plea showing that one of two plaintiffs had no interest in the matters of the suit, is a good defence to the whole bill. *Makepeace v. Haythorne*, 4 Russ. 244. **PL. PARTIES.**

To a bill by the assignee of a bankrupt, against a removed assignee, for an account, a plea that the suit was not instituted with the consent of the creditors at a meeting pursuant to the 11 & 12 Geo. 3. c. 8. s. 58. was allowed. *Stokes v. Deery*, 1 Beat. 152. **BANKCY. ASSIGNEES.**

There may be a distinction between an assignee commencing an original suit, and continuing one commenced by the bankrupt. *Id.* 156.

#### PORTIONS.

Limitations and devises of portions for children are not affected by 1 W. 4. c. 47. as to traders, 1 W. 4. c. 47. s. 5. **FRAUDLT. CONVEYANCE.**

#### POSSESSION.

Three defendants were ordered to deliver up to a ceiver certain premises, within a week, or in default to stand committed; but no writ of execution was taken out; they refused to deliver up, and a serjeant at arms was ordered to go against them. Upon being

brought up, two of them expressed contrition, and were ordered to be discharged, upon payment of costs; the third still persisting in his contempt, was committed to the Fleet; the costs not being paid by the other two, they remained in custody of the serjeant; the orders were, upon motion, discharged with costs, and the persons liberated. Upon a motion, subsequently, that the defendants might be ordered to deliver up possession within a week after service of the writ of execution of the order to be made on that application; the court stated the course of proceeding to be, that there must be, first, an order to deliver possession, then a writ of execution of that order must be served on the defendants; and until that is done, no further order can be made, and refused the motion with costs. *Green v. Green*, 2 Sim. 394. & 430. **PR. RECEIVER; PR. PROCESS.**

#### POSTHUMOUS CHILDREN.

A testator devises his real and personal property to trustees, upon trust for four children of M D, whom he described by their respective names, "together with every other children of the body of M D, alive at my decease, or born within nine months afterwards, share and share alike." M D had two other children born after the date of the will, but before the date of a codicil to it, and these as well as the four previously born, were all illegitimate. The children born after the date of the will are not entitled to any share of the property. *Mortimer v. West*, 3 Russ. 370. **WILL, C. OF, WHO ENTITLED; BASTARD.**

#### POWER.

Illusory execution of power shall be valid at law and equity, 1 W. 4. c. 46. s. 1. provided that nothing in act shall affect any provision in deed, &c. creating such power, which shall declare amount of share from which no object of power shall be excluded. *Id.* s. 2.

A testator gave the interest of a fund to his widow for life, with a power of appointment amongst all his children, and in default of appointment, amongst all such children, with a gift over to the widow, in case all the children should die before their shares should become payable; the widow appointed the fund to her two children, one of whom died in her lifetime: Held, that the survivor took the whole fund. *Rielesfield v. Record*, 2 Sim. 354. **WILL, C. OF, WHO TAKE.**

Testator gave 3000*l.* to trustees, for C S for life; remainder to such persons as she should appoint. C S by her will disposed of all her personal estate, and then gave all sums, messuages, &c. and other interest to which she was entitled under the testator's will. Held, that the latter gift was a good execution of the power. *Maples v. Brown*, 2 Sim. 327.

A feme covert, described as such in the will of the testator, may, during the coverture execute by deed, a power of disposition given her by the will, over real and personal estate. *Downes v. Timperon*, 4 Russ. 334. **HUSBAND & WIFE, HER POWER DURING COVERTURE.**

Where a donor recommends or directs that the donee, at her death, shall give personal property to such of his family, or such of his relations as he shall think fit, the donee has a power to select the objects of her bounty amongst his relations or family, though not within the degree of next of kin. But if the donee does not exercise the power, the word "relations" or the word "family," will be construed "next of kin," unless the special expressions of the donee have a different import. *Grant v. Lynam*, 4 Russ. 209. **WILL, C. OF, WHO TAKE.**

A gift of personal estate to the wife for life, with a direction that, after her death, one moiety thereof shall be at her entire disposal, either by will, or otherwise, amounts only to an estate for life in the wife, with a power of appointment. The sale by the widow of a sum of three per cent. stock, which constituted nearly the whole of the residue, and the investment of the proceeds in the purchase of long annuities in her own name, does not amount to an exercise of her power. *Reith v. Seymour*, 4 Russ. 263. WILL, C. OF, WHAT ESTATE; POWER TO APPOINT ESTATE FOR LIFE.

Where a feme covert having separate property, joins in a security for money advanced to her husband, the court acts upon it not as an agreement to charge her separate property, but as an equitable appointment under the settlement, to be satisfied from the rents and profits of that property, and not by sale or mortgage. *Field v. Soule*, 4 Russ. 112. AGREEMENT, WHO MAY CONTRACT.

A will is deemed a good execution of a power if it dispose of the power, although it does not refer to the power. The subject of the power will pass by the words of "all other my property" if it be plain from other expressions in that will, that under these general words she considered the property under the power to be included. *Walker v. Mackie*, 4 Russ. 71.

A general devise of all lands of which the testatrix had power to dispose, is not a good execution of a power to appoint monies which were to arise from the sale of lands. *Adams v. Austen*, 3 Russ. 461.

A plaintiff ought never to come into a court of equity to have an alleged defect in the execution of a power supplied, without admitting on the record, that at law the power has not been well executed. *Cockerell v. Cholmely*, 3 Russ. 565.

Where under a settlement a testator had in a certain event the fee of an estate subject to a term, and had under the same settlement a power in the particular event to appoint the fee subject to the term by deed or will, and by his will he devised the estate in fee without reference to his power, the will takes effect as a devise of his interest, and not as an execution of his power. By the same agreement he had, in the events which happened, a power to appoint a sum of 1000*l.*, which was to be raised after his death, by the term to which the fee of the same estate was subject, but his will took no notice whatever of this power; the devise of the estate does not operate as an execution of the power to appoint the 1000*l.* *Farmer v. Bredford*, 3 Russ. 354.

## PRACTICE.

### I. ABATEMENT & REVIVOR.

A creditor who has proved his debt under a decree, is entitled to apply to the master for a summons on the receiver to account. *Locke v. Ashe*, 1 Hog. 143. PR. BILL, DISMISSAL OF.

No process prior to sequestration can be revived, after abatement by death of plaintiff. *Collingham v. O'Reilly*, 1 Hog. 49. PR. SEQUESTRATION.

Conditional decree will be revived against defendant, in case one plaintiff die; but not, if defendant dies. *McGough v. Hunnington*, 1 Hog. 23.

If suit has abated by death of co-plaintiff, defendant may enter a side-bar rule to dismiss bill with costs, unless plaintiff revives suit in eight days. *Carey v. Davis*, 1 Hog. 14.

Where a feme covert, having separate property, joins in a security for money advanced to her husband, the court acts upon it, not as agreement to charge her separate property, but as an equitable appointment under the settlement, to be satisfied from

the rents and profits of that property, and not by sale or mortgage. The death of the husband after the filing of the bill, and before the hearing, makes no difference. *Field v. Soule*, 4 Russ. 112. HUSBAND & WIFE.

### III. ANSWER.

Where answer is required by plaintiff, though bill is taken *pro confesso*, defendant shall remain in custody. 1 W. 4. c. 36. rule 12. PR. PRISONER; PR. BILL PRO CONFESSO.

As to defendant's in contempt putting in answer to avoid bill being taken *pro confesso*. 1 W. 4. c. 36. rule 10. PR. CONTEMPT; PR. BILL PRO CONFESSO.

Answer of prisoner to be taken by warden or gaoler. 1 W. 4. c. 36. rule 20. PR. PRISONER.

Defendant refusing to answer, as to the proceedings on taking bill *pro confesso*. 1 W. 4. c. 36. rule 13. PR. ANSWER.

An answer taken by commission will be taken off the file, if the jurat does not state where it was sworn. *Kenny v. Costello*, 1 Hog. 130.

Leave was given to the defendants to file a general demurrer, notwithstanding they had obtained an order for time to plead, answer, or demur, not demurring alone; the subpoena having been made returnable immediately, and no wilful delay being imputable to them. *Att. Gen. v. Mayor, &c. of Carlisle*, 2 Sim. 427. PR. DEMURRER.

A defendant who allows the exceptions taken to his answer, has six days to put in his further answer, and no process can be made available against him to enforce it in the mean time. *Dee v. Scanlan*, 1 Hog. 101.

A plaintiff who has joined in naming commissioners to take the defendant's answer, is not thereby prevented from issuing process for want of an answer, before the return day of the commission. *Id. ib.*

Defendant cannot before answer obtain reference to master, to inquire whether suit has been instituted for infant's benefit. *St. John v. El. Beaborough*, 1 Hog. 41. PR. REF. OF SUIT FOR INFANT'S BENEFIT.

A plaintiff may, at the same time, proceed to enforce an answer by the process of the court, and bring an action against the defendant and his sureties, on the bail-bond given to the sheriff under an attachment. *Beddall v. Page*, 2 Sim. 224. PR. BAIL; PR. ATTACHMENT.

Leave to file a supplemental answer, and set up a modus, after the cause has been set down for hearing, was refused, on the ground that it was impossible to put the plaintiff in the same situation as he would have been in, if this defence had been stated on the record in due time. *Macdougall v. Purrier*, 4 Russ. 486.

In the exchequer, a plaintiff is at liberty to refer an answer for impertinence, at any time before replication. *Thomas v. Jones*, 3 Y. & J. 184. PR. IN EXCHEQUER.

Form of exceptions for impertinence under the new orders. An exception fails, if any part of the passage included in it be not impertinent. *Wagstaff v. Bryan*, 1 Russ. & M. 30.

### IV. APPEAL.

Where petition does not relate to an adjudication of property between subjects, but to the constitution of offices of the King's court, an appeal from the order made will not lie to the house of lords, but must be to the King in person. *Exp. Frederick Shaw*, 1 Beat. 33.

Where a case determined by the house of lords on an appeal, be sent back to this court to do what should

be just, a part of the decree having been reversed; the question of costs is in the discretion of the court. Costs of the appeal in the particular case, ordered in favour of the party succeeding on the appeal, although only in part. *Noel v. Ld. Henley*, 12 Price, 100. PR. COSTS.

Order made to stay proceedings to enforce answer pending appeal to house of lords from an order, overruling demurrer. *King of Spain v. Machado*, 4 Russ. 560. PR. STAYING PROCEEDINGS.

A bill was filed by A against the executors of B, a tenant for life, unimpeachable of waste, in order to charge his personal estate for the value of ornamental timber, alleged to have been cut by him. The decree directed an account; but before the master had proceeded under it, all matters in difference were submitted to an arbitrator, appointed by the master, under an order by consent, and arbitration bonds were executed by the parties. The arbitrator having found a certain sum due to the plaintiff, an application was made to the court to enforce payment accordingly, when the defendant presented a petition of rehearing, which suspended the proceedings upon the award, and the bill on the rehearing was dismissed without any order being made respecting the award. Upon appeal against this decree, the house decided that the appeal must be withdrawn; that the parties must go before the chancellor, in order that the decree and award might be considered together: and a special order was made to that effect. *Butler v. Kunnersley*, 1 Bligh. N. S. 374. See *Marg. Ormond v. Kunnersley*, 5 Madd. 369., and 2 Simon & Stuart, 15. PR. REHEARING; PR. DECREE.

Decree varied on appeal in respect of costs only. *Burkett v. Spray*, 1 Russ. & M. 113.

A petition to appeal need not be presented to the King in council within a year after an appeal has been refused by the colonial court. *President, &c. of Orphan Board v. Van Reepen*, 1 Knapp. 83.

#### V. APPEARANCE.

Defendant refusing to appear, bill to be taken *pro confesso*. 1 W. 4. c. 36. rule 13. PR. BILL PRO CONFESSO.

The manner of proceeding if defendant do not enter appearance by a time certain to be named. 1 W. 4. c. 36. s. 3. If defendant refuse to appear, court may enter it for him. *Id. ib.*

Appearance may be put in for defendant, having privilege of parliament, on return of process of sequestration. *Id. s. 12.*

The entry of an appearance at the time the defendant serves notice of a motion to set aside process for want of an appearance on the ground of irregularity, is no waiver of the irregularity complained of, but the motion may be made before the appearance is entered. *Halpin v. Hamilton*, 1 Hog. 103. WAIVER.

No new fact can be introduced into a bill by amendment, without prejudice to process for want of an appearance or answer. *Moffett v. Johnston*, 1 Hog. 106. WAIVER; PR. BILL, AMENDMENT OF.

A plaintiff cannot move *ex parte* for an injunction, after he has served the defendant with subpoena, and the defendant has appeared. *Perry v. Weller*, 3 Russ. 519. PR. INJUNC. EX PARTE; PR. SUBPENA, SERVICE OF, EFFECT OF.

#### VI. ATTACHMENT.

Writ of attachment, when issued for contempt in not answering, and *non est inventus* returned, serjeant-at-arms to go. 1 W. 4. c. 36. rule 1.

It is a contempt of court to insult a suitor or his counsel while attending in the master's office. If such contempt is committed, the party will be attached at once, on the production of the master's certificate. *French v. French*, 1 Hog. 138. PR. CONTEMPT;

PR. MASTER, PROCEEDINGS BEFORE. Attachment is irregular, if sealed and delivered out by sealer before, though not parted with till after, requisite affidavit is filed. *Gardner v. Rowe*, 4 Russ. 578. PR. SEAL.

The order to renew an order for an attachment, must be conditional in the first instance. *Creed v. Creed*, 1 Hog. 91.

Party in cause will not be attached for not executing conveyance to purchaser, if his six clerk has not been previously served with a copy of it. *Spunner v. Armstrong*, 1 Hog. 33.

A plaintiff may, at the same time, proceed to enforce an answer by the process of the court, and bring an action against the defendant and his sureties on the bail-bond given to the sheriff under an attachment. *Beddall v. Page*, 2 Sim. 224. PR. BAIL; PR. ANSWER.

An attachment, sealed after an order for time had been obtained, but before it is served, is regular. *Hewes v. Hewes*, 4 Russ. 508. PR. SEAL.

#### VIII. BAIL.

A plaintiff may at the same time proceed to enforce an answer by the process of the court, and bring an action against the defendant and his sureties, on the bail bond given to the sheriff under an attachment. *Beddall v. Page*, 2 Sim. 224. PR. ANSWER; PR. ATTACHMENT.

#### X. BILL, AMENDMENT.

In what cases bill may be amended without discharging contempt. 1 W. 4. c. 36, rule 10. PR. CONTEMPT, DISCHARGE FROM.

A bill may be amended without prejudice to process, if it appear that the amendment would not affect the rights of the parties against whom there is process. *Bennett v. Laurence*, 1 Hog. 149.

The thirteenth order does not apply to the case of an answer filed before the first day of Easter term, 1828. *Harris v. Harrison*, 2 Sim. 431.

An order for liberty to amend the bill cannot be obtained without notice, if there has been a conditional order to dismiss the bill, or the defendant has filed a rejoinder. *Molony v. Molony*, 1 Hog. 117.

The original bill must be dismissed as against those defendants who are not retained before the court as parties to the amended bill. *Sheppard v. Osbourne*, 1 Hog. 126. PR. BILL, DISMISSAL OF.

No new fact can be introduced into a bill by amendment, without prejudice to process for want of an appearance or answer. *Moffett v. Johnston*, 1 Hog. 106. WAIVER.

Plaintiff may make formal amendment after issue joined and witnesses examined. *Franklin v. Beamish*, 1 Hog. 72.

Motion for liberty to amend injunction bill, must be on notice and founded on affidavit, stating what new matter is, and that it came to plaintiff's knowledge after bill was filed, or else on exceptions to defendant's answer either ruled or allowed by notice. *Donagall v. Berry*, 1 Hog. 46. PR. INJUNC.

Plaintiff will be allowed to amend his bill without prejudice to a conditional decree of sequestration, by adding new parties, provided no new case is made against them. *Magenant v. Wilson*, 1 Hog. 48.



An order to extend the injunction to stay trial cannot be obtained after an order to amend. *Brown v. Reina*, 3 E. & F. 389. PR. INJUNCTION TO STAY TRIAL.

In general, under the thirteenth order, a motion for leave to amend a bill which has been previously amended, must be made on motion. • *Freem v. Best*, 1 Russ. & M. 79. PR. MOTION, NOTICE OF.

Formal amendments will be permitted to be made without notice, though the bill has been amended previously. *Smith v. Evans*, 1 Russ. & M. 80. 1b.

A second order giving the plaintiff leave to amend made upon an *ex parte* application. *Cottingham v. Potts*, 1 Russ. & M. 81. 1b.

A second order to amend obtained by petition, of course is irregular, though obtained before answer. *Turleton v. Dyer*, 1 Russ. & M. 1. PR. PETITION.

It is irregular to obtain an order to amend, when more than six weeks have elapsed from the time when the answer of all the defendants who are stated to be within the jurisdiction, is to be deemed sufficient, though no answer has been filed by another person alleged to be out of the jurisdiction, against whom process is prayed, when he shall come within the jurisdiction. *Id.* 7.

The acceptance of the twenty-shillings cost by the clerk in court of the defendant, is a waiver of the irregularity of a second order obtained as of course. *Id.* 1. S. P. *Hair v. Woodbridge*, *id.* 5. (n). WAIVER; PR. COSTS, PAYMENT AND EFFECT OF.

When bill is filed, a second amendment cannot take place without a special motion under 13th Gen. Ord. 3d April, 1828. *Turleton v. Dyer*, and *Barnes v. Wilson*, 1 Russ. & M. 1. GEN. ORD., C. OF.

#### XI. BILL PRO CONFESSO.

Bill to be taken *pro confesso* against persons with privilege of parliament, in default of answer. 1 W. 4. c. 36. rule 13, MEMBERS OF PARLIAMENT.

Defendant refusing to appear, bill to be taken *pro confesso*. 1 W. 4. c. 36. rule 13. PR. APPEARANCE.

See 1 W. 4. c. 36. as to taking bills *pro confesso*.

As to taking bill *pro confesso* against prisoner for misdemeanour, see 1 W. 4. c. 36. PR. PRISONER.

Petition to rehear on cause taken *pro confesso*, to be made within six months after copy of decree served. 1 W. 4. c. 36. s. 6. PR. REHEARING; PR. PETITION.

Defendant refusing to answer, as to the proceedings, on taking bill *pro confesso*. 1 W. 4. c. 36. rule 13. PR. ANSWER.

Where plaintiff requires an answer, though bill is taken *pro confesso*, defendant shall remain in custody. 1 W. 4. c. 36. rule 12. PR. ANSWER; PR. PRISONER.

As to defendant in contempt putting in answer to avoid bill being taken *pro confesso*. 1 W. 4. c. 36. rule 10. PR. ANSWER; PR. CONTEMPT.

#### XIII. BILL, DISMISSAL OF.

A creditor who has proved his debt under a decree is entitled to apply to the master for a summons on the receiver to account. *Locke v. Asha*, 1 Hog. 143. PR. ABATEMENT & REVIVOR.

An application by the plaintiff at the hearing to dismiss the bill without costs, the defendant having become insolvent after the bill filed, refused, as the plaintiff, when he discovered the insolvency, instead

of applying to dismiss the bill without costs, filed a supplemental bill, still seeking relief against the defendant personally, thereby adopting and continuing the original suit. Such an application at the hearing was quite irregular; it ought to have been the subject of special application on notice. *Drought v. Robinson*, 1 Beat. 87. INSOLVENCY.

Where a receiver had been appointed before decree in a foreclosure cause, and the master reported in what manner he should apply the rents, the court has not thereby acquired such a dominion over the suit, that it can prevent the plaintiff from dismissing the bill with costs; an order obtained by a defendant, who could derive no benefit from the suit, discharging the order of dismissal, reversed on appeal. But although the defendant had not answered, yet allowed the costs in the cause. *White v. Lord Westmeath*, 1 Beat. 174.

In that class of cases in which, to avoid multiplicity of suits, one person is allowed to sue on behalf of himself and all others in the same interest, the plaintiff cannot dismiss his bill after a decree, because such a decree not only provides for the rights of himself, but of all others who choose to come in and take the benefit of it, but the rule only applies to suits in which a decree has been pronounced. *Id.* 177.

The original bill must be dismissed as against those defendants who are not retained before the court as parties to the amended bill. *Sheppard v. Osborne*, 1 Hog. 126. PR. BILL, AMENDMENT OF.

Person named as defendant in prayer for process may appear and answer, without service of subpoena, and when the time has expired, enter rule to dismiss bill for want of prosecution. *Hume v. Babington*, 1 Hog. 8.

Where a defendant, after having given notice of a motion which was never made, dismissed the bill for want of prosecution, the court discharged an order obtained by the plaintiff to compel the defendant to pay costs of motion, of which notice had been given as being a motion abandoned. *Farquharson v. Pitcher*, 4 Russ. 510.

If a defendant who is in a situation to dismiss a bill by an order of course, for want of prosecution after replication filed, does not avail himself of his right, but permits the plaintiff to file interrogatories and examine witnesses, he cannot afterwards dismiss the bill for want of prosecution, and an order of dismissal subsequently obtained will be discharged for irregularity. *Fernes v. Hutchinson*, 1 Russ. & M. 22. WAIVER.

At the hearing of a cause the bill will be dismissed, if there be no evidence against a defendant, although upon a motion for an injunction, a case was made against him, on which an *ex parte* injunction was sustained. *Barfield v. Kelly*, 4 Russ. 355. PR. HEARING.

A defendant may dismiss a bill for want of prosecution, pending a notice given by him to a motion to dissolve an injunction, which the plaintiff had obtained. *Farquharson v. Pitcher*, 3 Russ. 383. PR. INJUNC., MOTION TO DISSOLVE.

#### XIV. BILL OF INTERPLEADER.

The plaintiff in an interpleading suit, who has not applied for an injunction, will not be ordered to bring in the property in dispute on the application of one of the defendants. *Clindennin v. O'Keefe*, 1 Hog. 118. PR. PAYMENT INTO COURT.

A testator having bequeathed a legacy to trustees in trust, to invest it on government or good security, and to pay the interest to a woman for life, and after her

death, to distribute the principal among certain persons, the executors and the trustees agreed, that a bond debt of equal amount, which was due to the testator, should be appropriated to the payment of the legacy, and communicated this arrangement to the obligor of the bond, who for many years paid the interest to the tenant for life, with the privity of the trustees: afterwards the surviving trustee of the legacy gave notice to the debtor not to pay the money to the executors, who, on the other hand, commenced an action upon the bond; the debtor having filed a bill of interpleader the executors demurred, but the demurrer was overruled. *Wright v. Ward*, 4 Russ. 215.

Warehousemen being private agents, and not holding goods as the possessors of a public bonded warehouse, cannot maintain a bill of interpleader; but where goods are deposited in a public bonded warehouse, a bill of interpleader may be maintained against contending claimants. *Cooper v. De Tustet*, 1 TamL 177. BAILEE.

In an interpleading suit the court will order the money which has been brought in by the plaintiff to be paid to a person having authority from all the defendants to receive it, though some of the defendants have not appeared, and for that purpose a reference will be directed to the master, to inquire whether a sufficient authority to receive the money has been given. *Pourell v. Sonnet*, 3 Russ. 556. PR. PAYMENT OUT OF COURT; PRINC. & AGENT.

## XXII. COMMISSION TO ASCERTAIN BOUNDARIES.

Where a plaintiff shews a title to some land, and a confusion of boundaries, he is entitled to a commission or an issue; in this case a commission was directed. *Godfrey v. Littell*, 1 TamL 221. and see cases in note, id. 234, 5, 6.

In order to sustain a bill for a commission to ascertain boundaries, the plaintiff must establish by the admission of the defendant, or by evidence, a clear legal title to some land in the possession of the defendant, and also a ground for equitable relief; and where the quantity of the land of the plaintiff in the possession of the defendant is doubtful upon the evidence, the court will direct a commission or an issue, as will best answer the justice of the case. S. C. 1 Russ. & M. 59.

## \* COMMISSION IN AID.

To obtain an order for commission in aid of an inquiry in relation to a receiver's securities, there must be an affidavit, that the witnesses intended to be examined, were expected to give material evidence: any party to an enquiry who unnecessarily sues out a commission, must pay the costs of it in any event. *Donovan v. Thompson*, 1 Hog. 150.

## XXIV. COMMISSION OF REBELLION.

Demurrer may be filed by party in contempt, if commission of rebellion has not issued against him. *Taaffe v. Redington*, 1 Hog. 28. PR. DEMURRER; PR. CONTEMPT.

## XXVIII. CONTEMPT.

In what cases bill may be amended without discharging contempt. 1 W. 4. c. 36. rule 10. PR. BILL; AMENDMENT, EFFECT OF.

As to defendant in contempt putting in answer to avoid bill being taken *pro confesso*. 1 W. 4. c. 36. rule 10. PR. ANSWER; PR. BILL; PRO CONFESSION.

When defendant who is very poor is in contempt, how to be dealt with. 1 W. 4. c. 36. rule 6.

In what cases court may compulsorily discharge defendants from contempt. *Id.* rule 18.

Register of names of persons committed for contempt by court of equity to be kept by warden of Fleet. *Id. ib.*

Costs of contempt are within provision of insolvent acts. 1 W. 4. c. 36. rule 1. PR. COSTS; INSOLVENTS.

The court will not entertain a motion for the discharge of a defendant from custody under an attachment for contempt in not producing deeds, papers, &c. before the master, on an affidavit, that the defendant has not, nor ever had, any such in his possession, or within his power; such an application refused with costs: the course is to leave an affidavit in the master's office, when, on obtaining his certificate, the defendant will be discharged as a matter of course. It was made part of the terms of a subsequent successful application for the defendant's discharge, that he should pay the costs of that application, and of the previous irregular motion. *Hurd v. Partington*, 12 Price, 689.

Party in contempt will not be heard to contradict statements in bill, or state any new facts in his defence; but he may show to court that plaintiff has not made sufficient case upon his own documents for the relief he seeks, or that his proceedings are irregular. — *v. Gurt*, 1 Hog. 77.

Defendant who has appeared, but is in contempt, is not entitled to notice of motion for receiver. *Fitzpatrick v. Hawkshaw*, 1 Hog. 82. PR. RECEIVER; PR. MOTION, NOTICE OF.

Demurrer may be filed by party in contempt, if commission of rebellion has not issued against him. *Taaffe v. Redington*, 1 Hog. 28. PR. DEMURRER; PR. COMMISSION OF REBELLION.

A party who is in contempt for disobedience to an order in a cause, is not thereby precluded from making a motion in another cause having reference to a distinct subject, though between precisely the same parties. *Semble. Clark v. Dew*, 1 Russ. & M. 103. PR. MOTION.

It is a contempt of court to insult a suitor or his counsel while attending in the master's office; if such contempt is committed, the party will be attached at once, on the production of the master's certificate. *French v. French*, 1 Hog. 138. PR. MASTER, PROCEEDINGS BEFORE; PR. ATTACHMENT.

## XXIX. COPIES.

Office copies of bill not to be taken by a poor defendant. 1 W. 4. c. 36. rule 14.

## XXX. COSTS.

Costs of contempt are within provisions of insolvent acts, 1 W. 4. c. 36. rule 1. INSOLVENTS; PR. CONTEMPT.

How costs under act 1 W. 4. c. 65. as to property of lunatics &c. infants and femes covert are to be paid. 1 W. 4. c. 65. s. 36.

The rule that a party in possession of a judgment of an inferior court, shall not, on appeal, pay the costs of the reversal of the judgment, does not apply to the reversal on an appeal by a purchaser of an order at the rolls, setting aside a sale of the goods. *Fisher v. Barry*, 1 Beat. 130.

After an action brought, the plaintiff receiving payment of his demands, may go on to a trial, if the costs then incurred are not tendered. But equity acts on a more discretionary rule than a court of law; if the sum received by the plaintiff had satisfied the whole purpose of the suit, he ought to apprise the defendant that he would proceed for his costs, unless they were also paid. Under decrees for specific performance, the vendee considered as entitled to his costs, up to the time when the vendor evidences a good title; when that is done, the vendee is bound to declare that he is satisfied, and will accept the title if the vendor will pay his costs up to that time: if he omit to do so, the court will fix all the subsequent costs on him. *Lill v. Robinson*, 1 Beat. 84.

Where a case determined by the house of lords on an appeal, be sent back to this court to do what should be just; a part of the decree having been reversed, the question of costs is in the discretion of the court. Costs of the appeal in the particular case ordered in favour of the party succeeding on the appeal, although only in part. *Noel v. Ld. Henley*, 12 Price, 700. PR. APPEAL.

The master of the rolls, in a suit by the assignees of a bankrupt against a trustee of a fund contingent on the event of the bankrupt surviving his father, which event happened after the bankruptcy, having made a decree in favour of the plaintiff, would not make the trustee pay costs, he having acted in ignorance. *Knight v. Martin*, 1 Tamil. 237. S. C. 1 Russ. & M. 70. TRUSTEE LIABILITY.

When costs are given against a party, he must pay the costs of his antagonist when taxed as between party and party. *Kirkwood v. Lyons*, 1 Hog. 116.

The plaintiff's costs of obtaining an order for the investment of money are costs in the cause. *Brennan v. Nolan*, 1 Hog. 130.

Next friend of infant plaintiff cannot be compelled to give security for costs. *St. John v. El. Besborough*, 1 Hog. 41. PR. PROCHAIN AMI.

Plaintiff in cross bill will not be compelled to give security for costs, though residing out of jurisdiction. *Thornton v. Wilson*, 1 Hog. 20.

Plaintiff who resides as judge in one of colonies, will not be compelled to give security for costs. *Stanley v. Hume*, 1 Hog. 12. OFFICERS PUBLIC.

An heir at law questioning the sanity of his ancestor, is entitled to an issue *devisavit vel non*, and if he fails, will not be compelled to pay costs, if the circumstances justified him in trying the issue; but costs will not be allowed him. *Smith v. Dwyer*, 3 Y. & J. 278. PR. ISSUE DEVISAVIT VEL NON; HEIR AT LAW.

Where there was a decree with costs against three persons, and during the progress of the taxation one of them died, it was held the master was regular in proceeding with the taxation and making his certificate, notwithstanding the two survivors objected that the suit was abated. *Meredith v. Hughes*, 3 Y. & J. 188. DEATH.

Where an equitable mortgagee applies for leave to bid at the sale of mortgaged premises, the practice is for him to pay the costs of the application. *Exp. Robinson*, 1 Mont. & M. 261. MORTGAGE. AND MORTGAGE; BANKCY. SALE; EQUITABLE MORTGAGES.

Where a defendant, after having given notice of a motion, which was never made, dismissed the bill for want of prosecution, the court discharged an order obtained by the plaintiff to compel the defendant to pay costs of motion, of which notice had been given, as being a motion abandoned. *Farquharson v. Pitcher*, 1 Russ. 410. PR. BILL, DISMISSAL OF.

The husband's costs of making a settlement on a female ward, who had been married without consent, were allowed, he having no property, and there being

no circumstances of aggravated misconduct on his part. *Anon.* 4 Russ. 423. PR. FUND IN COURT; MARRIAGE OF WARD OF COURT; HUSB. & WIFE.

Where a *cestui que trust*, having a life interest only, is declared entitled to his costs out of the trust property; the court will not give him a mere lien on it to be enforced by subsequent proceedings; but will direct an immediate sale for the purpose of defraying them. *Burkett v. Spray*, 1 Russ. & M. 113.

A trustee refusing to pay a legacy without the direction of the court, in a case which admits of no doubt, was refused his costs, but was not made to pay the costs of the suit, because he might have acted from ignorance, and not from any improper motive. *Knight v. Martin*, 1 Russ. & M. 70. S. C. 1 Tamil. 237. TRUSTEE, LIABILITY.

Seemingly, if a bill be dismissed at the hearing, with costs, and the plaintiff be then out of the jurisdiction, and the plaintiff's suit be so frivolous and vexatious, that the bill could not have been filed *bona fide* in expectation of a favourable decree; or if the solicitor of the plaintiff guarantee his client against the costs of the suit, the court upon the petition of the defendant, will compel the solicitor of the plaintiff to pay the taxed costs. *Cockle v. Whiting*, 1 Russ. & M. 43. PR. COSTS, TAXATION.

The costs of copies of deeds or documents not actually read at the hearing, but furnished by the parties to the court, are not allowed where they are personal costs, and do not come out of a fund. *Boson v. Williams*, 3 Y. & J. 378.

The acceptance of the 20s. costs by the clerk in court of the defendant, is a waiver of the irregularity of a second order obtained as of course. *Tarleton v. Dyer*, 1 Russ. & M. 1. S. P. *Hair v. Woodbridge*, id. 5 note. WAIVER; PR. ORDER TO AMEND.

Where there is a fair and substantial question to be argued on appeal, the decree may be varied as to costs, though affirmed in every other point; but it will not be varied as to costs, where the point which is presented as the ground of appeal has no substance. *Att. Gen. v. Butcher*, 4 Russ. 180.

The payment of a solicitor's bill pending a suit, does not preclude taxation. *Howell v. Edmunds*, 4 Russ. 67.

Where, upon a bill of redemption and foreclosure, the mortgagee assigns his mortgage after a decree for the usual accounts, the mortgagor is not to pay the costs of the supplemental bill, which is necessary to bring the assignee of the mortgagee before the court. *Barry v. Wrey*, 3 Russ. 465. MORTGAGE, ASSIGNMENT OF.

An executor or trustee is not to be allowed, without question, the amount of bills of costs which he has paid *bona fide* to the solicitor to the trust; and the master, without regularly taxing the bills, will moderate their amount. *Johnson v. Telford*, 3 Russ. 477. ACCOUNT, ALLOWANCE; EXOR. LIAB. OF.

A bill of costs was delivered by the solicitor in 1809, and shortly afterwards paid by the client: between that time and March, 1817, four other bills were delivered, and various payments were made on account: in November, 1817, a sixth bill was delivered, when the client paid the general balance due on the bills of costs, at the same time stating that he would insist on having the bills taxed. An application for taxation to a judge at law in 1818, and an application to the court of K. B. in 1819, failed, from circumstances not involving the merits of the question. Some attempts at a compromise were made from time to time, and the client was obliged, on three or four occasions, to leave England, in order to attend to urgent business in foreign countries; but at length, in 1824, a motion was made to have the bills referred for taxation, supported by evidence that some of the items of charge were improper. The court ordered that the

bill last delivered should be taxed generally, and that the five antecedent bills should be referred to the master, with a direction that the client should deliver to the solicitor a schedule of the items complained of, and that the master should exercise as large a discretion as he might think fit, with respect to the evidence on which he should proceed in forming his judgment concerning these items. *Seagull v. Campbell*, 3 Russ. 545.

If an heir at law, alleging insanity in a deviser, file his bill against the devisee, and he fail in the issue *devisavit vel non*, he shall pay the costs of the issue, but not the costs of the suit, unless he might have asserted his claim by ejectment, and then his suit will be deemed vexatious, and he will be ordered to pay the costs of it. *Scaife v. Scaife*, 4 Russ. 309. HEIR AT LAW; PR. ISSUE DEVISAVIT VEL NON.

In a suit for specific performance by a vendor, the costs will be thrown upon the purchaser, though the master reports that a good title was not shewn till after the filing of the bill, if that finding proceeded on the ground that certain evidence had not been previously furnished, which the vendor had offered to produce, but which had not been actually produced, before the institution of the suit, in consequence of the purchaser insisting upon other and unsubstantial objections. *Long v. Collier*, 4 Russ. 269.

Security for costs will be required from an officer in the service of the E. I. Comp. *Powell v. Bernard*, 1 Hog. 144. E. I. COMP.; PUBLIC OFFICERS.

A purchaser under a decree has no lien for his costs on the funds in court, arising out of the sales of other property, so as to prevent any distribution of the fund, until the report of the title being had has been confirmed. *McCann v. O'Farrell*, 1 Hog. 137. VEND. & PURCH. LIEN; PR. SALE'S JUDICIAL.

The costs of opposing a motion for further time to answer, will not be given where the motion is granted on special facts verified by affidavit, showing that the application is necessary, and that the defendant is in no default. *Wynne v. Ld. Farnham*, 1 Hog. 134.

Where, after bill of foreclosure filed, plaintiff becomes insolvent, costs of assignee, afterwards made defendant, must be paid by plaintiff; he cannot throw them on mortgagor. *Horan v. Wooloughan*, 1 Beat. 1.

Plaintiff prosecuting, to a decree, a suit for the arrears of an annuity under a will, after the arrears had been paid, entitled to the costs; the defendant not having tendered the costs up to the time of payment, and disputing by answer the will and making it necessary for the plaintiff to establish, by decree, the will. Plaintiff also entitled to the costs of defendant, the heir of a deceased trustee, who could not be co-plaintiff; but not to the costs of a necessary party, made a defendant by amendment, but omitted in the original bill. *Lill v. Robinson*, 1 Beat. 83.

### XXXII. CREDITOR'S SUIT.

A judgment creditor, not a party, will not be allowed to proceed at law, if a receiver has been appointed in a creditor's suit, and a prior incumbrancer is a party. *Thackaberry v. Christian*, 1 Hog. 109. PR. INJUNCTION TO STAY PROCEEDINGS AT LAW; PR. RECEIVER.

Pendency of creditor's suit, in which a receiver has been appointed, is cause against allowing a puisne judgment creditor to proceed at law after death of co-mortor. *Anon.* 1 Hog. 69. LIS PENDENS; PR. INJUNCTION.

Where all creditors under a decree for sale, and for the master to advertise for all outstanding creditors to go in and prove their debts, had been paid their demands, the surplus produce of the sale ordered to be paid to the defendant, the debtor, upon making an af-

fidavit that he had given no specific pledge or lien on the surplus fund, without further advertisement for creditors. *St. Andrew v. Elderly*, 1 Beat. 183.

### XXXIII. CROSS BILL.

A cross bill will be taken off the file, if filed without a certificate by counsel. If the certificate of counsel has been subjoined, but the plaintiff has not filed the necessary affidavit, no subpoena to answer can issue. The same engrossment may be replaced on the file, when the certificate of counsel has been subjoined. *Elliott v. Millet*, 1 Hog. 125. BARRISTER; PR. SIGNATURE OF COUNSEL.

### XXXIV. DECREE.

Decree *pro confesso* confirmed absolutely, if served, and no petition of rehearing within six months. 1 W. 4. c. 36. s. 6.

If decree is made on refusal of defendant to enter appearance, copy to be served on him if in custody, or forthcoming before process taken out. 1 W. 4. c. 36. s. 4.

Copy of decree *pro confesso* to be served upon persons returning, within seven years, within jurisdiction of court. 1 W. 4. c. 36. s. 5.

Creditors of mortgagor obtaining judgments between first and second mortgage, who did not come in to take the benefit of the decree of foreclosure, are bound by the decree, and cannot follow the estate in the hands of a purchaser, taking his title under the decree. *Steele v. Philips*, 1 Beat. 188.

Decree of foreclosure against an administrator, *pendente lite*, plaintiff knowing limited character in which administrator represented mortgagor, and that there were persons claiming the beneficial title to estate, not parties to suit, merely forecloses administrator *pendente lite*. Sale directed by decree of foreclosure to be made in a month, on the consent of administrator *pendente lite*; not binding on persons beneficially entitled to the estate, not parties in the suit. *Ellis v. Deane*, 1 Beat. 5. ADMINISTRATOR PENDENTE LITE.

Decree of foreclosure, the proceedings and sale under it set aside as fraudulent, the *res geste* of the parties concerned, affording conclusive evidence of a contrivance to use the process of the court to effect fraudulent sale, to obtain the estate under colour of pursuing the legitimate right to recover a debt. *Id. ib.*

A man, though no party to decree, may preclude himself from aid of a court of equity, if he knowingly allowed parties to proceed under it, and uses unreasonable delay in bringing forward his complaint; but every case of this kind depends on its own circumstances. *Id.* 21.

An application by creditors, whose debts, secured by a trust-deed, had been established by decree of the court of chancery in England, to appoint a receiver over the trust estates, in possession of defendant the debtor, refused: it being doubtful as the record was framed, whether at the hearing of the cause, the plaintiffs would be entitled to a decree; for the record to carry the English decree into execution, was so imperfectly framed, that the defendant, by joining issue on the original record, would be at liberty to impeach the securities so established; which he could not do on a bill filed solely and exclusively to aid the execution of the English decree. *Houlditch v. Ld. Donegal*, 1 Beat. 146. DEBTOR AND CREDITOR; PR. RECEIVER.

A conditional decree on sequestration cannot be amended if erroneous. *M'Alister v. Savage*, 1 Hog. 81. PR. SEQUESTRATION.

Purchaser under decree, with notice of judgments intervening between incumbrances ordered to be paid, is bound by them, unless persons to whom they are vested are parties to cause, or come in and prove under decree. *Steele v. Phillips*, 1 Hog. 49. **VENDOR AND PURCH.**

When a court of equity is called upon to carry into execution a former decree, it is not bound to do so, if upon inquiry into the merits, it appears to have been erroneous. *White v. Parnter*, 1 Knapp. 179.

A testator gave his property, after the death of his wife to trustees, in trust to pay the interest and profits to his two daughters J and E, to their separate use, with a direction to pay to and apply for the benefit of A, the son of E, 200*l.* annually, when he attained the age of twenty-one years, and before that period, such part of the 200*l.* bequeathed to him, as might be judged proper; he then gave his daughter power to dispose of the principal by will to their children or grandchildren respectively, "except that proportion of principal given to E, and from which the interest is to arise to my grandson, namely, 4000*l.* which sum shall be my grandson's property," and in case either of the daughters died without issue, he limited her share of the fund over to the other daughter, her children or grandchildren. The executrix having, in mistake, made payments to A, in respect of his annuity for two years before he attained twenty-one, was entitled to retain them out of the future payments of the annuity. An order, authorising her to retain them, and made upon petition after the decree had been passed, and entered as regular. *Livesey, v. Livesey*, 3 Russ. 287. **S. C.** in part reversed, *id.* 542. **EXORS. RIGHT TO RETAIN; REIMBURSEMENT; PR. PETITION; PR. ORDER.**

Where a suit has been decreed to be dismissed, the decree, in the exchequer, contains the pleadings at full length, contrary to the practice in chancery, where only a short order for dismissal is drawn up. The lord chief baron intimated his intention of considering the subject. *Bacon v. Williams*, 3 Y. & J. 378. **PR. IN EXCHEQUER.**

A bill was filed by A against the executors of B, a tenant for life unimpeachable of waste, in order to charge his personal estate for the value of ornamental timber, alleged to have been cut by him; the decree directed an account; but before the master had proceeded under it, all matters in difference were submitted to an arbitrator, appointed by the master, under an order by consent, and arbitration bonds were executed by the parties; the arbitrator having found a certain sum due to the plaintiff, an application was made to the court to enforce payment accordingly, when the defendant presented a petition of re-hearing, which suspended the proceedings upon the award, and the bill, on the re-hearing, was dismissed without any order being made respecting the award; upon appeal against this decree, the house decided that the appeal must be withdrawn; that the parties must go before the chancellor, in order that the decree and award might be considered together; and a special order was made to that effect. *Butler v. Kynnersly*, 1 Bligh, N. S. 374. **PR. APPEAL; PR. RE-HEARING.** See *Mary. Ormond v. Kynnersly*, 5 Mad. 369. 2 S. & S. 15.

#### XXXVI. DEMURRER.

Leave was given to the defendants to file a general demurrer, notwithstanding they had obtained an order for time to plead, answer, or demur; not demurring alone, the subpoena having been made returnable immediately, and no wilful delay being imputa-

ble to them. *Att. Gen. v. Mayor, &c. of Carlisle*, 2 Sim. 427. **PR. ANSWER.**

The defendant may demur any time before he sues out a *dedimus*, or there is process against him to a commission of rebellion, or he obtains order for time to answer. *Kenney v. Bodkin*, 1 Hog. 68.

On argument of demurrer, plaintiff is bound by case stated in bill in relation to discovery sought; and will not be allowed to maintain his right to discovery, upon suggestion *ore tenus* at bar not consistent with case made. *Little v. Archer*, 1 Hog. 55.

Demurrer may be filed by party in contempt if commission of rebellion has not issued against him. *Taaffe v. Robinson*, 1 Hog. 28. **PR. COMMISSION OF REBELLION; PR. CONTEMPT.**

#### XXXVIII. EVIDENCE.

Bill taken *pro confesso* against defendant, having privilege of parliament, shall be read as an answer, admitting facts. 1 W. 4. c. 36. s. 14.

Affidavits of prisoners to be taken by warden or gaoler. 1 W. 4. c. 36. rule 20. **PR. PRISONER.**

An affidavit verifying a short-hand writer's notes of a trial at nisi prius, which involved the same question as is raised on a petition in bankruptcy, is wholly impertinent. *Exp. Palmer*, 4 Russ. 188.

The question being, whether the appointment of a curate belonged to the vicar of the parish or to a corporation; entries in old books of the corporation were not received as evidence against the vicar, to shew cause that the corporation had from time to time appointed the curate. *Att. Gen. v. Warwick*, 4 Russ. 222.

The statute of the 25 Geo. 2. c. 6. does not extend to wills of personal estate only, and a legacy to a person who is an attesting witness to such a will, is not void. *Emanuel v. Constable*, 3 Russ. 436. **WILL, C. OF, WHO MAY TAKE; LEGACY; ESTATE, PERSONAL; STATUTE, C. OF.**

Where a feme covert, having separate property, joins in a security for money advanced to her husband, the court acted upon it not as an agreement to charge her separate property, but as an equitable appointment under the settlement to be satisfied from the rents and profits of that property, and not by sale or mortgage. If the feme covert insists upon the exercise of undue influence by the husband, she must prove it, and it is for the plaintiff to prove a negative. *Field v. Soule*, 4 Russ. 112. **HUSB. & WIFE; FRAUD, UNDUCE INFLUENCE.**

The petition of a defendant prayed, that he might be at liberty to examine one of the plaintiffs as a witness. The plaintiffs were co-partners and had a common interest adverse to the petitioner. The petition was dismissed with costs. *Fereday v. Wightwick*, 4 Russ. 114. **PR. PARTY, PLAINTIFF.**

Where the obligor in a bond has obtained the common injunction to restrain the obligee from proceeding in an action, which has been commenced in his name by an assignee of the bond, the answer of the obligee cannot be read in opposition to a motion to dissolve the injunction made by the assignee. *Montague v. Hill*, 4 Russ. 128. **PR. INJUNC.; DISSOLVING.**

The rule that the purchaser of a reversion must prove that he gave a full price, has so long been considered as settled, that it can be altered only by the court of appeal. *Hinckman v. Smith*, 3 Russ. 493. **HEIRS, EXPECTANT.**

Where a cause cannot come on till after the following term, publication may be further enlarged until the first day of the term, on motion, without assigning any special reason. *Vinter v. Bickley*, 12 Price. 460.

Leave was given to exhibit an interrogatory, after publication passed, to prove the antiquity of the hand-

writing in an ancient book in the British Museum. *Id. Kensington v. Pugh*, 3 Y. & J. 378.

Where the answer of a defendant insists that a covenant was inserted without his knowledge or consent in a deed executed by him, and that the deed was not read over to him, and that the covenant is a fraud upon him, such deed cannot be proved *vide* *note* against him as an executor; but it may be so proved as against another defendant, whose answer does not impeach the validity of the covenant. *Barfield v. Kelly*, 4 Russ. 355. **DREDS, IMPEACHMENT OF.**

A son conveys an estate to his father nominally as purchaser, but really as a trustee, and in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage for the use of the son. The father died shortly afterwards, and before any money was raised, having by a will subsequent to the conveyance made a general devise of all his real estate. The case is within the statute of frauds, and parole evidence is not admissible to prove the trust, but the son has a lien on the estate as vendor for the apparent consideration, no part of which was paid. *Leman v. Whitley*, 4 Russ. 423. **PARENT & CHILD; TRUST; VENDOR & PURCH.; LIEN.**

A person who is served with a *subpoena ad testificandum* in London, and is at the same time resident there, is not protected from arrest in the interval between the service of the subpoena and the day appointed for his examination. Semble, a witness who comes to London in order to be examined, is protected from arrest during the whole time that he remains in London *bonâ fide*, for the purpose of giving evidence. A witness is not protected in going three days before the day appointed by the examiner for his examination, to the solicitor's office to look at the interrogatories with a view to prepare himself to give his evidence accurately. *Gibbs v. Phillipson*, 1 Russ. & M. 19. **PR. PRIVILEGE FROM ARREST.**

If the plaintiff read a passage from the defendant's answer, as evidence of a particular fact, the defendant has no right to read subsequent matter connected with it by such words as "but" and "and," unless the subsequent matter be explanatory of the passage read by the plaintiff. *Davis v. Spurling*, 1 Russ. & M. 64.

Under the eighteenth of the new orders, publication may be enlarged on affidavit without notice. *Brown v. Brown*, 1 Russ. & M. 77. **GEN. ORD., C. OF.**

Parole evidence of collateral circumstances relating to the ages of the devisees, and the situation of the parties and to their being married or unmarried, is admissible in evidence for the purpose of construing a will. *Lowe v. Id. Huntington*, 4 Russ. 532.

An affidavit made by a defendant in a suit in the Exchequer, and sworn before a magistrate in Scotland was permitted to be read. *Ellis v. Sinclair*, 3 Y. & J. 273. **SCOTLAND; PR. EVIDENCE; AFFIDAVIT.**

In taking an account of the pecuniary transactions between an attorney and his client, the production of a bond entered into by the latter, is not sufficient evidence of a debt to that amount, and actual payment must be proved. *Iqnes v. Morgan*, 3 Y. & J. 230. **SOL. & CLIENT; DEBT.**

Party who makes out a proper case for it, will be allowed to examine witness after publication. *Coates v. Coates*, 1 Hog. 9.

Where personal interrogatories are filed, the party has four days to answer them, if he resides in town or within ten miles; or a month, if in country; further time can only be had on special application. *Jordan v. McCreight*, 1 Hog. 10.

Affidavit cannot be read pending a reference for profferty. *St. John v. El. Beesborough*, 1 Hog. 41. **PR. MASTER, REF. AS TO PROFFERTY.**

Practice in impeaching the credibility of a person

who has made an affidavit in a cause. *Creed v. Creed*, 1 Hog. 105.

A demurrer to interrogatories must be verified by affidavit. *Kirkwood v. Lyons*, 1 Hog. 116.

Evidence taken in the court of Exchequer may be used between the same parties litigant in chancery. *Magrath v. Veitch*, 1 Hog. 127.

The court will not allow articles to impeach the credit of a person who has sworn an affidavit, unless the articles of impeachment are ready and produced in court. *Roe v. Ashford*, 1 Hog. 127.

The cross-examination of a witness should always commence as soon as the direct examination is finished. *Beutage v. Beutage*, 1 Hog. 98.

Plaintiff by cross-examining a defendant, as a witness by another defendant, waives any objection to his competency as interested, but not to his credit. *Ellis v. Deane*, 1 Beat. 5. **WAIVER.**

An answer to a bill for an injunction, which has been filed after the service of notice of a motion for an injunction, is no bar to the motion, and can only be used as an affidavit. *Atkinson v. Collins*, 1 Hog. 110. **PR. INJUNC.**

It is irregular to pass publication of depositions in aid of one day's notice. *Noel v. Fitzgerald*, 1 Hog. 135.

A party will not be allowed to re-examine a witness, whose memory has been refreshed since his examination closed, except as to documentary evidence. *Id. ib.*

### XXXIX. EXCEPTIONS.

It is competent to the court on the hearing of exceptions, at the same time it allows an exception taken by the defendant, and directs the master to receive his report, generally to order the defendant to pay a sum of money into court, if it is satisfied that ultimately that sum will be found due from the defendant. *Brown v. De Tastet*, 4 Russ. 126. **PR. PAYMENT INTO COURT.**

### XL. EXCHEQUER, PRACTICE IN.

Where a suit has been decreed to be dismissed, the decree in the exchequer contains the pleadings at full length, contrary to the practice in chancery, where only a short order for dismissal is drawn up. The lord chief baron intimated his intention of considering the subject. *Brown v. Williams*, 3 Y. & J. 378. **PR. DECREE, FORM OF.**

In the exchequer an answer filed at any time previous to the sitting of the court, may be shewn as a cause against a motion to extend the common injunction to stay trial. *Snyde v. Crewdson*, 3 Y. & J. 186. **PR. INJUNC.**

In the exchequer, a plaintiff is at liberty to refer an answer for impertinence at any time before replication. *Thomas v. Jones*, 3 Y. & J. 184. **PR. ANSWER.**

The court of exchequer does not direct a case for the opinion of a court of law, but only orders the matter to be heard before the whole court. *Gaskell v. Gaskell*, 3 Y. & J. 305. **PR. ISSUES, &c. AT LAW**

### XLII. FUND IN COURT.

Persons who were found by the master to be the next of kin of the intestate, and were named by the court to be defendants, in a cause directed to try the rights of other persons who claimed to be the next of kin, were allowed a sum of 50*l.* out of the estate of the intestate, on giving security to account for it. *Gregg v. Taylor*, 4 Russ. 279.

In a suit for the administration of a testator's assets, which were more than sufficient to pay the legacies with interest, it was ordered that the master should ascertain one-fourth of what was due to each of the legatees for principal and interest in respect of their legacies, and that the same should be paid out of a fund in the cause: Held that the whole of the interest on the legacies was to be first paid, and then a part of the principal. *Thomas v. Montgomery*, 2 Sim. 348.

The husband's costs of making a settlement on a female ward, who had been married without consent, were allowed, he having no property, and there being no circumstances of aggravated misconduct on his part. *Anon.* 4 Russ. 473. PR. COSTS, WHAT FUND; HUSB. & WIFE; MARRIAGE OF WARD OF COURT.

The court, on the petition of the assignee of a reversion, will order the accountant-general not to transfer the stock, although the assignor has not been served with notice of the application. *Salmon v. —*, 1 Taml. 74. STOCK, TRANSFER OF.

### XLV. HEARING.

At the hearing of a cause the bill will be dismissed, if there be no evidence against a defendant, although, upon a motion for an injunction, a case was made against him, on which an *ex parte* injunction was sustained. *Barfield v. Kelly*, 4 Russ. 355. PR. BILL, DISMISSAL OF.

A plaintiff must establish, at the hearing, that he had a title to relief at the time of filing his bill, or if he relies on matter subsequent, he must file a supplemental bill. *Id. ib.* PR. SUPPLEMENTAL BILL.

Where a person not a party to the suit, or interested in a question, and appears by counsel, and submits to be bound by the decision, the court would not hear him without the consent of the other parties to the suit. *Bacon v. Bolland*, 1 Russ. & M. 69. PR. PARTY, STRANGER.

### XLVI. INJUNCTION.

An answer to a bill for an injunction which has been filed after the service of notice of a motion for an injunction, is no bar to the motion, and can only be used as an affidavit. *Atkinson v. Collins*, 110. 110. PR. EVID., ANSWER.

The court will not allow a person to bring an action at law, for damage for an improper arrest under an attachment, but will refer it to the master to enquire what compensation he ought to receive. *Batchelor v. Blake*, 1 Hog. 98. JURISDICTION.

A judgment creditor (not a party) will not be allowed to proceed at law, if a receiver has been appointed in a creditor's suit, and a prior incumbrancer is a party. *Thackaberry v. Christian*, 1 Hog. 109. PR. CRED.'S SUIT; PR. RECEIVER.

Course of practice for dissolving or continuing an injunction on the answer being filed. *Cotigen v. Hinchley*, 1 Hog. 45.

Motion for liberty to amend injunction, bill must be on notice, and founded on affidavit, stating what new matter is, and that it came to plaintiff's knowledge after bill was filed, or else on exceptions to defendant's answer, either ruled or allowed by notice. *Donagall v. Berry*, 1 Hog. 46. PR. BILL, AMENDMENT OF.

Pendency of creditor's suit, in which receiver has been appointed, is cause against allowing a puisne judgment creditor to proceed at law, after death of debtor. *Anon.* 1 Hog. 69. LIS PENDENS; PR. CRED.'S SUIT.

Leases for lives renewable for ever, will be enjoined

from committing waste by cutting timber, if he allows a large arrear of rent to become due. *White v. Nowlan*, 1 Hog. 21. S. P. *Pim v. Davies*, 1 Hog. 11. TENANT FOR LIFE.

A motion to postpone the new trial of an issue, in a tithe suit, from the summer to ensuing assizes, on the ground that a report of the application for the new trial, and the decision of the judge granting it, in which he observed, that the verdict in the first trial was against the opinion of himself and the judge who tried it, had been recently published in the newspapers, and would influence the minds of the jury, especially as the issue would be tried before the same judge, was refused with costs. *Willis v. Farren*, 3 Y. & J. 381. See the application for the new trial. 3 Y. & J. 264. PR. ISSUE AT LAW.

An order to extend the injunction to stay trial cannot be obtained after an order to amend. *Brown v. Reisen*, 3 Y. & J. 389. PR. AMENDMENT, ORDER FOR.

In the exchequer, an answer filed at any time previous to the sitting of the court, may be shewn as a cause against a motion to extend the common injunction to stay trial. *Snyde v. Crewdson*, 3 Y. & J. 186. PR. IN EXCHEQUER.

A bankrupt, after the issuing of the commission and appointment of assignees, transferred French stock, his property, to his wife, who afterwards transferred it to her three sisters; under a settlement the wife had a power of appointment over a sum of money in the funds in England, which she exercised by will in favour of one of the sisters, and died in her husband's life time: the sister, who resided in France, took out administration with the will annexed: an injunction was granted to restrain the trustees, in whom this fund was vested, from transferring it, on the ground, that if the French stock should be proved to have been the property of the bankrupt, the assignees would have a claim upon the assets of the wife. *Stead v. Clay*, 4 Russ. 550. HUSB. & WIFE; BANKCY. ASSIGNMENT, WHAT PASSES.

The court will not grant an injunction, but will leave the plaintiff to seek his legal remedy, where the matter which is the subject of the alleged piracy forms but a very inconsiderable part of the plaintiff's work, and contains merely calculations, and when the work complained of has been published some years. *Bailey v. Taylor*, 1 Russ. & M. 73.

A plaintiff who complains of a piracy of his work, has no remedy in equity unless he establish a title to an injunction, and then the account will follow. *Id. ib.* COPYRIGHT; ACCOUNT.

Upon a bill against A and B partners, for an account, and an injunction to stay proceedings at law, the common injunction was obtained for want of an answer; an answer having been afterwards put in, exceptions were taken and some of them allowed. A, being in England, put in a further answer, admitting the facts on which the exceptions were founded; but B, being abroad, did not put in a further answer. A moved to dissolve the injunction, but the court refused the application because the other defendant had not answered. *Prince v. Haylen*, 3 Y. & J. 190. FINE AND RECOVERY.

B, the holder of certain bills accepted by F, attaches, by proceedings in the Ld. Mayor's court, in the hands of C, a large sum of money belonging to F: F filed a bill to restrain the action; a special injunction is granted; and the money is paid into court by the garnishee. B, by his answer, denies the whole of the equity suggested by the bill: held, that though the injunction must be dissolved, the money in court will not be paid out to B before he has obtained judgment in this action. *Furnival v. Bogle*, 4 Russ. 142.

**PR. PAYMENT OUT OF COURT; PR. INJUNC. TO STAY PROC. AT LAW.**

Whether the proceedings of an assignee in the name of the obligee are stayed by an injunction which restrains only the assignee, his counsellors and agents. *Montague v. Hill*, 4 Russ. 128.

Where the obligor in a bond has obtained the common injunction to restrain the obligee from proceeding in an action which has been commenced in his name by an assignee of the bond, the answer of the obligee cannot be read in opposition to a motion to dissolve the injunction made by the assignee. *Id. ib.* PR. EVID.; ANSWER.

Lands were devised to a trustee and his heirs to the use of A for life, without impeachment of waste, with divers remainders over; and a power was given to the trustee with the consent of the tenant for life in possession to sell the property or any part of it, and to lay out the money in the purchase of other lands, to be settled to the same uses, and in the meantime to invest it in the public funds, and for the purposes of such sale to revoke the original uses, and appoint new uses. A contract was entered into for the sale of the estate for 13,400*l.* exclusive of the timber, which was to be taken at a valuation; and it being conceived, that the tenant for life without impeachment of waste, was entitled to receive for his own benefit the amount of the valuation of the timber, a deed was executed by which he, in consideration of 2448*l.*, conveyed the timber to the purchaser; and the trustee, in consideration of 13,400*l.*, conveyed the land, exclusive of the timber. Many years afterwards, the tenant for life being advised that he was not entitled to the amount of the valuation of the timber, transferred to the trustee as much 3 per cent. stock as 2448*l.* would have produced at the time of the sale. After the death of A, the next remainder man, though he had concurred in proceedings in which the fund produced by the sale was treated as applicable to the purposes of the testator's will, brought a writ of formedon, and obtained judgment on the ground, that the power of sale was not well executed: held, that a court of equity ought not to interfere by injunction to deprive him of the benefit of that judgment. *Cockerell v. Cholmeley*, 3 Russ. 565.

A defendant may dismiss a bill for want of prosecution pending a notice given by him for a motion to dissolve an injunction which the plaintiff had obtained. *Farquharson v. Pitcher*, 3 Russ. 383. PR. BILL, DISMISSAL.

A plaintiff cannot move *ex parte* for an injunction after he has served defendant with subpoena and the defendant has appeared. *Perry v. Weller*, 3 Russ. 519. PR. APPEARANCE; PR. SUBPENA, SERVICE OF, EFFECT OF.

**LIII. ISSUE AT LAW.**

There being a question as to the local situation of the lands, and the extent of a grant to the defendant, and little or no evidence of speculation on either side, the court considered that they must be bound by the verdict of the jury. *Ringrose v. Todd*, 12 Price, 650.

Where, on an issue in a suit in equity for small tithes, instituted by a lay impropriator, claiming against persons who set up a title by grant in another, also claiming by lay title, to the tithe of the particular lands in their occupation; the jury found a verdict for the defendants; the court refused to disturb it, on motion for a new trial, made upon the ground that the evidence, chiefly documentary, was wholly with the plaintiffs, and that the learned judge had misdirected the jury in respect of the legal doctrine of presumption of right, as applied to tithe cases. *Ringrose v. Todd*, 12 Price, 650. PR. NEW TRIAL.

The court ordered a new trial of an issue directed in a tithe suit, where it appeared that the verdict had been obtained by surprise, and against the opinion of the judge. *Willis v. Farrer*, 3 Y. & J. 264. PR. NEW TRIAL.

An heir at law questioning the sanity of his ancestor, is entitled to an issue *devisavit vel non*, and, if he fails, will not be compelled to pay costs, if the circumstances justified him in trying the issue; but costs will not be allowed him. *Smith v. Dearmer*, 3 Y. & J. 278. HEIR AT LAW; PR. COSTS.

A motion to postpone the new trial of an issue in a tithe suit from the summer to the spring assizes, on the ground that a report of the application for the new trial, and the decision of the judge granting it, in which he observed, that the verdict in the first trial was against the opinion of himself and the judge who tried it, had been recently published in the newspapers, and would influence the minds of the jury, especially as the issue would be tried before the same judge: was refused with costs. *Willis v. Farren*, 3 Y. & J. 381. See the application for the new trial, 3 Y. & J. 264. PR. INJUNC. TO STAY TRIAL.

The court of exchequer does not direct a case for the opinion of a court of law, but only orders the matter to be heard before the whole court. *Gaskell v. Gaskell*, 3 Y. & J. 305. PR. DECREE OF FORCLOSURE, DAY TO SHEW CAUSE AGAINST; PRAC. IN EXCHEQ.

In a suit for tithes there was no proof of payment for a very long period; all the evidence which could tend to prove a legal exemption (claimed by the occupier) was adduced at the hearing; but as that would not, in the opinion of the court, justify a jury in finding for the exemption, an issue was refused. *Ross v. Aglionby*, 4 Russ. 489. TITHES.

Where two borrowed 10,000*l.* on the bond of themselves and A B, to whom they at the same time gave a bond in 12,000*l.*, the court would not decide the question whether the bond was a gift or not, but sent it to a jury. *El. Winchelsea v. Garetty*, 1 Taml. 63.

Circumstances under which a new trial of an issue *devisavit vel non* will be directed. A third trial of an issue *devisavit vel non* directed after two juries had found in favour of the will. *Qu.* Whether, in a question between a devisee and an heir at law, the court will bind the inheritance by the result of one trial? *Winchelsea v. Wauchope*, 3 Russ. 441. PR. NEW TRIAL.

Where a party wishes to obtain a new trial of an issue, he must first, on an *ex parte* application, satisfy the judge in equity that there is a reasonable ground for sending to the judge who tried the issue for his notes of the trial. *Morris v. Davies*, 3 Russ. 318. PR. NEW TRIAL.

If an heir at law, alleging insanity in a deviser, file his bill against the devisee, and he fail in the issue *devisavit vel non*, he shall pay the costs of the issue, but not the costs of the suit, unless he might have asserted his claim by ejectment, and then his suit will be deemed vexatious, and he will be ordered to pay the costs of it. *Scaife v. Scaife*, 4 Russ. 309. HEIR AT LAW; PR. COSTS.

**LV. MASTER, PROCEEDINGS BEFORE.**

It is a contempt of court to insult a suitor or his counsel while attending in the master's office. If such contempt is committed, the party will be attached at once, on the production of the master's certificate. *French v. French*, 1 Hog. 188. PR. ATTACHMENT; PR. CONTEMPT.

It is not the course of proceedings in the master's offices in England, in cases where tenant in tail of lands to be purchased with money applies to have the



money paid out to him, to direct the master to advertise for outstanding creditors. The masters merely receive affidavits that the fund is not incumbered. *St. Antonio v. Adderley*, 1 Beat. 187.

There cannot be a re-letting of lands by the master, until the person declared tenant at the original letting is attached for not taking out lease, and the letting set aside. *Cole v. Moncks*, *Moncks v. Moncks*, 1 Hog. 128. LANDL. & TEN.

*Quere*, whether upon a petition objecting to a master's report of a receiver's accounts, the court will enter into a consideration of the particular items of the accounts, even where there is reason to doubt, whether as to some points, the conduct of a receiver has been strictly correct, further inquiry will not be ordered, where the attention of the parties has been previously directed to the subject, and ample opportunity of investigation afforded to them. *Shewell v. Jones*, 3 Russ. 522. PR. RECEIVER.

#### LVI. MASTER REFERENCE, &c.

Report stating, that it will be for infant's benefit, he being entitled to equity of redemption, that a suit to foreclose mortgage should be defended, it appearing by a receipt that the mortgage had been paid off is not correct. It should have stated, that bill should be filed to get rid of mortgage. *Horan v. Wooloughan*, 1 Beat. 1.

Motion for reference of title must be made on notice, if made by any of the parties to cause. *M'Cann v. O'Farrell*, 1 Hog. 121. PR. MOTION, NOTICE OF. Certificate of master is only conclusive when it certifies the performance of some judicial or ministerial act. *Ld. Longford v. O'Reilly*, 1 Hog. 83.

Defendant cannot, before answer, obtain reference to master, whether suit is instituted for infant's benefit. *St. John v. El. Beshorough*, 1 Hog. 41. PR. ANSWER. Affidavit cannot be read pending reference for proximity. *Id. ib.* PR. AFFIDAVIT.

A motion for leave to except to the master's certificate of the taxation of costs was refused, and a petition directed. *Boson v. Williams*, 3 G. & J. 378. PR. PETITION; PR. MOTION.

Where the decree, among other things, refers it to the master, to appoint a new trustee, a certificate by the master of such appointment, is to be considered as a separate report. *Harris v. Kemble*, 4 Ru. 174.

Where the sole trustee in a will, to whom a term was devised, died in the testator's life-time, the court referred it to the master to appoint a new trustee, and to approve of a like demise. *Devey v. Peace*, 1 Tamil. 78. TRUSTEE.

The court will not usually make a reference, with respect to the maintenance of an infant retrospectively. *Simon v. Barber*, 1 Tamil 22. INFANT, MAINTENANCE.

The court will decide in the first instance, on alleged impertinence in affidavits sworn in bankruptcy, where the impertinence is of such a kind, that there would be nothing gained in point of convenience, by directing a reference to the master. *Palmer v. Daniell*, 4 Russ. 186.

Semble, a trustee under an old trust creating successive limitations of equitable interests, some of which had failed, is entitled before he can be required to convey, to have the equitable title of those who call for a conveyance, ascertained by inquiry, and to have the deed of conveyance settled in the master's office. *Gooden v. Elliott*, 3 Russ. 583.

The court will not, on the application of a tenant for life, direct an enquiry, whether it would be for the benefit of all parties interested in the property, that certain permanent and substantial improvements

should be made in the mansion-house. *Nairn v. Majoribanks*, 3 Russ. 582.

A receiver is only entitled to one summons to account. The master's certificate, that he did not account pursuant to summons should not be granted on the day for which the summons issued. *Lawlor v. Lowry*, 1 Hog. 140. PR. RECEIVER.

#### LVIII. MOTION.

A motion for reference of title must be on notice, if made by any of the parties in the cause. *M'Cann v. O'Farrell*, 1 Hog. 121. PR. REFERENCE AS TO TITLE.

Defendant who has appeared, but is in contempt, is not entitled to notice of motion for receiver. *Fitzpatrick v. Hawkshaw*, 1 Hog. 82. PR. CONTEMPT; PR. RECEIVER.

Heir at law, on being served with subpoena *sci. fa.* may show cause by motion, why decree in original cause should not be revived against him. *Cor v. M'Namara*, 1 Hog. 12. HEIR AT LAW.

A motion for leave to except to the master's certificate of the taxation of costs was refused, and a petition directed. *Boson v. Williams*, 3 Y. & J. 378. PL. PETITION; PR. MASTER'S REP. EXCEPTIONS TO.

A party who is in contempt for disobedience to an order in a cause, is not thereby precluded from making a motion in another cause, having reference to a distinct subject, though between precisely the same parties. Semble. *Clark v. Dew*, 1 Russ. & M. 103. PR. CONTEMPT.

In general, under the thirteenth order, a motion for leave to amend a bill which has been previously amended, must be made on motion. *Freme v. Best*, 1 Russ. & M. 79. PR. BILL, MOTION TO AMEND.

Formal amendments will be permitted to be made without notice, though the bill has been amended previously. *Smith v. Evans*, 1 Russ. & M. 80. *Id.*

A second order giving the plaintiff leave to amend made upon an *ex parte* application. *Cottingham v. Potts*, 1 Russ. & M. 81. *Id.*

#### LIX. NEW TRIAL.

Where a party wishes to obtain a new trial of an issue, he must first, on *ex parte* application, satisfy the judge in equity that there is a reasonable ground for sending to the judge who tried the issue for his notes of the trial. *Morris v. Davies*, 3 Russ. 318. PR. ISSUE AT LAW.

Circumstances under which a new trial of an issue *devisavit vel non* will be directed. A third trial of an issue of *devisavit vel non* directed after two juries had found in favour of the will. *Quere*, whether in a question between a devisee and an heir at law, the court will bind the inheritance by the result of one trial? *Winchelsea v. Wauchope*, 3 Russ. 441. PR. ISSUE, DEVISAVIT VEL NON.

The court ordered a new trial of an issue directed in a title suit, where it appeared that the verdict had been obtained by surprise, and against the opinion of the judge. *Willis v. Farrer*, 3 Y. & J. 264. PR. ISSUE AT LAW.

Where on an issue in a suit in equity for small tithes instituted by a lay impropriator claiming against persons who set up a title by grant in another also claiming by lay title to the tithes of the particular lands in their occupation, the jury found a verdict for the defendants: the court refused to disturb it; on motion for a new trial, made upon the ground that the evidence, chiefly documentary, was wholly with the plaintiffs, and that the learned judge had misdirected the jury in respect of the legal doctrine of

presumption of right, as applied to tithes cases. *Ringrose v. Todd*, 12 Price, 650. *Id.*

By the forty-seventh of the new orders, every application for a new trial must be made to the judge who directed the issue; the same jurisdiction is meant although the judge may have resigned. *Footner v. Figs*, 2 Sim. 319. GEN. ORDER, C. OF.

#### LXI. OFFICERS OF COURT.

One of masters in chancery to visit Fleet prison periodically, and report his opinion thereon; and examine prisoners on oath, 1 W. 4. c. 36. rule 7. To examine books, *id.* rule 8. And warden to keep registry of names of persons committed for contempt. *Id.* s. 2.

Gaoler to take affidavits and answers of prisoners. 1 W. 4. c. 36. rule 20.

#### LXII. ORDER.

Where transfers directed to be made, who to be named. 1 W. 4. c. 60. s. 32. BANK OF ENGLAND; STOCK, TRANSFER OF.

If court has once acquired jurisdiction over party in cause, he may be effectually served with any order in cause in any part of world. *Anon.* 1 Hog. 1. JURISDICTION.

A testator gave his property after the death of his wife to trustees, in trust to pay the interest and profits to his two daughters J and E to their separate use, with a direction to pay to and apply for the benefit of A, the son of E, 200*l.* annually when he attained the age of twenty-one years: and before that period such part of the 200*l.* bequeathed to him as might be judged proper; he then gave his daughter power to dispose of the principal by will to their children or grandchildren respectively, "except that proportion of principal given to E, and from which the interest is to arise, to my grandson, namely 4000*l.*, which sum shall be my grandson's property;" and in case either of the daughters died without issue, he limited her share of the fund over to the other daughter, her children or grandchildren. The executrix having, in mistake, made payments to A in respect of his annuity for two years before he attained twenty-one, was entitled to retain them out of the future payments of the annuity. An order authorising her to retain them, and made upon petition after the decree had been passed and entered as regular. *Livesey v. Livesey*, 3 Russ. 287. S.C. in part reversed, *id.* 542. EXORS. RIGHT TO RETAIN; REIMBURSEMENT; PR. DECREE; PR. PETITION.

#### LXIII. PARTY.

Where a person not a party to the suit is interested in a question and appears by counsel and submits to be bound by the decision, the court will not hear him without the consent of the other parties to the suit. *Boxon v. Bolland*, 1 Russ. & M. 69. PR. HEARING.

The petition of a defendant prayed that he might be at liberty to examine one of the plaintiffs as a witness; the plaintiffs were co-partners, and had a common interest adverse to the petitioner; the petition was dismissed with costs. *Fereday v. Wightwick*, 4 Russ. 114. PR. EVID. EXAMINATION OF PARTY TO CAUSE.

#### LXIV. PAUPER.

Relief granted to plaintiffs suing in *forma pauperis* in a cause occasioned by their own default, on the terms that as the recovery afforded the means of payment, they should pay direct costs out of the fruit of *McDonough v. O'Flaherty*, 1 Beat. 54.

In pauper suits the court will not compel a solicitor to act for the pauper; but the course is to assign to him counsel and a fix clerk, and it is the duty of the six clerk to appoint one of the sixty clerks of his office to act on the part of the pauper. *Lewis v. Kennett*, 3 Russ. 466.

#### LXV. PAYMENT, ORDER FOR.

The general order on tenant to pay the receiver need not be personally served. *Donville v. Achmuty*, 1 Hog. 129. PR. RECEIVER.

#### LXVI. PAYMENT INTO COURT.

By settlement, monies were directed to be laid out on government or real securities; the trustees having lent the money to the husband on bond, were ordered, on motion, to pay the money into court. *Collis v. Collis*, 2 Sim. 365. TRUSTEES, LIAB. OF.

The plaintiff in an interpleading suit who has not applied for an injunction, will not be ordered to bring in the property in dispute on the application of one of the defendants. *Clindennin v. O'Keefe*, 1 Hog. 118.

It is competent to the court on the hearing of exceptions, at the same time it allows an exception taken by the defendant, and directs the master to receive his report, generally to order the defendant to pay a sum of money into court, if it is satisfied that ultimately that sum will be found due from the defendant. *Brown v. De Tastet*, 4 Russ. 126.

#### LXVII. PAYMENT OUT OF COURT.

Vendor may acquire lien on fund in court under contract for sale, and if vendee refuses to complete contract, may prevent him by injunction from drawing out of court fund which was appropriated by contract to be applied in part payment of purchase-money. *Doyne v. Hervey*, 1 Hog. 3. VEND. & PURCH.; LIEN.

Money in court belonging to a married woman, if less than 200*l.*, will be paid to the husband, although she had been deserted by him, and she opposes the application. *Foden v. Finney*, 4 Russ. 428. HUSB. & WIFE, HER SEP. ESTATE.

B, the holder of certain bills accepted by F, attaches by proceedings in the lord mayor's court in the hands of C, a large sum of money belonging to F; having filed a bill to restrain the action, a special injunction is granted, and the money is paid into court by the garnishee. B, by his answer, denies the whole of the equity suggested by the bill: Held, that though the injunction must be dissolved, the money in court will not be paid out to B before he has obtained judgment in this action. *Furnival v. Bogle*, 4 Russ. 142. PR. INJUNC. TO STAY PRDC. AT LAW; PR. INJUNC. DISSOLUTION.

In an interpleading suit the court will order the money which has been brought in by the plaintiff to be paid to a person having authority from all the defendants to receive it, though some of the defendants have not appeared, and for that purpose a reference will be directed to the master to inquire whether a sufficient authority to receive the money has been given. *Poucell v. Sonnet*, 3 Russ. 556. PRINC. & AGENT; PR. INTERPLEADER.

#### LXVIII. PETITION.

Petition to rehear on cause taken *pro confesso*, to be made within six months after copy of decree served. 1 W. 4. c. 36. s. 6. PR. REHEARING; PR. DECREE, PRO CONFESSO.

A motion for leave to except to the master's certi-

ficate of the taxation of costs was refused, and a petition directed. *Bozon v. Williams*, 3 Y. & J. 378. PR. MASTER'S REP. EXCEPTIONS TO; PR. MOTION.

A second order to amend obtained by petition of course is irregular, though obtained before answer. *Tarleton v. Dyer*, 1 Russ. & M. 1. PR. ORDER TO AMEND.

A testator gave his property, after the death of his wife, to trustees in trust to pay the interest and profits to his two daughters J and E, to their separate use, with a direction to pay to, and apply for the benefit of A, the son of E, 200*l.* annually when he attained the age of twenty-one years; and before that period such part of the 200*l.* bequeathed to him as might be judged proper; he then gave his daughter power to dispose of the principal by will to their children or grandchildren respectively, "except that proportion of principal given to E, and from which the interest is to arise to my grandson, namely 4000*l.*, which sum shall be my grandson's property;" and in case either of the daughters died without issue, he limited her share of the fund over to the other daughters, her children or grandchildren. The executrix having in mistake made payments to A in respect of his annuity for two years before he attained twenty-one, was entitled to retain them out of the future payments of the annuity. An order authorizing her to retain them, and made upon petition after the decree had been passed and entered as regular. *Livesey v. Livesey*, 3 Russ. 287. S. C. in part reversed, id. 542. EXORS. RIGHT TO RETAIN; REIMBURSEMENT; PR. DECREE; PR. ORDER.

Semble. An order of reference to the master on a petition presented under Ld. E.'s act ought not to be made except on a hearing in court, and on the appearance of counsel upon the petition. *Hinde v. Metcalfe*, 3 Russ. 416. STAT. C. OF; MONEY TO BE LAID OUT IN LAND.

The court will make an order for appointing a guardian, and allowing maintenance upon petition without bill where the infant's income does not exceed 300*l.* a year. *Exp. Lakin*, 4 Russ. 307. INFANT MAINTENANCE; PR. BILL.

Maintenance will not be allowed without a bill filed to an infant entitled to real estate which is of a yearly value exceeding 100*l.* a year. *In re. Molesworth*, id. 308. n. *Id.*

#### LXIX. PLEA.

Leave to amend a plea will not be granted, unless the court is told precisely what the amendment is to be, and how the slip happened. *Jackson v. Rowe*, 4 Russ. 514.

#### LXXI. PRISONER.

Affidavits of prisoners to be taken by warden or gaoler. 1 W. 4. c. 36. rule 20. PR. EVIDENCE.

Where prisoner is lunatic, &c., though no commission has issued, court may appoint a guardian to answer, and discharge defendant from his contempt. 1 W. 4. c. 36. rule 9. GUARDIAN AD LITEM.

Report of names of prisoners to be made by warden to Ld. Chancellor four times a year. 1 W. 4. c. 36. s. 11.

As to taking bill *pro confesso* against prisoner for misdemeanour. See 1 W. 4. c. 36. PR. BILL PRO CONFESSO.

Where plaintiff requires an answer, though bill is taken *pro confesso*, defendant shall remain in custody. 1 W. 4. c. 36. rule 12. PR. BILL PRO CONFESSO; PR. ANSWER.

Answer of prisoner to be taken by warden or gaoler. 1 W. 4. c. 36. rule 20. PR. ANSWER.

Service of an order on the turnkey, for a prisoner in close custody is sufficient, if it is intended to enforce obedience to the order by attachment. *Joyce v. Joyce*, 1 Hog. 121.

#### LXXII. PRIVILEGE FROM ARREST.

Writ of protection will not be given to a suitor or witness to protect him from arrest in any case, when, if arrested, he would not be entitled to his discharge without it. *Brien v. Brien*, 1 Hog. 34. PR. WRIT OF PROTECTION.

A person who is served with a *subpoena ad testificandum* in London, and is at the time resident there, is not protected from arrest in the interval between the service of the subpoena and the day appointed for his examination. Semble: A witness who comes to London in order to be examined, is protected from arrest during the whole time that he remains in London, *bona fide* for the purpose of giving evidence. A witness is not protected in going three days before the day appointed by the examiner for his examination to the solicitor's office, to look at the interrogatories, with a view to prepare himself to give his evidence accurately. *Gibbs v. Phillipson*, 1 Russ. & M. 19. PR. EVID. WITNESS.

#### LXXIII. PROCESS.

Writ of attachment when issued for contempt, in not answering, and *non est inventus* returned, sergeant at arms to go. 1 W. 4. c. 36. rule 1.

Process to compel performance of decree. 1 W. 4. c. 36. s. 3. Not to be taken out if defendant is forthcoming, until copy of such decree is served on defendant. *Id.* s. 4.

Service of order on turnkey for a prisoner in close custody is sufficient, if it is intended to enforce obedience to the order by attachment. *Joyce v. Joyce*, 1 Hog. 121. PR. PRISONER.

Three defendants were ordered to deliver up to a receiver certain premises, within a week, or, in default, to stand committed; but no writ of execution was taken out. They refused to deliver up, and a sergeant at arms was ordered to go against them. Upon being brought up, two of them expressed contrition, and were ordered to be discharged, upon payment of costs. The third, still persisting in his contempt, was committed to the Fleet. The costs not being paid by the other two, they remained in custody of the sergeant. The orders were, upon motion, discharged with costs, and the persons liberated. Upon a motion, subsequently, that the defendants might be ordered to deliver up possession within a week after service of the writ of execution of the order to be made on that application; the court stated the course of proceeding to be, that there must be, first, an order to deliver possession, then a writ of execution of that order must be served on the defendant; and until that is done, no further order can be made; and refused the motion with costs. *Green v. Grea*, 2 Sim. 394. 430. POSSESSION; PR. RECEIVER.

A defendant who allows the exception taken to his answer, has six days to put in his further answer, and no process can be made available against him to enforce it in the mean time. *Dee v. Scanlan*, 1 Hog. 101.

#### LXXIV. PROCHAIN AMI.

Where motion is made on behalf of feme covert, and no person is named in notice as her next friend, her solicitor will be liable for costs, if awarded against

her. *Cox v. M'Namara*, 1 Hog. 78. PR. COSTS; HUSB. & WIFE; SOL. & CLIENT.

Next friend of infant plaintiff cannot be compelled to give security for costs. *St. John v. El. Beaborough*, 1 Hog. 41. PR. COSTS, SECURITY FOR.

## LXXV. PRODUCTION OF DEEDS.

A *subpoena duces tecum* to a party defendant, discouraged; the proper course is to move for an order on the defendant to bring in the documents, which he admits by his answer to be in his possession. *Aldborough v. Stratford*, 1 Hog. 123.

A solicitor will not be ordered to bring into court the deeds of his client. *M'Cann v. Beeve*, 1 Hog. 129. SOL. & CLIENT.

The 60th of the new orders extends to the production of books and papers under orders or decrees made before the date of the new orders. The master is to exercise the discretion given him, by the 60th Order, to determine what books or papers shall be produced; though the order or decree under which he is proceeding, requires the parties to produce on oath, all books and papers. *In mre. of the Parish of Llantrisant*, 1 Russ. & M. 25. GEN. ORD. C. OF.

A plaintiff is not entitled to the production of a letter admitted by the defendant to be in his possession, but which the defendant states was written by him to his solicitor, and directed the solicitor to take the opinion of counsel, upon the question in dispute between the parties. *Vent v. Pacey*, 4 Russ. 193. ADMISSIONS; PROFESSIONAL CONFIDENCE.

A defendant will not be ordered to produce papers containing confidential communications between him and his solicitor, or between his country solicitor and town solicitor, in the relation of solicitor and client, during the progress of the suit, or with reference to it previous to its commencement. *Hughes v. Biddulph*, 4 Russ. 190. PROFESSIONAL CONFIDENCE.

## LXXVI. PRODUCTION OF PARTIES.

An order was made, *ex parte*, under the statute 6 Ann. c. 18. on the application of a person entitled in fee, subject to a lease for lives, that the lessee should produce the *cestui que vie* at a place and time, and before persons named in the order. *Exp. Whalley*, 4 Russ. 561.

## LXXVIII. RECEIVER.

A receiver will not be ordered to pay money in his hands to any person who could compel him to account, if a year has elapsed since he last accounted. *Putland v. Graydon*, 1 Hog. 123.

The general order on tenants to pay the receiver, need not be personally served. *Domville v. Achmuty*, 1 Hog. 129. PR. PAYMT. ORDER FOR.

Receiver will be appointed over possession of grantor of rent charge, who resides out of jurisdiction, on an affidavit that he staid out of jurisdiction to avoid service of process. *Quin v. Guan*, 1 Hog. 75.

A judgment creditor, not a party, will not be allowed to proceed at law if a receiver has been appointed in a creditor's suit, and a prior incumbrancer is a party. *Thackaberry v. Christian*, 1 Hog. 109. PR. INJUNC. TO STAY PROC. AT LAW; PR. CREDITOR'S SUIT.

Receiver ought not to interfere in any litigation between parties; and if he do so, will not be allowed costs of motion for such purpose. *Comyn v. Smith*, 1 Hog. 81.

Defendant who has appeared, but is in contempt, is

not entitled to notice of motion for receiver. *Fitzpatrick v. Harkshaw*, 1 Hog. 82. PR. MOTION, NOTICE OF; PR. CONTEMPT.

A receiver will not be appointed at the instance of a party claiming as devisee under a will, the validity of which is to be determined by an issue, unless the claimant satisfies the court that there is a reasonable probability of his succeeding on the issue, and that the property will be endangered by being left in the possession of the heir at law. *Clark v. Dew*, 1 Russ. & M. 103.

A mortgagee has no title to the rents of the mortgaged premises which have been paid into court by a receiver appointed in a suit for establishing the will of the mortgagor, notwithstanding that, after the appointment of a receiver, he gave notice to the tenants to pay the rents to him: he ought to have followed up that notice by moving to discharge the receiver. *Thomas v. Brigstocke*, 4 Russ. 65. LIEN ON FUND IN COURT; MORTGAG. & MORTGEE; LANDLD. & TENANT, ATTORNEYS.

A receiver appointed by the court, is not answerable for a loss of monies by the failure of a banker, if they are not mixed with his own monies, and are *bona fide* deposited for security, only under circumstances in which they could not have been properly paid into court. *Salway v. Salway*, 4 Russ. 60. INVESTMENT.

*Quere* whether, upon a petition objecting to a master's report of a receiver's accounts, the court will enter into a consideration of the particular items of the accounts; even where there is no reason to doubt whether, as to some points, the conduct of a receiver has been strictly correct; further enquiry will not be ordered, where the attention of the parties has been previously directed to the subject, and ample opportunity of investigation afforded to them? *Shewell v. Jones*, 3 Russ. 522. PR. ACCOUNT BEFORE MASTER.

A receiver appointed over lands in Ireland conveyed by a trust deed, the trustee not being before the court, and although the trustee had an interest in his own right, being one of the creditors to be paid off, and appeared upon the pleadings as in possession. *Malcolm v. Montgomery*, 1 Hog. 93.

A receiver will not be appointed over a defendant's property, to enforce his appearance in the cause, if he resides out of the jurisdiction, unless the plaintiff has a specific lien on the land, or there is danger of immediate loss of the property. *Arthur v. Arthur*, 1 Hog. 95.

A petition by a mortgagee for a receiver under the mortgage act (12 G. 3. c. 10. 1r.), will be dismissed, if it appears that the mortgage is impeached. *Leahy v. Arthur*, 1 Hog. 92.

Lands are liable to judgments, notwithstanding the court of chancery has appointed a receiver to receive the rents and keep down the incumbrances, and to pay the surplus to the owner. *Lewis v. Id. Zouch*, 2 Sim. 389. JUDGMENTS, WHAT LIABLE TO.

Three defendants were ordered to deliver up to a receiver certain premises within a week, or in default, to stand committed; but no writ of execution was taken out. They refused to deliver up, and a serjeant at arms was ordered to go against them. Upon being brought up, two of them expressed contrition, and were ordered to be discharged, upon payment of costs. The third still persisting in his contempt, was committed to the Fleet. The costs not being paid by the other two, they remained in custody of the serjeant. The orders were upon motion discharged with costs, and the persons liberated. Upon a motion subsequently, that the defendants might be ordered to deliver up possession within a week after service of the writs of execution of the order to be made on that application; the court stated the course of proceeding to be, that there must be, first,

an order to deliver possession, then a writ of execution of that order must be served on the defendant, and until that is done, no further order can be made, and refused the motion with costs. *Green v. Green*, 2 Sim. 394 and 430. POSSESSION; PR. PROCESS.

An application by creditors, whose debts, secured by a trust deed, had been established by decree of the court of chancery in England; to appoint a receiver over the trust estates in possession of defendant, the debtor, refused, it being doubtful as the record was framed, whether at the hearing of the cause, the plaintiffs would be entitled to a decree. For the record to carry the English decree into execution, was so imperfectly framed, that the defendant, by joining issue on the original record, would be at liberty to impeach the securities so established; which he could not do on a bill filed solely and exclusively to aid the execution of the English decree. *Houlditch v. Ld. Donegal*, 1 Beat. 146. DEBTOR & CRED.; PR. DECREE.

If a receiver has been appointed over a larger estate than is necessary to satisfy the demands of the incumbrancers, the debtor may have him confined to such portion of the estate as will be sufficient for that purpose. *Magrath v. Veitch*, 1 Hog. 110.

A prior annuitant may obtain a receiver over the possession of a custodee. *O'Neil v. Ward*, 1 Hog. 111.\*

How a receiver should proceed where the lands are held for lives, renewable for ever, and some of the lives have dropped. *Palmer v. Newport*, 1 Hog. 133.

A receiver is only entitled to one summons to account. The master's certificate that he did not account pursuant to summons, should not be granted on the day for which the summons issued. *Lawlor v. Lowry*, 1 Hog. 140. PR. MASTER'S REPORTS.

If waste has been committed and the case is pressing, the receiver may file a bill for an injunction without waiting for an order for the purpose, but if time will permit, he should first apply for a reference to enquire what proceeding he ought to take. *Nangle v. Ld. Fingall*, 1 Hog. 142. WASTE.

A creditor who has proved his debt under a decree, is entitled to apply to the master for a summons on the receiver to account. *Locke v. Ashe*, 1 Hog. 143.

A receiver will be allowed to distrain land under ejectment for non-payment of rent, provided he leaves a sufficient arrear to sustain the ejectment. *Erp. Cornwallis*, 1 Hog. 146.

#### LXXXIX. REMEARING.

Petition to rehear on cause taken *pro confesso*, to be made within six months after copy of decree served. 1 W. 4. c. 36. s. 6. PR. BILL PRO CONFESSO; PR. PETITION.

A bill was filed by A against the executors of B, a tenant for life, unimpeachable of waste, in order to charge his personal estate for the value of ornamental timber alleged to have been cut by him. The decree directed an account, but before the master had proceeded under it, all matters in difference were submitted to an arbitrator appointed by the master under an order by consent, and arbitration bonds were executed by the parties. The arbitrator having found a certain sum due to the plaintiff, an application was made to the court to enforce payment accordingly, when the defendant presented a petition of rehearing, which suspended the proceedings upon the award, and the bill on the rehearing was dismissed without any order being made respecting the award. Upon appeal against this decree, the house decided that the appeal must be withdrawn; that the parties must go

before the chancellor in order that the decree and award might be considered together, and a special order was made to that effect. *Butler v. Kynnersley*, 1 Bligh. N.S. 374. PR. DECREE; PR. APPEAL. See *Ormond v. Kynnersley*, 5 Mad. 369. 2 Sim. & Stu. 15.

On an application to Ld. Ch. to rehear a petition of appeal from the Vice Ch., which petition had been previously heard by Ld. Eldon, and the order of the Vice Ch. reversed; the Ld. Ch. considered such applications to be objectionable, and the practice to require regulation; but held, that he could not, consistently with the course pursued by his predecessors, now refuse to re-hear the case. *Erp. Baker*, 1 Mont. & M. 279. JURISDICTION; VICE CHANCELLOR.

On a bill by the assignees of a bankrupt to set aside a settlement made in favour of his children, on the ground that he was insolvent at the time of the execution of it. The court held, at the hearing of the cause, that the settlor was not insolvent within the meaning of the Bankrupt act, 6 G. 4. c. 16. s. 75, when he executed the settlement. The plaintiff afterwards presented a petition for leave to present a petition for a rehearing, on the ground that he had since discovered further evidence, establishing the fact of insolvency, which he might have discovered before the hearing, if he had not considered the evidence already produced sufficient. The court dismissed the petition, on the ground that it was against the order of the court, which had for its object to compel persons to bring forward their whole case in the first instance; if this evidence was allowed, a general examination would be let in to explain it. The court expressed a doubt whether the infants had not gained an estate to which they were entitled. *Cutten v. Sanger*, 3 Y. & J. 374. See the report on the hearing of the cause, 2 Y. & J. 459.

Petition of rehearing dismissed because it suggested as the grounds of rehearing facts not alleged in the pleadings. *Newinson v. Stables*, 4 Russ. 210. PR. PETITION.

In a suit instituted for the administration of the assets of a testator, who in his will was described as "of Halifax in Nova Scotia," certain lapsed shares of the residue were, at the hearing on further directions, ordered to be distributed according to the statute of distributions, there being no suggestion on the record that the administration might not be according to the law of England; afterwards a petition of rehearing was presented, stating that the testator died domiciled in Nova Scotia, and praying that the distribution might be according to the law of that country, but the petition was dismissed. *Id. ib.*

Where a replication has been filed as an answer to a conditional rule to dismiss the bill, it cannot be withdrawn unless the plaintiff makes out a special case for it. *Butler v. Mahon*, 1 Hog. 90.

#### LXXXII. SALES JUDICIAL.

The bidding at a sale under the court binds the purchaser, but the court may receive an outbidding, until the conditional order to confirm the sale is made absolute. The conditional order to confirm the sale cannot be obtained, until the bidder has deposited one-fourth of the purchase money. The conditional order to confirm the sale cannot be made absolute, till the remaining three-fourths of the purchase money have been paid. Should the title turn out bad, the purchaser will be paid back his purchase money with interest at six per cent. But should the purchaser prefer it, he may have the purchase money invested at his own risk expressly. A purchaser who pays in his purchase money, is entitled to the rents from the gale day previous to the lodgment of the

three-fourths, if the purchase be completed within the current sale from the bidding. The deposit of one-fourth of the purchase money does not bear interest for the purchaser, till the remaining three-fourths are lodged. *Kirwan v. Blake*, 1 Hog. 151.

A purchaser under a decree has no lien for his costs on the funds in court, arising out of the sales of other property, so as to prevent any distribution of the fund, until the report of the title being bad, has been confirmed. *McCann v. O'Farrell*, 1 Hog. 137. PR. COSTS; VENDOR & PURCH.; LIEN.

A sale under a decree in a creditor's suit, subject to certain specified defects, deteriorating the value of the estates, but which the creditor had no means of getting rid of by any suit, not set aside. *Fisher v. Barry*, 1 Beat. 139.

There is no settled rule in Ireland to regulate the sum which a person must lodge to obtain an order to open a sale. *Ford v. Head*, 1 Hog. 93.

The master will not be ordered to sell an estate until a statement of title is made out and lodged in his office. How to proceed when defendant refuses to give statement of his title. *Roberts v. Roberts*, 1 Hog. 124.

A direction for a reserved bidding ought not to be inserted in a decree for sale, but ought to be the subject of a separate order. *Brooker v. Collier*, 3 Russ. 369.

Premises held under distinct leases ordered to be sold in one lot upon the speculative probability arising from the nature of the property, that a higher price would be obtained by that mode of sale, than if they were put up in distinct lots. *Cook v. Collingridge*, 3 Russ. 520.

#### LXXXIII. SEAL.

Attachment is irregular if sealed and delivered out by sealer before, though not parted with till after requisite affidavit is filed. *Gardner v. Rowe*, 4 Russ. 578. PR. ATTACHMENT ISSUING.

#### LXXXIV. SEQUESTRATION.

As to sequestration of estate of party absconding, and on bill taken *pro confesso*. See 1 W. 4. c. 36. s. 3.

Where books may be seized under sequestration. 1 W. 4. c. 36. rule 16.

A writ of assistance will not be granted to sequestrators. How to proceed when sequestrators are resisted. *Brown v. Cuffe*, 1 Hog. 145. PR. WRIT OF ASSISTANCE.

A conditional decree on sequestration cannot be amended if erroneous. *McMinn v. Savage*, 1 Hog. 91. PR. DECREE.

Sequestrators appointed by the court of chancery have no right to seize on the tithes of an ecclesiastical benefice. *Ward v. Hayes*, 1 Hog. 107. TITHES.

No process prior to sequestration can be revived after abatement by death of plaintiff. *Cottingham v. O'Reilly*, 1 Hog. 49. PR. ABATEMENT & REVIVOR.

#### LXXXV. SERVICE SUBSTITUTED.

Service of subpoena to appear and answer will not be substituted on the solicitor and agent of a defendant who resides out of the jurisdiction, if the plaintiff has paid a charge on the defendant's estate. *Ld. Alington v. Peaton*, 1 Hog. 131.

#### LXXXVI. SIGNATURE OF COUNSEL.

A cross bill will be taken off the file, if filed without a certificate by counsel. If the certificate of counsel has been subjoined, but the plaintiff has not filed the necessary affidavit, no subpoena to answer can issue. The same engrossment may be replaced on the file, when the certificate of counsel has been subjoined. *Elliott v. Millet*, 1 Hog. 125. PR. CROSS BILL; BARRISTER.

#### LXXXVIII. STAYING PROCEEDINGS.

Order made to stay proceedings to enforce answer, pending appeal to house of lords from an order overruling demurrer. *King of Spain v. Machado*. 4 Russ. 560. PR. APPEAL.

#### LXXXIX. SUBPENA.

Service of subpoena to appear and answer, made out of a jurisdiction is a nullity, and proceedings founded thereon will be set aside. *Creeds v. Byrne*, 1 Hog. 79. JURISDICTION.

A plaintiff cannot move *ex parte* for an injunction after he has served the defendant with subpoena, and the defendant has appeared. *Perry v. Weller*, 3 Russ. 519. PR. INJUNCTION EXP.; PR. APPEARANCE.

A cause having been set down at the rolls, and a subpoena duly served, was heard; but before judgment, the master of the rolls became lord chancellor. The cause was then, upon a motion by the plaintiff, which was opposed by the defendant, set down in the lord chancellor's paper, next after a particular appeal which was specified. On being called on, the defendant made a default, and the plaintiff took a decree *nisi*. Held, that a subpoena to hear judgment, being general, and not confined to any particular branch of the court, the defendant was bound to attend whenever the cause should be called on for hearing; the decree *nisi* was therefore strictly regular. *Jackson v. Bourne*, 4 Russ. 484.

#### XC. TAKING PLEADINGS OFF FILE.

By the direction of A, a bill was filed for the administration of a testator's assets in which A, and his infant brother and sister by A as their next friend, were plaintiffs. D, their elder brother, who had an interest adverse of theirs, and was one of the defendants, acted as solicitor in the country for the plaintiffs, and the suit was conducted by his town agents. After the sister had attained her full age, D died, having appointed her his executrix. A gave notice to the persons who had been the town agents of D, not to take any proceedings in his name, and the sister appointed them to act as solicitors for her: Held that A was not entitled to have the papers connected with the case delivered over to him, though he offered to satisfy any lien which might be claimed against them. The sister filed a bill of revivor after the death of D, and made A and his infant brothers defendants. A, and the brother, after notice of that bill, filed another bill of revivor; the second bill was ordered to be taken off the file and the court held that an alleged defect of parties in the frame of the first bill of revivor offered no reason for allowing the second bill of revivor to remain on the file. *Livesey v. Livesey*, 1 Russ. & M. 18. SOLICITOR AND CLIENT; LIEN.

A defendant's answer will be taken off the file for the purposes of an indictment for perjury, when the preparatory steps have been taken, and the time of

trial is near at hand. *Curtis v. —*, 1 Hog. 132. INDICTMENT.

An affidavit will be taken off the file for the purpose of an indictment for perjury, when the preparatory steps have been taken, and the time of trial is near at hand. The affidavit to support the motion should not enter into the merits of the indictment. *Swift v. Quinlan*, 1 Hog. 132. INDICTMENT.

#### \* WRIT OF ASSISTANCE.

Writ of assistance where to issue in equity. 1 W. 4. c. 36. rule 19.

A writ of assistance will not be granted to sequestrators. How to proceed when sequestrators are resisted. *Brown v. Cuffe*, 1 Hog. 145. PR. SEQUESTRATORS.

#### XIII. WRIT NE EXEAT REGNO.

A writ of *ne exeat regno* discharged with costs where, upon the affidavit of the plaintiff, and the answer of the defendant taken together, there was a strong *prima facie* case that nothing was due from the defendant to the plaintiff. *Lee v. Lambert*, 3 Russ. 417.

A writ of *ne exeat regno* will be granted in respect of a person equitably entitled to the sum due on the bond, though the personal representative of the trustee to whom it had been assigned in trust for him was not a party to the suit. A writ of *ne exeat regno* will not be discharged, though it appears to have issued for a sum greatly exceeding that for which it can be sustained; but the amount for which it is marked will be reduced. A writ of *ne exeat regno*, will be granted in respect of a debt which was contracted in Jamaica between persons resident there, though in Jamaica the defendant could not have been arrested for the demand. A defendant in custody under a *ne exeat regno* is not bound to answer before he moves to discharge the writ. *Grant v. Grant*, 3 Russ. 599.

The writ of *ne exeat regno*, granted at the suit of a person equitably entitled to certain bonds, though the transactions out of which the demands arose took place in Jamaica, between parties resident there, and were the subject of suits in that island, and though in one of those suits an injunction issued, restraining the person whom the present plaintiff represented, from proceeding on the bonds at law; the court considering the injunction, though never dissolved, as substantially superseded by subsequent proceedings. *Id.* 598.

#### \* WRIT OF PROTECTION.

Writ of protection will not be given to a suitor or witness, to protect him from arrest in any case when, if arrested, he would not be entitled to his discharge without it. *Brien v. Brien*, 1 Hog. 34.

#### PRESUMPTION.

In favour of a long continued enjoyment of tithes, in conformity with successive recitals in old leases, the court will presume performance of conditions to endow, &c. and adopt every other presumption necessary to give effect to such a title so supported. *Woolley v. Birkenshaw*, 12 Price, 702.

Presumption of grant, founded on non-perception, may be raised against a lay rector, if the pleadings are so framed as to admit it. *Ringrose v. Todd*, 12 Price, 660.

The mere non-payment of tithes, for however long a

period, would not be evidence of a grant; yet a layman's adverse enjoyment or permanency for a long series of years, of the tithes of certain lands, or of a money payment in lieu of tithes occupied by a succession of deeds, by which the tithes or money payments in lieu of tithes have been conveyed from one person to another, corresponding with the enjoyment, affords evidence sufficient to justify a jury in presuming a legal grant of the tithes. *Bacon v. Williams*, 3 Russ. 525. TITHES, EVIDENCE.

#### PRINCIPAL AND AGENT.

Personal estate not disposed of by a will, drawn by the confidential counsel, (the sole executor,) without informing the testator of the legal effect of the will: Held, to be a trust for the next of kin. *Segrave v. Kirwan*, 1 Beat. 157. FRAUD, CONCEALMENT; EXOR. BENEF. INTERESTED; BARRISTER.

Trustees not affected by notice to their agent, which he did not receive in that character. *France v. Wood*, 1 Taml. 172. NOTICE.

A husband having been found guilty for an assault upon his wife, the court recommended an accommodation: the counsel of the parties thereon signed a memorandum of an agreement, that the husband would allow the wife 50*l.* a year, and the court referring to the agreement, imposed merely a nominal fine. Upon a bill for a specific performance it was decided, that the defendant must disprove that his counsel had authority to sign the agreement, and that in the absence of evidence to the contrary, the court will presume that he had such authority, and therefore, decreed a performance. *Elworth v. Bird*, 1 Tam. 40. BARRISTER; SPEC. PERF.

By the statute 59 Geo. 3. c. 111., navy agents are entitled to make the usual charge for passing accounts before that act, and to charge commission on the full amount of pay, without being limited to the money passing through their hands; the defendants having received a sum as returned premiums, without bringing it to account for many years, alleging that they awaited the final adjustment of average; it was referred to the master to inquire whether they were entitled to retain it, according to the custom of merchants. *Drury v. Atkins*, 1 Taml. 75. ACCOUNT.

A business, the property of A, was carried on with his capital, and for his profit by B, his agent, in the name of the latter, at a fixed salary. A, having become bankrupt, B filed his bill, stating, that by reason of the use of his name he had become liable to a heavy amount for the concern, which was insolvent; notwithstanding the bankruptcy of A, and praying for an injunction to restrain the assignees from in any way intermeddling with the concern; held, that B had a lien on the business, to the extent of his liabilities, and an injunction was granted. *Foxcroft v. Wood*, 4 Russ. 487. BANKCY. ASSIGNMENT, WHAT PASSES; LIEN.

A person employed on behalf of himself and co-partners in negotiating the term of a lease, is not entitled to stipulate clandestinely with the lessors for any private advantage to himself. Where, therefore, a sum of 12,000*l.* was paid in pursuance of such a stipulation, the party receiving it was declared to hold it in trust for the partnership. Before the transaction was discovered one of the partners withdrew, and subsequently another partner assigned a share in the stock and in his proportion of the claim, to persons then admitted into the concern. Held, that the retired, the continuing, and the new partners, were properly joined as co-plaintiffs in a suit to have the trust declared. *Fawcett v. Whitehouse*, 1 Russ. & M. 132. PARTNERSHIP; TRUST; PL. PARTIES, PLAINTIFFS.

If an agent employed to purchase an estate becomes

the purchaser for himself, he is to be considered as a trustee for his principal. *Jess v. Nutfall*, 1 Russ. & M. 53. *FRAUD; FID. SARC.*

Where notice is given by a party to his agent in a particular adventure, that another person is jointly interested with him in the adventure, this *prima facie* imposes upon the agent the necessity of accounting with such other person for his share of the adventure; but this obligation ceases to exist, if the transaction shews that it was the intention of such other person, and of the party originally interested in the adventure, that the agents should account solely with the latter. *Killock v. Greg*, 4 Russ. 285.

If, of several plaintiffs, some have an interest in the matter of the suit, and others have no interest in it, but are merely the agents of their co-plaintiffs, a general demurrer to the whole bill is a good defence. *King of Spain v. Machado*, 4 Russ. 225. *PL. PARTIES; PL. DEMURRER, WHERE.*

An agent named executor, is not entitled to charge commission on business done subsequently to the testator's death. *Sheriff v. Aze*, 4 Russ. 33. *EXOR., ALLOWANCE TO; ACCOUNT, ALLOWANCES.*

In an interpleading suit, the court will order the money which has been brought in by the plaintiff to be paid to a person having authority from all the defendants to receive it, though some of the defendants have not appeared; and for that purpose a reference will be directed to the master to inquire, whether a sufficient authority to receive the money has been given. *Possell v. Sonnet*, 3 Russ. 556. *PR. PAYMENT OUT OF COURT; INTERPLEADER.*

A had long employed B as his steward, professional adviser and general confidential agent; disputes having arisen between them, an agreement was entered into between B, and a clergyman acting on behalf of A, by which a gross sum was to be paid to B, in lieu of all his claims; but no accounts or vouchers were rendered or produced by A, nor any bill of costs delivered; that agreement will not protect B from rendering an account to his principal. *Jenkins v. Gould*, 3 Russ. 385. *ACCOUNT.*

Disputes existing between A and his solicitor, receiver and confidential agent B, which involved long and intricate matters of account, an authority was given by A to a third person, to settle any account in which he, A, had an interest, and to compromise any claims which he might have; such an authority will not empower that third person to make an agreement, without the production or examination of any account, that a gross sum shall be paid to B, in lieu of all his demands on A: *Id. ib.*

### PRINCIPAL AND SURETY.

B, being hired as clerk to A and Co., but not for any definite period, C and D joined with him in a bond to secure his duly accounting for his assets. C died, and his executrix gave written notice to A and Co., that she would no longer remain security. A Co. communicated this notice to B, and re-

obtained from him the bond of another D died, and also the new surety, and four and a half after death of C, B died, when deficiencies were found in his accounts subsequent to the notice. Held, executrix of C had no equity to restrain A and Co. from proceeding at law on bond. *Gordon v. Culbert*, 4 Russ. 581.

The plaintiff joined the testator as surety in a bond, which he paid after the death of the testator, taking assignment of the bond; he is only a simple contract creditor of the testator. *Jones v. Davis*, 4 Russ. 277. *DEBTOR & CRED. BY SIMPLE CONTRACT.*

A, B, and C, carrying on business in copartner-

ship for a term, which would expire on the 19th of Feb. 1807, under articles which empowered A, in case of his death during the term, to bequeath his share of the trade in favour of his wife or children. S, a customer of the bank and a surety, covenanted that any, or one of them, would pay to A, B, & C, the survivors or survivor of them, &c. all sums which on or before, or until the 19th of Feb. 1807, should become due from the customer to A, B, and C, the survivors or survivor of them, &c. A died, having bequeathed his share of the concern to his executors, in trust for his children; the business continued to be carried on under the same firm as before, and his executors interfered in the management, and shared in the profits. At the time of A's death, the balance due from S to the bank was upwards of 14,000*l.*; after that time, S continued his dealings with the bank in the same manner as previously, paying in more than 14,000*l.* within a few weeks after A's death, but drawing out during the same period a larger sum, and these subsequent dealings were contained in the same account current with the preceding dealings, and some years afterwards S became insolvent, being indebted to the bank in a balance of 19,000*l.* and upwards. Held, that the partnership, which carried on the business after the death of A, was a new partnership; that the surety's covenant did not extend to cover sums advanced to the customer by the bank after A's death; that the balance due at A's death from the customer, was to be considered as discharged by the payments subsequently made by him to the bank. *Pemberton v. Oakes*, 4 Russ. 154. *PARTNERSHIP.*

A surety under an annuity deed, redeeming the annuity subsequent to the bankruptcy of the grantor of the annuity, is entitled to the benefit of the grantee's proof under the grantor's commission, and to proceed by action against the grantor, who had obtained his certificate for the arrears of the annuity subsequent to the commission. *Watkins v. Flannagan*, 3 Russ. 421. *BANKCY.; PROOF IN.*

### PRIORITY OF SECURITY.

An unregistered deed retains its priority over a subsequent judgment, where there is no memorial of registry of any other deed comprising the lands, the subject of the unregistered deed. *Crymble v. Adair*, 1 Beat. 122.

It is clear from the Registry Act, (6 Anne, c. 21. s. 4.) that the priority given to the registered deed, depends not only on the time of the registry of the memorial, but is confined to such lands only as are comprised in the memorial. *Id. ib.*

If there be no memorial of a deed registered, the registry act does not apply, and the unregistered deed will have the same validity and effect as before passing the act. *Id. 123.*

A deed, by the common law, has effect from the date of its execution, but the registry act provides, that it shall have priority only from the date of its registration. *Id. ib.*

Judgments not docketed having no preference against heirs, executors, or administrators. *London v. Ferguson*, 3 Russ. 349. *JUDGMENT.*

### PRIVITY OF CONTRACT.

Where a debtor by a deed poll directs, *inter alia*, the receiver of the rents of his estate to keep down the interest of a certain debt, the direction does not create a trust in favour of a creditor, if it be without



consideration, and without the privity of the creditor.  
*Page v. Broom*, 4 Russ. 6. TRUST.

PROFESSIONAL CONFIDENCE.

A defendant will not be ordered to produce papers containing confidential communications between him and his solicitor, or between his country solicitor and town solicitor, in the relation of solicitor and client, during the progress of the suit, or with reference to it, previous to its commencement. *Hughes v. Bid-dulph*, 4 Russ. 190. PR. PRODUCTION OF DEEDS.

A plaintiff is not entitled to the production of a letter admitted by the defendant to be in his possession, but which the defendant states was written by him to his solicitor, and directed the solicitor to take the opinion of counsel upon the question in dispute between the parties. *Vent v. Pacey*, 4 Russ. 193. ADMISSIONS; PR. PRODUCTION OF DEEDS.

PUBLIC POLICY.

Deeds of separation in 1817, between husband and wife, who were to continue to live together, on condition that, if disputes arose again, a separation should take place. Disputes continuing, a deed in 1813 is executed, providing for an immediate separation. The husband continuing to live in the wife's house, dining, and visiting with her, but without cohabitation as

man and wife.\* The husband files a bill in the chancery of Ireland to set aside the deeds, chiefly on the ground that they were against public policy, and the deed of 1817 is declared null and void, but without prejudice to the claims of a child of the marriage thereunder. As to the deed of 1818, the bill was retained for twelve months, with liberty for the parties to proceed at law, of which no advantage was taken. The husband appeals against this decree to the house of lords. The judgment below was affirmed, and an order made for enlarging the time for retaining the bill, so as to enable the parties still to proceed at law, if they thought fit. Lord Eldon considered the question of public policy, and as such, resting on the same grounds both at law and in equity, but that the opinion of a court of law ought to be taken in the first instance, and the case be put into such a shape and form that it might be brought before the house by writ of error; that the deed of 1817 (against the decree declaring which void, there was no appeal) could not be for a moment sustained; that the circumstances under which the parties lived together, after the execution of the deed of 1818, put an end to it also; but still that the question ought to be tried at law. The Ld. Ch. was decidedly against both deeds. *Marg. Westmeath v. Mar. Westmeath*, 1 Dow, N. S. 519. HUSB. & WIFE, SEPARATION.

The court will not assist a party in recovering an estate conveyed by him for an illegal purpose, such as to enable the grantee to vote at an election, or sit in parliament. *Groves v. Groves*, 3 Y. & J. 163. FRAUDULENT CONVEYANCE.

REIMBURSEMENT, &c.

A testator gave his property, after the death of his wife, to trustees, on trust to pay the interest and profits to his two daughters, J & C, to their separate use, with a direction to pay to, and apply for the benefit of A, the son of E, 200*l.* annually, when he attained the age of twenty-one years, and before that period such part of the 200*l.* bequeathed to him as might be judged proper. He then gave his daughter power to dispose of the principal by will to their children or grandchildren respectively, "except that proportion of principal given to E, and from which the interest is to arise to my grandson, namely, 4000*l.* which sum shall be my grandson's property," and in case either of the daughters died without issue, he limited her share of the fund over to the other daughter, her children, or grandchildren. The executrix having, in mistake, made payments to A, in respect of his annuity, for two years before he attained twenty-one, was entitled to retain them out of the future payments of the annuity. An order, authorising her to retain them, and made upon petition after the decree had been passed and entered as regular. *Livesey v. Livesey*, 3 Russ. 287. S. C. in part reversed, id. 542. EXONS., RIGHT TO RETAIN; PR. PETITION; PR. DECREE; PR. ORDER.

RELEASE.

A nephew, who was the heir at law and sole next of kin of the testator, having taken the opinion of counsel as to the widow's rights under the husband's will, and being advised that he took the residue absolutely, contracted to sell to her a house which had descended to him as heir; and part of the agreement was, that he should release all demands against her

as executrix, or against her deceased husband's personal estate; a general release executed in pursuance of this agreement, was held to be valid, and to vest the stock in the executrix absolutely, though it made no specific mention of the stock. *Collier v. Squire*, 3 Russ. 467.

REMAINDER.

Whether a remainder may be limited on a *donatio mortis causa*. *Hambrooke v. Simmons*, 4 Russ. 25.

Cross remainders cannot be implied in a deed, and are not created as to accruing shares by a limitation of entire estate to an only surviving child and his issue, or by a gift over, if the entire estate in remainder, after the failure of all issue, or by an express creation of cross-remainders, as to the original shares. *Edwards v. Alliston*, 4 Russ. 78. DEEDS, C. OF.

RENTS AND PROFITS.

Devise of freeholds of inheritance to trustees for five hundred years, and subject to that term, to the use of various persons successively for life, with remainder to the first and other sons of such several persons successively in tail male, with remainders to the daughters of such several persons successively in tail general, with remainders over. The trusts of this five hundred years term were declared to be, that the trustees of the term should, out of the rents, &c. of the hereditaments comprised therein, pay the several annuities mentioned in the will, and subject thereto; should out of the residue of the rents and profits of the premises comprised in the said term, raise such sums, not exceeding 8000*l.* in the whole, as should be

necessary to pay such debts as might be owing by her late husband, or by herself, and all which she directed the trustees to pay out of the said rents and profits, as they should think fit, and as soon as convenient after her decease, and subject to the several trusts of the said term, upon trusts to pay the residue of the net rents, &c. of the premises comprised therein, unto the persons who, for the time being, should be next entitled to the reversion or remainder of the premises expectant therein, under the foregoing limitations: Held, that the testatrix did not intend the debts to be raised out of the corpus of the estate, but only that they should be discharged out of the annual rents and profits. *Heneage v. Lde Andover*, 3 Y. & J. 360. WILL, C. OF; TRUST TO PAY DEBTS.

#### RESIDUE.

Executor's rights not affected, where there is no

person to take undisposed residue. 1 W. 4. c. 40. s. 2. EXOR.

Executors to be deemed trustees for persons entitled to residue of personal estate. 1 W. 4. c. 40. s. 1. EXOR.

A testator, by his will, gave certain annuities and directed that the sums set apart to secure them should, as the annuitants died, sink into the residue of his personal estate. By a codicil to his will he stated that in case his property would not provide an income equal to the annuities, they should be rateably reduced. His estate was deficient, and the annuities were rateably reduced. Upon the death of any annuitant, the sum set apart to secure the reduced annuity, will belong to the residuary legatee, and is not to be applied to increase the reduced annuities to the amount given by the will. *Farmer v. Mills*, 4 Russ. 86. WILL, C. OF.

#### SCOTLAND.

An affidavit made by a defendant in a suit in the exchequer, and sworn before a magistrate in Scotland, was permitted to be read. *Ellis v. Sinclair*, 3 Y. & J. 273. PR. EVID. AFFIDAVIT; PR. EVID. WHAT SUFFICIENT.

The agent of the Albion insurance company had an office in Glasgow, at which J P and others, the owners of a steam vessel, effected an insurance, receiving from the company's agent, a contract, importing generally that a policy, corresponding with the memorandum, would be prepared at the office in London, and delivered to the assured, or their order, "on the third Monday in the ensuing month, or on any subsequent day." The policy that was sent down, and which was never shown to, or demanded by the assured, contained a clause that "it should be suspended and remain out of force, during the time the steam-boat might be at sea." At the end of the year the policy was renewed through the agent at Glasgow, who delivered to the assured a memorandum, signed by the company's secretary in London, signifying that the above policy had been renewed, but no notice of the exception was ever communicated to the assured. The vessel was shortly afterwards destroyed by fire on her passage from Liverpool to Dublin. Held, that the memorandum was the contract of the parties, which had not been fulfilled by the company, who were therefore liable for damages; that the act 6 Geo. 1. c. 18. (repealed see 6 G. 4. c. 91.) so far as it declares all policies executed by six persons, other than the London Insurance and Royal Exchange Assurances, to be absolutely void, does not extend to Scotland: that a contract so entered into was a Scotch, and not an English contract. *Pattison v. Mills*, 2 Bligh, N. S. 519. INSURANCE; SPEC. PERT.

A Scotchman, by a will, in the English form, made in England, gave the residue of his personal estate to trustees, of whom some, but not all, were resident in Scotland, upon trust to lay out the same in the purchase of land, or rents of inheritance, in fee simple, for the intent expressed in an instrument of even date with his will, and by that instrument he directed the trustees of his will to pay the rents annually to certain other trustees, who, at all times, were to be persons residing within twenty miles of Montrose, to be by them applied to the relief of indigent ladies in Montrose, or within twenty miles of that town: Held that the bequest was void under the mortmain act. *Att.*

*Gen. v. Mill*, 3 Russ. 320. CHARITY, MORTMAIN; FOREIGN MATTERS, &c.

#### SETTLEMENT.

Where the husband incurs a forfeiture under the 4 Geo. 4. c. 76. s. 23, the court has no discretion to mitigate the penalty, but is bound to settle and secure all property present and future of the wife, for the benefit of herself or the issue of the marriage. *Att. Gen. v. Mullay*, 4 Russ. 329. STAT. C. OF; HUSBAND & WIFE.

By covenant in a marriage settlement, the husband was bound to give by his last will or otherwise, to his children in equal shares, all his real estates other than a settled estate and personal property: Held, that the covenant bound only such real estate as he should die seised of; that the covenant bound shares of the settled estate, which the husband became entitled to by devise from a child who died in his lifetime. The children living at the death of the husband, were alone entitled to the benefit of the covenant. *Needham v. Smith*, 4 Russ. 318.

Where a settlement requires that a retiring trustee should assign the trust property to the continuing trustee, and that a new trustee should be chosen in the place of the retiring trustee, and there is no power to appoint a sole trustee, then if a retiring trustee assign the trust property to the continuing trustee, and he in abuse of his trust dispose of it, the retiring trustee is answerable. *Wilkinson v. Parry*, 4 Russ. 272. TRUSTEE, LIABILITY OF.

P B, on his daughter's marriage, settled a sum of money on her and her husband, and their issue, and after reciting that he had agreed to make a further provision for his daughter equal to his younger children, covenanted to settle by his will or otherwise on the husband and wife, and their issue, as great a share of his property as he should by his will or otherwise, provide for any of his other younger children, to take effect on the death of the survivor of himself and wife; and if he died intestate, or omitted to make such provision, that his executors should pay to the trustees as great a share of his property, as any of his younger children should in that event become entitled to: Held, that the trustees had a claim upon the executors in respect of subsequent advancements by the settlor to his other younger children in his lifetime, and not merely for a provision equal to that which any of the

other children became entitled to at his death. *Willis v. Black*, 4 Russ. 170.

A testator having devised freeholds and copyholds to the same persons, afterwards executed a settlement in contemplation of his marriage, by which he bargained and sold the freehold to trustees and their heirs, to the use of himself during his life, and after his death, to the intent that the wife might receive annually a rent charge, which was secured by powers of distress and entry, and by a term of years, and subjected the rent charge and the term to the use of the settlor, his heirs and assigns; and he covenanted to surrender the copyholds, to the uses of the settlement. The marriage was solemnized, and the testator died, leaving his wife surviving, without having surrendered the copyholds to the uses of the settlement; the covenant to surrender did not operate as an entire revocation of the devise of the copyholds, but was a revocation only so far as the particular purposes of the settlement required. *Vauser v. Jefferrey*, 3 Russ. 479. WILL, REVOCATION OF.

In contemplation of marriage between A and B, settlements were made of real estate belonging to B, the intended wife, and of personally belonging to A, the intended husband, upon uses and trusts which, after the solemnization of the marriage, were to be for the benefit of the husband and wife, and their issue; the marriage ceremony was performed, and the parties lived together as husband and wife, but after the lapse of more than a year, and before the parties had any children, the marriage was discovered to be void, and they executed deeds purporting to revoke the former settlement; some time afterwards a new settlement in contemplation of marriage was made, including the same property as the former, but different from the former in the interest given to the issue, as well as in other provisions; the parties then intermarried, and there was issue of the marriage: Held, that the first settlement being founded on mistake and misapprehension, was not binding on the parties, and that the rights of the issue, both as to the real estate, and the personally were regulated by the second settlement. *Robinson v. Dickenson*, 3 Russ. 399. MISTAKE.

Previous to marriage the fortune of the wife is so settled, as in the event of her surviving her husband, to belong to her absolutely, and by other deeds of the same date, the husband makes a settlement of his property, under which certain interests are given to the wife; he dies in her lifetime, having by his will bequeathed to her considerable benefits, which he directs shall be in satisfaction of all her claims or demands against his estate, or executors, under the settlement made by him, or on any other account whatsoever; the acceptance of the benefit given to her by the will, does not preclude the wife from claiming a leasehold, part of her own fortune, which the husband was bound, by deed settling her fortune, to renew in the name of trustees, and upon the trusts of that settlement, but which he had renewed in his own name. *Coleman v. Jones*, 3 Russ. 312.

#### SETTLEMENT OF FAMILY DISPUTES.

A transaction cannot be considered as a family arrangement, where the doubts existing as to the rights alleged to be compromised, are not presented to the mind of the party interested. *Harvey v. Cooke*, 4 Russ. 34. FRAUD; IGNORANCE OF RIGHTS.

#### SOLICITOR—SOLICITOR AND CLIENT.

Whenever a professional man is called on to give his services to a client, whether to prepare a deed or will, the law implies to him a knowledge of all the legal

consequences to result, and requires that he should distinctly and clearly point out to his client, all those consequences from whence a benefit may arise to himself, from the instrument so prepared, and if he fail to do so, equity will deprive him of it. *Segrave v. Kirwan*, 1 Beat. 166.

An attorney who practices in the name of a solicitor without having previously obtained his permission to do so, cannot recover any costs from his clients. *Lawrence v. Sharp*, 1 Hog. 84.

A solicitor will not be ordered to bring into court the deeds of his clients. *McCann v. Beers*, 1 Hog. 129. PR. PRODUCTION OF DEEDS.

When in notice of motion on behalf of feme covert, no prochain ami is named, her solicitor will be liable for costs awarded against her. *Coe v. McNamara*, 10 J. 78. PR. COSTS; HUSB. & WIFE; RU. PROC. AMI.

In taking an account of the pecuniary transactions between an attorney and his client, the production of a bond entered into by the latter is not sufficient evidence of a debt to that amount, and actual payment must be proved. *Lacey v. Morgan*, 3 Y. & J. 230. PR. EVID., WHAT SUFFICIENT; DEBT.

A demurrer to a bill by the assignees of a bankrupt, because it did not state that it had been filed, with consent of the creditors, as required by the stat. 6 Geo. 4. c. 16, was over-ruled; the act merely intended to make assignees responsible, as between them and the creditors, if they instituted any suit without the consent directed by the act. *Jones v. Yates*, 3 Y. & J. 373. PL. PARTIES: PL. BILL; BANKCY. ASSIGNEES.

A having purchased lands, left the title to the investigation of C and D, solicitors in partnership, upon whose advice the purchase was completed; D was a trustee to uses to bar dower in the conveyance; A died, and his devisee sold the property to D. On a bill for specific performance by the vendor, it was held that a solicitor who has been employed to advise on a title, could not, on purchasing the property himself, set up an objection which he did not think important when advising his principal. *Beavor v. Simpson*, 1 Tam. 69. AGREEMENT, SPEC. PERF.; VEND. & PURCH.; TITLE.

If a solicitor institutes unnecessary proceedings, the court will take care that the client shall not suffer by the course adopted. *Wood v. Wood*, 4 Russ. 668.

If a solicitor in a cause, having assumed, improperly, the character of a receiver, neglects to collect the rent, while the parties consider him to be acting as a receiver, he makes himself responsible for any rents lost in consequence of his neglect. S. C.

By the direction of A, a bill was filed for the administration of a testator's assets, in which A and his infant brother and sister, by A as their next friend were plaintiffs; D, their elder brother, who had an interest adverse of theirs, and was one of the defendants, acted as solicitor in the country for the plaintiffs, and the suit was conducted by his town agents. After the sister had attained her full age, D died, having appointed her his executrix. A gave notice to the persons who had been the town agents of D, not to take any proceedings in his name, and the sister appointed them to act as solicitors for her: Held, that A was not entitled to have the papers connected with the cause, delivered over to him, though he offered to satisfy any lien which might be claimed against them. The sister filed a bill of revivor after the death of D, and made A and his infant brother defendants. A and the brother, after notice of that bill, filed another bill of revivor; this second bill was ordered to be taken off the file, and the court held that an alleged defect of parties in the frame of the first bill, of revivor, afforded no reason for allowing the second bill of revivor

to remain on the file. *Livesey v. Livesey*, 1 Russ. & M. 10. PR. TAKING PLEADINGS OFF FILE.

A party is bound by the consent of his counsel given in court, though they had no instructions to consent, if they were at the time apprised of all those facts, of which the knowledge was essential to the proper exercise of their discretion, but he will be relieved from an order made by such consent, if they give that consent in ignorance of material circumstances. How far a party will be affected by the remissness of his solicitor in not immediately objecting to an order, made by consent of counsel in court, when neither the party nor his solicitor was present, and instructions to consent had not been given by either. *Furnival v. Bogle*, 4 Russ. 142. CONSENT; BARRISTER.

### STAMP.

Letters of administration, under which a plaintiff makes title, must be stamped *ad valorem*. *Harper v. Ravenhill*, 1 Taml. 145.

### STATUTES, CONSTRUCTION OF.

By the preamble of the registry act, the object of the legislature appears to be, to secure purchasers, and to prevent forgeries, fraudulent gifts, and conveyances; but a judgment creditor is not a purchaser, and does not fall within the provision of the preamble. *Crymble v. Adair*, 1 Beat. 124.

The preamble is a good mean to find out the meaning of the statute, and is a key to open the understanding thereof. *Id. ib.*

Husband and wife made a post-nuptial settlement of monies due to the wife, which, when paid, were invested in the names of trustees. The husband, having committed an act of bankruptcy prior to the settlement, was afterwards declared a bankrupt, and the bargain and sale was executed previously to the new bankrupt act, 6 G. 4. c. 16. coming into operation. Held that the 73d section of that act (which to enable the voluntary deed of a bankrupt to be set aside, requires that at the time of his conveying, he should have been insolvent,) had no retrospect to this case; but that the law in force at the time of the bargain and sale should regulate its operation; and, therefore that the assignees were entitled to the fund. *Wombwell v. Laver*, 2 Sim. 360. BANKCY. ASSIGNMENT WHAT PASSES.

A contracted to sell a freehold estate to B, and by will gave the purchase money to trustees for certain purposes; and if the contract should not be completed, he devised the estate to the trustees for the same purpose. A died, leaving a son, who died leaving an only daughter, an infant. Held that she was not a trustee within the statute 6 G. 4. c. 74. *In re. of Moody*, 1 Taml. 4. INFANT TRUSTEE.

A clause in act of parliament passed for regulation of joint stock company, provided, that all proceedings, whether at law or equity to be carried on, by or on behalf of the company against any person or persons, whether members or not, should be instituted, &c. in name of chairman, or of one of directors as nominal plaintiff; such clause does not apply where directors appropriate to their own use part of the joint stock, by charging the company with a much larger sum, as the price of property purchased by them, than was actually paid. *Hitchens v. Congreve*, 4 Russ. 562.

A and B, the residuary legatees of a deceased person, obtained administration of, and had part of the assets transferred to their names: the letters of administration were afterwards recalled, and administration granted to B, the sole next of kin of the deceased, who was declared to have died intestate. A was

abroad, and B a prisoner for contempt, for not obeying an order of the court to transfer to the credit of the cause, certain stock which they had admitted by their answer to belong to the deceased. A petition was presented, under the 6 G. 4. c. 74. to have the stock transferred; but the court held that the act extended only to express trusts, and refused to make the order. *Dew v. Clark*, 4 Russ. 511. STOCK; TRUSTEE.

Where the husband incurs a forfeiture under s. 23. of 4 G. 4. c. 76., the court has no discretion to mitigate the penalty, but is bound to settle and secure all property present and future of the wife for the benefit of herself, or the issue of the marriage. *Att. Gen. v. Mullan*, 4 Russ. 329. HUSBAND AND WIFE; SETTLEMENT.

The statute of the 25 G. 2. c. 6. does not extend to wills of personal estate only, and a legacy to a person who is an attesting witness to such a will is not void. *Emanuel v. Constable*, 3 Russ. 436. WILL C. OF, WHO MAY TAKE; PR. EVIDENCE, WITNESS, COMPETENCY; LEGACY; ESTATE PERSONAL.

A feme covert, tenant in tail in remainder of money to be laid out in land, by arrangement with the tenant for life, and on a private examination under the 7 G. 4. c. 45. consented to the payment of a proportion of the money to her husband; and the order was made accordingly. *In re Silcocks*, 3 Russ. 369. HUSB. AND WIFE, CONSENT TO BAR; MONEY TO BE LAID OUT IN LAND.

The equity of redemption of a leasehold for years with a covenant for perpetual renewal, is not an interest in real estate within the meaning of the 53 G. 3. c. 102. s. 19. The assignee of an insolvent is not bound, under that section, to dispose of such an equity of redemption by public auction. In a suit by the assignee of an insolvent to impeach a sale, which a former assignee had made of an equity of redemption, the insolvent is not rendered a competent witness for the plaintiff, by releasing his interest in the residue of his estate. *Waldren v. Howell*, 3 Russ. 376. INSOLVENT.

Seemle, an order of reference to the master on a petition, presented under Lord Eldon's act, ought not to be made, except on a hearing in court, and on the appearance of counsel upon the petition. *Hinde v. Metcalfe*, 3 Russ. 416. PR. PETITION; MONEY TO BE LAID OUT IN LAND.

### STIPULATED DAMAGES.

By an indenture, a farm was demised at a yearly rent, with a covenant by the tenant, that if during the last three years of the term, he should sow more than seventy acres of clover in one year, he should pay an additional rent of 10*l.* a year, for every acre above seventy for the remainder of the term: Held that the additional rent was in the nature of stipulated damages, entitling the plaintiff to a discovery in aid of an action at law; and a plea that the discovery would subject defendant to penalties, was overruled. *Jones v. Green*, 3 Y. & J. 298. LANDLORD AND TENANT; PL. DISCOVERY TENDING TO CRIMINATE.

### STOCK.

Where transfers directed to be made, who to be named. 1 W. 4. c. 60. s. 32. BANK OF ENGLAND; PR. ORDER.

See as to transfer of stock, 1 W. 4. c. 60. 1 W. 4. c. 65.

The court, on the petition of the assignee of a reversion, will order the accountant-general not to transfer the stock, although the assignor has not been

served with notice of the application. *Salmon v. —*, 1 Taml. 74. PR. FUND IN COURT.

A and B, the residuary legatees of a deceased person, obtained administration of, and had part of the assets transferred to their names. The letters of administration were afterwards recalled, and administration granted to B, the sole next of kin of the deceased, who was declared to have died intestate. A was abroad, and B a prisoner for contempt, for not

obeying an order of the court, to transfer to the credit of the cause certain stock, which they had admitted, by their answer, to belong to the deceased. A petition was presented, under the 6th G. 4. c. 74. to have the stock transferred; but the court held, that the act extended only to express trusts, and refused to make the order. *Dew v. Clark*, 4 Russ. 511. TRUSTEE; STAT. C. OF.

### TITLE.

The language of endowment being ambiguous, and it being unexplained by any other documents, and there being no parol testimony on either side on which any reliance could be placed, the court declined making a decree, but directed an issue. *Wyld v. Ward*, 3 Y. & J. 192.

### TITHES.

To a bill by a vicar against occupiers for certain tithes, impropiators ought to be admitted as parties, although the defendants allege that it is uncertain, whether these lands are or are not within the parish; and that the impropriate rectors had always received or demanded the tithes: occupiers only are necessary parties. *Cooke v. Blunt*, 2 Sim. 417. PR. PARTIES.

On a bill by a vicar for the tithe of mills, the defendant set forth that the mill was an ancient mill, and was built before living memory, and that tithes had never been paid, but that they had always been considered as exempt from tithes. The exemption was considered as sufficiently laid. *Townley v. Colegate*, 2 Sim. 297. *Broune v. Woolsey*, 2 Sim. 305.

Tithe is not payable in respect of corn, belonging to the parties, ground at their own mills, and afterwards sold to the public. S. C.

Terriers are evidence of tithes merely personal. S. C.

Sequestrators appointed by the court of chancery have no right to seize on the tithes of an ecclesiastical benefice. *Ward v. Hayes*, 1 Hog. 107. PR. SEQUESTRATION.

In a suit for tithes, there was no proof of payment for a very long period; all the evidence which would tend to prove a legal exemption (claimed by the occupier) was adduced at the hearing; but as that would not, in the opinion of the court, justify a jury in finding for the exemption, an issue was refused. *Ross v. Aglionby*, 4 Russ. 489. PR. ISSUE AT LAW.

A single terrier, unsupported by usage, is not sufficient to establish a modus. To support a parochial modus, it is not sufficient for the defendant to prove the non-render: he must go further, and shew the acceptance of the modus for some time, and to some extent. *Lynes v. Lett*, 3 Y. & J. 405.

The bishop's registry office is the proper custody for the sequestrator's accounts, with reference to their admissibility on questions of right to tithes. *Palley v. Hilton*, 12 Price, 625.

A general title to tithes throughout a parish in a vicar, gives him a *prima facie* case; and throws it on the defendants to prove their alleged exemption from liability, on the trial of an issue. *Id. ib.*

Though mere non-payment of tithes for however long a period would not be evidence of a grant, yet a layman's adverse enjoyment or porncancy for a long series of years of the tithes of certain lands, or of a

new payment in lieu of tithes, coupled with a succession of deeds by which the tithes or money payments in lieu of tithes have been conveyed from one person to another, corresponding with the enjoyment, affords evidence sufficient to justify a jury in presuming a legal grant of the tithes. *Bacon v. Williams*, 3 Russ. 525. PRESUMPTION.

### TOLL.

A grant of a fair or market, with an express grant of toll, passes reasonable toll, though no amount be specified. *Corp. of Stamford v. Pawlett*, 1 Cramp. & J. 57. DEEDS, C. OF.

### TRADERS.

As to administration of estates of traders in equity, see 1 W. 4. c. 47.

Persons having only estate for life, enabled to convey the fee when estate ordered to be sold. 1 W. 4. c. 47. s. 12. ESTATE, TENANT FOR LIFE.

### TRUST.

Limitations or devises to pay debts are not affected by 1 W. 4. c. 47. s. 5. relating to traders.

Devise of freeholds of inheritance to trustees for 500 years, and subject to that term, to the use of various persons successively for life, with remainder to the first and other sons of such several persons successively in tail male, with remainder to the daughters of such several persons successively in tail general, with remainders over. The trusts of the 500 years' term were declared to be, that the trustees of the term should out of the rents, &c. of the hereditaments comprised therein, pay the several annuities mentioned in the will, and subject thereto, should, out of the residue of the rents and profits of the premises comprised in the said term, raise such sums not exceeding 8,000*l.* in the whole, as should be necessary to pay such debts as might be owing by her late husband or by herself, and all which she directed the trustees to pay out of the said rents and profits as they should think fit, and as soon as convenient after her decease; and, subject to the several trusts of the said term, upon trust to pay the residue of the net rents, &c. of the premises comprised therein, unto the persons who for the time being should be next entitled to the reversion or remainder of the premises expectant thereon, under the foregoing limitations: held, that the testatrix did not intend the debts to be raised out of the corpus of the estate, but only that they should be discharged out of the annual rents and profits. *Heneage v. Ld. Andover*, 3 Y. & J. 360. RENTS AND PROFITS; WILL, C. OF.

D having an estate for life in lands, assigned them,

together with certain furniture, to trustees for ninety-nine years, in trust to pay to the appellant 5000*l.* a year, and to his creditors, partners to the assignment, 5 per cent. upon their respective debts. The creditors generally executed the assignment, by which they covenanted not to sue the appellant; but P and B having obtained judgment, sued out a writ of *fi. fa.*, under which the sheriff seized the goods of D, but refused to sell in consequence of a claim by the trustees. P and B then filed a creditor's bill in chancery in Ireland, stating these facts, and setting forth in part, the deed of trust and assignment as it appeared in the registry, but, alleging that they were ignorant of the trusts, prayed that the defendants might set forth the deed, and that the creditors might have power to elect to take the benefit of the deed, or otherwise that it might be declared fraudulent and void as to them and that a receiver might be appointed. After the bill was filed, two of the trustees died, and new ones were appointed. D, and the surviving trustee put in their answers. In 1824, P and B filed a supplemental bill setting forth the deed, and stating that, under it, D was entitled to a rent charge issuing out of the lands, and that they had sued out an *elegit* against D for 1000*l.*, directed to the sheriff of R, who returned, that D and his trustee were seized of a freehold rent, issuing out of lands in the county of R: one moiety of which he had delivered to P and B, to hold till they had levied the damages marked upon the writ. They claimed by this bill to be entitled either to a moiety of the lands, or the rent charge, or to have satisfaction of their judgment out of the amount payable to D under the trusts of the deed. The lords held, (confirming the judgment of the master of the rolls, the lords commissioners, and the lord chancellor,) that certain orders appointing a receiver and restraining the surviving trustee from paying the annuity to D, were properly made. Also, that the defects in the sheriff's return to the *elegit* were immaterial, as no return was necessary, and that the suing out an *elegit* was sufficient to ground the equity. And further, that one *elegit* is sufficient, although the rent be payable out of lands in three counties. *Ld. Dillon v. Plissett*, 2 Bligh, N. S. 211. **ELECT.**

A person employed on behalf of himself and his copartners, in negotiating the term of a lease, is not entitled to stipulate clandestinely with the lessors for any private advantage to himself; where, therefore, a sum of 12,000*l.* was paid in pursuance of such a stipulation, the party receiving it was declared to hold it in trust for the partnership. Before the transaction was discovered, one of the partners withdrew, and subsequently another partner assigned a share in the stock, and in his proportion of this claim to persons then admitted into the concern: held, that the retired, the continuing, and the new partners, were properly joined as complainants in a suit to have the trust declared. *Fawcett v. Whitehouse*, 1 Russ. & M. 132. **PARTNERSHIP; PARTN. AND AGENT; PL. PARTIES; PARTNERS.**

A son conveys an estate to his father nominally as purchaser, but really as a trustee, and in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage for the use of the son. The father died shortly afterwards, and before any money was raised, having by a will subsequent to the conveyance, made a general devise of all his real estate. The case is within the statute of frauds, and parol evidence is not admissible to prove the trust, but the son has a lien on the estate as vendor for the apparent consideration, no part of which was paid. *Laman v. Whiteley*, 4 Russ. 423. **PARENT & CHILD; PR. EVID.; PROR. VINDIC. & PERCU.; LIT.**

A mother entitled to a considerable property un-

der the will of a relation, in a conversation with the executor of that relation, expressed an intention to make a settlement of part of that property which was standing in his name, upon her daughter; and requested the executor to instruct her solicitor to prepare such a settlement. On the prepared settlement being brought to her for execution, she had changed her mind and refused to sign it. Held, that her intention expressed in the conversation with the executor of her relation, did not amount to a declaration of trust, although the property was personal estate. *Bayley v. Boulcott*, 4 Russ. 345.

Where a debtor by a deed poll, directs *inter alia*, the receiver of the rents of his estate to keep down the interest of a certain debt, the direction does not create a trust in favour of the creditor, if it be without consideration and without the privity of the creditor. *Page v. Brown*, 4 Russ. 6. **PURITY OF CONTRACT.**

If a tenant for life of an under-lease for eighteen years, granted by a person who himself holds the premises so under-let along with other property under a lease for twenty-one years, purchases the interest of his immediate lessor, and obtains from the superior lessor a renewal of the lease thus purchased. The renewed lease is subject so far as regards the premises which were comprised in the under-lease, to the same trusts as would have affected the under-lease, if it had not been merged or had not expired by the effluxion of time. The same rule holds, though the lease at the time of the purchase was vested in a trustee upon trusts, under which he could not have granted a renewal of the under-lease, and though the tenant for life outlived by twenty-five years the time at which the under-lease would have expired by effluxion of time. *Giddings v. Giddings*, 3 Russ. 241. **LEASE, RENEWAL OF; MERGER.**

A, being tenant for life of a leasehold for years, with remainder to B. After devising one estate to B in tail, bequeathed to him the leasehold during his life with remainder over, and gave him all the residue of his real and personal property. B took possession of the residuary estate; suffered a recovery of the lands devised for him in tail; acted as the absolute owner of the leasehold estate; and outlived the term for which the lease was granted, having previously acquired a new interest in the demised premises. Held, that B elected to take under the will, and was bound to give effect to the devise of the leasehold in favour of the remainder man. *Giddings v. Giddings*, 3 Russ. 241. **ELECTION.**

A made a voluntary surrender of copyholds to a trustee upon trust for F during her life; and if at her death she left children who attained twenty-one, upon trust to sell and divide the money among them; but if that event did not take place, upon trust for A in fee. Afterwards by a deed reciting that the trustee was seized of the premises upon trust for F and her husband and A. The trustee and F and her husband and A concurred in demising the premises for a valuable consideration to G for a long term of years. Held, that the lessee was to be considered as having notice of the trust for the benefit of the children of F, and that the lease was void as against them. *Malpas v. Ackland*, 3 Russ. 273. **NOTICE.**

## TRUSTEES.

New trustees when to be appointed in cases of charities. 1 W. 4. c. 60. s. 22. **CHARITY.**

Court of Chancery may appoint persons to convey real estate, where trustees are out of jurisdiction, &c. 1 W. 4. c. 60. s. 8.; and to assign and surrender leases where trustees out of jurisdiction, &c. *id.* s. 9. Where bill to be previously filed to establish right, *id.* s. 12. **JURISDICTION.**

By s. 19. where feme covert is executrix, husband shall be deemed a trustee within 1 W. 4. c. 60. *EXECUTOR; HUSB. & WIFE.*

Heir of vendor or nominal purchaser, where to be deemed trustee after decree for specific performance. 1 W. 4. c. 60. s. 16. *HEIR AT LAW; VENDOR & PURCH.*

Where heir of surviving trustee of real estate not known or refusing to act, a person appointed to convey. 1 W. 4. c. 60. s. 8. *HEIR.*

Where heiress to convey is feme covert, her husband deemed a trustee. 1 W. 4. c. 60. s. 19. *HUSB. & WIFE; HEIR.*

As to trustees being lunatic, or refusing to convey, or out of kingdom, &c. &c. 1 W. 4. c. 60.

It is a salutary rule that the trustee cannot institute a suit, without his *cestui que trusts* being parties; but it is a subject to be modified according to circumstances. *Bisfield v. Taylor*, 1 Beat. 93.

The master of the rolls, in a suit by the assignees of a bankrupt, against a trustee of a fund contingent on the event of the bankrupt surviving his mother, which event happened after the bankruptcy, having made a decree in favour of the plaintiffs, would not make the trustee pay costs, he having acted in ignorance. *Knight v. Martin*, 1 Taml. 237. S. C. 1 R. & M. 70. *PR. COSTS; TRUSTEE.*

Trustees having contracted to purchase land, sell out stock, and deposit the produce at a banker's, when the purchase seems to be near completion, they are not liable to make good the money if the bankers fail. *Freme v. Woods*, 1 Taml. 172. *INVESTMENT.*

By settlement, monies were directed to be laid out on government or real securities, the trustees having lent the money to the husband on bond, were ordered, on motion, to pay the money into court. *Collis v. Collis*, 2 Sim. 365. *PR. PAYMENT INTO COURT.*

Where the sole trustee in a will, to whom a term was demise, died in the testator's lifetime, the court referred it to the master to appoint a new trustee, and to approve of a like demise. *Decey v. Peace*, 1 Taml. 78. *PR. MASTER, REFERENCE.*

A & B, the residuary legatees of a deceased person, obtained administration of, and had part of the assets transferred to their names. The letters of administration were afterwards recalled, and administration granted to B the sole next of kin of the deceased, who was declared to have died intestate. A was abroad, and B a prisoner for contempt for not obeying an order of the court, to transfer to the credit of the cause certain stock which they had admitted by their answer to have belonged to the deceased. A petition was presented, under the 6 Geo. 4. c. 74. to have the stock transferred, but the court held that

the act extended only to express trusts, and refused to make the order. *Dew v. Clark*, 4 Russ. 511. *STOCK; STAT. C. OF.*

A trustee refusing to pay a legacy without the direction of the court, in a case which admitted of no doubt, was refused his costs, but was not made to pay the costs of the suit, because he might have acted from ignorance, and not from any improper motive. *Knight v. Martin*, 1 Russ. & M. 70. *PR. COSTS; TRUSTEES.*

Where a settlement requires that a retiring trustee should assign the trust property to the continuing trustee, and that a new trustee should be chosen in the place of the retiring trustee; and there is no power to appoint a sole trustee, then if the retiring trustee assign the trust property to the continuing trustee, and he in abuse of his trust dispose of it, the retiring trustee is answerable. *Wilkinson v. Parry*, 4 Russ. 272. *SETTLEMENT, C. OF.*

A testator gave the residue of his personal estate to trustees, directing them to convert it into money and invest the proceeds in government or real security, of which they were to stand possessed upon trust for A during her life; and afterwards for B. The trustees permitted a share which the testator had in an Indian loan, bearing interest at ten per cent. to remain for several years out of that security, during which time they paid to A the interest at ten per cent. which it yielded annually; and the loan being afterwards paid off, they invested the money in the three per cent. at a time when the funds were so low that the amount of stock purchased was considerably greater than if the conversion had taken place at the end of a year, from the testator's death. Held, that the tenant for life was not entitled to the actual interest which the money yielded while it remained on the Indian security, but only to the dividends of so much three per cent. stock, as would have been purchased with it at the end of a year from the testator's death; that the trustees ought to be charged with the whole of the stock actually purchased, and all sums allowed in their discharge as payments to the tenant for life; not the sums which they had in fact paid her, but only a sum equal to what she would have received for dividends, if the money had been transferred from the Indian security, and invested in the three per cent. stock at the end of a year from the testator's death. *Davis v. Scott*, 4 Russ. 195. *WILL, C. OF; INTEREST, RATE OF; INVESTMENT.*

Scamble, where the *cestui que trusts* convey their beneficial interest in a portion of the property to a purchaser, the purchaser may file a bill against the trustee for a conveyance of the legal estate, without making the *cestui que trusts*, who sold to him parties to the suit. *Goodson v. Ellison*, 3 Russ. 583. *PR. PARTIES.*

## USURY.

Where an annuity is granted for a term of years to be paid half-yearly, and at the same time promissory notes are given by the grantee for the payment of each half-year's annuity when it becomes due, and it appears that the several half-yearly payments will repay the purchase money with interest exceeding the rate of 5l. per cent. the transaction is usurious. *Fereday v. Wightwick*, 1 Russ. & M. 45. S. C. 1 Taml. 250. *ANNUITY, VALIDITY.*

A covenant in a mortgage of property in the West Indies on the part of the mortgagor, to consign the

produce of the estate to the mortgagee to be sold on commission for the mortgagor; and to take all such plantation stores as may be wanted for the use of the estate from the mortgagee, is not usurious. A mortgagee is entitled to the benefit of such a covenant, and to charge a commission on the sale of the produce consigned to him. On the assignment by a mortgagee, the cost of supplies and contingencies furnished to the plantation previous to the assignment, but paid for subsequently by the assignee, may be added to the mortgage debt and charged against the estate. *Sayers v. Whitfield*, 1 Knapp, 133. *MORTGAGE.*

## VENDOR AND PURCHASER.

A person who had entered into an agreement for the purchase of land which was formerly part of the glebe of a rectory, and had been before sold for the redemption of the land tax, is not bound to complete his purchase, when it appears that upon the prior sale for the redemption of the land tax, the rector was himself the actual purchaser in the name of his curate. *Grover v. Hugell*, 3 Russ. 428. LAND TAX, REDEMPT. OF; AGREEMENT, SPEC. PERF.

By an agreement for the sale of an estate, the purchase money, with interest, was to be secured by the bond of the purchaser, and was to remain so secured during the life of the vendor. The conveyance which was afterwards executed, expressed that the purchase money had been paid, and the vendor's receipt was indorsed upon it; but in fact, only a part of the price had been paid, and the residue was secured by the purchaser's bond, conditioned for payment of the principal with interest within twelve months after the death of the vendor; and of interest in the meantime. The vendor was held to have a lien on the estate for the amount of the bond. *Winter v. Anson*, 3 Russ. 488.

There is no distinction between copyholds and freeholds as to the doctrine of the vendor's lien for his purchase money. *Id.* 492.

In an agreement for the purchase of an estate, the purchaser stipulated to pay the residue of the purchase money on a day specified, "upon the vendor's making a good title or otherwise, if such title should not then be completed, upon his executing a bond to complete such title, and to convey the estate as soon as the same could be completed:" the vendor is bound to shew a good title; and till a good title is shewn, the purchaser, though he has entered into possession is not bound to pay the purchase money. (*Clarke v. Faur*, 3 Russ. 320. PAYMT. OF PURCH. MONEY.

If after a contract for sale of an estate before the title is accepted, the title deeds be destroyed by fire, this court will not compel the specific performance of the contract, unless the vendor can furnish the purchaser with the means of showing what were the contents of the destroyed deeds, and of proving that such deeds were duly executed and delivered. *Bryant v. Bush*, 4 Russ. 1. ACCIDENT.

A purchaser who has not been in possession, is bound to pay interest on the purchase money and take the rents and profits only from the time when a good title was first shewn, and not from the time fixed by the agreement for the completion of the purchase. *Jones v. Mudd*, 4 Russ. 118. INTEREST.

A contract of purchase contained a stipulation that if by reason of any unforeseen or unavoidable obstacles, the conveyance could not be perfected for execution before the day fixed for the completion of the purchase, the purchaser should from that day pay interest at five per cent. on his purchase money, and be entitled to the rents and profits of the premises, the vendor did not show a good title till long after the specified day: Held that he was not entitled to interest, except from the time when a good title was first shown. *Monck v. Huskisson*, 4 Russ. 121. (n). INTEREST.

The generality and vagueness of descriptions of copyhold property on the court rolls, are so well known, that a vendor is not bound to show how the description on the court roll is to be applied to the present state of the property; if he prove that the property has actually been enjoyed, and passed under that description for upwards of sixty years. *Long v. Collier*, 4 Russ. 267.

In a suit for specific performance by a vendor, the costs will be thrown upon the purchaser, though the

master reports that a good title was not shewn till after the filing of the bill, if that finding proceeded on the ground that certain evidence had not been previously furnished, which the vendor had offered to produce, but which had not been actually produced before the institution of the suit, in consequence of the purchaser insisting upon other and unsubstantial objections. *Long v. Collier*, 4 Russ. 269.

As a general rule where land is agreed to be sold tithe free, the right to the tithes is to be considered so material to the enjoyment of the lands, that a purchaser is not compelled to complete his contract, with a compensation, if a good title cannot be made to the title; but this rule admits of exception where the circumstances manifest that the right to the title did not form any inducement to the purchaser to enter into the contract. *Smith v. Tolcher*, 4 Russ. 302.

The lien of a vendor upon the land and title deeds until payment of the purchase money, does not apply to a conveyance to the purchaser executed by some, but not all of the parties, where the contract has gone off by the vendor's default; and if there be any lien on such a conveyance, it is vested in the purchaser as security for his deposit. *Orenham v. Esdaile*, 3 Y. & J. 263.

A vendor who has taken, as security for part of the purchase money, the bond of the vendee and a mortgage of part of the property sold, has not, on the bankruptcy of the vendee, a lien on the whole estate. *Capper v. Spottiswoode*, 1 Tam. 21.

Devise to trustees and their heirs during the life of A B, in trust to lay out the rents and issues thereof in government securities, until A B should attain twenty-one, and after that, to suffer her to receive and take the profits during her life, not subject to the debts or controul of her husband, her receipt to be a sufficient discharge; and, after her decease, to her heirs. Upon a suit for a specific performance of an agreement for the purchase of part of the estates, the question was whether A B took the legal, or only an equitable interest for life in the property, so as to bring the title within the rule in *Shelley's case*. The Ld. C. B. would not compel the defendant to accept the title. *Playford v. Houre*, 3 Y. & J. 175. WILL, C. OF, WHAT ESTATE.

Devise to executors and trustees of a freehold of inheritance for a term of ten years, in trust to pay debts and legacies, and after testator's decease, to his wife for life; then "to my grandson Thomas Chorlton, son of the late R. Chorlton, all that my estate where I now live, and all that other estate and promises thereto belonging, situate, &c., called or known by the name of Weaste estate, now in the holding of T, for his own use during his natural life, with remainder to the first son of the body of the said Thomas Chorlton lawfully begotten, severally and successively in tail male of the name of Chorlton. And for want of such lawful issue of that name, either by my said grandson Thomas Chorlton, or my son John Chorlton, then I give and devise the said estate where I now live, and the Weaste estate, amongst my daughters and their children share and share alike, to hold unto them, his, her, or their heirs for ever as tenants in common and not as joint tenants." Thomas Chorlton suffered a recovery. He had no child. Held, on an exception to the title taken by a purchaser under a sale by order of the court, that the devisee could make a good title in fee to the vendee. The question of title or no title being matter of opinion for the court, the purchaser is bound thereby, and cannot object to complete the purchase on the ground of the difficulty of the question on which the title depends. *Rushon v. Craven*, 12 Price, 599. WILL, C. OF, WHAT ESTATE.

If the vendor of an estate, the contract for which was not complete in the lifetime of the testator, who



was the purchaser, is afterwards paid the purchase money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor with respect to his lien on the estate. *Qu.* if a pecuniary legatee would be entitled to the same benefit against the devisee? *Selby v. Selby*, 4 Russ. 336. EXORS.; ASSETS, MARSHALLING; LEGATEES; DEVISERS.

A purchaser not compelled to take a title depending upon the words of a will which were too doubtful ever to be settled without litigation. *Sharp v. Adcock*, 4 Russ. 374.

A son conveys an estate to his father nominally as purchaser, but really as a trustee, and in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage, for the use of the son; the father died shortly afterwards, and before any money was raised, having, by a will, subsequent to the conveyance, made a general devise of all his real estate: the case is within the statute of frauds, and parol evidence is not admissible to prove the trust; but the son has a lien on the estate as vendor for the apparent consideration, no part of which was paid. *Leman v. Whitley*, 4 Russ. 423. PARENT AND CHILD; TRUST; PR. EVID. PAROL.

Where the possession is vacant, a purchaser is not bound to inquire of the late occupier what was the nature of his title. Under an agreement between A, who held lands under a college lease, and B, the owner of an adjoining estate; B occupied part of the college lands, and A had occupied, along with the residue of the leasehold, part of B's estate. A having become bankrupt, the college leasehold was sold, and was described in the particulars of sale as "late the residue of A." Held, that the purchaser was not to be considered as having implied notice of the agreement of exchange, and that he had a right to recover by ejectment that portion of the leasehold which was in B's occupation. *Miles v. Langley*, 1 Russ. & M. 39.

If land, generally reputed to be water-meadow, is sold by the assignees of a bankrupt by the description of uncommonly rich water-meadow, whereas, in fact, it is very imperfectly watered; this is not such a misrepresentation as will avoid the sale. *Scott v. Hanson*, 1 Russ. & M. 126. FRAUD; MISREPRESENTATION.

A purchaser of a reversion must pay interest on his purchase money, from the time of the purchase. *Trejusis v. Ld. Clinton*, 2 Sim. 359. INTEREST, FROM WHEN.

If an estate be conveyed away in the lifetime of the party to whom it belonged, and he dies within forty days from the execution of the conveyance, his heir may recover it from the purchaser. Under such circumstances, if the heir has received the purchase-money, he cannot have the estate restored without refunding the price paid for it. But where the price has been paid to other persons, the purchaser cannot call upon the heir to repay it, but must recover it as he can from those to whom it has been given by the deceased. *Marett v. Jeunes*, 1 Knapp, 103. HEIR AT LAW.

A, having purchased lands, left the title to the investigation of C and D solicitors in partnership; upon whose advice the purchase was completed. D was a trustee to uses to bar dower in the conveyance. A died, and his devisee sold the property to D. On a bill for specific performance by the vendor, it was held, that a solicitor who has been employed to advise on a title, could not, on purchasing the property himself, set up an objection which he did not think important when advising his principal. *Beever v. Simpson*,

1 Tam. 69. SOL. & CLERK: AGREEMENT, SPEC. PERF.

Purchase money invested under order of court, obtained by purchaser without notice to all parties, is at risk of purchaser; but investment is at risk of estate, if order for investment is made on motion, of which all parties had notice. *McCann v. Forbes*, 1 Hog. 13.

If solicitor of inheritor is employed by creditor to make out title to purchaser, he will be paid his costs out of fund in court. *Thompson v. Cooke*, 1 Hog. 28.

Purchaser under decree, with notice of judgments intervening between incumbrances ordered to be paid, is bound by them, unless persons to whom they are vested are parties to the cause, or come in and prove under decree. *Steels v. Philips*, 1 Hog. 49. PR. DECREE, WHO BOUND BY.

When plaintiff neglects to make out title to purchaser, the latter will be allowed to make it out himself, and deduct expence from purchase-money. *Harding v. Middleton*, 1 Hog. 80.

Vendor may acquire lien on fund in court, under contract for sale, and if vendee refuses to complete contract, may prevent him by injunction from drawing out of court, fund which was appropriated by the contract to be applied in part discharge of purchase-money. *Doyle v. Harvey*, 1 Hog. 3. PR. PAYMENT OUT OF COURT.

Where an estate has been sold to a person who has since died, the court will direct an account to be taken of the personal estate, and decree that the vendor shall have a lien on the land for so much as the personal estate will not extend to pay. *Topham v. Constantine*, 1 Tam. 135. ACCOUNT.

An injunction to restrain a widow from proceeding at law to enforce her dower out of lands of inheritance, purchased from her husband during marriage, refused; the purchaser having "through negligence, neither insisted on having a fine, nor used common diligence to ascertain and preserve evidence that a jointure had been settled on her; but the widow having in her answer to the original bill, admitted that her husband, previous to marriage, had executed an instrument settling an annuity of 150l. on her, in case she survived him, together with a bond collateral, but of which she knew not the contents, restrained from proceeding to execute her writ of dower, till after she had answered the amended bill." She is not, as a condition connected with the order, entitled to a receiver, which would be an equitable execution; neither is she entitled to her costs at law. *Power v. Sheil*, 1 Beat. 48. DOWER.

Heir of vendor or nominal purchaser, when to be deemed trustee, after decree for specific performance. 1 W. 4. c. 60. s. 16. HEIR AT LAW; TRUSTEE.

A purchaser under a decree has no lien for his costs on the funds in court, arising out of the sales of other property, so as to prevent any distribution of the fund until the report of the title being bad has been confirmed. *McCann v. O'Farrell*, 1 Hog. 137. PR. SALES JUDICIAL; PR. COSTS.

#### VICE CHANCELLOR.

On an application to the Ld. Ch. to rehear a petition of appeal from the V. Ch., which petition had been previously heard by Ld. Eldon, and the order of the V. Ch. reversed; the Ld. Ch. considering such application to be objectionable, and the practice to require regulation, but held, that he could not consistently with the course pursued by his predecessors, now refuse to rehear the case. *Exp. Baker*, 1 Mont. & M. 279. REHEARING; JURISDICTION.

## WAIVER.

If a defendant is in a situation to dismiss a bill by an order of course, for want of prosecution after replication filed, and does not avail himself of his rights, but permits the plaintiff to file interrogatories and examine witnesses, he cannot afterwards dismiss the bill for want of prosecution; and an order of dismissal, subsequently obtained, will be discharged for irregularity. *Fernes v. Hutchinson*, 1 Russ. & M. 22. **PR. BILL, DISMISSAL FOR WANT OF PROSECUTION.**

The acceptance of the 20s. costs, by the clerk in court of the defendant, is a waiver of the irregularity of a second order obtained as of course. *Tarleton v. Dyer*, 1 Russ. & M. 1. **S. P. Hair v. Woodbridge**, id. 5. (n). **PR. ORDER TO AMEND; PR. COSTS, PAYMENT AND EFFECT.**

The entry of an appearance at the time the defendant serves notice of a motion to set aside process for want of an appearance on the ground of irregularity, is no waiver of the irregularity complained of; but the motion may be made before the appearance is entered. *Halpin v. Hamilton*, 1 Hog. 103. **PR. APPEARANCE.**

No new fact can be introduced into a bill by amendment without prejudice to process for want of an appearance or answer. *Moffett v. Johnston*, 1 Hog. 106. **PR. BILL, AMENDMENT; PR. APPEARANCE.**

The plaintiff having parted with title deeds, on which she had a lien, to enable her debtor to raise a sum of money on annuity; the defendant, by memorandum in writing, undertook to pay that annuity to the plaintiff, in case it should not be paid by the grantor; the annuity fell into arrear, and the plaintiff paid it. On a bill for specific performance and adequate security: held, that the plaintiff having taken this personal security, a court of equity would not interfere. Bill dismissed. *Brough v. Oddy*, 1 Taml. 215.

Plaintiff, by cross-examining a defendant, examined as a witness by another defendant, waives any objection to his competency as interested, but not to his credit. *Ellis v. Deane*, 1 Beat. 5. **PR. EVIDENCE.**

## WASTE.

**Qu.** Whether planting grass potatoes is waste. *Deane v. Caffray*, 1 Hog. 23.

A tenant will not be allowed to break up ancient meadow or pasture though the land is mossy and requires tillage. *Murphy v. Coggan*, 1 Hog. 120. **LANDLORD & TENANT.**

If waste has been committed, and the case is pressing, the receiver may file a bill for an injunction without waiting for an order for the purpose; but if time will permit, he should first apply for a reference to enquire what proceeding he ought to take. *Nangle v. La. Fingall*, 1 Hog. 142. **PR. RECEIVER.**

Where a bog has been demised as bog, or all the land demised is bog, and only valuable as such, the tenant may use it as he pleases. In all other cases it is waste for a tenant to cut turf, unless he has a special commission. *Anon.* 1 Hog. 147.

## WILLS.

## VII. REPUBLICATION OF.

A testator devised to his wife, who died in his lifetime, certain estates, subject to certain bequests; and also all other his freehold, copyhold, and leasehold estates whatsoever, not before otherwise disposed of.

By a codicil, after reciting the devise to his wife, he, in case she should die before him, gave and devised all his said estates to trustees upon certain trusts. Held, that the codicil was not a republication of the will, so as to pass estates purchased between the date of the will and the codicil. *Smith v. Dearmer*, 3 Y. & J. 280. **WILL, C. OF, WHAT PASSES, AFTER-FURCHASES.**

## VIII. REVOCATION OF.

A testator having devised freeholds and copyholds to the same persons, afterwards executed a settlement in contemplation of his marriage, by which he bargained and sold the freeholds to trustees and their heirs, to the use of himself during his life; and after his death to the intent that the wife might receive annually a rent charge, which was secured by powers of distress and entry, and by a term of years; and subject to the rent charge and the term, to the use of the settlor, his heirs and assigns; and he covenanted to surrender the copyholds to the uses of the settlement. The marriage was solemnized, and the testator died, leaving his wife surviving, without having surrendered the copyholds to the uses of the settlement; the covenant to surrender did not operate as an entire revocation of the devise of the copyholds, but was a revocation only so far as the particular purposes of the settlement required. *Vausser v. Jeffery*, 3 Russ. 479. **SETTLM. C. OF.**

A conveyance of an estate to trustees upon trust to sell for payment of debts, is not a revocation of a prior will, because it declares that the surplus monies arising from the sale shall be personal estate of the testator; but if it have the further purpose, to provide an annuity for the separate use of the wife until the sale, it will be a revocation, because the wife will be entitled to the annuity after the death of the husband, if the sale do not take place in his lifetime. *Hodges v. Green*, 3 Russ. 28.

A testator, in the case of an event which happened after his death, directed a freehold estate to be sold, and the produce applied upon the trusts, intents, and purposes afterwards expressed in his will, as to his residuary personal estate; by a codicil he revoked the gift in his will of his residuary personal estate, and made a new disposition of it. The produce of the freehold estate is not thereby affected, but passes upon the trusts, intents, and purposes which were expressed in the will as to the residuary personal estate. *Franzis v. Collier*, 4 Russ. 331.

A testator devised his moiety of an estate, and then made partition with his co-tenant; on this the estate was conveyed to a trustee, as to one part to the use of the testator in fee; and a mortgage term created by the co-tenant in his moiety was assigned to attend the inheritance: held, that this is not a revocation of the will. *Barton v. Croxall*, 1 Taml. 164.

## XV. 2. CONSTRUCTION, GENERALLY.

R N, by his will, gave all his personal estate to R N, and J N, that is to say, (he then enumerated several particulars,) in trust for the following purposes: that the same be not liable or resorted to for the payment of mortgages or bond debts, and charges thereafter mentioned should be satisfied; and as soon as that could be effected, the same was to be resorted to in relief of his real estate. The testator then gave several legacies to his wife and children; and bequeathed the residue; after the respective charges thereby made thereon, to his eldest son and child.

that the residue, as well as the enumerated articles, were subject to the charges in the will mentioned. *Nicholas v. Nicholas*, 1 Taml. 269.

Devise of lands, subject to 1000*l.* to be raised for the testator's daughters, to an annuity of 37*l.* 10*s.* to his widow, and to all such incumbrances as might happen to be thereon, does not exempt the personal estate from the payment of a mortgage thereon. *Philips v. Parker*, 1 Taml. 136. ESTATE, PERSONAL, EXEMPTION OF.

Where a Hindoo testator made two of his sons his executors, and after directing the performance of various religious acts by them, and that when they should do them they should give notice to their brothers, and that they should all of them perform the acts, otherwise, whatever the executors might think proper they might do, and should any one raise objections, they should be inadmissible: held, that the executors had not an unlimited discretion in expending the testator's fortune in religious ceremonies. *Mullik v. Mullik*, 1 Knapp, 245. EXORS. DISCRETIONARY POWERS.

Devise of freeholds of inheritance to trustees for 500 years, and subject to that term, to the use of various persons successively for life, with remainder to the first and other sons of such several persons successively in tail male, with remainder to the daughters of such several persons successively in tail general, with remainders over. The trusts of the 500 years' term were declared to be, that the trustees of the term should out of the rents, &c. of the hereditaments comprised therein, pay the several annuities mentioned in the will, and subject thereto, should out of the residue of the rents and profits of the premises comprised in the said term, raise such sums not exceeding 8000*l.* in the whole, as should be necessary to pay such debts as might be owing by her late husband or by herself, and all which she directed the trustees to pay out of the said rents and profits as they should think fit, and as soon as convenient after her decease; and, subject to the several trusts of the said term, upon trust to pay the residue of the net rents, &c. of the premises comprised therein, unto the persons who for the time being should be next entitled to the reversion or remainder of the premises expectant thereon, under the foregoing limitations: held, that the testatrix did not intend the debts to be raised out of the corpus of the estate, but only that they should be discharged out of the annual rents and profits. *Per Lord Chief Baron*. This is a question of intention only. The cases show that where the remainder-man takes an estate of inheritance, unless there be something demonstrating a contrary intention, the court, in favour of the person entitled to the charge, if it be a gross sum, will raise it by sale or mortgage. The controversy becomes more important and critical where the remainder-man is tenant for life only. It is a question materially affecting the interest of the devisee, whether the corpus of the estate is to bear the charge, or the devisee is to lose all benefit of his estate until the charge is satisfied. *Heneage v. Ld. Andover*, 3 Y. & J. 360. TRUST TO PAY DEBTS; RENTS AND PROFITS.

A testatrix, by her will, gave to A 50*s.* a month, for life, "in lieu of him giving up all the other notes and claims;" and by a codicil, she gave him "3*l.* a month," for life; and directed all other things to be paid and done as the will ordered: held, that A was entitled to both the monthly payments for his life. *Lord v. Sutcliffe*, 2 Sim. 273. LEGACIES, ACCUMULATIVE.

Testator gives to his son a public-house and stock in trade, on condition that he pay debts and a legacy. This is a condition, and not a trust. If, therefore, the son accept the bequest, he is bound to pay the debts, although they amount to more than the value of the property. *Messenger v. Andrews*, 4 Russ. 479.

Effect of evidence of collateral circumstances, relating

to the ages of the devisees, and the situation of the parties, and to their being married or unmarried, is admissible in evidence, for the purpose of construing the will. *Lowe v. Huntingtower*, 4 Russ. 532. PR. EVID. TO EXPLAIN WILL.

A codicil does not revoke or alter a will to a greater extent than was intended. A testator, by his will, gave certain legacies exclusively charged on real estate: by a codicil, after reciting so much of the will as related to those legacies, he revoked that part of his will, and in lieu of the legacies therein given, gave smaller ones. The object of the codicil being only to alter the amount of the legacies, held, that it could not extend to charge the personal estate, and not being attested by three witnesses, could not alter the legacies charged on the real estate. *Thicke v. Thicke*, 4 Russ. 435. LEGACIES, PAYMT. FROM WHAT FUND.

A testator gives an annuity and pecuniary legacies, and then devises all the rest, residue, and remainder of his freehold, copyhold, and leasehold estates to trustees, for the uses and benefit of his children. The annuity and pecuniary legacies given prior to the devise are well charged upon the freehold, copyhold, and leasehold estates. *Cole v. Turner*, 4 Russ. 376. ESTATE, CHARGE ON REAL.

Where a testator gives annuities, and directs them to be paid without any deduction whatsoever, and where, from the nature of the property out of which the annuities are to be paid, there could be no deduction, except in respect of the legacy duty, there the annuities shall be paid clear of legacy duty. *Smith v. Anderson*, 4 Russ. 352. LEGACY DUTY.

A testator gave to his daughter a legacy of 10,000*l.*, payable and to be paid unto her in manner following, viz.: a sum of 5000*l.* upon her marriage under twenty-one with the consent of his trustees, and the sum of 5000*l.* within two years afterwards. The daughter married under twenty-one without the consent of the trustees, and her first husband dying, she married a second husband, at the distance of thirty years from her first marriage. *Qn.* if, on such second marriage, she became entitled to the 10,000*l.*? *Clifford v. Beaumont*, 4 Russ. 325. CONDITION, PERF. OF.

A testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in government or real security, of which they were to stand possessed, upon trust for A during her life, and, after her death, for B. The trustees permitted a share which the testator had in an Indian loan, bearing interest at 10*l.* per cent., to remain for several years on that security, during which time they paid to A the interest at 10*l.* per cent. which it yielded annually, and the loan being afterwards paid off, they invested the money in the three per cents. at a time when the funds were so low that the amount of stock purchased was greater than if the conversion had taken place at the end of a year from the testator's death. Held, that the tenant for life was not entitled to the actual interest which the money yielded while it remained on the Indian security, but only to the dividends of so much three per cent. stock as would have been purchased with it at the end of a year from the testator's death; that the trustees ought to be charged with the whole of the stock actually purchased, and all the sums actually received in respect of the Indian rate of interest, and that they ought to be allowed, in their discharge as payments to the tenants for life, not the sums which they had in fact paid her, but only a sum equal to what she would have received for dividends, if the money had been transferred from the Indian security, and invested in the three per cent. stock at the end of a year from the testator's death. *Dimes v. Scott*, 4 Russ. 195. INTEREST, RATE OF; TRUSTEES, LIABILITY OF; INVESTMENT.

Construction of a will, as to the question whether

the proceeds of real estate were made the pecuniary fund for the payment of certain legacies. *Rickets v. Ladley*, 3 Russ. 418. LEGACIES, FROM WHAT FUND.

When a testator directs a sum to be laid out in building a church, the bequest is void; the rule of construction being that a direction to build, includes a direction to purchase land for the purpose of building, unless the testator distinctly refers to land already in mortmain. *Pritchard v. Arbourin*, 3 Russ. 456. CHARITY, MORTMAIN.

A son died before his father, leaving a widow, to whom he gave all his property. The son's estate being insufficient for the payment of his debts, the father, by a codicil to his will, directed his trustees and executors to pay his son's debts, and named the son of his son residuary devisee and legatee. The true construction of the father's codicil is, that he intended only the payment of such portion of the debts of the son as his son's estate would be insufficient to pay. *Walker v. Lodge*, 3 Russ. 459.

By a marriage settlement, stock, the property of the husband, was settled on trust for the separate use of the wife during her life, and after her death, for the husband, if he survived her; but if he died in her lifetime, then for such persons as he should, by deed or will appoint; and in default of appointment, for his executors and administrators. The husband died in the wife's lifetime, having appointed an executrix, but without exercising his power. Held, that the executrix was not entitled to the stock beneficially, but that it was to be administered by her as part of his general personal estate. *Collier v. Squire*, 3 Russ. 467. EXORS. BENEFICIALLY INTERESTED.

A testator devises the residue of his personal estate to such of his children as shall attain twenty-one, or marry under that age with consent. All the children are entitled, although their interests are contingent, to have allowance out of the residue for their maintenance during their minorities. *Brown v. Temperley*, 3 Russ. 263. INFANT.

An allowance out of a residue which was directed to be accumulated, made for the support of a legatee in the interval between the time when the legatee attained his full age, and the time fixed for the distribution of the accumulated fund. *McDermott v. Kealy*, 3 Russ. 264. INFANT.

The husband, by his will, bequeathed as follows: "And unto my wife, (whom I make full and wholly executrix), I give my house, with all my household furniture, as also all my plate, china, books, linen, and every other article belonging to me, both in and out of my house, and which may not be herein mentioned, she being subject to the payment of all my just debts, funeral and testamentary expenses." Held, that the beneficial interest in the settled stock did not pass to the wife. *Collier v. Squire*, 3 Russ. 467. EXORS. BENEFICIALLY INTERESTED.

A testator gave his property after the death of his wife to trustees on trust to pay the interest and profits to his two daughters J and E to their separate use, with a direction to pay to and apply for the benefit of A, the son of E, 2000l. annually, when he attained the age of twenty-one years, and before that period, such part of the 2000l. bequeathed to him as might be judged proper; he then gave his daughters power to dispose of the principal by will, to their children or grandchildren respectively, "except that proportion of principal given to E, and from which the interest is to arise to my grandson, namely, 4000l. which sum shall be my grandson's property;" and in case either of the daughters died without issue, he limited her share of the fund over to the other daughter, her children, or grandchildren. The executrix having in mistake made payments to A, in respect of his annuity, for two years before he attained twenty-one, was entitled to retain them out of the future pay-

ments of the annuity. An order authorizing her to retain them, and made upon petition after the decree had been passed and entered, is regular. *Livesey v. Livesey*, 3 Russ. 287. S.C. in part reversed, id. 542. LEGACY, WHEN IT VESTS.

A legacy was given to the separate use of a married woman during the joint lives of her and her husband, and in case she survived him, to her absolutely; but if she did not survive him, to such persons as she should by will appoint; and in default of appointment, to her next of kin exclusive of her husband and the testator. Held, that the legacy lapsed. *Baker v. Hunbury*, 3 Russ. 340. LEGACY, LAPSED.

Where a testator directs his just debts and funeral expenses to be fully paid and satisfied, by his executor thereinafter named, it is a condition imposed upon the executor to satisfy the testator's debts and funeral expenses, as far as all the property which he derives under the testamentary disposition will extend, whether real or personal. *Hennell v. Whitaker*, 3 Russ. 343. S. P. *Finch v. Hattersby*, id. 345. note. *Brigden v. Loader*, id. 346. note.

The words "if A B shall happen to die, leaving a child or children," construed to mean, upon the effect of the whole will, the death of A B before the testator's widow. *Du Costa v. Keir*, 3 Russ. 360.

A testator, by his will, gave certain annuities, and directed that the sums set apart to secure them should, as the annuitants died, sink into the residue of his personal estate. By a codicil to his will, he stated that in case his property would not provide an income equal to the annuities, they should be rateably reduced. His estate was deficient, and the annuities were rateably reduced. Upon the death of any annuitant, the sum set apart to secure the reduced annuity will belong to the residuary legatee, and is not to be applied to increase the reduced annuities to the amount given by the will. *Farmer v. Mills*, 4 Russ. 86. RESIDUE, WHAT.

In order to advance the apparent intention of the testator, the words "if he should die," were construed "when he should die." *Smart v. Clark*, 3 Russ. 365.

#### XV. 3. WHAT ESTATE IS GIVEN.

Devise of the residue of realty and personality to testator's two sons as joint tenants. They, for twenty years after the father's death, carried on the business of farmers with such estates, and kept the monies arising therefrom in one common stock, and with part of such monies purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting such farming business, or ever accounted with each other: Held that as to the leasehold and personal estate, which passed by the will of the father, the two sons remained joint-tenants, but that as to all the after purchased estates, they were tenants in common. *Morris v. Barnett*, 3 Y. & J. 384. ESTATE, JOINT TENANCY; ESTATE TENANCY IN COMMON.

A gift to A and B, "whom I appoint my executors, of all that I possess in any way belonging to me, by them freely to be possessed of, or enjoyed of whatever nature or manner it may be," will pass the fee-simple of real estate. *Thomas v. Phelps*, 4 Russ. 348. ESTATE, FEE-SIMPLE.

Devise to executors and trustees of a freehold of inheritance for a term of ten years, in trust to pay debts and legacies, and after testator's decease, to his wife for life; then "to my grandson T C, son of the late R C, all that my estate where I now live, and all that other estate and premises thereto belonging, situate, &c, called or known by the name of W. estate, now

in the holding of T for his own use during his natural life, with remainder to the first son of the body of the said T C lawfully begotten, severally and successively in tail male of the name of C. And for want of such lawful issue of that name, either by my said grandson T C, or my son J C, then I give and devise the said estate where I now live, and the W. estate, amongst my daughters and their children share and share alike, to hold unto them, his, her, or their heirs for ever as tenants in common, and not as joint tenants." T C suffered a recovery. He had no child. Held, on an exception to the title taken by a purchaser under a sale by order of the court, that the devise could make a good title in fee to the vendee. The question of title or no title being matter of opinion for the court, the purchaser is bound thereby, and cannot object to complete the purchase on the ground of the difficulty of the question on which the title depends. *Rushton v. Craven*, 12 Price, 599. **VEND. AND PURCH., TITLE.**

A gift of real estate to A for life, with remainder to her children as tenants in common, and in case A should die without leaving lawful issue, then with remainder over, is a gift to A for life, with remainder to her children for life, with remainder to A in tail. *Parr v. Swindells*, 4 Russ. 283. **ESTATE FOR LIFE.**

A gift of personal estate to the wife for life, with a direction that after her death one moiety thereof shall be at her entire disposal, either by will or otherwise, amounts only to an estate for life in the wife, with a power of appointment. The sale by the widow of a sum of three per cent. stock which constituted nearly the whole of the residue, and the investment of the proceeds in the purchase of long annuities in her own name, does not amount to an exercise of her power. *Reith v. Seymour*, 4 Russ. 263. **POWER TO APPOINT; POWER, EXECUTION OF; ESTATE FOR LIFE.**

J L by his will, devised his manors to trustees upon trust, to convey the same to his son J H L, for life, with remainder to trustees to preserve contingent remainders; with remainder to the second and other younger sons of J H L, in tail male. There was no limitation to the first son of J H L; but the declaration of the trust of the term contained a provision to raise money for the daughters, on failure of issue male of the body of J H L. The will also provided, that in case J H L. should have any children, other than besides an eldest or only son, then J H L, might raise money for the portion of younger sons or daughters: Held that the true construction of the will was, that the first son should have an estate tail male in reversion, after the death of his father. *Langston v. Pole*, 1 Taml. 119.

A devise of lands to A, "for paying his son 50l., when of the age of twenty-one years," gives A the fee beneficially charged with the payment of 50l. *Abrams v. Windhup*, 3 Russ. 350. **ESTATE, FEE.**

#### XV. 4. WHAT PASSES.

Testator devised his estate in Leicestershire to trustees upon trust to sell the same, and also his books and stock, either together or in parcels. He afterwards disposes of the monies to arise from the sale of his Leicestershire estate. As the estate, books, and stock, might have been sold in one lot, and the produce was to form one common fund: Held, that the disposition of the monies to arise from the Leicestershire estate, extended to the books and stock. *El. Newburgh v. Eyre*, 4 Russ. 454.

A testatrix gave such of her jewels as should at her death be deposited in her jewel-box at Rundell and Bridge's, to persons whose names would be found written on a paper contained in the box, and bequeathed the rest of her jewels to A B; two years

before her death she became the subject of a commission of lunacy, and no jewel-box was then, or at the date of her will, or at her death deposited at Rundell and Bridge's, nor was there any written paper designating who were to take the jewels: the intended gift of the jewels wholly fails. A Scotch heritable bond, although it contain a personal obligation to pay the debt, does not lose its heritable quality, and will not pass by an English will, but descends to the heir at law. *Jerningham v. Herbert*, 4 Russ. 388. **S. C. 1 Taml. 103.**

Whether stock will, or will not pass under the word "monies," or under the word "goods," or under the word "chattels," depends upon the whole context of the will. The word "goods," and equally the word "chattels," used simply and without qualification, will pass the whole personal estate including stock. A bequest of all monies, goods, chattels, clothing, &c., the testator's property, which may remain after paying his funeral charges and debts, will pass the testator's interest in stock and money. *Kendall v. Kendall*, 4 Russ. 360.

A testator devised to his wife, who died in his lifetime, certain estates, subject to certain bequests; and also all other his freehold, copyhold and leasehold estates whatsoever, not before otherwise disposed of. By a codicil, after reciting the devise to his wife, he, in case she should die before him, gave and devised all his said estates to trustees upon certain trusts. Held, that the codicil was not a republication of the will, so as to pass estates purchased between the date of the will and the codicil. *Smith v. Deamer*, 3 Y. & J. 280. **WILL, REPUBLICATION OF.**

A bequest of a cabinet, with whatever it contains "except money," will not pass a promissory note payable to the testatrix, of a date anterior to the will, and which at her death was found in the cabinet. *Read v. Stewart*, 4 Russ. 69. **BILL OF EXCHANGE.**

Where legacies are given upon trust to accumulate, the interest and dividends will not pass by a gift over of the principal sums, unless the court is satisfied by a reference to other clauses of the will, that the interest and dividends were omitted in the gift over by clerical mistake. *Harvey v. Cooke*, 4 Russ. 34.

A Scotch heritable bond, though containing a personal obligation, carries with it the personal right as being *jus nobilius*, and descends to the heir, and will not pass by an English will. *Jerningham v. Herbert*, 1 Taml. 103. **S. C. 4 Russ. 388. HEIR AT LAW.**

A testator, being absolute owner of some copyholds of which he had been admitted tenant, and having the legal fee of other copyholds holden of the same manor to which he had not been admitted, but subject to trusts under which he was in equity only tenant for life, with remainder to his son in tail, remainder to himself in fee, surrendered to the use of his will, all his copyholds holden of that manor, or which he was seised of, or entitled to, in possession, reversion, remainder, or expectancy: he was subsequently admitted tenant of all the copyholds which were subject to the trust, except the moiety of one tenement, and afterwards made a will, devising all his hereditaments, freehold and copyhold, in possession, reversion, remainder, or expectancy, to trustees and their heirs, upon trust for his son for life, with remainder over. Held, that the surrender and the will passed both the legal and beneficial interest in all the copyholds upon which the surrender operated, including those of which the deviser was in equity only tenant for life, and that the son was bound to elect whether he would give effect to this general devise, or would insist upon the benefit of the equitable estate tail, which he took under the old trusts to which some of the copyholds were subject. *Abdy v. Gordon*, 3 Russ. 278. **WILL, C. OF, WHAT PASSES; COPYHOLD; HEIR AT LAW; ELECTION.**

A bequest of household furniture and other household effects, in a dwelling house and premises, comprises all the property placed there, either for ornament or for use, or consumption in it. *Cole v. Fitzgerald*, 3 Russ. 301. HOUSEHOLD FURNITURE.

#### XV. 5. WHAT INTEREST.

A testator gave to his wife an annuity and 100*l.* a year for each of his three children during their minority, and from and after the decease or marriage of his wife, then the 300*l.*, to be divided amongst his said children; and subject thereto he bequeathed his leasehold and personalty unto three children, and the survivors and survivor of them. One died under twenty-one: Held, that he took a vested interest, at the death of the testator. *Russ v. Russell*, 1 Tam. 48. INTEREST, VESTED.

Devise to trustees and their heirs during the life of A B, in trust to lay out the rents and issues thereof in government securities, until A B should attain twenty-one, and, after that, to suffer her to receive and take the profits during her life, not subject to the debts or controul of her husband, her receipt to be a sufficient discharge; and, after her decease, to her heirs. Upon a suit for a specific performance of an agreement for the purchase of part of the estates, the question was, whether A B took the legal, or only an equitable interest for life in the property, so as to bring the title within the rule in *Shelley's case*. The Ld. C. B. would not compel the defendant to accept the title. *Playford v. Hoare*, 3 Y. & J. 175. VENDOR & PURCH., TITLE.

Devise to A and B and their heirs, to sell and dispose at their discretion of all the testator's right in S, belonging to the manor of M, and all his right in M, if an act should pass for inclosing the same within twenty years, to pay the proceeds to the several persons therein mentioned. An inclosure act passed within the twenty years, and various allotments were made in respect of the testator's estates: Held, that the devise was in the nature of an executory devise to take effect on the passing of the act. And the decree declared the parties claiming under the devise, to be entitled to one-fourth part of the monies produced from the sale of the allotments in S, in respect of the testator's messuage and lands in S, and to the whole of the monies produced by the sale of the allotments in respect of the land in M. *Gardner v. Lyddon*, 3 Y. & J. 389. EXECUTORY DEVISE.

Testator gave legacies of 4000*l.* charged exclusively on real estate. He struck out the 4000 with his pen, and inserted 3000 in pencil; and by an unattested codicil, which was a nullity, as the legacies were exclusively charged on real estate, expressly altered the amount of the legacies from four to three thousand pounds. Held, that the legatees were entitled to the legacies of 4000*l.* *Kirke v. Kirke*, 4 Russ. 435.

Obiterations and interlineations by the testator in his will, coupled with an ineffectual codicil, does not amount to a revocation, but is a substitution, which failing, the original disposition stands good. S. C.

Devise of property to be sold, and the proceeds invested in the Bank of England, and the interest to be paid to testator's daughter for her life, and the principal wholly at her disposal at her death: Held, not to give the daughter an absolute interest, so that she could dispose of it during her life. *Simpson v. Forrester*, 1 Knapp, 241.

#### XV. 6. WHO TAKE.

A testator devised certain property to his wife for life, and after her death to A I who then lived with him, for life, provided she so long continued single and unmarried. Then, he devised part of his estate (except what he had given to his wife and A I) to

trustees for thirty-one years, upon certain trusts, and after the expiration of such term, to the children which he might have by A I and living at his death, or born six months after, and in default of such children, to his nephew. The wife died, and the testator published his will after her death: Held, by the judges and house of lords, that the children of A I who had previously acquired the character of reputed children of the testator by A I, took an estate in the lands devised. *Wilkinson v. Adams*, 12 Price, 478. BASTARD.

The statute of the 25 G. 2. s. 6. does not extend to wills of personal estate only, and a legacy to a person who is an attesting witness to such a will is not void. *Emanuel v. Constable*, 3 Russ. 436. PR. EVID. WITNESS, ATTESTING; LEGACY; ESTATE, PERSONAL; STAT. C. OF.

A testator gave the interest of a fund to his widow for life, with a power of appointment amongst all his children, and in default of appointment, amongst all such children, with a gift over to the widow, in case all the children should die before their shares should become payable. The widow appointed the fund to her two children, one of whom died in her lifetime: Held, that the survivor took the whole fund. *Bielefield v. Record*, 2 Sim. 354. POWER, EXECUTION OF.

A testator gave one-fifth of the interest of a fund in the following proportions; namely, one-fifth to M, and two-fifths each to C and J; if M should die without issue, which event did happen, her fifth was to go between C and J for their lives, if living at M's decease, or if only one, to him; if C should leave issue, they should be entitled to the principal monies, the interest whereof was given to C for life; but if he should die without issue in the lifetime of J, all benefit of the bequest to C should go to J; and if J should die without having succeeded to and been in actual possession of the family estate for a certain time, leaving issue other than an only son, such issue should be entitled to all the principal monies, the interest whereof J might be entitled to as aforesaid. Then followed a gift over of all benefit intended for J, in case he should die in the lifetime of C, either without issue, or without issue other than an only son, or having been in possession of the estate for a certain time. If both C and J should die without issue, to be entitled as aforesaid to the bequest, the whole property should go as the survivor should think fit. J, having survived M, died in the lifetime of C, leaving a daughter, and without having been in possession of the estate; and then C died without issue: Held, that the daughter of J was entitled to the whole fund. *El. Neuburgh v. Eyre*, 4 Russ. 454.

Testatrix devised lands "to the next of kin of her father and mother both deceased, his or her heirs and assigns, and if more than one, in equal shares." The testatrix being unmarried, and the only child of her parents, and the parents being strangers in blood to each other, there could be no person who was next of kin to both. Held, however, that the testatrix meant the next of kin of both parents. *Pycroft v. Gregory*, 4 Russ. 626.

A testator bequeathed "to the two sons and the daughter of A B, 50*l.* each." At the date of the will, and the death of the testator, A B had one son and four daughters; each of these five children is entitled to a legacy of 50*l.* *Harrison v. Harrison*, 1 Russ. & M. 72.

In a will the words "failing the male issue" were, upon the whole context, construed to mean "if there shall be no son then living." *Murray v. Addenbrook*, 4 Russ. 407. WORDS, C. OF.

The word "survivors" in a bequest to children, held, upon the context of the will, to mean surviving so as to attain their respective ages of twenty-one. *Crozier v. Fisher*, 4 Russ. 398. 16.

Where a pecuniary legacy is given by a testator to his heir, the word is to be understood in its legal and ordinary sense, unless controuled by the context of the will, and the heir at law will take the legacy, and not the next of kin. In such a case it makes no difference that there are three co-heirs. *Mounsey v. Blamire*, 4 Russ. 334. HEIR AT LAW; NEXT OF KIN.

A testatrix gives a legacy to the sole and separate use of her daughter for life, with a power of appointment, and in default of appointment, to her next of kin, "as if she had died sole and intestate, to the utter exclusion of her husband." This expression will not exclude a child of the daughter, but is to be considered as used for the sole purpose of excluding the husband. *Hardwicke v. Thurston*, 4 Russ. 380.

Where a donor recommends or directs that the donee, at her death, shall give personal property to such of his family, or such of his relations, as he shall think fit; the donee has a power to select the objects of her bounty amongst his relations or family, though not within the degree of next of kin; but if the donee does not exercise the power, the word "relations," or the word "family," will be construed "next of kin," unless the special expressions of the donee have a different import. *Grant v. Lynam*, 4 Russ. 292. POWER, C. OF.

A bequest to all the children of A, and their issue, share and share alike, and to be paid twelve months after the testator's death, is an absolute gift to such children of A as are living at the testator's death. *Butler v. Ommamney*, 4 Russ. 70.

A testator bequeathed the residue of his estate after the death of two persons, to such children of B, as should be then dead, leaving children; he directed that the children should stand in the place of their parents: held that the children of such children of B as died in the testator's lifetime, took no share of the residue. *Id.* 73.

"Child or children," may mean "issue." A testator bequeathed property to trustees upon trust to pay the income thereof to his daughter during her life, and directed that in case she should leave any issue living at her death, that the property should be disposed of, and the produce thereof paid to and amongst such child or children as she should appoint, and in default of appointment, to and amongst such issue as tenants in common, or if there should be but one child, the whole to be paid to such one; and if there should be no issue of his daughter living at her decease, or they should die infants, then over: Held, that the words "child or children," must be construed "issue," and, therefore, that an appointment to the exclusion of the grandchildren was void. *Doe v. Welch*, 2 Sim. 319.

A testatrix bequeathed one moiety of the residue of her personal estate to her daughter H, for her separate use during the joint lives of her and her husband, and if she survived him, to her absolutely; if not, to such of her children living at her decease as should attain twenty-one, with a bequest over if there were no such children to another daughter, M, for her separate use and her children; and she bequeathed the other money to M for her separate use during

the joint lives of her and her husband, and after her decease to such of her children living at her decease as should attain twenty-one; and if there were no such children of M; to H and her children in like manner as the first moiety; with a proviso that if H died in her husband's lifetime, and should not have a child living at her decease, who should attain twenty-one, the second moiety was to go over to H's executors and administrators, and that in like manner the first mentioned moiety in the event in which it was limited over, should, if M had not a child living at her death, who should attain twenty-one, go over to M's executors and administrators: by a codicil the executrix gave 1500*l.* if M died without leaving any child who attained twenty-one, to H and her children, in the same manner as was in the will directed touching the first mentioned moiety of the residue; and in case both daughters died without leaving any child living who should attain twenty-one, she bequeathed the 1500*l.* together with all the residue of her personal estate to A; both the daughters died without issue, but H survived her husband: Held nevertheless, that A was entitled to the residue. *Hopkins v. Towle*, 3 Russ. 304.

A testator gave the residue of his estate upon trust to pay the interest to his widow during her life for her separate use, and after her decease, to pay the principal to C for her own use, and to be at her own disposal, but if C should happen to die leaving any child living at her decease, then to such child or children; and if she should happen to die without any child living at her decease, then to D and E; but if either of them should die before they should become entitled to receive the fund, then he gave the whole to the survivor, and if they should both die in the lifetime of his widow, then he gave the whole to his wife absolutely. C having survived the widow, was entitled to the residue absolutely. *Da Costa v. Keir*, 3 Russ. 360.

A testator devises his real and personal property to trustees, upon trust for four children of M D, whom he described by their respective names, together with every other child of the body of M D alive at my decease, or born within nine months afterwards, share and share alike. M D had two other children born after the date of the will, but before the date of a codicil to it, and these as well as the four previously born, were all illegitimate. The children born after the date of the will are not entitled to any share of the property. *Mortimer v. West*, 3 Russ. 370. POSTHUMOUS CHILDREN; BASTARD.

## WORDS, CONSTRUCTION OF.

In a will, the words "failing the male issue," were upon the whole context construed to mean "if there shall be no son then living." *Murray v. Addenbrook*, 4 Russ. 407. WILL, C. OF, WHAT ESTATE.

The word "survivors" in a bequest to children: Held upon the context of the will to mean, surviving so as to attain their respective ages of twenty-one. *Crosier v. Fisher*, 4 Russ. 398. WILL, C. OF, WHO TAKE.





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